

RULES AND REGULATIONS

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE REAL ESTATE COMMISSION [49 PA. CODE CH. 35] Disclosure Summary

The State Real Estate Commission (Commission) is amending § 35.201 (relating to definitions) and adding § 35.336 (relating to disclosure summary) to read as set forth in Annex A.

This rulemaking implements section 608 of the act of November 25, 1998 (P. L. 908, No. 112) (Act 112), which added section 608 of the Real Estate Licensing and Registration Act (63 P. S. § 455.608) (act). Act 112 permits licensees to enter into various agency relationships with consumers. Section 608 of Act 112 requires the Commission to adopt a disclosure summary, containing 11 enumerated provisions, to be provided to the consumers at the initial interview.

Notice of proposed rulemaking was published at 29 Pa.B. 4451 (August 21, 1999). Publication was followed by a 30-day public comment period during which the Board received comments from the Pennsylvania Association of Realtors (PAR) and Dino Bello, a broker. Following the close of the public comment period, the Board also received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The amendments reflected in Annex A are responsive to the comments and suggestions received by all commentators.

For ease of reference, the Board will address the comments in the order in which the amendments appear. § 35.336(a).

Subsection (a) requires the Consumer Notice be in the form set forth in Annex A. IRRC recommended that the section include specific minimum standards for typeset size and format. The Commission acknowledges IRRC's concern and modified the subsection to indicate that licensees must use the form the Consumer Notice developed by the Commission. Licensees will be able to obtain the form by fax or mail from the Commission office, or from the Commission's web page at realesta@pados.dos.state.pa.us. Licensees may reproduce the form provided it remains in the same format as the original.

The Commission believes that requiring all licensees to use the same form will ensure that every consumer receives the same information. It also places licensees on equal footing with regard to use of the form.

Paragraph 1 of Consumer Notice form.

IRRC raised the concern that the term "licensee" in the Consumer Notice refers only to brokers and salespersons while section 301 of the act (63 P. S. § 455.301), defines licensee as including all individuals licensed by the Commission. IRRC recommended that the term "licensee" be defined in the Notice. The Commission agrees with this suggestion and has inserted a definition as requested.

Paragraph 2 of Consumer Notice form.

The HPLC, IRRC and PAR recommended that paragraph 2 be amended to clarify that to enter into an agency relationship there must be a written agreement between the consumer and the broker. Additionally, they recommended that the Commission clarify that in the absence of a written agreement, no business relationship will be presumed. The Commission agrees with this suggestion and amended the provision to reflect the suggested language.

Paragraph 3 of Consumer Notice form.

IRRC suggested that the duties of licensees generally contained in paragraph 3 of the Notice should mirror section 606.1 of the act (63 P. S. § 455.606a), rather than summarize the provision. The Commission has amended this paragraph accordingly.

PAR recommended that the Commission delete the list of duties. PAR suggested that this information is redundant since it is contained in agreements of sale and other real estate-related standard forms. The Commission disagrees. Section 608 of the act requires that consumers be advised about the various agency relationships. As part of that advice, consumers are informed of the additional duties imposed under seller's agency, buyer's agency, dual agency, designated agency and transaction licensee. For consumers to understand the additional duties, the Commission believes it is necessary to explain the general duties. Accordingly, the Commission did not amend paragraph 3.

Various Agency Relationships

IRRC recommended that the exceptions to the additional duties on licensees arising from an agency relationship found in sections 606.2(2), 606.3(2), 606.4(b)(3) and 606.5(b)(2) of the act (63 P. S. §§ 455.606b(2), 455.606c(2), 455.606d(b)(3) and 455.606e(b)(2)) be added to the Consumer Notice. The Commission has made this change to the seller agency, buyer agency and dual agency sections.

Paragraph 6 of the Consumer Notice form (Dual Agency).

IRRC recommended that the second sentence in paragraph 6 be deleted in that it repeats the notice requirement in the first sentence. The Commission agrees with this recommendation and has deleted the second sentence.

Paragraph 7 of the Consumer Notice form (Designated Agency).

PAR suggested that paragraph 7, relating to designated agency, be amended by deleting the phrase "to act exclusively as the agent for the seller/landlord and one or more licensees to act exclusively as the agent for the buyer/tenant" be deleted and replaced with "to represent you." The Commission finds this suggestion acceptable since it clarifies the provision without changing the original provision.

PAR also suggested that the second sentence be amended by deleting "may represent another party and should not be provided with any confidential information" and replacing it with "do not represent you and may in fact be designated by the broker to represent the party with whom you eventually enter into a real estate

transaction.” Given the amendment to the first sentence, the Commission does not believe that PAR’s second amendment is warranted. However to improve clarity, the Commission has removed the words “who are not designated” from the second sentence and “to the seller/landlord or buyer/tenant” from the third sentence.

