

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF THE NEW JERSEY REAL ESTATE COMMISSION

REAL ESTATE COMMISSION

**Employment Agreements; Commissions; Accounting to Salespersons and Referral Agents;
Actions for Collection of Compensation**

Proposed Amendment: N.J.A.C. 11:5-4.1

Authorized By: New Jersey Real Estate Commission, Robert L. Kinniebrew, Executive Director.

Authority: N.J.S.A. 45:15-6 and 45:15-17.t.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2016-159.

Submit comments by November 18, 2016, to:

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The agency proposal follows:

Summary

N.J.A.C. 11:5-4.1 sets forth the rules concerning real estate licensee employment agreements as well as the collection of compensation and commissions. It provides, in part, that a real estate broker must have a written agreement with all real estate broker-salespersons, salespersons, or referral agent licensees that work at the brokerage firm. Pursuant to N.J.A.C. 11:5-4.1, the written “employment” agreement must include, among other things, terms related to compensation. The rule does not dictate whether an employee/employer relationship exists or whether an independent contractor relationship exists between a broker and a salesperson or a referral agent. The rules do require, however, that a written agreement containing certain terms be entered into by the parties. Historical practice as well as current practice indicates that licensees determine the nature of their business relationship.

The Real Estate Commission (Commission) seeks to clarify this for the real estate industry and is therefore proposing to amend N.J.A.C. 11:5-4.1. The summary of the proposed changes follows.

N.J.A.C. 11:5-4.1 is proposed to be amended in title to clarify that this section is not applicable exclusively to “employment” agreements, but to all real estate licensee business relationship agreements, as well as the collection of compensation and commissions arrangements among broker-salesperson, real estate salesperson, or real estate referral agent. As such, the title reference to “Employment” agreement is proposed to be deleted and replaced with “Licensee Business Relationship.”

N.J.A.C. 11:5-4.1(a) is proposed to be amended to reduce superfluous language, but maintain its intent that prior to a salesperson or referral agent engaging in any real estate brokerage activity, a broker and salesperson or referral agent must enter into and sign a written agreement which contains the terms of their business relationship as required in this subsection.

N.J.A.C. 11:5-4.1(a)2 is proposed to be amended to delete the reference to an “employment” agreement and instead refer to a “written” agreement.

N.J.A.C. 11:5-4.1(d) is proposed to be amended to reduce superfluous language by deleting the phrase “[i]n the event that” and replacing it with “[i]f.” In addition, the reference to the complete and “comprehensive” written explanation is redundant, and as such, it is proposed to delete the term “comprehensive.”

N.J.A.C. 11:5-4.1(e) is proposed to be amended to reduce superfluous language, but maintain the intent of the rule. As such, the Commission proposes to delete and replace the term “[u]pon,” which begins the first sentence of the paragraph, with the phrase “[w]ithin 30 days of,” and delete the last sentence of the paragraph, “[s]uch accounting shall be delivered to the salesperson or referral agent not later than 30 days after termination.” The Commission proposes to delete and replace the term “make” with “provide” to clarify the intent that the broker is required to provide a complete accounting to the salesperson or referral agent and not simply prepare one. The Commission proposes to delete the phrase “[i]n the event that” and replace it with “[i]f.” The Commission also believes the reference to the complete and “comprehensive” written explanation is redundant, and proposes to delete the term “comprehensive.”

N.J.A.C. 11:5-4.1(f) is proposed to be amended to emphasize that the broker is required to maintain all written documents and proof of delivery of documents to the salesperson or referral agent for six years as described in N.J.A.C. 11:5-4.1(a). The Commission proposes to remove references to “written” agreements in this section as redundant. The Commission also proposes to correct the cross-reference errors by deleting and replacing the reference to “(e)” above with “(d)” above, and by deleting and replacing reference to “(f)” above with “(e)” above.

N.J.A.C. 11:5-4.1(g) is proposed to be amended to delete “[i]n situations where” and replace it with “[i]f” to streamline the language.

N.J.A.C. 11:5-4.1(i) is proposed to be amended to remove “shall be construed” as the Commission believes the language to be redundant.

N.J.A.C. 11:5-4.1(j) is proposed to be added to clarify that all references to “employment agreement,” “employ” and “employing broker” in the rules are construed to allow an employment relationship or an independent contractor relationship between a broker and a broker-salesperson, salesperson, or referral agent.

A 60-day comment period is provided for this notice of proposal and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the notice is excepted from the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

The proposed amendments assures that a written agreement between a broker and broker-salesperson, salesperson, or referral agent shall be required whether there exists an employee/employer relationship or an independent contractor relationship. The proposed amendments will have a positive effect on licensees by conforming the rules to reflect the historical and current practice that licensees are free to agree to the type of business relationship that is appropriate for them.

Economic Impact

No additional cost will be incurred as a result of the proposed amendment because the amendment simply reflects the historical and current practice that licensees are free to agree to the type of business relationship that is appropriate for them. No professional services should be required in order to comply with the proposed amendments.

Federal Standards Statement

A Federal standards analysis is not required because the Commission's proposed amendments are not subject to any Federal requirements or standards.

Jobs Impact

The Commission does not believe that the proposed amendments will cause any jobs to be generated or lost.

