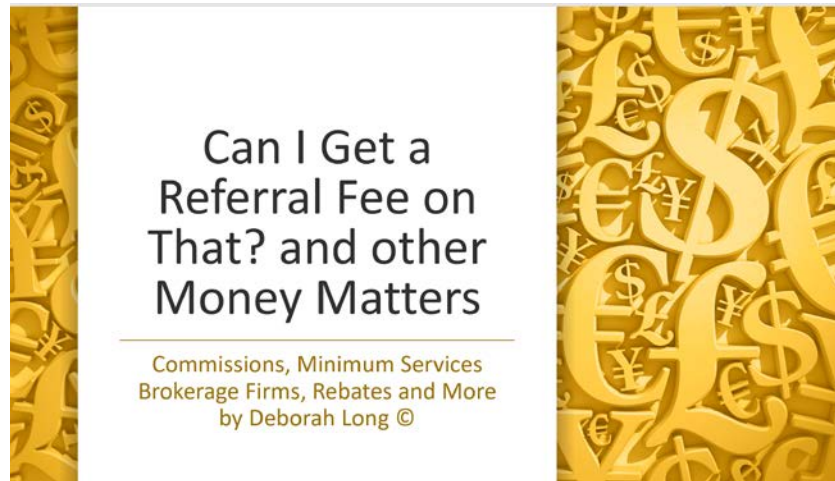


## Can I Get a Referral Fee on That?

### And Other Money Matters

By Deborah H. Long, DREI, CDEI, Ed.D.



## INTRODUCTION

I receive a lot of email and phone inquiries from brokers asking about how they can legally receive referral fees (or rebates or discounts) when they want to purchase or sell properties in markets outside their jurisdiction.

I also receive questions about other commission practices (such as fee-splitting) and whether or not non-traditional brokerage firms are operating lawfully.

Brokers also ask me if they are entitled to their commissions if buyers or sellers default on a sales contract and they want to know if they have to pay out-of-state brokers referral fees.

Brokers want quick answers to these pressing questions, but the answers are very nuanced. In order to address these issues, we have to review some basics about which individuals need a license to receive or pay compensation. We will start with a review of what the NC Real Estate Commission (NCREC) requires in terms of licenses. A review of typical compensation clauses in listing, representation and sales agreements is also helpful.

We also will look at NCREC rules regarding receiving compensation; the Real Estate Settlement Procedures Act (RESPA); the Sherman-Clayton Anti-Trust Act; some interesting litigation on the issue of brokerage compensation; and non-traditional brokerage models.

## SECTION 1. NCREC RULES / FEDERAL LAWS ABOUT COMMISSIONS AND COMPENSATION



North Carolina general statutes. 93A-1 and 93A-2 state that *any person or business entity who directly or indirectly engages in the business of a real estate broker for compensation or the promise thereof while physically in the state of North Carolina must have a North Carolina real estate broker license.*

**Let's parse that statement.**

### **"Any Person or Business Entity"**

Whether it is a real person or an artificial entity, such as a corporation, limited liability company (LLC), or partnership, anyone who provides services of real estate for compensation needs to have a valid, current real estate license in North Carolina if that is where they are providing the service.

Note that if you are buying or selling (or providing another real estate service (mentioned in the next discussion) *for yourself*, you do not need a license. BUT when you are providing these services *for others*, you do.

### **"The Business of a Real Estate Broker"**

What does the NCREC consider to be services of real estate? According to the NCREC's *License Law and Comments*,

Brokerage activities include:

1. Listing (or offering to list) real estate for sale or rent, including any act performed by a real estate licensee in connection with obtaining and servicing a listing agreement. Examples of such acts include, but are not limited to, soliciting listings, providing information to the property owner, and preparing listing agreements or property management agreements.
2. Selling or buying (or offering to sell or buy) real estate, including any act performed by a real estate licensee in connection with assisting others in selling or buying real estate. Examples of such acts include, but are not limited to, advertising listed property for sale, "showing" listed property to prospective buyers, providing information about listed property to prospective buyers (other than basic property facts that might commonly appear in an advertisement in a newspaper, real estate publication or internet website), negotiating a sale or purchase of real estate, and assisting with the completion of contract offers and counteroffers using preprinted forms and communication of offers and acceptances.
3. Leasing or renting (or offering to lease or rent) real estate, including any act performed by real estate licensees in connection with assisting others in leasing or renting real estate. Examples of such acts include, but are not limited to, advertising listed property for rent, "showing" listed rental property to prospective tenants, providing information about listed rental property to prospective tenants (other than

basic property facts that might commonly appear in an advertisement in a newspaper, real estate publication or internet website), negotiating lease terms, and assisting with the completion of lease offers and counteroffers using preprinted forms and communication of offers and acceptances.

4. Conducting (or offering to conduct) a real estate auction. (Mere criers of sale are excluded.) NOTE: An auctioneer's license is also required to auction real estate.

5. Selling, buying, leasing, assigning, or exchanging any interest in real estate, including a leasehold interest, in connection with the sale or purchase of a business.

6. *Referring a party to a real estate licensee, if done for compensation. Any arrangement or agreement between a licensee and an unlicensed person that calls for the licensee to compensate the unlicensed person in any way for finding, introducing, or referring a party to the licensee has been determined by North Carolina's courts to be prohibited under the License Law. Therefore, no licensee may pay a finder's fee, referral fee, "bird dog" fee or similar compensation to an unlicensed person.*<sup>1</sup>



Here's the important part: Item #6 clearly states that **referral fees, if done for compensation**, are considered a service of real estate brokerage. See later discussion.

### **"For compensation"**

If you are a salaried employee (you receive W-2 income from an employer) for providing real estate services, you do not need a real estate license. For example, an individual who is employed by AT&T to purchase land for cable installation does not need a license.

But anyone who receives transactional compensation, that is a commission or bonus, does have to have a license. The reason is that when one is paid transactionally, there is an incentive to engage in inappropriate business practices. The NCREC (and other licensing boards) must protect the public, so it requires that anyone who is going to be paid by commission or bonuses complete a licensing program and pass a test so that he or she knows what is required of them by law.

If you are providing brokerage services for free (introducing a friend to a neighbor who is selling her home, you do not need a license. But if you get paid or expect to be paid, *you do need a license*.

### **"Licensure"**

It isn't enough to have a real estate license. Anyone practicing real estate brokerage in North Carolina must have a NC real estate license. While it is relatively easy to obtain a license in NC if a broker has a license in another state, brokers from other states cannot simply travel to NC and "open shop." They must apply to obtain a license in NC and receive one.

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<sup>1</sup> <https://www.ncrec.gov/pdfs/studyguide.pdf>



A NC license must also be kept in the right condition in order to lawfully accept compensation. A license must be *active*. It also must be *current*.

In order for a license to be *active*, a broker must take 8 hours of the correct continuing education classes each license year. The 8 hours include an update (either the General Update or the Broker-in-Charge Update) and an approved elective. The courses must be completed by June 10 of each year, or the license will be inactive.

In order for a license to be *current*, brokers must renew their licenses each year by paying the appropriate renewal fee by June 30<sup>th</sup>. If they do not renew, brokers will have an expired license.

To repeat, licenses must be both active and current in order for their holders to be lawfully compensated.

### Exceptions to the Rule

There are a *few minor exceptions* to the rule about giving compensation to unlicensed people:



1. NC brokers may split commissions or pay referral fees to licensees of another state so long as the out-of-state licensee does not provide any brokerage services while physically in North Carolina. (See discussion of referral fees below.)
2. Another narrow, limited exception to this restriction is that licensees may pay referral fees to travel agents who contact them to book vacation rentals only, so long as well-defined procedures are followed.
3. If broker decides to terminate his or her relationship with a firm, the firm may still pay the broker directly for any compensation still outstanding, provided that the broker was properly licensed at the time that real estate services were rendered. That exception includes brokers whose licenses become inactive or expire—as long as the licenses were in proper shape at the time the work was done, the BIC can pay the former agent.



There are some real estate services that are also exempt under very narrow circumstances. Individuals performing these services can be paid (not transactionally, however) and not need a license:

1. A business entity selling or leasing real estate owned by the business entity when the acts performed are in the regular course of or are incident to the management of that real estate and the investment therein. This exemption extends to officers and employees of an exempt corporation, the general partners of an exempt partnership, and the managers of an exempt limited liability company when engaging in acts or services for which the corporation, partnership or limited liability company would be exempt.
2. A person acting as an attorney-in-fact under a power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease, or exchange of real estate. (Note: This limited exemption applies only to the final completion of a transaction already commenced. The licensing requirement may not be circumvented by obtaining a power of attorney.)
3. An attorney-at-law who is an active member of the North Carolina State Bar only when performing an act or service that constitutes the practice of law under Chapter 84 of the General Statutes. Thus, the attorney exemption is strictly limited, and attorneys generally may NOT engage in real estate brokerage practice without a real estate license.

4. A person acting as a receiver, trustee in bankruptcy, guardian, administrator or executor or any person acting under a court order.
5. A trustee acting under a written trust agreement, deed of trust or will or the trustee's regular salaried employees.
6. Certain salaried employees of broker- property managers.<sup>2</sup>
7. An individual owner selling or leasing the owner's own property.
8. A housing authority organized under Chapter 157 of the General Statutes and any regular salaried employee with regard to the sale or lease of property owned by the housing authority or to the subletting of property which the housing authority holds as tenant.



Please note that the NCREC rules also state that:

- A provisional broker (PB) may NOT accept any compensation for brokerage services from anyone other than his employing broker or broker age firm.
- A broker may not pay a commission or fee directly to another broker's PB or firm.
- All compensation must be made through the PB's employing broker or firm.

A reminder: If you are buying, selling, renting, leasing property for yourself, no license is needed. But if you have a license, you have to be careful. Brokers must not commit the act of self-dealing: this occurs when an agent attempts to make a secret profit in a transaction where he is supposed to be representing a principal.



And another note: brokers who work for a firm must remember that they earn commissions in the name of the firm. So if a broker terminates employment with EFG Realty, all the commissions on pending sales (as well as all other contracts) are the property of the firm. Whether or not the firm pays a broker who has terminated employment and is up to the firm. Any broker contemplating terminating a relationship with a firm should first check company policy to see what the departing broker's rights may be to any pending transactions.



G.S. 93A-6(a)(4) also prohibits any "self-dealing" on the part of an agent. For example, if an agent attempts to make a secret profit in a transaction where he is supposed to be representing a principal, then the agent violates this "conflict of interest" provision.

Example: An agent lists a parcel of undeveloped property which is zoned for single-family residential use. The agent knows that this property is about to be rezoned for multi-family residential use, which will greatly increase the property's value. Rather than informing the seller of this fact, the agent offers to buy

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<sup>2</sup> (See G.S. 93A-2(c)(6) for details.)

the property at the listed price, telling the seller that he wants to acquire the property as a long-term investment. The deal closes. Several months later, after the rezoning has been accomplished, the agent sells the property at a substantial profit.

The NCREC does not require that brokers disclose that they have a NC real estate license immediately, but the National Association of Realtors does require its members to do. NC broker should at the minimum verbally disclose that they have a license at the appropriate time and then make sure that disclosure is on any offer or contract that is formed.



Even if NC brokers are not using their license, that is, they are buying property from a for sale by owner or purchasing a property for themselves, the NCREC will hold brokers to higher standards than they will hold the public. For example, while sellers do not have to disclose defects on their homes on the *Residential Property and Owners Association Disclosure* form, NC brokers must do so any—not necessarily on the RPOADS form but somewhere, preferably in writing.<sup>3</sup>

### ***Is there a standard commission rate?***

The simple answer is “no.”

The reason there is no standard commission rate in the U.S. is that anti-trust laws (see later discussion) make it unlawful to suggest that there is a set price for brokerage services. Brokerage commission rates are negotiable by the firm and the client based on what the market will bear and what the client is willing to pay.

While many news outlets report that the “typical” brokerage fee is 6% of the purchase, that information is incorrect. The average brokerage fee in the United States fell to an all-time low in 2020, remaining below 5%.

Real Trends, a Colorado-based research firm that issues a widely cited survey on the topic, says the average commission slid to 4.94 percent in 2020 from 4.96% in 2019 and 5.03%. Commissions typically decline in strong seller’s markets like that of 2020-21, years when homes sold quickly, and many sellers were inundated with multiple offers over the list price.<sup>4</sup>

The decline in average commissions may be a result of many factors: the large number of real estate agents vying for a small number of deals also encourages Realtors to compete by cutting their fees; a growth in the number of discount / nontraditional firms; and an and an increase in consumer willingness to ask about fees.

However, the decline in commission rates has been offset by rising home prices. Brokers get a smaller piece of the pie, but the pie is getting bigger.

### ***Why isn’t here a standard commission rate?***

Simple. Because of federal antitrust laws.

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<sup>3</sup> <https://www.ncrec.gov/pdfs/studyguide.pdf>

<sup>4</sup> <https://www.bankrate.com/real-estate/real-estate-commissions-fall/>



In 1890, Congress passed the first antitrust law, which is known as the *Sherman Act*. The Federal Trade Commission explains the Sherman Act is a “...comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”<sup>5</sup>

In 1914, Congress then passed the *Federal Trade Commission Act*, which created the FTC, and the *Clayton Act*. These three laws are still in effect today and are the main antitrust laws in the nation.

