

2011-2012 BROKER-IN-CHARGE ANNUAL REVIEW

COMPENSATION DISCLOSURES TO BUYER FROM DUAL AGENT

OUTLINE:
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Learning Objective: Upon completing this Section, brokers should have a better understanding of the compensation disclosures required under Commission Rule A.0109(c) that should be made by a buyer agent to his/her buyer-client when the broker/real estate company is acting as a dual agent, rather than as a buyer agent.

BACKGROUND

Several Commission rules were revised in 2008 and were discussed in the *2008-2009 Real Estate Update* course materials (Section Two). One of the revised rules was **Commission Rule A.0109**, entitled “**Brokerage Fees and Compensation**,” to which new subparagraphs (c), (d), and (e) were added effective October 1, 2008. The thrust of the revisions was to clarify both the content and timing of disclosures to buyer clients by buyer agents concerning any compensation the buyer agent was being offered by anyone other than his/her buyer client on any given property to the extent that the amount offered differed from the amount agreed upon in the broker’s buyer agency agreement.

2007 Incentive Advisory Committee

The revisions to the Rule arose in part due to the recommendations of an *Incentive Disclosure Advisory Committee* convened by the Commission in the *Fall of 2007* to explore the issue of *undisclosed fees paid to licensees unbeknownst to the licensee’s principal*. Receipt by agents of undisclosed fees in certain areas of North Carolina had stimulated inquiry by members of the public and the press that were brought to the Commission’s attention. The charge to the Committee was:

Whether changes in Real Estate Commission rules are needed to reasonably assure that real estate purchasers and sellers are properly informed of any compensation received by or offered to their real estate agents from another party to the transaction; and if so, the rule changes necessary to accomplish this.

The Committee members, who included residential and commercial brokers, a developer/homebuilder, educators, attorneys and a representative from the Consumer Protection Division of the NC Attorney General's office, discussed practices around the State. The Committee reviewed advertisements in which developers, homebuilders and/or real estate listing firms offered bonuses or rewards to real estate agents for bringing buyers to the sellers' properties. Specifically, the Committee found that there were promotions by builders and developers offering bonuses or special incentives to certain real estate brokers representing buyers without adequate disclosure to those buyers. These incentives ranged anywhere from \$2,000 - \$10,000 in cash, trips, or other prizes for selling particular properties. In most cases, the prices of the homes were increased to cover the cost of the bonus or incentive, meaning the buyers unknowingly paid the bonuses. Sometimes the incentives were disclosed to the buyer, but in other instances, they were not disclosed.

As summarized in the Committee report (a copy of which may be found on the Commission's website), the members agreed that the common elements of most of the incentive programs included:

The offer of something of value (cash, gift, etc.), usually by a real estate seller (often a homebuilder/developer or a listing firm) to a real estate agent, to direct the agent's clients (usually buyers) to the seller's property; and that the "something of value," often paid at or after the closing of the sale, is in addition to the sales commission or compensation the agent would have otherwise received from the sale.

It was further acknowledged that incentive programs are well-received in the real estate business. The Committee discussed *what would constitute proper disclosure of such bonuses/rewards* and concluded that the **following elements should be present**, namely:

1. That all compensation, including bonuses and incentives, to be paid to the brokerage company be prominently disclosed *in writing* and acknowledged by the agent's client;
2. That the *value of the incentive* be disclosed and, if other than cash, a description of the incentive and a statement of its monetary value; and
3. That the agent *timely disclose* to the client that an incentive exists for any particular property, preferably while showing the properties, but in no event later than the client making an offer on the property.

As a result of the Committee's recommendations, and deliberations and discussion by the Commission, the Commission approved amendments to Rule A.0109 prepared by Commission staff. The application of the revised rule was discussed extensively in the *2008-2009 Real Estate Update Course* materials and will be revisited shortly in these materials.

