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To: Clients and Friends

From: Shawn P. Black

Subject: TREC Prohibits Real Estate Brokers and Sales Agents from Participating in "Pay-to-Play" Programs with Real Estate Settlement Service Providers.

The Texas Real Estate Commission ("TREC"), Texas' regulating body for real estate brokers and sales agents (collectively, "license holders"), recently amended 22 TAC §535.148 to explicitly prohibit license holders from participating in "Pay-to-Play" programs with real estate settlement service providers. "Pay-to-Play" refers to the practice of requiring payment to access a brokerage and its sales agents by being included in a preferred provider program, thus giving that service provider improved access to potential business from the license holder's clients. The amendments were adopted under Texas Occupations Code §1101.151, which authorizes TREC to adopt and enforce rules necessary to administer Chapters 1101 and 1102. The amendments were adopted August 13, 2019 and implemented September 2, 2019.

The preamble to the amendments states, in part, "TREC currently has a rule that includes these provisions for inspectors but not explicitly for other real estate license holders. The change provides parity for license types subject to TREC's jurisdiction and ensures settlement provider independence. These amendments prohibit license holders from selling referrals or recommending settlement providers to their clients based solely on money or other valuable consideration received in order to ensure that license holders are upholding their fiduciary duty by putting their clients' interest above their own financial gain." (44 *TexReg* 4738, August 30, 2019). Below are the amendments to 22 TAC §535.148.

§535.148 - Receiving an Undisclosed Commission or Rebate

(a) A license holder may not receive a commission, rebate, or fee in a transaction from a person other than the person the license holder represents without first disclosing to the license holder's client that the license holder intends to receive the commission, rebate or fee, and obtaining the consent of the license holder's client. ~~[This subsection does not apply to referral fees paid by one licensed real estate broker or sales agent to another active licensed broker or sales agent.]~~

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

(d) ~~A license holder may not pay or receive a fee or other valuable consideration to or from any other settlement service provider for, but not limited to, the following: [A license holder may not accept a fee or payment for services provided for or on behalf of a service provider to a real estate transaction the payment of which is contingent upon a party to the real estate transaction purchasing a contract or services from the service provider].~~

(1) the referral of inspections, lenders, mortgage brokers, or title companies;

(2) inclusion on a list of inspectors, preferred settlement providers, or similar arrangements; or

(3) inclusion on lists of inspectors or other settlement providers contingent on other financial agreements.

(e) In this section, "settlement service" means a service provided in connection with a prospective or actual settlement, and "settlement service provider" includes, but is not limited to, any one or more of the following:

(1) a federally related mortgage loan originator;

(2) a mortgage broker;

(3) a lender or other person who provides any service related to the origination, processing or funding of a real estate loan;

(4) a title service provider;

(5) an attorney;

(2 pages)

- (6) a person who prepares documents, including notarization, delivery, and recordation;
- (7) a person who provides credit report services;
- (8) an appraiser;
- (9) an inspector;
- (10) a settlement agent;
- (11) a person who provides mortgage insurance services;
- (12) a person who provides services involving hazard, flood, or other casualty insurance, homeowner's warranties or residential service contracts;
- (13) a real estate agent or broker; and
- (14) a person who provides any other services for which a settlement service provider requires a borrower or seller to pay.

(f)[(e)] A license holder must use TREC No. RSC-2, Disclosure of Relationship with Residential Service Company, to disclose to a party to a real estate transaction in which the license holder represents one or both of the parties any payments received for services provided for or on behalf of a residential service company licensed under Texas Occupations Code Chapter 1303.

(g)[(f)] The Texas Real Estate Commission adopts by reference TREC No. RSC-2, Disclosure of Relationship with Residential Service Company, approved by the Commission for use by license holders to disclose payments received from a residential service company. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

(h) This section does not prohibit:

- (1) normal promotional or educational activity that is not conditioned on the referral of business and that does not involve the defraying of expenses that otherwise would be incurred;
- (2) a payment at market rates to any person for goods actually furnished or for services actually performed; or
- (3) a payment pursuant to a cooperative brokerage or referral arrangement or agreement between active licensed real estate agents and real estate brokers.

In an article posted on TREC's website, Chelsea Buchholtz, General Counsel for TREC, addressed specific questions relating to the amendments. According to the article, it is still permissible to maintain a preferred service provider list. However, a license holder may not charge settlement service providers to be on the list. It is permissible to charge other vendors, such as moving or landscape companies, which are not settlement service providers, to be on the list. While a limited exception for advertising exists under §535.148(h), allowing a license holder to charge a real estate settlement service provider market rates for engaging in promotional activities which are not conditioned on the referral of business, it must be made clear on the face of the advertisement that any ranking is not based on performance but instead is based solely on advertising rates paid by the service provider. Finally, any preferred provider programs that contain an implied ranking of settlement service providers (i.e. gold, silver or bronze), must include reference to a specific source of objective criteria supporting the ranking, to comply with the requirements of Section 1101.652(b)(23) of The Texas Real Estate License Act and Commission Rule 535.155(d)(19), prohibiting false or misleading advertising.

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