IRRC suggested that the first word of the clause regarding confidential information be changed from “should” to “shall.” The Commission agrees and has replaced the word should in this paragraph as well as in paragraph 8 regarding transaction licensees.

Other Information About Real Estate Transactions

IRRC recommended that the first paragraph regarding negotiability be amended to remove the words “are negotiable” from each of the bulleted paragraphs. IRRC also recommended that the fourth bulleted paragraph include a reference to sharing of fees. The Commission has made both recommended changes.

Acknowledgment

Both the HPLC and PAR recommended that the consumer print as well as sign the acknowledgment section of the form and include the address and phone number. IRRC questioned the rationale for requiring the address and phone number. The Commission believes that the addition of the printed name will ensure more accurate documentation for licensees and consumers. However, the Commission believes that the addition of the address and telephone number should be optional instead of mandatory. In the Commission’s collective experience, consumers engaged in initial discussions with licensees are reluctant and wary of providing personal information. The Commission believes that making this information optional will help ensure consumer compliance.

§ 35.336(b).

IRRC raised the concern that subsection (b) requires licensees to provide the Consumer Notice at the initial interview, but the regulations do not define initial interview. The Commission believes this suggestion has merit and has added a definition for “initial interview” in § 35.201. The definition clarifies that when conversations extend beyond objective data about the property, the Consumer Notice, in § 35.336, shall be provided to and be acknowledged by consumers. These discussions may take place at open houses, in E-mail requests and during phone calls to licensees.

IRRC also suggested that subsection (b) should be amended to guide licensees when consumers refuse to sign the acknowledgment. In response to this suggestion, the Commission has added subsection (d). The new provision advises that the licensee shall note the refusal on the Consumer Notice and retain a copy of the acknowledgment for its records as specified in subsection (c).

§ 35.336(c).

IRRC questioned the need for licensees to retain the signed acknowledgments. Section 608 of the act requires licensees to give the Consumer Notice to all consumers. The Notice is the first document in a real estate transaction. As such, the acknowledgment would be one of the records of a real estate office subject to inspection under § 35.246 (relating to inspection of office). The Commission believes that retention of the signed acknowledgments evidences compliance with section 608 of the act and therefore will assist both licensees and inspectors on behalf of the Commission during these inspections.

IRRC also noted that if retention is required the regulation should set a retention period. Section 35.286(a) (relating to retention and production of records) requires brokers to retain copies of records pertaining to real estate transactions for at least 3 years following consummation of the transaction. Owing to concerns regarding the expense of retention and storage, the Commission has determined that when the broker and the consumer have not entered into a business relationship, a licensee need only keep the signed acknowledgments for 6 months. When the consumer and the broker have entered into a business relationship, the 3-year requirement in § 35.286(a), would apply inasmuch as the Consumer Notice is a record of the transaction.

Generally

Mr. Bello suggested that the Consumer Notice is insufficient as drafted because it does not define the term “fiduciary” and does not provide an explanation of the fiduciary duties owed to consumers who enter into agency relationships. The Commission believes that further amendment is not necessary because the amendments to the act do not contain a definition of the term “fiduciary.” Fiduciary duties encompass the general duties plus the additional agency duties as appropriate.

Compliance with Executive Order 1996-1, Regulatory Review and Promulgation

The Board reviewed this rulemaking and considered its purpose and likely impact upon the public and the regulated population under the directives of Executive Order 1996-1, Regulatory Review and Promulgation. The final-form rulemaking addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact and Paperwork Requirements

The amendments will have minimal fiscal impact on the Commonwealth. The proposed amendment will require the Commission to print the disclosure summary and make it available to all licensees. In addition to obtaining a copy from the Commission staff, the disclosure summary will be available on the Internet for downloading. This rulemaking will also have a minimal fiscal impact on the regulated community in that licensees will incur the cost of reproducing the disclosure summary.

Additional paperwork requirements for the Commission will be limited to having copies of the disclosure summary available. Licensees will also have the additional paperwork requirement of keeping the signed acknowledgment and providing a copy of the entire disclosure to the consumer. The amendments will not necessitate any legal, accounting or reporting requirements on the regulated community.

Statutory Authority

The amendments are authorized by section 608 of the act.

Sunset Date

The Board continually monitors the effectiveness of its regulations through communications with the regulated population; accordingly, no sunset date has been set.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the agency submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 4451, to IRRC and the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment. In compliance with section 5(b.1), the agency also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing these final-form regulations the agency has considered all comments received from IRRC and the public.