Following the release of the final version of the *2008-2009 Real Estate Update Course* materials, questions began to arise as to what disclosure was required by a buyer-agent to a buyer-client when the property was listed with the buyer agent's real estate company, thereby rendering both the company and individual broker dual agents? In the *Update* materials, the Commission had indicated that *once a buyer agent, with the consent of both clients, is transformed into a dual agent, then the full amount of the commission and any bonuses to be*

paid to the company (presumably already known by the seller-client) **should be disclosed to the buyer-client as well**, rather than just the amount that would be paid to an outside buyer agent. This stance generated some controversy.

2010 Incentive Advisory Committee

As it sometimes does when confronted with policy issues involving multiple considerations and points of view, the Commission decided to form a second advisory committee to study the *limited issue* of **what disclosure is required to a buyer-client from a buyer agent acting as a dual agent?** The eleven members of the 2010 advisory committee included individuals from the brokerage industry as well as the public, and represented various geographic areas of the state, both large and small real estate companies, and both residential and commercial brokerage arenas. The history and reasoning underlying the Rule A.0109 revisions, the Commission's current interpretation of the rule, and concerns and responses to that interpretation were explained to the Committee. The charge to the Committee was:

Without diminishing consumer protections, evaluate complaints and criticisms and recommend to the Real Estate Commission alternative(s), if any, to the Commission's current compensation disclosure requirements in dual agency transactions.

The Committee generally agreed that many brokers believe that the rule is limited to disclosure of additional or incentive compensation and do not fully appreciate that when the firm represents both the buyer and the seller, it is not receiving merely the buyer side, but rather the full commission, since it represents both parties, and that the full amount of the compensation to be received by the firm must be disclosed to the buyer, just as it already was disclosed to the seller in the written listing agreement. Various arguments, both practical and legal, were made, including an observation that when a broker assumes the responsibility of representing a consumer as an agent, the appellate courts will impose a fiduciary duty on the broker-agent to disclose to the buyer all facts known to the agent that could affect the buyer's decision-making.

Ultimately, after much discussion, the 2010 Incentive Advisory Committee concluded that **full disclosure should remain the rule**. In other words, a buyer client working with a buyer agent is entitled to know what the buyer agent (i.e., the company) is going to receive and from whom when acting as a buyer agent, *as well as* the amount of all compensation the buyer agent/company will receive if acting as a dual agent. 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.

The 2010 Committee recommended that NCAR be asked to modify its buyer agency agreement to allow buyer agents to separately identify the compensation the company will receive when acting as a buyer agent and the compensation it will receive when acting as a dual agent, if dual agency is authorized by both parties. NCAR kindly obliged and revised the Exclusive Buyer Agency Agreement (NCAR Form 201) in November 2010. The Committee also recommended that an educational effort be initiated to teach both instructors and licensees, particularly brokers-in-charge, a licensee's obligations under Rule A.0109(c) and methods of

complying with the disclosure requirements in a dual agency situation, and that this educational material be included in this year's BICAR course. Hence, this section.

RULE A.0109: BROKERAGE FEES & COMPENSATION

First, brokers should clearly understand that both the *common law of agency and* subsequently *License Law* [G.S. 93A-6(a)(4)] *have always required brokers to disclose known conflicts of interest and to avoid working on behalf of one party in a transaction without the knowledge of each party for whom the broker acts.* Listing agents are required to specify their compensation with their clients in the written listing agreement. Buyer agents must do the same in the express buyer agency agreement, whether oral or written.

Rule A.0109 has several subparagraphs, but this discussion will focus on subparagraphs (c), (d), and (e). Note that subparagraphs (a) and (b) of Rule A.0109 pertain to *agent disclosure of compensation when referring a party to a provider of goods or services and apply whenever a broker is acting as an agent in any real estate transaction, whether sales, lease, option or exchange, residential or commercial.* Subparagraph (f) removes the Commission from arbitrating compensation disputes between duly licensed brokers, (g) prohibits a broker from sharing consideration with any unlicensed person for brokerage activity, (h) allows brokers to pay referral fees to travel agents for *vacation rentals only* under certain circumstances, and (i) states that if a payment is illegal under RESPA, then it is illegal under License Law and rules.