States also have their own versions of the antitrust laws that are similar to the federal laws. The FTC states that “...for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.” The courts will apply the laws and determine what constitutes illegal anticompetitive and antitrust behavior.

### **The Sherman Act**

Section 1 of the Sherman Act provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.” Early on this provision was fairly broad and could encompass most behavior engaged in by businesses or individuals. The FTC further explains that the Sherman Act also makes illegal, behavior that amounts to “...monopolization, attempted monopolization, or conspiracy or combination to monopolize.”

The Supreme Court has explained that “the purpose of the *Sherman Act* is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.” Therefore, it is important to understand that not all behavior that may restrain competition is violative of the antitrust laws.

### **The Clayton Antitrust Act**

The *Clayton Antitrust Act* strengthens earlier antitrust legislation and prohibits anticompetitive mergers, predatory and discriminatory pricing, and other forms of unethical corporate behavior.

The *Clayton Antitrust Act* also protects individuals by allowing lawsuits against companies and upholding the rights of labor to organize and protest peacefully.

### **Impact on Real Estate Brokers**

On September 5, 1974, John Foley, the president of Jack Foley Realty, Inc., hosted a dinner party at the Congressional Country Club in Bethesda, Maryland. The guests were nine of the leading brokers in Montgomery County. Following the meal, Foley allegedly stood up and announced that his firm was raising its commission rate from 6 percent to 7%. Attendees then discussed the rate change, and over time the

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<sup>5</sup> (<https://bit.ly/38q0BF4>)

brokers adopted a 7-percent commission rate. A United States grand jury indicted the brokers on April 1, 1977. A jury trial found the defendants guilty of criminal price fixing — a felony.<sup>6</sup>

While not all behavior that may be anticompetitive is illegal, there is behavior that is recognized to be a “per se” violation of the antitrust laws. The Supreme Court over the years developed certain guidelines and indicated that certain forms of eliminating competition are unreasonable “per se” or “on its face.” Some actions that are considered to be “per se” illegal include price fixing, group boycotts, market or customer allocations and tying agreements. Any agreement to fix or suggest commission rates for example, constitutes a violation of the Sherman Act. Any group of two or more brokers who agree that they will not do business with another broker or particular enterprise, would constitute a group boycott. Agreements that restrict the right of competitors to enter a particular territory are also “per se” illegal.

### **Fixing Commission Rates Is Illegal**

A form of illegal antitrust behavior is agreeing on a commission split. Price fixing is prohibited. This means that competing brokers, real estate governing bodies, or multiple listing organizations cannot agree to set sale conditions, fees, or management rates.

NAR points out that “...listing brokers may not agree on the commission ‘split’ to be paid to compensate cooperating brokers who produce a ready, willing, and able buyer for a listed property. Conspiracies among competitors to fix the compensation paid to cooperating brokers may also be deemed per se illegal.” NAR explains that “...brokers must determine their cooperative compensation policies in the same unilateral and independent manner that they establish the commission or fees charged to clients.”<sup>7</sup>



It is permissible, however, for listing brokers and selling brokers to discuss the commission *they will pay to each other* in connection with each individual transaction, which should take place in advance of an offer.

### **Group Boycotts**

Group boycotting is usually considered a “per se” violation of the antitrust laws. In certain instances, group boycotts may also be analyzed under the “Rule of Reason” standard. As pointed out by NAR, “a group boycott is a concerted refusal to deal with a particular party, such as when two or more businesses agree to refuse to deal with another competitor in order to force a change in a competitor’s behavior or to attempt to drive the competitor out of business.”

Often the target of the alleged boycott is a broker that employs a ‘discount,’ ‘alternative,’ or other non-traditional commission/compensation arrangement with clients.” The group boycott’s primary effect is to eliminate a competitor in the market.

### **NAR: Agreements as to other Terms are Illegal**

NAR further points out that the “...agreements among competitors regarding other terms or conditions of a listing agreement, such as the length of the listing, the type of listing accepted, or the marketing services to be provided by the listing broker, although such agreements may not be treated as “per se” violations

<sup>6</sup> <https://www.inman.com/2016/09/28/illegal-discuss-real-estate-commissions-social-media/>

<sup>7</sup> <https://bit.ly/3qxltAA>.



but may be illegal. Any express or “understood” agreements as to the terms and conditions of listing agreements or other broker-client agreements raise serious antitrust concerns. The lawfulness of such agreements will in many cases be analyzed under the Rule of Reason, which balances the pro-competitive effects of the agreement, if any, against the anti-competitive consequences.

### **Penalties for Anti-Trust Violations**

An individual may be fined a maximum of \$100,000 and be sentenced up to three years in prison-and a corporation may be fined up to \$1 million for breach of the Sherman antitrust laws. In a civil suit, an aggrieved person may recover up to triple the value of the actual damages plus attorneys' fees and costs.<sup>8</sup>

### **Avoiding Accusations of Unlawful Conduct Regarding Anti-Trust Laws**

To avoid being accused of anti-trust violations, brokers should:

- Discuss only their companies' policies regarding compensation.
- Avoid discussing compensation in gatherings with competitors.
- Never say to a consumer, “We charge x%. All the brokers around here do.”
- Never say to a consumer, “No broker wants to work with KLM Realty. They don't pay the standard commission split.”
- Show property based on a client's needs, not solely on the offered compensation.
- Boycott competitors' listings.
- Participate in a boycott where a broker is denied access to the MLS or other similar services.
- Don't say:
  - Everyone charges this rate.
  - The Board/Association says we have to charge X.
  - The best way to handle Broker X is to not do business with him.
  - Why is Broker X advertising here? This is our territory.
  - You shouldn't sign with Broker X, nobody does business with him.
  - Let's not deal with Broker X; he's not a professional he hires part-timers.
  - Let's agree to always split commissions like this...
  - I bet they'd drop their discount program if we refused to business with them.



### **Summary of preventative measures:**

- Never make derogatory remarks about a competitor. Compete by showing how good your services are.
- Never discuss or use the Board/Association of REALTORS®, MLS meetings, or other broker meetings or real estate professional gatherings to discuss “dealing with” or “boycotting” alternative service brokers or any real estate service provider.
- Never have discussions regarding commission splits or payment of referral fees unless discussing a particular transaction with the other broker involved in the transaction.

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<sup>8</sup> <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>

- Never discuss your firm’s commission rate or referral fee structure with real estate professionals outside your firm, unless discussing an on-going transaction that you are mutually working to complete.
- Never imply or suggest that commissions are set by a group of brokers or the Board/Association of REALTORS®.

### **A LACK OF TRANSPARENCY**

In 2019, the Consumer Federation of America (CFA) released a new report, *Hidden Real Estate Commissions: Consumer Costs and Improved Transparency* which found that traditional real estate agents and brokers make it difficult for consumers to learn about commission levels. This lack of transparency may give rise to the myth that there is a standard commission.

According to the CFA,

For most major consumer services, it is relatively easy for consumers to access information about prices. This is not the case for an estimated \$100 billion in real estate commissions that are charged home sellers each year. Traditional firms and agents:

- Do not advertise their commissions.
- Do not include information about their commissions on their websites.
- On these websites, rarely mention that commissions are charged.
- In response to general phone inquiries, usually do not provide information about full commission levels during the call.

In conversations with a prospective home seller, in response to a query about seller costs, usually do not quickly provide information about commission levels (though eventually, nearly all did).

Moreover, the industry restricts the ability of buyers to learn what portion of the commission (“splits”) their buyer agents receive.<sup>9</sup>

### **LAWSUITS ABOUT ANTI-COMPETITIVE PRACTICES**

Numerous lawsuits indicate that the concerns about brokerage fees are under attack because of the way these fees are levied and/or discussed.

Two cases were at the federal district court level, *Moehrl v. NAR* (Missouri)<sup>10</sup> and *Sitzer v. NAR* (Illinois).<sup>11</sup>

On March 6, 2019, a group of recent home sellers filed a class-action lawsuit, *Moehrl v. NAR, et al.*, in the U.S. District Court for the Northern District of Illinois against NAR, 20 of the biggest MLSs, and four of the largest real estate companies in the country — RE/MAX Holdings, Keller Williams Realty, HomeServices of America and Realogy Holdings.

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<sup>9</sup> [https://consumerfed.org/press\\_release/new-research-shows-that-real-estate-commissions-are-hidden-and-poorly-understood-by-consumers/](https://consumerfed.org/press_release/new-research-shows-that-real-estate-commissions-are-hidden-and-poorly-understood-by-consumers/)

<sup>10</sup>

<https://www.cohenmilstein.com/sites/default/files/Moehrl%20v%20National%20Assoc%20of%20Realtors%20Complaint%2003062019.pdf>

<sup>11</sup> <https://casetext.com/case/sitzer-v-natl-assn-of-realtors>

On April 29, 2019, a substantially similar class-action lawsuit, *Sitzer v. NAR, et al.*, was filed in the U.S. District Court for the Western District of Missouri.

The lawsuits alleged that NAR, the MLSs and the four brokerage companies conspired to create a commission structure that significantly inflated the cost of selling their homes by requiring all brokers to make a blanket, non-negotiable offer of compensation when listing a property on an MLS.

The lawsuits alleged that REALTOR® compensation rules are anti-competitive and result in inflated commissions because they require home sellers to pay fees for both the listing agent and buyer's agent.

Another case involves a group of Massachusetts home sellers who have filed suit against real estate brokerage firms Realogy, RE/MAX, Keller Williams, and Home Services of America. Unlike *Moehrl and Sitzer, Bauman v. MLS*, names a Multiple Listing Service (MLS) group as a defendant—the MLS PIN. The MLS PIN serves the six New England states and New York. Its 41,000+ members make it the seventh largest in the country. The complaints also mention steering in the industry, which occurs when agents direct prospective buyers to the properties that will return the highest commission.

NAR has been named in a number of lawsuits for creating rules that are anti-competitive.<sup>12</sup> To make matters even more interesting, in November, 2020, the Department of Justice filed a civil lawsuit against the National Association of REALTORS® (NAR) alleging that NAR established and enforced illegal restraints on the ways that REALTORS® compete.

The Antitrust Division simultaneously filed a proposed settlement that requires NAR to repeal and modify its rules to provide greater transparency to home buyers about the commissions of brokers representing home buyers (buyer brokers), cease misrepresenting that buyer broker services are free, eliminate rules that prohibit filtering multiple listing services (MLS) listings based on the level of buyer broker commissions, and change its rules and policy which limit access to lockboxes to only NAR-affiliated real estate brokers.<sup>13</sup>



The suit resulted in a settlement requiring the NAR to amend some of its practices, including requiring buyer's agents to stop representing their fees as free and eliminating Realtors' ability to filter home listings based on expected commission.<sup>14</sup>



Readers may be interested in this NAR video program on the DOJ/NAR settlement:  
<https://www.nar.realtor/2020-nar-doj-agreement-regarding-mls-rules>

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<sup>12</sup> <https://www.nar.realtor/legal/hot-topics-for-brokers>

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<sup>14</sup> [https://consumerfed.org/press\\_release/doj-settlement-with-nar-will-discourage-steering-and-discrimination-against-discount-brokers-but-will-not-significantly-advance-price-competition-in-the-real-estate-brokerage-marketplace/](https://consumerfed.org/press_release/doj-settlement-with-nar-will-discourage-steering-and-discrimination-against-discount-brokers-but-will-not-significantly-advance-price-competition-in-the-real-estate-brokerage-marketplace/)

## GETTING PAID

If brokerage firms or brokers are not paid as promised, they will not find justice with the NCREC. The Commission does not arbitrate commission disputes.



G.S 93A-3(c) provides that the Commission shall not make rules or regulations regulating commission, salaries, or fees to be charged by licensees.

Paragraph (f) of Rule A.0109 augments that statutory provision by providing that the Commission will not act as a board of arbitration regarding such matters as the rate of commissions, the division of commissions, pay of brokers and similar matters.

Certainly, it is hoped that brokerage firms have *written policy manuals* that discuss compensation matters and that brokers-in-charge follow their firms' policies. Affiliated brokers can always consult with their attorneys about any disparity between what was promised by the firm and what was delivered. Brokerage firms can also sue other brokerage firms about broken promises.



Brokers who are members of a local association of Realtors can also file a complaint with their association against non-complying members. Complaints filed by Realtors against Realtors are common, particularly in the area of money matters and procuring cause.

## VIDEO RESOURCES



Readers may be interested in these NAR video program on anti-trust practices:

- <https://www.youtube.com/watch?v=rICi8rB01qE>
- <https://www.youtube.com/watch?v=wGFFewdGUWI>

The Maryland REALTORS® produced this video of possible interest:

<http://www.mdrealtor.org/Resources/Videos/All-Videos/lc/1506183/lcv/s/realtor%20antitrust%20liability%20information%202021>



Individuals and companies have to be licensed to be entitled to any form of compensation for any brokerage service. There is no standard commission rate because of anti-trust laws. Realtors and brokers are perceived to be less than forthcoming about their compensation and numerous lawsuits against major brokerage firms and NAR underscore this issue.

## SECTION 2. REFERRAL FEES

We have already examined the issue of how to be lawfully compensated for providing a brokerage service in NC. Anyone who does so must be properly licensed.

We have also discussed how the act of referring is considered to be a service of real estate in NC, one that requires proper license.



