CP-2 Commission Position on Earned Fees (revised 08/07/2012)

Commissions:

Section 12-61-113(1)(j), C.R.S. of the license law forbids a broker from paying a commission or valuable consideration, for performing brokerage functions, to any person who is not licensed as a real estate broker. Brokerage functions include negotiating the purchase, sale or exchange of real estate. *See* section 12-61-101(2)(a), C.R.S. Pursuant to Colorado case law, "negotiating" means "the act of bringing two parties together for the purpose of consummating a real estate transaction." *Brakhage vs. Georgetown Associates, Inc*., 523 P. 2d 145, 147 (1974). Therefore, any unlicensed person who directly or indirectly brings a buyer and seller together, is negotiating and would need a broker's license in order to be compensated. This includes, but is not limited to, such activities as referring potential time-share purchasers to a developer or referring potential purchasers to a homebuilder.

Referral Fees:

Section 12-61-203.5(1), C.R.S. permits a real estate broker to pay a referral fee if reasonable cause for payment exists. Reasonable cause exists when:

1) An actual introduction of business has been made;
2) A contractual referral fee relationship exists; or
3) A contractual cooperative brokerage relationship exists.

Section 12-61-203.5(2)(b)(III), C.R.S. defines a referral fee as "any fee paid by a licensee to any person or entity, other than a cooperative commission offered by a listing broker to a selling broker or vice versa." Payment for providing a name to a licensed broker is not specifically addressed in Colorado statute. However, it would be illegal to pay such a fee to anyone performing acts that require a license (*e.g.*., negotiating, listing, and contracting). Care should be taken. At best, the unlicensed referrer can have no active involvement in the transaction beyond merely giving to a licensee the name of a prospective buyer, seller or tenant. If the payment is simply for the referral of a name to a licensee, with no further activity on the part of the referrer, and the referrer is not a provider of a settlement service, the Commission will not consider it to be a violation of the license law. Complaints and inquiries are dealt with on a case-by-case basis.

In real estate transactions involving federally related mortgage loans, Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 et seq., governs the payment of referral fees. Pursuant to 12 U.S.C. § 2602(1) of RESPA, the term "federally related mortgage loan" is defined to include:

(1) any loan (other than temporary financing such as a construction loan) which--

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) (i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. § 1602(f)), who makes or invests in residential real estate loans aggregating more than $ 1,000,000 per year, except that for the purpose of this Act, the term "creditor" does not include any agency or instrumentality of any State.

RESPA and Commission Rule E-22 prohibit the payment or receipt of referral fees and kickbacks which tend to increase unnecessarily the costs of settlement services. As part of this prohibition, any referral of a settlement service is not compensable. Thus, a company is not allowed to pay another company or its employees for the referral of settlement business. Moreover, it is not appropriate for a settlement service provider to pay a broker, or offset a broker's expenses, for lead generation. The Commission views this as payment for the referral of business, which would be a violation of Rule E-22. Additionally, the Commission is required by law to refer such issues to the Consumer Financial Protection Bureau for investigation as a potential violation of RESPA.

RESPA, however, does permit:

1) A payment to an attorney at law for services actually rendered:
2) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;
3) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;
4) A payment to any person of a bona fide salary or compensation for goods or facilities actually furnished or for services actually performed;
5) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate brokers (all parties must be acting in a real estate brokerage capacity);
6) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or
7) An employer's payment to its own employees for any referral activities.

Administrative Fees:

As a result of the United States Supreme Court's decision in *Freeman v. Quicken Loans, Inc.,* 132 S. Ct. 2034, 2012 U.S. Lexis 3940 (2012), real estate brokers may charge administrative fees, either for services performed by the broker or the real estate brokerage, in addition to the broker's commission. In *Quicken* Loans, the Supreme Court held that while RESPA prohibits the splitting of fees if the charges are divided between two or more persons (i.e. settlement service providers) and the fee was paid for services not actually performed, dividing or splitting fees amongst a single settlement service provider is not prohibited. The Commission considers a real estate broker and his or her licensed broker-employer (or brokerage) to be a single provider of settlement services and fees may be split amongst them.

Marketing Services:

Payment for general promotion of a real estate business is not prohibited. Contracting with newspapers, catalog companies of general circulation or with institutional advertisers such as radio, television or any other media, is not prohibited provided the activity does not otherwise

constitute offering, negotiating, listing, selling, or leasing real estate as defined in Section 12-61-101(2), C.R.S. Payment based on the successful sale or lease of real estate does not in itself constitute brokering as so defined. However, in the past, the Commission has determined that many so-called advertising services actually involved brokering activities. The method of payment is often an important factor in determining whether the activity requires a license.

The marketing of a settlement service or product (separate from the licensed brokerage duties provided by the broker), including the collection and conveyance of information, does not constitute the performance of a settlement service. Any marketing performed by a real estate broker for a provider of settlement services must be equivalent to the services that would be provided by a marketing firm. Brokers that share advertising or marketing with other settlement service providers must ensure that the cost of the advertising is commensurate with the advertising, marketing services or space actually provided. Additionally, the broker cannot require a prospective client to use the services of the settlement service provider sharing the advertising or marketing costs.

For example, a broker that pays $2,000.00 per month for a website designed to promote the broker's business can enter into an agreement with a mortgage loan originator to use the website for a fee. If the mortgage loan originator pays the broker, or the website vendor, $1,000.00 per month to advertise on the broker's website, 50% of the advertising services need to be dedicated to the mortgage loan originator. The broker cannot require a prospective buyer to pre-qualify with or utilize the services of the mortgage loan originator.