Disclosure of Compensation

Rule A.0109 was last revised October 1, 2008 and since then has read in pertinent part:

(c) In a real estate sales transaction, a broker shall not receive any compensation, incentive, bonus, rebate, or other consideration of more than nominal value:

(1) from his principal unless the compensation, incentive, bonus, rebate, or other consideration is provided for in a written agency contract prepared in conformity with the requirements of 21 NCAC 58A.0104.

(2) from any other party or person unless the broker provides full and timely disclosure of the incentive, bonus, rebate, or other consideration, or the promise or expectation thereof to the broker's principal. The disclosure may be made orally, but must be confirmed in writing before the principal makes or accepts an offer to buy or sell.

(d) Full disclosure shall include a description of the compensation, incentive, bonus, rebate, or other consideration including its value and the identity of the person or party by whom it will or may be paid. A disclosure is timely when it is made in sufficient time to aid a reasonable person's decision-making.

(e) Nothing in this rule shall be construed to require a broker to disclose to a person not his principal the compensation the broker expects to receive from his principal or to disclose to his principal the compensation the broker expects to receive from the broker's employing broker. For the purpose of this rule, nominal value means of insignificant, token, or merely symbolic worth.

Basic Requirements of A.0109(c), (d) and (e)

First, licensees should understand that *the provisions of subparagraphs (c), (d) and (e) apply only in sales transactions, both residential and commercial.* The basic tenets are:

1. No broker may receive any compensation, consideration, bonus, incentive, or rebate of more than nominal value *from his/her principal* unless the amount of that compensation, incentive, bonus, rebate or other consideration is specified in the appropriate *written* agency agreement between the broker and his/her client as required by Rule A.0104.

2. No broker may receive *any* compensation, incentive, bonus, rebate or other consideration *from any party or person other than his/her principal unless the broker fully and timely discloses to his/her principal* the amount of all compensation/consideration which the broker expects to receive from such other party or person. The disclosure must include a description of the value of the compensation, bonus, incentive, rebate or other consideration and the identity of the person or party by whom it may be paid. The disclosure may be oral while showing properties, but must be confirmed in writing *before the principal makes or accepts an offer to buy or sell.*

3. Note that the rule does not require a broker to disclose to someone not his principal the amount or form of compensation or consideration the broker may receive from his/her principal, nor must an individual broker disclose to his/her principal the amount of compensation the broker expects to receive from his/her employing broker (i.e., the Company).

4. 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.” The last sentence of (e) defines “**nominal value**” as meaning “...of insignificant, token or merely symbolic worth.”

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 timely 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 at all possible, but if not, at least prior to the submission of an offer.

Underlying Policy

The rule serves two policies. First, a consumer is entitled to know what the consumer will owe his own broker in connection with the consumer’s real estate transaction. In addition, a consumer is entitled to know when his own broker is being paid by someone else in the transaction, and how much the broker is to receive if the consumer completes the transaction. If a broker stands to make a bonus if he sells a property in a particular subdivision, the buyer has a right to know and to decide whether the buyer wants to see homes outside the subdivision that might not offer the same bonus, but might be comparable and may be listed at a lower price.

Why can’t brokers just disclose “extra” compensation in addition to the commission? This is circular reasoning. One can’t determine what is “extra” until one first establishes or defines a base amount. Since brokerage fees are negotiable and neither the Real Estate

Commission nor any other body has the legal authority to set commission rates, nor can brokers lawfully agree among themselves as to a base-rate (because of federal antitrust laws), a rule that merely required brokers to disclose “extra” compensation would be ineffective, as what is “extra” when there is no defined base, nor can there be? A broker could simply add the incentive to the base-rate in the transaction, call it all commission, and disclose nothing to the buyer.