- It doesn't matter to the NCREC that someone receives compensation in the form of a check, gift card, or cash or gems.
- It doesn't matter to the NCREC that the compensation is referred to as a "rebate," "kicker," "sweetener," "bird-dog fee," etc. To the NCREC, it is still compensation.
- It doesn't matter that the individual only received the unlawful compensation once. There is no exemption for engaging in a limited number of transactions. A person or entity who performs a brokerage service in even one transaction must be licensed.
- It doesn't matter whether the compensation was stingy or generous. No fee or other consideration is so small as to exempt one from the application of the licensing statute when acting for another in a real estate transaction.

You might wonder how someone who receives illegal compensation will get caught. Rest assured, it happens. See the two examples below:

### Illegal Compensation

**Disciplinary Actions**

*NOTE: Readers are cautioned to avoid mistaken identities and resulting embarrassment by carefully examining the listed names and locations.*

Following licenses were surrendered:

Lino V. Abejon, salesman, Hialeah; eff. 3/7/90.  
 Roberto A. Aramayo, salesman, Crango Park; eff. 1/18/90.  
 Nancy C. Aughey, broker, Jacksonville; eff. 1/8/90.  
 Eduardo Balmasoda and All American Investment Corporation, brokers, Miami, eff. 3/20/90.  
 Phillip Banks and Abode Realty, Inc., brokers, Miami; eff. 4/24/90.  
 John H. Colvin, Jr., and Colvin Services, Inc., DoLeon Springs; eff. 3/9/90.  
 Sarah G. Del Pino, broker, Miami, eff. 3/20/90.  
 Charles P. Elliott, broker, Naples; eff. 4/12/90.  
 Richard L. Fast and Fast & Co. Realty, Inc., brokers, Ft. Lauderdale; eff. 3/5/90.  
 John F. Gates and Gates & Associates, Inc., brokers, Orange Park; eff. 1/23/90.  
 Lucille E. Harris and Elaine Harris, Inc., brokers, Alachua; eff. 2/16/90.  
 George F. Holmes, salesman, Ft. Lauderdale; eff. 2/21/90.  
 Nathan L. Kerr, broker, Ft. Lauderdale; eff. 2/5/90.  
 John J. Long a/k/a John Joseph Longo, salesman, West Palm Beach; eff. 9/29/89.  
 Maura Mora, salesman, Tampa, eff. 4/24/90.  
 George R. Newman, salesman, Merrill Island; eff. 1/25/90.  
 Kenneth A. Ratliff, salesman, Miami; eff. 3/21/90.  
 Gideon A. Rechiniz and Gar Enterprises Pinellas County, Inc., brokers, St. Petersburg, eff. 1/16/90.  
 Deborah L. Ritchie, salesman, Seminole; eff. 2/20/90.  
 Charles R. Semelberger and Veteran Real Estate of Riviera Beach, Inc., brokers, eff. 12/31/89.

Judy Mitchell Curtis and A. J. Curtis International, Inc., brokers, Bradenton; revoked eff. 3/7/90; culpable negligence, failed to account and deliver a deposit, failed to maintain an office and entrance sign, failed to produce records for inspection and failed to notify of change of address.  
 Jerry L. Daniel, broker, suspended 3 years eff. 2/24/90 and fined \$1,000; fraud, misrepresentation, dishonest dealing and breach of trust.  
 Franklin B. Dickinson, salesman, Tampa; revoked eff. 3/7/90; culpable negligence.  
 Michael H. Duffley, broker, Seaside; suspended five years eff. 4/7/90; failed to pay a \$4,000 fine.  
 Bernard Fried, broker, Miami; reprimanded and placed on probation for a period of 6 months for having paid a fee or other compensation to an unlicensed person, namely, their daughter.  
 Jane A. Fried, salesman, Miami; reprimanded and placed on probation for a period of 6 months for having paid a fee or other compensation to an unlicensed person, namely, their daughter.  
 Edward Friedman and Century Real Estate, Inc., brokers, West Palm Beach; reprimand and fined \$500 each; mishandled trust funds.  
 Adam A. Green, salesman, St. Petersburg; fined \$2,000 and suspended 2 years eff. 4/7/90; been guilty of a crime and failed to notify FREC of having been convicted of a felony.  
 Charles P. Grimes, broker, Sebastian; suspended 60 days eff. 2/26/90 and fined \$1,000; failed to maintain trust funds and failed to account and deliver.  
 Robert R. Hambley, broker, Seminole; revoked eff. 9/22/89; mishandled and misappropriated trust funds.  
 Paul Hochman, broker, Boca Raton; revoked eff. 5/11/90; failed to account and deliver and failed to maintain trust funds in escrow account.  
 Charles A. Holl and Greenleaf Realty, Inc., brokers, Tampa; fined \$1,000; failed to maintain trust funds.  
 Belinda G. Hubbard t/a Hubbard Realty and Investments, Inc., broker, Tallahassee; fined \$1,000.

**JONATHAN H. ELLIOT** (Fayetteville)

– Following a hearing, the Commission permanently revoked the broker license of Mr. Elliot effective December 1, 2016. The Commission found that Mr. Elliot, acting as broker-in-charge of a sole proprietorship, failed to respond to Letters of Inquiry sent by the Commission; that Mr. Elliot failed to provide owner ledgers for the properties he was managing, copies of cancelled checks, or a trial balance; that Mr. Elliot paid “bonus” checks based on 25% of the total rent payments mandated in leases to an unlicensed company as compensation for getting leases signed by tenants; that Mr. Elliot failed to list a property for sale for the owner as required under the listing agreement and placed a tenant in the subject property without the knowledge of the property owner; that Mr. Elliot collected rent from the tenant monthly for over two years and placed this money in his trust account; that Mr. Elliot never disbursed this money to the property owner and the balance owed to the owners in this account ballooned to over \$20,000; that Mr. Elliot did not have a property management agreement with the owner; that the owner was unaware of a tenant being in the property because Mr. Elliot failed to provide owner statements during the tenancy and failed to provide the owner with a copy of the lease; that checks written

*Continued*

In the first example of Bernard and June Fried (Miami, Florida brokers) that their daughter told too many people that she received compensation for referrals to her parents; perhaps a competitor of the Frieds heard about this unlawful compensation and then turned the Frieds into the Florida Real Estate Commission.

The second case involves a North Carolina broker who was audited by the NCREC and among the many wrongdoings of Mr. Elliott, he was discovered to have paid unlawful referral fees.

More important than the issue of whether the person is going to be caught is that real estate licensees know that it is unlawful to be paid for brokerage services if individuals are not properly licensed.



It's one thing for the uneducated public to know that individuals should not be paid or receive unlawful compensation. It's *absolutely critical that real estate licensees are not the ones making the offer of illicit compensation*. Note that [G.S. 93A-6(a)(5) and (9)] state that "A broker may NOT pay a commission or valuable consideration to any person for acts or services performed in violation of the License Law."

*This provision flatly prohibits a broker from paying an unlicensed person for acts which require a real estate license.* Following are examples of prohibited payments:

*Example:* The payment by brokers of commissions to previously licensed sales associates who failed to properly renew their licenses for any acts performed after their licenses had expired. Note that payment could properly be made for commissions earned while the license was on active status, even if the license is inactive or expired at time of payment. The determining factor is whether the license was on active status at the time all services were rendered which generated the commission.

*Example:* The payment of a commission, salary, or fee by brokers to unlicensed employees or independent contractors (e.g., secretaries, "trainees" who haven't passed the license examination, etc.) for performing acts or services requiring a real estate license.

*Example:* The payment by licensees of a "finder's fee," "referral fee," "bird dog fee," or any other valuable consideration to unlicensed persons who find, introduce, or bring together parties to a real estate transaction. This is true even if the ultimate consummation of the transaction is accomplished by a licensee and even if the act is performed without expectation of compensation.

Thus, a licensee may NOT compensate a friend, relative, former client, or any other unlicensed person for "referring" a prospective buyer, seller, landlord or tenant to such licensee. This prohibition extends to "owner referral" programs at condominium or time share complexes and "tenant referral" programs at apartment complexes.<sup>15</sup>

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<sup>15</sup> <https://www.ncrec.gov/pdfs/studyguide.pdf>

## The Difference Between a Gift to a Client and A Referral Fee

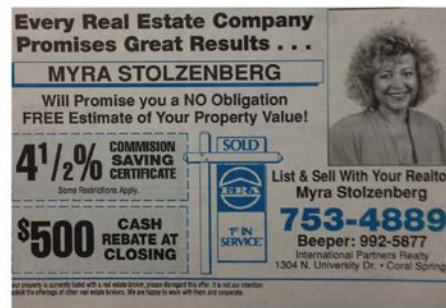
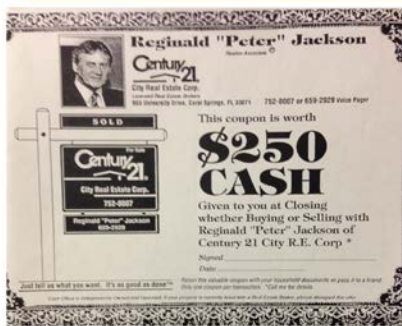
There's a lot of confusion between paying a gift to a client and paying a referral fee.



First, it is totally legal to give a gift to clients, whether the clients are landlord, tenants, buyers, or sellers. (The IRS may not let you write off the total cost of the gift, but you can be as generous as you want within the limits of any brokerage firm policy that may exist.)

Could a gift be a dinner out? A gift certificate? A home warranty policy? Yes. A check for \$500 or \$5,000? Yes. Essentially by giving a gift, you're taking your commission and giving a discount to your clients. (Again, you can do what you want with your part of the commission, but you cannot give away the firm's commission without permission.)

Your clients do not have to be licensed to receive the benefit of the gift (which again, is really a reduction in the commission.) You can even offer such a gift to *prospective* clients and advertise accordingly. See the lawful offers advertised below:



Giving compensation or a "gift" (or whatever you want to call it) to an unlicensed person for referring clients to you, however, is *illegal*. In this case, the person doing the referral is not your client but rather someone who is finding clients for you. You cannot pay this individual any thing of value at all, as mentioned above.

So an ad that look like this would get you in hot water with the NCREC.

**Do you know anyone who is thinking of selling their home?  
I pay \$500 for every lead you provide.  
Call me, Tanya Ellis, licensed broker, 919-444-7654**

In this case, Tanya is offering to pay unlicensed individuals and violating NCREC rules. The person who accepts the offer is also violating state law since unlicensed people cannot receive compensation for a real estate service (and again, referring is a real estate service) without being properly licensed. Brokers cannot pay unlicensed people anything of value...not even a candy bar. A thank you note, however, is fine.

## Paying A Broker from Another Jurisdiction

Referrals to other brokers are made in various situations, including:

- An agent sells a house for a consumer who wishes to purchase a property in another geographic location.
- An agent retires from selling properties but continues to learn of consumers who are searching for an agent.
- An agent specializes in finding potential buyers and sellers but does not wish to service them.
- A referral agency, such as Referral Exchange or HomeLight, collects information about potential buyers and sellers then “sells” this information to agents.

### *How do referral fees typically work?*

For example, say that a selling agent working with a buyer receives 3% of a \$300,000 sale or \$9,000.

The selling agent promised to pay a 25% referral fee. So the selling agent would send one-quarter of the \$9,000 or \$2,250, to the referral agency.

### *Can NC brokers pay brokers from out of state a referral fee?*

Yes! But rules apply.



For one, brokers who are receiving a referral fee must be licensed in their state.

They must also stay in their state. If they come to NC to provide a service of real estate, they must be licensed here. So out-of-state brokers are unlicensed in NC and could not receive their referral fee if they are in NC to practice real estate.

Note that not all countries required real estate licensing. For example, if your Australian cousin sends you a client who buys a home from you in Charlotte, you can pay your firm can pay your cousin since Australia does not require licensing.

But your firm should check on the ARELLO Real Estate Licensee Verification Database website at <https://www.arello.com/> to see that anyone receiving referral fees is properly licensed, including the firms involved.

The screenshot shows the ARELLO Real Estate Licensee Verification Database website. At the top, there is a navigation menu with links for ARELLO.ORG, HOME, SEARCH, PARTICIPANTS, and API. The main heading reads "Welcome to ARELLO Real Estate Licensee Verification Database" with a sub-heading "Search 4,423,910 Licensee Records". Below this, there are two search options: "SEARCH BY LICENSE NAME" and "SEARCH BY LICENSE NUMBER". The search form includes fields for "First Name", "Last Name", and "Jurisdiction" (with a dropdown menu set to "ALL JURISDICTIONS"). There are "FAQ" and "SEARCH" buttons at the bottom of the form. A small disclaimer at the bottom states: "\* search results may include records from the National Association of Realtors®".



### *Do you have to pay brokers from another jurisdiction?*

That's up to your brokerage firm. Referral fees are paid from one company to another (or from sole proprietors to other firms, so referral checks are handled by the firm and the supervising broker.

Some states, such as Illinois, have extremely specific rules about referral fee requests:

#### Request for Referral Fee

- 1) No licensee may request a referral fee unless reasonable cause for payment of the referral fee exists. Reasonable cause for payment of a referral fee means:
  - A) An actual introduction of a client was made to a licensee; or
  - B) A contractual referral fee relationship exists with the licensee.
- 2) No residential leasing agent licensee may request, or be paid, a referral fee, except for a referral fee from a lease or rental of residential real estate.<sup>16</sup>
- 3) The fact that reasonable cause to demand a referral fee exists does not necessarily mean that a legal right to the referral fee exists.