Agriculture Industry Impact

The Commission does not expect any impact on the agriculture industry as a result of the proposed amendments.

Regulatory Flexibility Analysis

Pursuant to N.J.S.A. 52:14B-17, a "small business" means any business resident in this State, which employs fewer than 100 full-time employees; is independently owned and operated; and is not dominant in its field. Most real estate brokers meet this definition. The proposed amendments do not impose recordkeeping or other compliance requirements on those businesses. Rather, the amendments clarify the existing practice in the rules requiring written agreements between a broker and a broker-salesperson, salesperson, and a referral agent, without distinction of whether there exists an employee/employer relationship or an independent contractor relationship.

The policies underlying the need for the Commission's adequate oversight of the industry for consistency and for sufficient protection of the interests of New Jersey consumers are paramount and do not vary with the size of the business. Therefore, no exemptions or different compliance requirements are provided based upon business size.

Housing Affordability Impact Analysis

The proposed amendments will not have an impact on housing affordability because the proposed amendments relate to reducing business relationships to a written agreement between real estate licensees.

Smart Growth Development Impact Analysis

The Commission believes that there is an extreme unlikelihood that these proposed amendments would evoke a change in housing production in Planning Areas 1 and 2, or within the designated centers, under the State Development and Redevelopment Plan in New Jersey because the proposed amendments address reducing business relationships between real estate licensees to a written agreement.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 4. EMPLOYMENT PRACTICES/OFFICE AND LICENSEE SUPERVISION

11:5-4.1 [Employment] **Licensee business relationship** agreements; commissions; accounting to salespersons and referral agents; actions for collection of compensation

(a) [No salesperson or referral agent may commence operations as such for a broker and no broker may authorize a salesperson or referral agent to act as such on his or her behalf until a written agreement as provided in this subsection has been signed by the broker and salesperson or referral agent. Prior to an individual's commencement of activity as a salesperson or referral agent under the authority of a broker, the broker and salesperson or referral agent shall both sign a written agreement which recites the terms under which the services of the salesperson or referral agent have been retained by the broker. Such terms shall include, but need not be limited to, the following:] **Prior to a salesperson or referral agent engaging in any real estate**

brokerage activity, a broker and the salesperson or referral agent must enter into and sign a written agreement that contains the terms of their business relationship. Such agreement shall contain terms including, but not limited to, the following:

1. (No change.)

2. A promise by the broker to pay to the salesperson or referral agent his or her portion of commissions earned within 10 business days of their receipt by the broker or as soon thereafter as such funds have cleared the broker's bank, or in accordance with another payment schedule explicitly set forth in the [employment] **written** agreement;

3. -4. (No change.)

(b)-(c) (No change.)

(d) [In the event that] **If** any monies due a salesperson or referral agent under the terms of the written agreement with their broker are not paid within 10 business days of the broker's receipt of such funds or promptly thereafter upon their having cleared the broker's account, the broker shall provide to the salesperson or referral agent a complete [and comprehensive] written explanation of the failure to pay such monies.

(e) [Upon] **Within 30 days of** the termination of the affiliation of a salesperson or referral agent with a broker, the broker shall [make] **provide** a complete **written** accounting [in writing] of all monies due the salesperson or referral agent as of the date of termination and/or which may become due in the future. [In the event] **If** any sums so accounted for are not in accord with the terms of the post-termination compensation clause in the written agreement between the broker and the salesperson or referral agent, the broker shall give a complete [and comprehensive] written explanation of any difference to the salesperson or referral agent with the accounting. [Such accounting shall be delivered to the salesperson or referral agent not later than 30 days

after termination.]

(f) [Copies of all written] **A broker must maintain copies of the following documents and proof of delivery of the document to the salesperson or referral agent for six years:**

agreements as described in (a) above[, of all written]; explanations of the failure to pay compensation due a salesperson or referral agent on a timely basis as described in [(e)] **(d)** above[,]; and [of all] accountings and [written] explanations regarding compensation due a salesperson or referral agent subsequent to the termination of their affiliation with a broker as described in [(f)] **(e)** above [shall be maintained by the broker, with adequate proof of the delivery of the same to the salesperson or referral agent, for a period of six years].

(g) [In situations where] **If** the Commission confirms that a broker has complied with [all of] the requirements imposed by this section, the Commission will not further investigate a complaint alleging the non-payment of a commission by a broker to a salesperson or referral agent unless such complaint is accompanied by a copy of an arbitration decision or the equivalent, or a copy of a judgment of a court of competent jurisdiction secured by the salesperson or referral agent against the broker. Unless appealed, the failure by a broker to pay monies awarded to a salesperson or referral agent under the terms of any such decision or judgment within 30 days of its effective date shall subject the broker to sanctions pursuant to N.J.S.A. 45:15-17.

(h) (No change.)

(i) All references to "salesperson" in this section [shall be construed to also] include individuals licensed as broker-salespersons. All references to "non-payment of a commission" in this section shall be construed to include the non-payment of other forms of compensation.

(j) The Commission interprets "employment agreement," "employ," and "employing broker" in N.J.S.A. 45:15-1 et seq., and this section to permit an employment relationship

or an independent contractor relationship between a broker and a broker-salesperson, salesperson, or referral agent.