Application of the Rule

Listing Agent for Sellers

A broker representing a seller will satisfy the rule so long as the broker complies with the agency disclosure and agreement rule which requires a *written listing agreement prior to providing any services* on behalf of the owner and the broker does not receive any compensation from anyone other than the seller. [The agency rule also requires a written property management agreement with the owner prior to rendering any services, but lease transactions do not trigger the disclosure requirements of Rule A.0109(c).] The listing agreement should specify any and all fees the real estate company expects to receive from its principal for assisting the owner in selling his/her property. A properly completed listing agreement will satisfy the requirements of the rule if the compensation or fee is expressed as a dollar amount or as a formula which any reasonable person could apply. The most obvious formula is a commission expressed as a percentage of the sales price. If there are additional fees or expenses the seller is expected to pay, these must also be set forth in the listing agreement. ***The Company/listing agent cannot demand any payment from the principal in excess of the terms specified in the listing agreement.***

Broker Acting as Buyer Agent

Where a broker is working with a buyer under an express agreement to act as a buyer agent, *but the agency agreement has not yet been reduced to writing*, then the broker *minimally* must orally disclose to his/her buyer client what the company expects to receive as compensation when acting as a buyer agent. As with the listing agreement, this may be a dollar amount or a formula, e.g. a percentage, or some other defined method of calculating the company/agent’s compensation. If the buyer agent expects to be paid by the listing agent in a cooperative arrangement, then the buyer agent must disclose that to his client as well. Understand that the foregoing, i.e., ***compensation amount and who is paying it, must be clearly understood and agreed between the parties*** (the broker and consumer) ***even when the buyer agency agreement is oral***, and certainly should/must be included in the written buyer agency agreement. Remember that the *buyer agency agreement must be in writing no later than presentation of any offer*.

Most buyer agency agreements have a blank in which to insert the amount of compensation the buyer agrees to pay his/her buyer agent. This amount is negotiable, and may be “zero,” a specific dollar amount, or a formula. The buyer agent generally agrees to first seek that compensation from the listing agent or seller. The North Carolina Association of REALTORS® has revised its Exclusive Buyer Agency Agreement used in residential transactions (Form #201) to facilitate compliance with the revised rule by specifying the amount of compensation the agent will seek from the listing firm or seller. The form specifically advises brokers to insert some number in the blank and *not* to put “zero” or “N/A.” The standard form states that the broker will seek payment of the stated fee first from the seller or listing company,

but that if the listing company or seller refuses to compensate the buyer agent, or the offered compensation is less than that stated in the parties' buyer agency agreement, then the buyer is liable for paying the broker's fee. *So long as the buyer agent has disclosed the amount of his/her compensation, whether a percentage of some number or a flat fee or whatever, then the agent is authorized to accept that amount from any seller or listing company without any additional disclosures to his/her buyer client.*

Where the **buyer agency agreement is already in writing**, but the buyer agent is showing the buyer a property where the consideration offered by the seller or listing company exceeds the amount stated in the buyer agency agreement, then *the buyer agent still must orally disclose to his/her buyer client the amount the broker/company would receive over and above the amount stated in the buyer agency agreement if the buyer were to purchase that property.* Note that the agency agreement (as in Form 201) may already permit the broker to receive bonuses, incentives, rewards or other consideration in excess of the stated fee to the company. Thus, consent may already exist, but what is required is *timely disclosure* to the principal of those properties offering consideration above that stated in the parties' agreement. The broker also must **confirm the disclosure of the excess amount in writing** to his/her buyer **prior to preparing an offer** on that property for the buyer.

This written confirmation of the previous oral disclosure may be accomplished either by using NCAR Form 770, if the broker is a REALTOR® member, or in any other writing that clearly describes the form and value of any consideration the buyer agent/company will receive and by whom it will be paid, typically either the seller or listing agent. In the situation where the buyer-agency contract is not reduced to writing until the time an offer to purchase is being prepared, the written confirmation of compensation required by the rule can be fully satisfied by describing the agent's fee or commission and by whom it will be paid in the written buyer agency agreement.

Similarly, when showing a buyer client properties that offer *less than the amount* stated in the parties' agency agreement, the buyer agent must orally disclose that fact to the buyer, particularly where the broker expects the buyer to pay the difference between the stated fee and the amount offered, as that information clearly may influence the buyer's decision whether to make an offer on that property. Understand as well that *failing to agree on the broker's compensation in any buyer agency agreement, whether oral or written, results in the broker having to orally disclose to the buyer the offered compensation on every property the broker shows the buyer, as no floor or base amount has ever been established.* Whereas if the oral buyer agency agreement provides that the company expects to receive x% of the purchase price if acting as a buyer agent, then the individual broker only needs to inform the buyer of properties offering more or less than that stated in the oral agency agreement.