Brokerage firms also establish their own policies about referral fees. Some companies require that if another firm is going to receive referral fees, the referring firm must make its request known at the beginning of the relationship between the referred company and the client. If in the middle or latter part of the transaction, a client says, "Oh, by the way, my brother is a licensed Virginia broker, and he wants a referral fee," a NC broker certainly does not have to comply. (It is a very annoying occurrence that happens all too frequently.)

### ***Can NC brokers pay brokers from in-state a referral fee?***



Same rules apply. In order to receive an in-state referral fee, the receiving broker must be properly licensed in North Carolina. It's easy to check that the [proposed recipient has a valid license by going to the NCREC website.

It is wise to refer certain consumers or transactions to other brokers, particularly if they are more knowledgeable about the type of transaction or the location of the purchase or sale.

### ***What is the standard referral fee?***

There is no such thing as a standard referral fee. According to a recent study by the Consumer Federation of America "Most real estate agents collect and pay fees to other agents for referrals of consumers who buy or sell a home.<sup>12</sup> Some agents derive all of their income from these fees. These fees are typically 25% of the commission collected by the agent receiving the referral, yet sometimes are higher."<sup>17</sup> For some agents, referral fees are their sole source of income.

The study also indicates that "there is also general agreement that referral fees range from 10 percent to 50 percent, with a large majority falling in the range from 20 percent to 35 percent.<sup>11</sup> At the low end, the association of exclusive buyer brokers charges referral fees of only 15 percent to its members.<sup>12</sup>

<sup>16</sup> <https://ilga.gov/commission/jcar/admincode/068/068014500G07800R.html>

<sup>17</sup> <https://consumerfed.org/wp-content/uploads/2020/09/Real-Estate-Referral-Fees-Report-9-21-20.pdf>

At the high end, relocation agencies sometimes charge a fee as much as 50 percent of the commission received by the buying agent.”<sup>18</sup>

### Getting Paid a Referral Fee

***Let’s say that a NC broker has a daughter in Illinois who now wishes to purchase a home in the Chicago area. May the NC broker receive a referral fee on that transaction?***

Simply, yes. BUT the broker should handle it this way:

First, as the broker would in any other transaction, the broker should be careful in helping her daughter find a great Illinois-licensed real estate professional. Once that decision has been made, the broker should contact the Illinois broker and determine if the choice is a good one, and then ask what the referral fee would be if the transaction is successful.

Next, let’s assume that the NC broker plans to give the referral fee to her daughter (which is totally legal and likely).

The NC broker should then ask the Illinois brokerage firm to discount the amount of the commission it would earn in the transaction by the amount of the fee or credit the amount it to the daughter on the closing statement.

The net amount to the Illinois firm is the same and it is legal for the Illinois firm to discount its commission to a client. See the article at the end of this section titled: Can Real Estate Practitioners Avoid Taxable Income from Commission Rebates? They Can Now!”



If the NC broker were to accept the referral fee, it creates a taxable event for the broker. The IRS may not allow the broker substantial tax relief simply because the referral fee will be entirely rebated to the daughter.



Another note: the NC broker can assist her daughter but must do so by staying in NC, or if the NC broker wishes to travel to Illinois, it must be clear to all the parties that the NC broker is giving “motherly” guidance and not participating in providing brokerage services in Illinois.

Needless to say, this transaction must go through the NC broker’s firm, and the firm will be entitled to its split (assuming that the firm asks for one), but the NC broker can certainly deal with her share of the commission in the manner described above.

This scenario is also true when NC brokers wish to buy, sell, lease, rent or participate in real estate transactions within or outside of NC for themselves. For example, a broker from Charlotte may want to buy beachfront property and hires a buyer-broker in the Outer Banks. It is perfectly appropriate to find an Outer Banks broker who will rebate the referral fee toward the Charlotte broker’s closing costs.

Note that generally when lenders are involved in real estate transactions, these rebates/referral fees must be disclosed on the settlement statement.

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<sup>18</sup> Ibid.

## Referral fees to charities

Brokers can certainly donate to their charities of choice. However, they cannot give compensation to charities as a result of charities advertising as follows: “ Good Hope Charities will receive \$500 for every client who works with GHJ Realty.”



Brokers should not allow a charitable group, church, or school to advertise that they will donate a portion of each commission you receive to that group as an incentive for buyers or sellers to work with you.

Brokers may not pay incentives to unlicensed persons or firms, including charities, to help them obtain business. Brokers MAY advertise that they regularly contribute to a church or charity or other organization.<sup>19</sup>

## Referral fee disclosure

The National Association of Realtors Code of Ethics, Article 6, permits referral fees between agents and brokers without requiring disclosure to clients. “Realtors shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate fees, the Realtor or Realtor’s firm may receive as a direct result of such recommendation.” Some states – including North Carolina, Minnesota, California, and Idaho – require a disclosure but not always in writing or in a timely way. We have seen no evidence that these requirements are enforced.

## Controversy

Not all agents believe that paying referral fees is good for them or good for consumers. The Consumer Federation of America also suggests that referral fees raise the cost of transactions to consumers. The CFA also states, “...the referrers often do not adequately vet agents receiving referrals. As one expert put it: ‘The bulk of referrals are not well-informed, which means the referrer knows nothing about the new agent. ‘Another agent explained the referral process:’ The referring agent isn’t really doing much of anything for the client. They are simply tossing them into a hopper with no idea who they’ll get in many cases. It’s a few minutes effort to fill out an online form and a check later.”<sup>20</sup>

There are challenges as well regarding the practice of referral fees. When brokers want to offer a thank you gift to former clients or friends or relatives when they are kind enough to make a referral, they cannot provide valuable consideration, as discussed earlier. There is nothing that stops brokers from writing a beautiful thank you note. But that is all that can be offered. But the practice of giving clients discounts is not only legal, it is sometimes expected by consumers who are rather aggressive about demanding referral fees—legal or otherwise.

Read this essay that I wrote on the subject a number of years ago for a real estate publication.:

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<sup>19</sup> <https://bulletins.ncrec.gov/compensation-issues-how-to-handle-them/>

<sup>20</sup> <https://consumerfed.org/wp-content/uploads/2020/09/Real-Estate-Referral-Fees-Report-9-21-20.pdf>



## A Business "Thank You": Referral Fees

From *Long on Ethics*  
June, 2002  
Revised October, 2007

What should be one of the most pleasant and trouble-free aspects of a professional life is one of its most complex: saying "thank you" for a client referral.

When I was an active real estate practitioner, I lost a long-time friendship over the sale of home. A colleague referred his sister to me, and after several weeks of showing her property, I successfully closed a lucrative sale, one that earned my firm about \$4,000 in total commissions. When I thanked my colleague with an appropriate note and a handshake, he made it clear he expected a more tangible reward. I explained that real estate licensees cannot pay unlicensed individuals for providing referrals. He indicated that I could surely afford to be generous. I responded by explaining that of the \$4,000 my firm earned on that sale, I earned approximately \$1,000 before taxes and expenses. While I had rebated a substantial sum to his sister (a lawful practice), I could not give him anything more than a hearty "thank you" without risking my license. His response was, "Yes, but who's going to know?" Unfortunately, my answers did not satisfy him, and the friendship was irretrievably lost.

I wondered then, and still wonder, why lay people expect monetary rewards from real estate agents and other licensed professionals. Is it because of a mistaken belief that we are earning thousands of dollars in fees? Is it because of greed? An expectation that we will compensate them because they have seen others (illegally) compensated? Or is it a belief that in business, reciprocity should be a guiding principle—you scratch my back, and I will scratch yours.

But when I give a new neighbor the name of my pediatrician or dentist, I have no expectation that the next time I receive professional service from my physicians that I will get a discount or cash back or a free root canal. I never even expect a thank you—and rarely have I received one. The only expectation I have is that my neighbor will receive the same professional service from my doctor and dentist. If my neighbor does not receive good service, I would simply never refer that professional again. Why don't consumers have the same expectation of real estate practitioners and other licensed professionals?

Part of the problem may lie in the conflict between licensing laws, federal laws, and business protocol. For example, real estate agents may pay other properly licensed real estate agents a referral fee. Real estate agents may give their clients—buyers or sellers—a discount on commission rates or housewarming presents for participating directly in a transaction (as I did with my friend's sister, as described above). The prohibition in real estate deals with paying referral fees to unlicensed people who did not participate directly in a transaction.

This prohibition against giving a fee for referral runs counter to custom in other businesses. Many businesspeople—even those in regulated businesses—are permitted to accept and give referral fees and gifts. It is considered a polite gesture to give individuals who refer others a fruit basket, a modest gift certificate, or a dinner out. While many corporations have codes of ethics limiting the amounts that can be spent on wooing business clients, there is a general understanding that reciprocity can be a form of business protocol and etiquette.

To make matters more complex, federal laws govern referral fees. *The Real Estate Settlement Procedures Act* (or RESPA) enacted in 1974, specifically prohibits kickbacks and referral fees prohibited -- the paying or receiving of any fee or thing of value for the referral of business related to the settlement or closing without rendering a service. Settlement services are broadly defined to include more than just the traditional services performed by a lender, mortgage broker or title company, such as origination, processing, or funding a loan. Rendering credit reports, termite inspections, and home inspections are all considered settlement services.

Under RESPA, even those fees which are fully disclosed and agreed to by buyers or sellers are likely to be illegal. So mortgage brokers or loan officers or title company clerks getting a \$100 kickback from the surveyor

firm they recommended to a buyer would be in violation of RESPA if they did not earn that \$100 by providing a real estate service for compensation. (Any person who violates RESPA's provisions may be fined up to \$10,000 or imprisoned for up to one year, or both. Additionally, the person violating RESPA is liable to the person charged for the settlement service for three times the amount paid for the settlement service. In addition to criminal penalties, RESPA violations are being combined with other private lawsuit claims such as antitrust violations, exposing violators to additional civil liability.)

Another federal law, the *Federal Corrupt Practice Act*, prohibits U.S. companies from making payments or gifts to government officials for the purpose of influencing business decisions. First enacted in 1977, this law has been controversial from the start and was amended eleven years later because U.S. companies claimed to be at too great a competitive disadvantage with foreign companies. The act now allows payments to foreign officials where the purpose of the payments is to expedite routine governmental action, such as processing visas or providing police protection. Those accused of violating the Act may offer the defense that the alleged payoff was a normal and reasonable business expenditure.

Let's set aside the issue of law, for just a moment. What are some of the ethical issues in giving or receiving referral fees?

As I mentioned earlier, I don't have any qualms about providing modest thank-you gifts to individuals who send me business—with one proviso: those referrals should be unsolicited. In other words, I should not make offers to reward consumers if they send me business. If satisfied clients wish to send me referral business without prompting on my part, it seems appropriate and polite to send a small gift. (Again, this gift would be unlawful in most U.S. states even if it is the nice thing to do. All real estate practitioners can do lawfully is send a thank-you note.)

If a firm wants to woo my business with token gifts, such as donuts, ballpoint pens, or even educational seminars—as long as there is no expectation that I will buy or recommend the firm's products, the gifts are ethically acceptable. However, if the firm is trying to buy my recommendation of their product with expensive trinkets or junkets, the gift is really a bribe.

Another offensive—but lawful—practice that is currently making the rounds is paying fees to be placed on referral lists. If I must pay to have my firm placed on a "List of Recommended Vendors," I would conclude that the so-called recommended vendors are simply the ones who can afford the price of being on the list. The value of such a list is ethically questionable.

So here we have it: referral fees can be ethical but unlawful. They also can be lawful but unethical. So on what basis should we conduct ourselves? The Law Enforcement Code of Ethics states, "The public demands that the integrity of police officers be above reproach. Police officers must, therefore, avoid any conduct that might compromise integrity and thus undercut the public confidence in a law enforcement agency. Officers will refuse to accept any gifts, presents, subscriptions, favors, gratuities, or promises that could be interpreted as seeking to cause the officer to refrain from performing official responsibilities honestly and within the law. Police officers must not receive private or special advantage from their official status. Respect from the public cannot be bought; it can only be earned and cultivated."

This high standard for police officers sets a high bar for all licensed professionals.

## **Making a career out of referrals**

Some of my students want to retire but still be able to earn referral fees. Is that possible? Yes, as long as brokers keep their licenses in current and active condition. They don't have to join an association of Realtors®, they don't have to belong to an MLS, and they don't even have to be a broker-in-charge.

Brokers who meet certain conditions don't have to become a broker-in-charge (although there is a minimal education requirement to do so) if they meet three conditions"

- 1) They cannot solicit /advertise listings (no business cards, no flyers, no social media);
- 2) They cannot supervise agents;
- 3) They cannot have an escrow/trust account.

These limitations mean that the broker can certainly help buyers and/or can give referrals, but not much else.

This may be a perfect arrangement for those who wish minimal involvement in the business.

### ***Is there a reasonable income one could expect from referrals?***

There is no definitive information about the extent of referrals and collection of related fees. One expert notes: "At some time or another, most professionals admit, almost every real estate agent in the business will agree to pay a referral fee in exchange for a client." A 2018 survey of more than 1,200 agents also suggests that referrals are widespread.