These final-form regulations were approved by the HPLC on November 16, 1999, and deemed approved by the SCP/PLC on November 23, 1999. IRRC met on December 2, 1999, and approved the final-form regulations in accordance with section 5(c) of the Regulatory Review Act.

Contact Person

Further information may be obtained by contacting Deborah A. Sopko, Administrative Assistant, State Real Estate Commission, at P. O. Box 2649, Harrisburg, PA 17105-2649 (717) 783-7155.

Findings

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The amendments do not enlarge the purpose of proposed rulemaking published at 29 Pa.B. 4451.

(4) The amendments are necessary and appropriate for administration and enforcement of the Board's authorizing statute.

Order

The Board, acting under its authorizing statute, orders that:

(1) The regulations of the Board, 49 Pa. Code Chapter 35, are amended by amending § 35.201 and by adding § 35.336 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(2) The Board shall submit this order and Annex A to the Office of General Counsel and to the Office of Attorney General as required by law.

(3) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(4) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

RITA HALVERSON,
Chairperson

(Editor's Note: The amendment of § 35.201 was not included in the proposal at 29 Pa.B. 4451. For the text of the Independent Regulatory Review Commission relating to this document, see 29 Pa.B. 6384 (December 18, 1999).)

Fiscal Note: Fiscal Note 16A-567 remains valid for the final adoption of the subject regulations.

Annex A**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS****PART I. DEPARTMENT OF STATE****Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS****CHAPTER 35. STATE REAL ESTATE COMMISSION****Subchapter B. GENERAL PROVISIONS****§ 35.201. Definitions.**

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Initial interview—The first communication between a broker or salesperson and a consumer involving the personal/business or financial needs and motivations of the consumer. A discussion of the objective facts about the property, including dimensions, zoning classification, age, description or list price/lease amount, is not by itself a substantive discussion.

Licensee—An individual or entity licensed under the act. For purposes of the consumer notice in § 35.336(a) (relating to disclosure summary), the term means a broker or salesperson.

* * * * *

Subchapter E. STANDARDS OF CONDUCT AND PROCEDURE**REAL ESTATE DOCUMENTS****§ 35.336. Disclosure summary.**

(a) The Disclosure Summary shall be entitled "Consumer Notice" and shall be in the following format available from the Commission office upon request by phone, fax or internet:

**CONSUMER NOTICE
THIS IS NOT A CONTRACT**

Pennsylvania Law requires real estate brokers and salespersons (licensees) to advise consumers of the business relationships permitted by the Real Estate Licensing and Registration Act. This notice must be provided to the consumer at the first contact where a substantive discussion about real estate occurs.

Before you disclose any information to a licensee, be advised that unless you select an agency relationship by signing a written agreement providing for such a relationship the licensee is not representing you. A business relationship of any kind will not be presumed but must be established between the consumer and the licensee.

Any licensee who provides you with real estate services owes you the following duties:

- Exercise reasonable professional skill and care which meets the practice standards required by the act.
- Deal honestly and in good faith.
- Present, in a timely manner, all offers, counteroffers, notices, and communications to and from the parties in writing. The duty to present written offers and counteroffers may be waived if the waiver is in writing.
- Comply with Real Estate Seller Disclosure Act.
- Account for escrow and deposit funds.
- Disclose all conflicts of interest in a timely manner.

- Provide assistance with document preparation and advise the consumer regarding compliance with laws pertaining to real estate transactions.

- Advise the consumer to seek expert advice on matters about the transaction that are beyond the licensee's expertise.

- Keep the consumer informed about the transaction and the tasks to be completed.

- Disclose financial interest in a service, such as financial, title transfer and preparation services, insurance, construction, repair or inspection, at the time service is recommended or the first time the licensee learns that the service will be used.

A licensee may have the following business relationships with the consumer:

Seller Agency:

Seller agency is a relationship where the licensee, upon entering into a written agreement, works only for a seller/landlord. Seller's agents owe the additional duties of:

- Loyalty to the seller/landlord by acting in the seller's/landlord's best interest.

- Confidentiality, except that a licensee has a duty to reveal known material defects about the property.

- Making a continuous and good faith effort to find a buyer for the property, except while the property is subject to an existing agreement.

- Disclosure to other parties in the transaction that the licensee has been engaged as a seller's agent.

A seller's agent may compensate other brokers as subagents if the seller/landlord agrees in writing. Sub-agents have the same duties and obligations as the seller's agent. Seller's agents may also compensate buyer's agents and transaction licensees who do not have the same duties and obligations as seller's agents.

If you enter into a written agreement, the licensees in the real estate company owe you the additional duties identified above under seller agency. The exception is designated agency. See the designated agency section in this notice for more information.

