



State of New Jersey
DEPARTMENT OF BANKING AND INSURANCE
REAL ESTATE COMMISSION
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TO: ALL REAL ESTATE LICENSEES, SCHOOL DIRECTORS,
INSTRUCTORS AND OTHER INTERESTED PARTIES

FROM: THE NEW JERSEY REAL ESTATE COMMISSION

RE: PROSCRIPTION OF CERTAIN
DISCRIMINATORY COMMISSION SPLITS
UNDER N.J.A.C. 11:5-7.6

Please provide copies to all the salespersons and broker-salespersons in your office.

Recently, the Real Estate Commission ("Commission") has received inquiries concerning the interpretation of the Commission regulation which proscribes discriminatory commission splits. Specifically, N.J.A.C. 11:5-7.6 proscribes discriminatory commission splits, but permits listing brokers to vary a commission split in order to achieve equality of commission splits. The purpose of this Bulletin is to reaffirm the Commission's long-standing interpretation of its regulation.

The prohibition on discriminatory commission splits codified in N.J.A.C. 11:5-7.6 is grounded in long-standing principles of anti-trust law. The general public policy underlying that body of law is that the public is best served by open, unfettered and vigorous competition within business sectors. Thus business practices that have the effect of inhibiting competition are prohibited because they prevent or have the potential to prevent the members of the public effected by such practices from enjoying the benefits of full competition.

With respect to N.J.A.C. 11:5-7.6, the Commission reiterates the interpretation it has applied since that regulation was adopted in 1981. Licensees may not discriminate or retaliate against a licensee who takes listings at lower commission rates. The practice of offering a fixed "reciprocal" percentage constitutes such discrimination and therefore violates N.J.A.C. 11:5-7.6. The "equality of commission splits" referred to in the regulation relates to a proportional equality of commission split, rather than a fixed reciprocal percentage. The situation arises where listing brokers are charging different commission rates to their customers.

For example, broker A, who frequently takes listings at a 3% commission rate, offers a 1/3 commission split (1%) to a cooperating broker that sells its

properties. Broker B frequently takes listings at a 6% commission rate. Some brokers have incorrectly interpreted equality of commission splits to mean that broker B may offer the same fixed reciprocal percentage (1%) to broker A when broker A is the cooperating broker on a 6% listing of broker B. This practice is inconsistent with the regulation and with the goal of fostering competition amongst brokers with respect to commissions charged on listings. In such a situation, the proper application of the rule would be for broker B to offer broker A a 1/3 commission split (2% if the gross commission is 6%).

The specific intent of the anti-discrimination provision in the Commission's regulation was and is to prohibit licensees from using discriminatory tactics to retaliate against other brokers who were taking listings at lower commission rates. Prohibiting retaliation against brokers who are taking listings at lower commission rates promotes competition, which results in lower commission fees to consumers.

The Commission also notes that any discriminatory action would also be violative of a licensee's obligation to fully cooperate with all other licensees. See N.J.A.C. 11:5-6.4. Such action may, in particular factual circumstances, also constitute a violation of a licensee's fiduciary obligations to protect and promote the interests of his client. See N.J.A.C. 11:5-6.4.

Finally, all licensees are reminded that pursuant to N.J.A.C. 11:5-6.2(b), no listing agreement or contract shall contain a prescribed or predetermined fee, commission rate or commission amount and that N.J.A.C. 11:5-6.4(f) specifically requires that all written listing agreements shall include a provision on commission splits and specify therein the complete formula for determining the commission split. (See N.J.A.C. 11:5-6.4(f) for the text of the required provision.)

Failure to comply with the directives in this bulletin will subject you to penalties as permitted under the law.

For the Real Estate Commission:

November 29, 2005
Date

/s/ _____
Robert Pimienta, President

/s/ _____
Dawn Rafferty, Executive Director