Nearly nine in ten agents surveyed (87%) reported that they received income in the previous year from referrals. Over half (55%) said that they received at least six paid referrals in the past year, with 11% indicating that they earned income from at least 25 referrals in this period.

Nearly half of surveyed agents (45%) reported that they earned at least \$10,000 in the previous year from referrals, with 8% saying that they received at least \$50,000 in the period. One real estate expert estimates that between 30 and 35% of all real estate transactions include at least one referral fee.<sup>21</sup>



There are a lot of nuanced regulations about paying and receiving referral fees.

### **Can Real Estate Practitioners Avoid Taxable Income from Commission Rebates? They Can Now!**

By Mark Lee Levine<sup>22</sup>

Most tax practitioners are well aware of a fundamental point in the tax law regarding taxable income. Under 26 U.S.C.A. §61(a), gross income is very broadly defined.<sup>1</sup> Because of this broad definition in the Internal Revenue Code, real estate practitioners must be concerned with the issue as to whether they

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<sup>21</sup> A good introduction to referrals and related fees can be found in: Elizabeth Weintraub, "How Do Real Estate Agent Referrals Work?" The Balance (March 31, 2020). Teresa Boardman, "Real estate referral fees: The good, the bad and the ugly," Inman News (July 1, 2017). Reuven Shechter, "7 FAQs About Real Estate Agent Referral Fees," Clever (June 25, 2019)

<sup>22</sup> Adapted from the Real Estate Educator's Journal, Vol 20, No. 1, with the permission of the editor. The article was written in 2007 but is still current in terms of policy. Mark Levine, DREI, J.D., Ph.D., has been a real estate broker, attorney, investor, and professor for more than 35 years. He has lectured throughout the U.S. and internationally. Levine holds an endowed chair at the University of Denver in his name and is a recent Fulbright Scholar to China. He has written 52 books and more than 300 articles. He can be reached at mlevine@du.edu.

have taxable income when they receive a commission and then rebate part of that commission to a buyer, seller or other broker involved in the transaction.

In most instances, real estate practitioners want to receive all of the commission in a transaction. However, to encourage additional business, especially in a slower market, many licensees have agreed in some circumstances to pay part of the commission that was otherwise due to the broker to another party, often a buyer.<sup>2</sup> When Congress wrote Code §61, the general idea was to include most activities within the definition of income and then to allow for deductions, exemptions, and other adjustments, before the actual tax rate was levied against the taxable amount. Because of this approach, Code §61(a) states: “Except as otherwise provided in this subtitle, gross income means all income from whatever source derived...” Thus, the simple use of the word all makes clear the intent of Congress in enacting Code §61. In fact, if that word were not sufficient to make most sources of revenue coming to a taxpayer taxable, Code §61(a) provides that all income includes income from whatever sources derived. This section goes on to state: “including (but not limited to) the following items: (1) compensation for services, including fees, commissions, fringe benefits and similar items...”<sup>3</sup> Thus, the language makes it apparent that commissions are in fact income, and anything that is similar to commissions, such as other payments for services, advice, referral fees, and the like, would also be income. Code §61(a) further provides that gross income includes earnings derived from businesses, from dealings in property, interest, rents, royalties, dividends, and much more.

As mentioned in my text, *Real Estate Transactions: Tax Planning*, the Internal Revenue Service (IRS) has successfully argued in a tax court case, *Patch v. CIR*, T.C. Memo 1995-449, that even monies received by a bank robber actually constituted taxable income to the bank robber! (The fact that the bank robber must surrender such monies that were not his did not change the outcome.)<sup>4</sup> This simple case illustrated the position that the IRS, interpreting what Congress wrote in Code §61, clearly intends that all sources of monies, unless otherwise shown to be a specific exception, constitutes income. This issue is relevant in the real estate field because taxpayers have been concerned as to whether there is income generated when a taxpaying broker receives a commission but distributes that commission to other parties, such as a buyer, seller, or other broker. The issue is: “Does the distributed commission amount constitute income to the taxpayer?”

This issue is relevant in the real estate field because taxpayers have been concerned as to whether there is income generated when a taxpaying broker receives a commission but distributes that commission to other parties, such as a buyer, seller, or other broker.

It is worthwhile to note that in some instances, it might be assumed that receiving the total amount of income and paying it out, with the corresponding deduction, would result in no net difference to the taxpayer who received a gross amount. For example, if a taxpayer received \$100,000 and distributed that \$100,000, under contractual agreement, to others who were to share in that amount, the question would be whether the taxpayer must report the \$100,000; or, the taxpayer would report the net amount, such as paying \$40,000 to another person, netting only \$60,000 for the given taxpayer.

This issue is very important where a full deduction is not allowed of the \$40,000 in the above-noted example. This issue is also very important for other purposes, such as computing the Alternative Minimum Tax (AMT), which is another form of tax calculation under federal income tax law.<sup>5</sup>

As many taxpayers know, the IRS often issues guidance, general or specific, for taxpayers on important issues. General guidance from the IRS may be issued in the form of a broad Revenue Ruling or Revenue Procedure. A specific guideline may come as a Private Letter Ruling (PLR).

On the specific question as to whether there was taxable income for real estate brokers who rebated part of their commissions to a seller or buyer, the IRS issued PLR 200721013.<sup>6</sup> This PLR noted a factual setting where the taxpayer, a broker, received a real estate commission. The broker signed an agreement to act as an agent for the buyer, which is referred to as buyer's agency.

In this agency agreement, the taxpayer/broker agreed to pay the purchaser/buyer a given amount of commission that was received from the seller. Apparently, there were several transactions undertaken by this taxpayer/broker in this fashion. In some instances, the broker would receive the commission and write a check to the purchaser, consistent with the above-noted agreement. In other settings, the purchaser would receive a credit on the closing statement for an amount that would equate to the agreed-upon portion of commission that the taxpayer was to pay to the buyer. In any event, the buyer benefited by reducing the amount of cash needed at closing. The first issue addressed by Private Letter Ruling 200721013 was to determine whether the payments were taxable income.

The Ruling cited Code §61, which generally supports the position that almost any payment received is gross income, unless the taxpayer can show some authority to the contrary, such as receiving a gift, which is not income.<sup>7</sup> The Ruling also cited Revenue Ruling 2006-27. That Revenue Ruling supported the position that when a nonprofit corporation provided down payments for purchasers who had low income, such payments did not constitute

the issue for real estate licensees is whether the part paid to another party allows the real estate practitioner to receive the whole commission, reduce the amount that is paid to a third party, and report the net amount.

The IRS cited another Revenue Ruling, showing that when the manufacturer of an automobile rebated monies to the purchaser of a car, such rebate was not counted as taxable income; rather, the rebate was considered as a reduction

in the purchase price.<sup>9</sup> In looking to the authorities noted, the PLR concluded that the payment to the purchaser (taxpayer) was an adjustment to the purchase price. It reduced the purchase price; as such, it was not taxable income. On the second issue addressed, the IRS looked to the question as to whether reporting (regarding tax return information) was required of the parties because of the transactions where the broker paid part of the commission to a buyer. That PLR cited 26 U.S.C.A. §6041, which requires taxpayers engaged in a trade or business to report such tax information and to file an information return with the Internal Revenue Service.<sup>10</sup> However, this Ruling concluded that Code §6041 does not require the reporting of the return information if what is received is not includable in income. The above discussion noted that such amount received by the buyer was not income; therefore, the tax return information was not required to be filed under Code §6041.

This PLR 200721013 is good news to buyers and brokers. With a good deal of negative news recently reported regarding the residential marketplace, at least in this instance there was no income generated in the above-referenced scenario when a broker paid part of the commission to a buyer. There is the added benefit that the buyer is not required to file a separate information return under these



circumstances. Thus, in this limited setting, in some cases, a real estate broker can rest more comfortably knowing that the IRS supports the ability of a broker to pay part of the commission to a third party and to be taxed only on the net amount received by the broker. Of course, a PLR is only valid authority for the person that requested the Ruling. But this Ruling does show the inclination of the IRS on this issue of taxable commissions.

#### ENDNOTES

1 Internal Revenue Code, 26 U.S.C.A. §61 (1986).

2 Editor's note: The practice of commission rebating is increasingly common. Rebating to a party to the transaction is a lawful practice in many U.S. jurisdictions.

3 Internal Revenue Code, 26 U.S.C.A. §61 (1986).

4 Levine, M. L. (2007). Real estate transactions, tax planning. Eagan, MN: Thomson-West.

5 Author's note: A discussion of this issue is beyond the scope of this examination. However, for more detail on this topic, see the text cited earlier.

6 Internal Revenue Service. Private Letter Ruling 200721023-61.00-00: Gross income v. not gross income. (2007, May 25).

7 Internal Revenue Code, 26 U.S.C.A. §61 (1986).

8 Internal Revenue Service. Revenue ruling 2006-27, 2006-21 I.R.B. 915. (2006, May 22). Internal Revenue Service. Revenue ruling 2006-27, 2006-21 I.R.B. 915. (2006, May 22).

9 Internal Revenue Service. Revenue Ruling 76-96, 1976-1 C.B. 23, modified by Revenue Ruling 2005-28, 2005-1 C.B. 997. (2005, May 9). See also the authority in endnote 4, *supra*, text section 3.

10 Internal Revenue Code, 26 U.S.C.A. §6041 (1988).

### SECTION 3. DISCLOSURE OF COMPENSATION

#### *Do brokers have to disclose their earnings? And if so, to whom? When?*

A broker is obligated to disclose to his/her principal the value of any expected compensation / consideration whenever such consideration in any form is "of more than nominal value."

Full disclosure requires a description of the compensation, incentive, or bonus, including its value and the identity of the party by whom it will or may be paid.

The value can be expressed using a specific dollar figure, percentage, or other mathematical formula. It is not sufficient to describe compensation as being any amount "up to" a certain amount, or "between" two figures.

Disclosure is considered appropriate if it is made in sufficient time to aid a reasonable person's decision-making. To be timely to a buyer, the disclosure should be made at the time of showing, if possible, but if not, at least prior to the submission of an offer.

Obviously, brokers will and must state their fees on any contracts with their clients. For example, a listing contract and a buyer representation agreement will state under what circumstances brokers have earned their commission and what their professional fees are.

Here's an example of compensation language from the NC Association of Realtor *Exclusive Right of Sale* listing form:

7. **FIRM'S COMPENSATION.**

(a) **Fee.** Seller agrees to pay Firm a total fee of \_\_\_\_\_ % of the gross sales price of the Property, OR \_\_\_\_\_ ("Fee"), which shall include the amount of any compensation paid by Firm as set forth in paragraph 8 below to any other real estate firm, including individual agents and sole proprietors ("Cooperating Real Estate Firm").

(b) **Fee Earned.** The Fee shall be deemed earned under any of the following circumstances:

(i) If a ready, willing and able buyer is procured by Firm, a Cooperating Real Estate Firm, the Seller, or anyone else during the Term of this Agreement at the price and on the terms set forth herein, or at any price and upon any terms acceptable to the Seller;

(ii) If the Property is sold, optioned, exchanged, conveyed or transferred, or the Seller agrees, during the Term of this Agreement or any renewal hereof, to sell, option, exchange, convey or transfer the Property at any price and upon any terms whatsoever; or

(iii) If the circumstances set out in (i) or (ii) above have not occurred, and if, within \_\_\_\_\_ days after the Expiration Date ("Protection Period"), Seller either directly or indirectly sells, options, exchanges, conveys or transfers, or agrees to sell, option, exchange, convey or transfer the Property upon any terms whatsoever, to any person with whom Seller, Firm, or any Cooperating Real Estate Firm communicated regarding the Property during the Term of this Agreement or any renewal hereof, provided the names of such persons are delivered or postmarked to the Seller within 15 days after the Expiration Date. HOWEVER, Seller shall NOT be obligated to pay the Fee if a valid listing agreement is entered into between Seller and another real estate broker and the Property is subsequently sold, optioned, exchanged, conveyed or transferred during the Protection Period.

(c) **Fee Due and Payable.** Once earned as set forth above, the Fee will be due and payable at the earlier of:

(i) Closing on the Property;

(ii) The Seller's failure to sell the Property (including but not limited to the Seller's refusal to sign an offer to purchase the Property at the price and terms stated herein or on other terms acceptable to the Seller, the Seller's default on an executed sales contract for the Property, or the Seller's agreement with a buyer to unreasonably modify or cancel an executed sales contract for the Property); or

(iii) Seller's breach of this Agreement.

(d) **Transfer of Interest in Business Entity.** If Seller is a partnership, corporation or other business entity, and an interest in the partnership, corporation or other business entity is transferred, whether by merger, outright purchase or otherwise, in lieu of a sale of the Property, and applicable law does not prohibit the payment of a fee or commission in connection with such sale or transfer, the Fee shall be calculated on the fair market value of the Property, rather than the gross sales price, multiplied by the percentage of interest so transferred, and shall be paid by Seller at the time of the transfer.

(e) **Additional Compensation.** If additional compensation, incentive, bonus, rebate and/or other valuable consideration ("Additional Compensation") is offered to the Firm from any other party or person in connection with a sale of the Property, Seller will permit Firm to receive it in addition to the Fee. Firm shall timely disclose the promise or expectation of receiving any such Additional Compensation and confirm the disclosure in writing before Seller makes or accepts an offer to sell. (NOTE: NCAR Form #770 may be used to confirm the disclosure of any such Additional Compensation)



Note that this language clearly states that the fee is due and payable (paragraph 7c) even if the transaction does not close. This is to protect the brokers from a seller who breaches the sales contract. This contract states that the commission *has been earned* when a ready, willing, and able buyer is brought to the seller, but that the commission can be paid at closing.