Buyer Agency:

Buyer agency is a relationship where the licensee, upon entering into a written agreement, works only for the buyer/tenant. Buyer's agents owe the additional duties of:

- Loyalty to the buyer/tenant by acting in the buyer's/tenant's best interest.

- Confidentiality, except that a licensee is required to disclose known material defects about the property.

- Making a continuous and good faith effort to find a property for the buyer/tenant, except while the buyer/tenant is subject to an existing contract.

- Disclosure to other parties in the transaction that the licensee has been engaged as a buyer's agent.

A buyer's agent may be paid fees, which may include a percentage of the purchase price, and, even if paid by the seller/landlord, will represent the interests of the buyer/tenant.

If you enter into a written agreement, the licensees in the real estate company owe you the additional duties identified above under buyer agency. The exception is

designated agency. See the designated agency section in this notice for more information.

Dual Agency:

Dual agency is a relationship where the licensee acts as the agent for both the seller/landlord and the buyer/tenant in the same transaction with the written consent of all parties. Dual agents owe the additional duties of:

- Taking no action that is adverse or detrimental to either party's interest in the transaction.

- Making a continuous and good faith effort to find a buyer for the property and a property for the buyer, unless either are subject to an existing contract.

- Confidentiality, except that a licensee is required to disclose known material defects about the property.

Designated Agency:

In designated agency, the employing broker may, with your consent, designate one or more licensees from the real estate company to represent you. Other licensees in the company may represent another party and shall not be provided with an confidential information. The designated agent(s) shall have the duties as listed above under seller agency and buyer agency.

In designated agency, the employing broker will be a dual agent and have the additional duties of:

- Taking reasonable care to protect any confidential information disclosed to the licensee.

- Taking responsibility to direct and supervise the business activities of the licensees who represent the seller and buyer while taking no action that is adverse or detrimental to either party's interest in the transaction.

The designation may take place at the time that the parties enter into a written agreement, but may occur at a later time. Regardless of when the designation takes place, the employing broker is responsible for ensuring that confidential information is not disclosed.

Transaction Licensee:

A transaction licensee is a broker or salesperson who provides communication or document preparation services or performs other acts for which a license is required without being the agent or advocate for either the seller/landlord or the buyer/tenant. Upon signing a written agreement or disclosure statement, a transaction licensee has the additional duty of limited confidentiality in that the following information may not be disclosed:

- The seller/landlord will accept a price less than the asking/listing price.

- The buyer/tenant will pay a price greater than the price submitted in a written offer.

- The seller/landlord or buyer/tenant will agree to financing terms other than those offered.

Other information deemed confidential by the consumer shall not be provided to the transaction licensee.

Other Information about Real Estate Transactions

The following are negotiable and shall be addressed in an agreement/disclosure statement with the licensee:

- The duration of the employment, listing agreement or contract.

- The fees or commissions.

- The scope of the activities or practices.

- The broker's cooperation with other brokers, including the sharing of fees.

Any sales agreement must contain the zoning classification of a property except in cases where the property is zoned solely or primarily to permit single family dwellings.

Real Estate Recovery Fund exists to reimburse any person who has obtained a final civil judgment against a Pennsylvania real estate licensee owing to fraud, misrepresentation, or deceit in a real estate transaction and who has been unable to collect the judgment after exhausting all legal and equitable remedies. For complete details about the Fund, call (717) 783-3658.

ACKNOWLEDGMENT

I acknowledge that I have received this disclosure.

Date:

Print (Consumer)

Print (Consumer)

Signed (Consumer)

Signed (Consumer)

Address (Optional):

Address (Optional):

Phone Number (Optional):

Phone Number (Optional):

I certify that I have provided this document to the above consumer during the initial interview.

Date:

Print (Licensee)

Signed (Licensee)

Adopted by the State Real Estate Commission at 49 Pa. Code § 35.336

(b) Licensees shall provide the disclosure summary to all consumers at the initial interview.

(c) Licensees shall provide a copy of the entire disclosure to the consumer and shall retain the signed acknowledgment for their records for 6 months, unless the consumer and the broker have entered into a business relationship whereby the records shall be retained under § 35.286 (relating to retention and production of records).

(d) if a consumer refuses to sign the acknowledgment, licensees shall note the refusal on the acknowledgment and retain it for their records as specified in subsection (c).

[Pa.B. Doc. No. 00-59. Filed for public inspection January 7, 2000, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD [25 PA. CODE CH. 102]

[Correction]

Erosion and Sediment Control

An error occurred in the Preamble to 25 Pa. Code Chapter 102 as it appeared at 30 Pa.B. 111, 119 (January 1, 2000). Fiscal note information was inadvertently omitted and should read as follows:

Fiscal Note: Fiscal Note 7-332 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 00-51. Filed for public inspection December 30, 1999, 9:00 a.m.]