The *Exclusive Right to Represent* agreement has similar language:

#### 4. COMPENSATION OF FIRM.

- (a) Firm acknowledges receipt of a non-refundable retainer fee in the amount of \$\_\_\_\_\_ which  
 shall  shall not be credited toward any compensation due Firm under this Agreement.
- (b) Buyer agrees that Firm's fee for services hereunder shall be in the amount of \_\_\_\_\_ ("Fee")

*(Insert dollar amount, percentage of purchase price, or other method of determining Firm's compensation for each type of property the Buyer may purchase, such as resale, new construction, land/lot and/or unrepresented seller. Do not insert N/A or a zero (\$0)).*

- (i) Firm shall seek the Fee from a cooperating listing firm (through the listing firm's offer of compensation in MLS or otherwise) or from the seller if there is no listing firm, and Buyer agrees that Firm shall be entitled to receive same in consideration for Firm's services hereunder.
- (ii) If Buyer purchases property where the compensation offered by the listing firm and/or seller is less than the Fee, or where no compensation is offered by either the listing firm or the seller, Buyer and Firm agree that Buyer will pay the difference between the Fee and the compensation offered unless prohibited by law. Firm will timely inform Buyer if the compensation offered is less than expected.
- (iii) If additional compensation, incentive, bonus, rebate and/or other valuable consideration ("*Additional Compensation*") is offered through the MLS or otherwise, Buyer will permit the Firm to receive it in addition to the Fee. Firm shall timely disclose the promise or expectation of receiving any such Additional Compensation and confirm the disclosure in writing before Buyer makes or accepts an offer to buy. (Note: NCAR Form #770 may be used to confirm the disclosure of any such Additional Compensation)
- (c) The compensation shall be deemed earned under any of the following circumstances:
- (i) If, during the term of this Agreement, Buyer, any assignee of Buyer or any person/legal entity acting on behalf of Buyer directly or indirectly enters into an agreement to purchase, option, and/or exchange any property of the type described above regardless of the manner in which Buyer was introduced to the property; or
- (ii) If, within \_\_\_\_\_ days after expiration of this Agreement, Buyer enters into a contract to acquire property introduced to Buyer during the term of this Agreement by Firm or any third party, unless Buyer has entered into a valid buyer agency agreement with another real estate firm; or

Note that the contract states that while the firm shall first seek its fee from a cooperating listing firm or from the seller (if the transaction involves a for-sale-by-owner), but ultimately the buyer can be held responsible to see that the buyer broker is paid.

#### ***Do you have to disclose your earnings to someone other than your client?***

No. Brokers do not have to disclose to someone not their principal the amount or form of compensation the broker may receive from his/her principal the amount of compensation the broker expects to receive from his/her employing broker (i.e., the Company).

#### ***What if you are handling the transaction for the buyer, but you are not a buyer agent, you are a subagent of the seller?***

According to the NCREC, "No disclosure is necessary. Your principal is the seller, and he or she should have already received disclosure through the listing agent. If you have thoroughly discussed agency with the buyer, and the buyer has acknowledged receipt of the *Working with Real Estate Agents* [form] which indicates you are a subagent of the seller, the buyer should understand that you do not represent him or her."<sup>23</sup>

#### ***What compensation must a dual agent disclose?***

A client working with an agent is entitled to know what the agent (i.e., the company) is going to receive and from whom as well as the amount of all compensation the buyer agent/company will receive if acting as a dual agent.

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<sup>23</sup> <https://bulletins.ncrec.gov/disclosing-compensation-when-why-and-how/>

Why? Basically, because agency law requires an agent to disclose to its principal everything the agent knows, particularly any factors that may influence, bias, or color the agent's advice to the principal, such as the agent's self-interest.

Buyers should be able to question whether their agent is selecting and showing them properties where the real estate firm and agent derive the most benefit, rather than properties that would most benefit the buyer.

Remember that in most cases, the firm owns the listing and the buyer agency agreement, not the individual agents working the transaction. Disclosure to the seller is not an issue if it is done as part of the written listing agreement. Since the firm represents both the buyer and the seller, however, and since the firm is being paid by the seller, it must make a full compensation disclosure to its buyer client. This means the full amount of compensation or bonuses the firm is receiving from the seller."<sup>24</sup>

Here is the example that the NCREC cites:

An agent working with a buyer may not know at the time of showing or at the time an agency agreement is signed with the buyer the full amount of commission on each property listed by the firm, plus any other incentives. Firms must make this information available to their brokers so disclosure can be made at the time of showing. If the information is not available at the time of the showing, the agent should make a good faith estimate of the firm's compensation and then follow up with full disclosure before an offer is made. If a broker assisting the buyer discovers a bonus is being offered at some point after the initial disclosure, the broker must disclose the bonus to the buyer immediately in writing. Emailing the buyer is a sufficient means of disclosure.<sup>25</sup>



**Bottom line: Brokers must disclose to their clients what their fees will be. But they do not have to discuss their earnings with other parties.**

***What happens if a broker is offered a gift or some form of compensation from a vendor in exchange for giving that vendor some business?***

This situation occurs frequently when brokers provide property management service. For example, a property manager may send out bids to have a 40-unit apartment building re-painted. A painting company says that if it gets the winning bid, it will paint the property manager's home for free.



Rule A.0109 (Disclosure to principal of compensation from a vendor or supplier of goods or services) addresses this type of issue and others associated with the disclosure of and sharing of compensation received by a real estate licensee.

Paragraph (a) prohibits a licensee from receiving any form of valuable consideration from a vendor or supplier of goods or services in connection with an expenditure made on behalf of the licensee's principal in a real estate transaction without first obtaining the written consent of the principal.

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

*Example:* A broker manages several rental units for various owners and routinely employs Ajax Cleaning Service to clean the units after the tenants leave. The broker pays Ajax a \$50 per unit fee for its services out of rental proceeds received and deposited in his trust account. Ajax then “refunds” to the broker \$10 for each \$50 fee it receives, but the property owners are not aware that the broker receives this payment from Ajax in addition to his regular brokerage fee. The broker in this situation is making a secret profit without the property owners’ knowledge and is violating the rule.

Paragraph (b) prohibits a licensee from receiving any form of valuable consideration for recommending, procuring, or arranging services for a party to a real estate transaction without full and timely disclosure to such party. The party for whom the services are recommended, procured, or arranged does not have to be the agent’s principal.

*Example:* An agent sells a listed lot to a buyer who wants to build a house on the lot. Without the buyer’s knowledge, the agent arranges with ABC Homebuilders for ABC to pay the agent a 3% referral fee if the agent recommends ABC to the buyer and the buyer employs ABC to build his house. The agent then recommends ABC to the buyer, ABC builds the buyer’s house for \$100,000 and ABC secretly pays the agent \$3,000 for his referral of the buyer. The agent has violated this rule. (Note that the buyer in this situation likely paid \$3,000 more for his house than was necessary because it is highly likely the builder added the agent’s referral fee to the price he charged the buyer for building the house. The main point here is that the buyer had the right to know that the agent was not providing disinterested advice when recommending the builder.)

*Example:* A selling agent in a real estate transaction, while acting as a subagent of the seller, recommends to a buyer who has submitted an offer that the buyer apply to Ready Cash Mortgage Company for his mortgage loan. The agent knows that Ready Cash will pay him a “referral fee” of \$100 for sending him the buyer’s business if the loan is made to the buyer, but the agent does not disclose this fact to the buyer. If the agent subsequently accepts the referral fee from the lender, he will have violated this rule. (The buyer has the right to know that the agent’s recommendation is not a disinterested one.)

***What about brokerage services in sales transactions? Can a broker receive “side” compensation?***

Paragraph (c) deals with disclosure to a licensee’s principal of the licensee’s compensation in a sales transaction from various sources other than in situations addressed in paragraphs (a) and (b). A broker may not receive any compensation, incentive, bonus, rebate, or other consideration of more than nominal value

- (1) from his or her principal unless the compensation, etc. is provided for in a written agency contract or
- (2) from any other party or person unless the broker provides to his or her principal a full and timely disclosure of the compensation.

*Example:* ABC Homebuilders offers to pay any broker who procures a buyer for one of ABC’s inventory homes a bonus of \$1,000 that is in addition to any brokerage commission the broker earns under any agency contract and/or commission split agreements.

Any broker working with a buyer-client who is considering the purchase of one of ABC's homes must comply with the disclosure requirement and disclose the bonus to the buyer in a timely manner. Note: If ABC Homebuilders also offers a bonus of \$2,000 on a second sale of one of its homes and \$3,000 on a third sale, and if a buyer's broker has already sold one of ABC's homes, then the broker must disclose to his or her buyer principal the entire bonus program and that his or her bonus will be at least \$2,000 if the buyer purchases an ABC home.

***What is nominal compensation?***

Compensation is considered to be "nominal" if it is of insignificant, token or merely symbolic worth. The Commission has cited gifts of a \$25 bottle of wine or a \$50 dinner gift certificate as being examples of "nominal" compensation paid to a broker that do not require the consent of the broker's principal.

***How should disclosure happen in this situation?***

Paragraph (d) of Rule A.010 explains what is meant by "full and timely disclosure" in paragraphs (a), (b) and (c). "Full" disclosure includes a description of the compensation, incentive, etc. including its value and the identity of the person or party by whom it will or may be paid. The disclosure is "timely" when it is made in sufficient time to aid a reasonable person's decision-making.

In a sales transaction, the disclosure may be made orally, but must be confirmed in writing before the principal makes or accepts an offer to buy or sell.

Restrictions on compensation disclosure requirement. Paragraph (e) clarifies that a broker does NOT have to disclose to a person who is not his or her principal the compensation the broker expects to receive from his or her principal, and further clarifies that a broker does NOT have to disclose to his principal the compensation the broker expects to receive from the broker's employing broker/firm (i.e., the individual broker's share of the compensation paid to the broker's employing broker/firm).<sup>26</sup>

***What does NAR require its Realtor-members to disclose regarding "side" compensation?***

The National Association of Realtors Code of Ethics, Article 6, permits referral fees between agents and brokers without requiring disclosure to clients: "Realtors shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate fees, the Realtor or Realtor's firm may receive as a direct result of such recommendation."

Some states – including North Carolina, Minnesota, California, and Idaho – require a disclosure but not always in writing or in a timely way.

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<sup>26</sup> <https://www.ncrec.gov/pdfs/studyguide.pdf>



Realtors also are required to follow the standards of practice regarding compensation in the following articles from the Code of Ethics:

### Article 3

REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. *(Amended 1/95)* [\[listen\]](#)

- Standard of Practice 3-1

REALTORS®, acting as exclusive agents or brokers of sellers/ landlords, establish the terms and conditions of offers to cooperate. Unless expressly indicated in offers to cooperate, cooperating brokers may not assume that the offer of cooperation includes an offer of compensation. Terms of compensation, if any, shall be ascertained by cooperating brokers before beginning efforts to accept the offer of cooperation. *(Amended 1/99)*

- Standard of Practice 3-2

Any change in compensation offered for cooperative services must be communicated to the other REALTOR® prior to the time that REALTOR® submits an offer to purchase/lease the property. After a REALTOR® has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative transaction. *(Amended 1/14)*

- Standard of Practice 3-3

Standard of Practice 3-2 does not preclude the listing broker and cooperating broker from entering into an agreement to change cooperative compensation. *(Adopted 1/94)*

### Article 7

In a transaction, REALTORS® shall not accept compensation from more than one party, even if permitted by law, without disclosure to all parties and the informed consent of the REALTOR®'s client or clients. *(Amended 1/93)*



Clients have a right to know how much and under what terms their brokers are compensated.

## SECTION 4. THE REAL ESTATE SETTLEMENT PROCEDURES ACT AND COMPENSATION



The *Real Estate Settlement Procedures Act of 1974* (RESPA) (12 U.S.C. 2601 et seq.) was enacted in 1975 as a way of protecting consumers from unfair settlement or closing practices and costs. The Act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process.

The Act also prohibits specific practices, such as kickbacks, and places limitations upon the use of escrow accounts.

### ***What are example of settlement services?***

Services that occur at or prior to the purchase of a home are typically considered settlement services. These services include title insurance, mortgage loans, appraisals, abstracts, and home inspections.

RESPA also defines the term “Settlement service” as any service provided in connection with a real estate settlement for which the buyer or seller will pay. These services include, but are not limited to, the following:

- title searches,
- title examinations,
- the provision of title certificates,
- title insurance,
- services rendered by an attorney,
- the preparation of documents,
- property surveys,
- the rendering of credit reports or appraisals,
- pest and fungus inspections,
- *services rendered by a real estate agent or broker,*
- the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and
- the handling of the processing, and closing or settlement.

Services that occur *after closing* generally are not considered settlement services.

### ***Who does RESPA regulate?***

RESPA covers, among others, real estate brokers, mortgage bankers and mortgage brokers, title companies and title agents, home warranty companies, hazard insurance agents, appraisers, flood and tax service providers, and home and pest inspectors.

RESPA, however, does not apply to moving companies, gardeners, painters, decorating companies and home improvement contractors.



## Which part of RESPA directly affects brokerage compensation?

RESPA prohibits a real estate broker or agent from receiving a “thing of value” for referring business to a settlement service provider, or SSP, such as a mortgage banker, mortgage broker, title company, or title agent.

RESPA also prohibits SSPs from sharing fees received for settlement services, unless the fee is for a *service actually performed*.

## Are there any exceptions to RESPA's prohibitions?



Not all referral arrangements fall under RESPA’s referral restriction. In fact, RESPA and its regulation feature a number of exceptions.

Three examples are:

- *Promotional and Educational Activities*

Settlement service providers, such as mortgage bankers, mortgage brokers, title insurance companies, and title agents, can provide normal promotional and educational activities under RESPA.

These activities must not defray the expenses that the real estate broker/agent otherwise would have had to pay. The activity cannot be in exchange for or tied in any way to referrals. As an example, if a title company wanted to provide a free educational program to a real estate firm, there is no RESPA violation. However, if the title company said that the program is only free if the brokers in that firm give the title company all of their title work, then there is a RESPA violation. The same would be true of notepads and other promotional items.

- *Payments in Return for Goods Provided or Services Performed*

A real estate broker or agent must provide goods, facilities, and services that are actual, necessary, and distinct from what they already provide. The amount paid to a real estate broker or agent must be commensurate with the value of those goods and services. If the payment exceeds market value, the excess will be considered a kickback and violates RESPA.

The payments should not be “transactionally based.” A payment for services rendered is transactionally based if the amount of the payment is determined by whether the real estate broker/agent’s services resulted in a successful transaction. Payments may not be tied to the success of the real estate broker/agent’s efforts, but must be a flat fee that represents fair market value.

This situation applies to home warranty companies which often provide a rebate of \$60 or more to brokerage firms who promote the warranty programs. RESPA requires that brokers do something for that rebate, such as hang signs on listed property promoting the warranty; do a visual inspection of the property; fill out paperwork, etc. It is not enough for a broker to place a phone call to order the warranty.

Moreover, the rebates must be shown on the settlement statement.

- *Affiliated Business Arrangements*

Real estate brokers and agents are permitted to own an interest in a settlement service company, such as a mortgage brokerage or title company, so long as the real estate broker/agent:

- Discloses its relationship with the joint venture company when it refers a customer to the mortgage broker or title company;
- Does not require the customer to use the joint venture mortgage broker or title company as a condition for the sale or purchase of a home; and
- Does not receive any payments from the joint venture company other than a return on its ownership interest in the company. These payments cannot vary based on the volume of referrals to the joint venture company.
- The joint venture mortgage broker or title company must be a bona fide, stand-alone business with sufficient capital, employees, and separate office space, and must perform core services associated with that industry.

Here is an example of a broker who is *in compliance* with RESPA. Able is a real estate broker who refers business to its affiliate title company Baker Title. Able provides its customers with an affiliated business disclosure that lists the range of charges that Baker will charge for title services, states that Able has a financial interest in Baker Title and notifies the customer that he or she is not required to use Baker Title for title services.

The referrer of business to an affiliated entity is required to provide a written disclosure to each consumer that identifies the affiliated relationship, provides the charges or range of charges that the joint venture generally charges, and notifies the consumer that he or she is not required to use the affiliated business.

Here is an example of a *violation* of RESPA:

Real estate broker Acorn and title insurance company Broadway Title create an affiliated title agency Cornwall Title. Cornwall Title pays annual dividends to Broker Acorn and Broadway Title in proportion to the amount of business that each refers to Cornwall Title during the year.

Again, this is a violation. An affiliated business may only pay its partners or investors a proportionate share of the profits based on their ownership interest in the affiliate. So if they own 50% of the business, they may receive 50% of the profits in annual dividends that are based on the amount of stock held by the partners. RESPA prohibits the payment of dividends based on the amount of business referred or expected to be referred to an affiliated business.

Here are some more examples of *permissible* activities and payments:

- A title agent provides a food tray for an open house, posts a sign in a prominent location indicating that the event was sponsored by the title agent, and distributes brochures about its services.
- A mortgage lender sponsors an educational lunch for real estate agents where employees of the lender are invited to speak. If, however, the mortgage lender subsidizes the costs of continuing legal education credits, this activity may be seen as defraying costs the agent would otherwise incur, and may be characterized as an unallowable referral fee.
- A title company hosts an event that various individuals, including real estate agents, will attend and posts a sign identifying the title company's contribution to the event in a prominent location for all attending to see and distributes brochures regarding the title company's services.

- A hazard insurance company provides notepads, pens, or other office materials reflecting the hazard insurance company's name.
- A mortgage brokerage sponsors the hole-in-one contest at a golf tournament and prominently displays a sign reflecting the brokerage's name and involvement in the tournament.
- A real estate agent and mortgage broker jointly advertise their services in a real estate magazine, provided that each individual pays a share of the costs in proportion with his or her prominence in the advertisement.
- A lender pays a real estate agent fair market value to rent a desk, copy machine, and phone line in the real estate agent's office for a loan officer to prequalify applicants.
- A title agent pays for dinner for a real estate agent during which business is discussed, provided that such dinners are not a regular or expected occurrence.

The following are examples of *prohibited* activities and payments:

- A title company hosts a monthly dinner and reception for real estate agents.
- A mortgage broker pays for a lock-box without including any information identifying the mortgage broker on the lock-box.
- A mortgage lender provides lunch at an open house, but does not distribute brochures or display any marketing materials.
- A hazard insurance company hosts a "happy hour" and dinner outing for real estate agents.
- A home inspector pays for a real estate agent to go to dinner, but does not attend the dinner.
- A title company makes a lump-sum payment toward a function hosted by the real estate agent, but does not provide advertising materials or make a presentation at the function.
- A mortgage broker buys tickets to a sporting event for a real estate agent, or pays for the real estate agent to play a round of golf.
- A title company sponsors a "get away" in a tropical location, during which only an hour or two is dedicated to education and the remainder of the event is directed toward recreation.
- A mortgage lender only pays a real estate agent for taking the loan application and collecting credit documents if the activity results in a loan.



**Note that RESPA NC Rule A.0109** reminds brokers that the state rule regarding referral fees works alongside RESPA. In other words, nothing in Rule A.0109 permits a licensee to accept any fee, kickback, etc. that is prohibited by the federal Real Estate Settlement Procedures Act (RESPA) or implementing rules, or to fail to make any disclosure required by that act or rules.

## Respa, Referrals, You

### NCREC Bulletin 2017-V47-3

By Sarah E. Herman, Consumer Protection Officer

A pest control company solicits real estate brokers to join what they refer to as a “Preferred Broker Program.” Among other listed benefits of becoming a Preferred Broker, the company offers all broker participants quarterly pest control services at their personal homes at no charge. In order to receive the free pest control, the broker must refer their buyer clients to the pest control company for the completion of lender-required pest inspections.

The question posed to the Commission’s legal staff was whether this type of program is in violation of the Real Estate Settlement Procedures Act (RESPA). RESPA prohibits kickbacks and unearned fees in any real estate transaction involving a federally related mortgage loan. The kickback provision is generally referred to as RESPA’s “Section 8.”

Section 8 prohibits anyone, including real estate brokers, from “...accept[ing] any fee, kickback, or thing of value...” as “...part of a real estate settlement service involving a federally related mortgage loan...” 12 U.S. Code Chapter 27 § 2607(a).

A “thing of value” is any payment, advance, funds, loan, service, or other consideration with more than nominal value.

“RESPA also defines the term “Settlement service” as any service provided in connection with a real estate settlement for which the buyer or seller will pay. These services include, but are not limited to, the following:

- title searches,
- title examinations,
- the provision of title certificates,
- title insurance,
- services rendered by an attorney,
- the preparation of documents,
- property surveys,
- the rendering of credit reports or appraisals,
- pest and fungus inspections,
- services rendered by a real estate agent or broker,
- the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and
- the handling of the processing and closing or settlement.

When a lender requires a buyer to have a pest inspection as part of the loan qualification process, the inspection is considered a settlement service. On the other hand, if a seller independently chooses to have a pest inspection as part of the listing process and pays for that service separately from the settlement process, it is not related to the real estate settlement and is not considered a settlement service.

If a broker receives a quarterly pest control from the pest control company at no cost, a service that would typically have an associated cost, they have received a “thing of value.” And if that broker receives that thing of value for referring a client to the pest control company to do a lender-required pest inspection, there is likely a RESPA violation.

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Even if the broker is referring a client to the pest control company for services unrelated to a closing and there is no apparent problem with RESPA, the broker must fully disclose their arrangement with the pest control company to their client per Commission Rule A .0109.

As you can see from the example above, whether a referral is prohibited under RESPA depends greatly on the specific transaction. If you are confronted with a business referral program, use the following fill-in-the-blank sentence as a test to determine whether the program may be in violation of RESPA: As part of this program, I will receive \_\_\_\_\_, which will enrich or benefit me or my firm, in exchange for referring clients to \_\_\_\_\_ for services related to a real estate settlement. If you can fill in these blanks, the safest course is to consider the program a no-go.<sup>27</sup>



RESPA regulates a number of brokerage compensation arrangements, particularly the discussion of commissions, boycotting, and affiliated business arrangements.

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<sup>27</sup> This article came from the February 2017-Vol47-3 edition of the bulletin.

## SECTION 5 NON-TRADITIONAL BROKERAGE FIRMS, IBUYERS, AND COMPENSATION

Listing firms often offer a wide range of "traditional" services to the seller. Such firms use contracts are commonly referred to as "full service" listing contracts.

Since the early 200s, however, the real estate brokerage business has seen the proliferation of firms and brokers who specialize in providing a "limited listing service" to sellers who primarily want the benefit of MLS advertising and who are willing to show their own properties, negotiate their own sales contracts, and handle their own preparations for closing. These "limited service" brokers offer to list a seller's property in the MLS and perhaps also on Internet sites for a flat fee or a fixed fee of several hundred dollars but provide no other services to the seller.

They advertise that their approach will save the seller thousands of dollars in listing commissions as compared to listing with a traditional "full service" broker. The primary target market for these services consists of homeowners who are inclined to sell their homes using the "For Sale by Owner" (FSBO) approach, possibly because they want to reduce the amount of the brokerage commission or because they do not feel they need the full range of services offered by mainstream brokers. The increasing popularity of Internet house shopping by prospective buyers and Internet advertising of listed real estate and real estate brokerage services seem to have given interest in the practice of limited or "unbundled" listing services.

In some cases, nontraditional firms do a poor job of explaining that their firms may charge less for listing, but they do not explain thoroughly that sellers may be required to additionally compensate the brokers who bring buyers to the transaction.

### ***Are minimum services companies lawful in NC?***



Although limited-service brokerage arrangements are not popular with many traditional full-service brokers, for obvious reasons, limited-service listing contracts are legally permissible. If a broker is careful in the wording of the limited-service contract to specify those services that will be provided and to clearly indicate that the broker's services are limited to those described in the contract, then such a contract is *perfectly legal*.

When other states tried to prohibit limited services or minimum services companies, the federal Department of Justice stopped them from doing so. The DOJ's opinion was that prohibiting these types of nontraditional companies was anti-competitive. As a result, these companies have flourished, particularly in times of hot sellers' markets when consumers believe brokerage firms don't do that much for the fees they charge.



As discussed earlier, the NCREC does not regulate professional fees. However, the NCREC *does regulate the services* that brokers, and their firms provide. The NCREC states that:

1. Brokers MAY lawfully limit by contract the services they will provide to a client.
2. Brokers may NOT contractually limit or waive the duties imposed by statute and Real Estate Commission rules.

3. A contract that limits agency services only limits the agent's duties under the common law of agency to the extent that such duties may not apply because of the limitation in services. For example, if a limited-service listing contract calls for the broker to only place a sign on property and place the listing in the MLS, then the seller is made responsible for all advertising other than “for sale” sign and placing the listing in the local MLS. Thus, the listing broker in this situation has no duty of further advertise the proper or other publications.<sup>28</sup>



In North Carolina, brokers are obligated to comply with the general duties of an agent under the common law of agency AND duties imposed in the NC Real estate License Law and NCREC rules:

The major duties that a listing broker may NOT waive or limit by contract include:

1. Duty to disclose any material fact to any party.
2. Duty to avoid making false promises.
3. Duty to avoid any undisclosed conflict of interest.
4. Duty to properly account for funds held in trust for the principal.
5. Duty to act competently in the performance of services.
6. Duty to promptly deliver all copies of offers and contracts to parties to a transaction.

#### ***What services can a limited broker waive?***

Limited brokers often limit advertising; they also may not show the property; they may not set up appointment, but rather have buyer brokers call the seller direct. Listing brokers may by means of a carefully worded listing contract, limit or expand the scope of contractual services they will provide to a seller. To some extent a limitation of services may also have the effect of limiting the application of traditional duties owed by an agent to a principal under the common law of agency; For example, if a contract specifically provides that the broker will not show the listed property and deal with prospective buyers, then the broker’s general duty of skill care and diligence does NOT include the duty to show the property and negotiate with buyers.



It is important to note, however, that the limited broker may NOT limit traditional agency duties with regard to the partial service being provide under the limited services contract. For example, a broker whose contractual services are limited to listing the seller’s property in the MLS *still owes the seller the duty to exercise skill, care, and diligence in servicing that listing and to also comply with other traditional agency duties (loyalty and obedience, disclosure of information and accounting) to the extent necessary to property provide the contract service.*

A limited-service broker also has certain non-waivable duties that arise from the Residential Property Disclosure Act.

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<sup>28</sup> Notes from the 2006-2007 NC Real Estate Manual Regarding Minimum Services

*There is no standard limited-service listing contract form provided by the NCREC or the NCAR.*

### **How do I work as a buyer's agent with a seller who has listed with a limited-service broker?**

It's not easy since the limited services broker may be largely absent from the transaction. That means that brokers working for/with buyers may work directly with sellers, and those sellers may be confused about that relationship.

There is nothing improper about a buyer's agent working directly with a seller who has employed a limited-service listing broker so long as the buyer's agent discloses to the seller his/her status as a buyer's agent and is fair and honest in his/her dealing with the seller.

It is a good idea for the limited-service listing broker, the buyer's agent and their clients to be clear about the compensation arrangement before committing themselves to a transaction. That compensation understanding should be written well before the buyer sees the property.

Buyers' agents should always be sure he or she has the limited-service listing broker's permission to work directly with the seller. If comments in the MLS listing instruct other agents to contact the seller directly with any offers, that is sufficient permission. A buyer's agent must:

- disclose agency status to the seller.
- provide and explain the Working with Real Estate Agents brochure and disclose status as buyer's agent.
- advocate for buyer-client.
- avoid representing the seller's interest.

### ***How do I-Buyer firms work? How are they paid?***

In 2007, Justice Department wrote about its perception of the brokerage business:

*"While there have been many positive developments in the residential real estate industry, there are some indications that consumers are not enjoying all of the possible benefits of competition in the real estate brokerage industry. A number of developments have raised competitive concerns, particularly laws and regulations in some states that limit consumer choice of real estate brokerage service offerings and that prohibit rebates to consumers, anticompetitive agreements among brokers, and industry practices that impede competition. These practices can lead to substantial consumer harm through reduced choice of real estate brokerage services, higher fees, and limitations on the ability to access information about real estate listings."*<sup>29</sup>

While the DOJ persists in litigating matters regarding what it perceives to be the anticompetitive nature of the NAR and various MLSes, it could not say that consumers today do not have choices. Never has the real estate marketplace had as many options for purchasing and selling real estate as it does today.

Let's take a look at a number of nontraditional real estate firms that have made some successful inroads into the marketplace recently:

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<sup>29</sup> <https://www.justice.gov/atr/competition-real-estate-brokerage-industry>



## OpenDoor

Opendoor Technologies Inc is an online company for transacting in residential real estate. Headquartered in San Francisco, it makes instant cash offers on homes through an online process, makes repairs on the properties it purchases and relists them for sale.<sup>30</sup> It also provides mobile application-based home buying services along with financing. As of March 2021, the company operates in 27 markets in the US.<sup>31</sup>

OpenDoor's system involves property owners bidding to sell their properties on its online platform. When a bid is accepted, Opendoor purchases the property as-is, charging a fee OpenDoor claims is comparable to the commissions real estate agents collect in return for the convenience of closing a sale quickly without home showings.

Opendoor then makes necessary repairs before relisting the property. By following this process, the company is known as an "iBuyer" in the real estate industry.<sup>32</sup> Through this process, Opendoor carries an inventory of homes. In 2019, the company reported that the average time a property is held by the company is 90 days.<sup>33</sup>

According to one real estate tech strategist, Opendoor

"...buys houses and owns them, acting as a middleman (as opposed to a matchmaker) in residential real estate transactions. Opendoor won't buy every house -- qualifying properties include single-family homes built after 1960 with a value between \$125,000 and \$500,000.

Opendoor makes money in two ways: from the service fees it charges, and from any difference between what it buys houses for and what it sells them for. Opendoor works with real estate agents, offering to pay full buyer commissions, as well as seller commissions if a sale comes from an agent.

Opendoor charges a variable fee for its services, starting at 6 percent and rising to 12 percent for more risky properties. The average fee falls between 8 percent and 9 percent for sellers, which is higher than the standard 6 percent fee charged by traditional real estate agents. But with the higher fees come certainty around a transaction.<sup>34</sup>

....Opendoor offers to eliminate all of the hassle and uncertainty of selling a house with a simple, transparent offer. In other words: don't worry about fixing the fence, mowing the lawn, picking the right agent, and wondering if and when your home will finally sell."<sup>35</sup>

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<sup>30</sup> <https://www.crunchbase.com/organization/opendoor-2>

<sup>31</sup> <https://www.nasdaq.com/articles/opendoor-may-be-the-right-stock-for-the-right-time-2021-01-04>

<sup>32</sup> OpenDoor claims it invested iBuying: "We created a new model for selling a home, often called iBuying. Sellers who work with Opendoor skip the costly preparation, frequent showings, and months of uncertainty that come with the traditional process. Instead of listing your home on the market and waiting to find a buyer, Opendoor purchases your home from you. You also get to choose your close date to avoid expensive double-moves, double-mortgages and storage units." <https://www.opendoor.com/w/faq/how-is-selling-different-than-the-traditional-way>

<sup>33</sup> <https://techcrunch.com/2019/03/20/opendoor-raises-300m-on-a-3-8b-valuation-for-its-home-marketplace/>

<sup>34</sup> OpenDoors' website at <https://www.opendoor.com/w/guides/how-does-opendoor-make-money> claims it charges between 5 and 8% but could go as high as 14%.

<sup>35</sup> <https://www.mikedp.com/opendoor-ibuyer-business-model>

Traditional firms have been questioned the cost to sellers of doing business with OpenDoor; some have suggested that OpenDoor will offer far below market value and then charge excessive fees to fix up the property.<sup>36</sup>

### ***Is OpenDoor operating lawfully?***

OpenDoor is not a licensed broker in North Carolina, nor does it have to be if it is acting as a buyer. As discussed earlier, anyone who provides services for him or herself does not need to have a license.

If and when OpenDoor sells the property, it is acting as a seller and does not need to have a license.

### ***What is Knock?***

Knock, which launched in Atlanta, Georgia, in 2016, is another iBuyer firm which promises to save customers the hassle of making repairs, listing their home and opening it up for multiple showings. As of June 2019, Knock operates in five U.S. cities: In addition to Atlanta, there's Charlotte, North Carolina; Dallas-Fort Worth, Texas; Phoenix, Arizona and Raleigh-Durham, North Carolina. Like Zillow, Trulia and other sites, Knock also operates as a home-listing service. Knock will typically buy a home at a 3% to 5% discount, according to the website. To sell your home, Knock charges a 6% commission. Knock also a lender that can approve homeowners for a new mortgage before you sell your old home. Knock also offers an interest-free Home Swap loan that can be used for a down payment, repairs, and overlapping mortgage payments.<sup>37</sup>

Knock Homes is a NC licensed entity and thus must comply with all regulations regarding compensation, disclosure, and other rules and statutes.

### ***What is Zillow Offers?***

Zillow Offers, formerly called Zillow Instant Offers, is the iBuying division of the popular online real estate marketplace Zillow.

Zillow Offers is another iBuyer firm and a competitor to OpenDoor. Zillow Offers charges a service fee for selling a home that averages 2.5% but can be as high as 9%. There are also selling costs of up to 6%.

Zillow Offers states it can close in 7-90 days, depending on the seller's timeline.<sup>38</sup> The national average closing time for a traditional sale is 30-45 days.

Zillow Offers is operating lawfully as a buyer and then as a seller. Like OpenDoor, it does not need a license to do what it claims to be its operating model.

### ***What about Redfin?***

Redfin offers incentives for buyers called the "Redfin Refund." The Redfin Refund program allows buyers to receive part of the commission that their Redfin Agent receives. The refund amount is based on the

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<sup>36</sup> As an example, <https://www.raleighrealtyhomes.com/blog/pros-and-cons-of-using-opendoor-to-sell-your-home.html>

<sup>37</sup> <https://www.knock.com/how-it-works>

<sup>38</sup> <https://www.zillow.com/offers/>

asking price of the house, and typically is around \$1,700 that gets applied to closing costs. If the savings happen to be higher than the closing costs, then they will provide a check for the difference.

Redfin is also operating lawfully by discounting its commission to their buyers. Redfin is a licensed brokerage where it operates.

### ***What is UpNest?***

UpNest is an online platform which has real estate agents compete for purchases and for sellers. Buyers and home sellers use it to get offers from the top 5% of real estate agents in their local markets. This typically leads to discounts on commissions from agents.

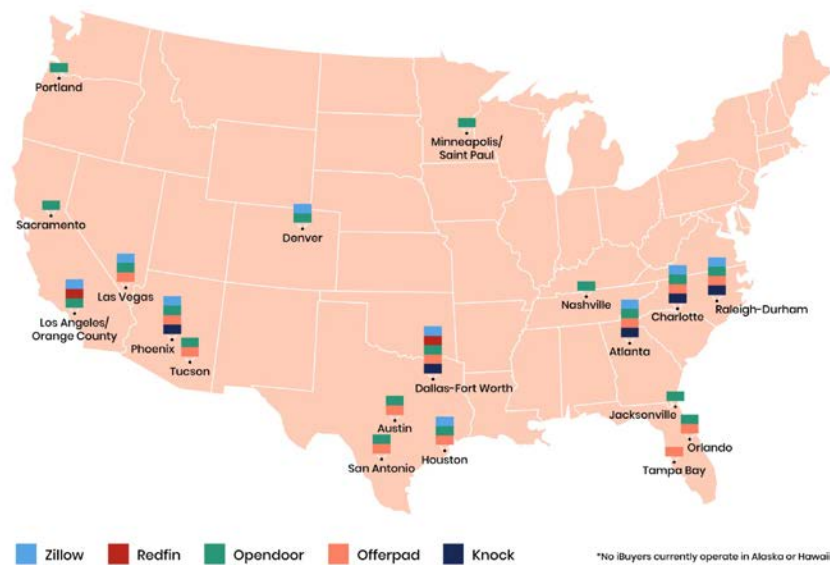
UpNest is a discount referral brokerage and must be licensed where it operates. Buyers and sellers do not pay for the service directly. UpNest make money by charging participating brokers a referral fee of 30%.<sup>39</sup> It could be argued that buyers would be better negotiating that discount directly from the brokers they choose to work with.

### ***How significant are iBuyer firms?***

Real estate professionals are painfully aware of the fact that technology is disrupting the industry. The most successful brokers are finding ways to incorporate technology into their practices to increase their efficiency and draw in more clients, but the rising popularity of iBuying platforms has led to a whole new wave of concern.

See the chart below.<sup>40</sup>

### **Where iBuyers are operating**



<sup>39</sup> <https://www.realestatewitch.com/upnest-review/>

<sup>40</sup> <https://archive.curbed.com/2019/3/21/18252048/real-estate-house-flipping-zillow-ibuyer-opendoor>



## SUMMARY

Nontraditional brokerage firms continue to challenge the real estate industry, particularly in the areas of compensation and delivery of services.

## SUMMARY

What appears to be a simple question, “Can I get a referral fee on that?” is clearly not so simple. Any number of state and federal laws and rules have impact on the payment and receipt of compensation from a real estate transaction.

As the marketplace changes and consumers and brokers have more opportunities to influence the practice of real estate, no doubt regulators and lawmakers will make their own adaptations and perhaps change compensation rules.

The relationship between brokers and agents has been redefined a number of times during the last 50 years. Each time the redefinition of the relationship resulted in the formation of a new company and/or group of companies. The innovations brought to the industry by those new companies caused a disruption in the industry that resulted in an increase in the number of agents jumping between companies.

There is no question that traditional compensation structures will change and evolve to meet the demands of consumers but also comply with rules and laws.

One of the best aspects of being a real estate broker is that our business changes all the time, compelling us to think in new ways and motivating us to learn.

## THE AUTHOR



Deborah H. Long is a licensed real estate instructor in North Carolina. She completed her doctorate in educational leadership in 1994. Her research on the effect of ethics instruction on the ethical reasoning of real estate brokers received national media and industry attention. She has three other college degrees. She has been a teacher for more than 50 years.

In addition to holding a GRI (Graduate Realtor Institute), CDEI (Certified Distance Education Instructor) and CRS (Certified Residential Specialist) designations, Deborah earned the DREI (Distinguished Real Estate Instructor), the most prestigious designation for excellence in teaching offered by the Real Estate Educators Association.

She is the award-winning author of many articles and education programs as well as 18 real estate textbooks. Her real estate ethics program for educators have received the "Best Single Education Program" award from the Real Estate Educators Association and from the NC Real Estate Educators. The North Carolina Real Estate Educators Association recognized Deborah as "Educator of the Year." She was also the editor of the prestigious REEA Journal for 10 years.

Deborah's real estate ethics research has been featured in the Wall Street Journal and on numerous radio talk shows. Her research has led her to write *Doing the Right Thing: A Real Estate Practitioner's Guide to Ethical Decision Making*, now available in its 4th edition.

She has been a proponent of online education since it became available and has taught numerous educators about technology. She earned the prestigious Certified Distance Education Instructor designation from ARELLO (Association of Real Estate License Law Officials).

Deborah was named Tar Heel of the Week in 2017 for her contributions to the community. Debbie can be reached at [DebbieTheTeacher@gmail.com](mailto:DebbieTheTeacher@gmail.com).