Broker Working with Buyer as Seller (Sub)Agent

So long as a broker working as a seller agent or subagent otherwise complies with the agency disclosure and agreement rule and both the broker and the buyer have a clear understanding that the broker is working with the buyer as a seller's agent or subagent (which disclosure must be in writing from the first substantial contact), and thus owes his/her loyalties to the seller, and not to the buyer, the *broker working as a seller agent or subagent has no obligation under the revised rule to inform the buyer of the amount or value of any consideration the broker expects to receive* from the seller or listing company. The selling broker's principal is

the seller who should already be aware of the amount s/he has agreed to pay the listing company under the written listing agreement.

Differential Compensation Paid by Real Estate Company

The rule also states that an individual broker is *not required to disclose to his/her principal the amount of compensation/consideration s/he expects to receive from his/her employing broker*. Where the seller is the broker's principal, the seller already has a written listing agreement with the real estate company which is in fact the listing agent for the seller-principal. The principal's financial liability to the company remains fixed and is not increased or decreased by the fact that the Company chooses to apportion its internal splits with its affiliated agents differently based on differing transactional facts.

Disclosure in Dual Agency/Designated Agency

What compensation must a dual agent disclose? Remember that in most cases, *the firm or company owns the listing agreement and the buyer agency agreement, not the individual agents* working the transaction. As previously discussed, disclosure to the seller usually is not an issue so long as all compensation terms are included in the listing agreement that must be in writing *before* any services are provided to the seller and the company is not receiving any consideration from any other person or entity. However, in dual agency the firm represents both the buyer and the seller, one of whom already is aware of the full amount to be paid to the company. Further, as a dual agent, the broker is obligated to treat both its principals fairly, equally and impartially. Disclosing only the amount of compensation that the company would pay to an outside buyer agent does not accurately reflect the reality of the situation, because the company no longer is acting solely as a buyer agent in the transaction. Rather, the company is acting as a dual agent and will receive not only the buyer side of the fee, but the listing side as well. Thus, for all of the foregoing reasons, *the firm* through its affiliated agents *must make a full compensation disclosure to its buyer client*. Full compensation disclosure means the **full amount of compensation, fees or bonuses the firm is receiving from the seller**.

An agent working with a buyer may not know at the time of showing or at the time a buyer agency agreement is signed the full amount of commission to be paid, plus any other incentives, for each property listed by the firm. While the individual broker may not have actual knowledge of the fee to be paid to the company on any given listing, s/he nonetheless probably has a fairly good idea of what the company typically charges for its services when representing sellers, depending on whether the property is improved or unimproved, residential or commercial, or vacant land. Most companies typically establish the fees to be charged by its affiliated brokers in the company's office policy manual, rather than allow the individual brokers to decide on a case-by-case basis what they feel like charging in that particular transaction. Where the firm sets the fees to be charged by its affiliated brokers, it must make this information available to its brokers so disclosure can be made at the time of showing.

If for some reason the information is not available at the time of the showing, the agent should make a good faith estimate of the firm's compensation based on the broker's knowledge of the firm's general fee schedule, 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.

Available Forms

Brokers who are members of a REALTOR® organization most likely have access to any of the many Realtor® forms, which include multiple agency agreements for use in sales and lease transactions in both residential and commercial contexts. Brokers who do not belong to a Realtor® organization will not have these agency agreements available to them and must either create their own agency agreement (which is permissible because the broker/firm is a party to the agreement) or have an attorney prepare the various agency agreements the firm might need and then use those agreements as the firm's "standard" agency forms.

Residential Transactions

As noted earlier, NCAR adopted in part the 2010 Advisory Committee's suggestion to revise its buyer agency agreement to allow disclosure of the fee to be received by the company when acting as buyer agent, as well as the fee the company will receive when acting as a dual agent, if authorized. The residential buyer agency form (#201) in Paragraph 4 states the amount of compensation the company will receive when acting as a buyer agent, and Paragraph 14 addresses dual agency, whether the client authorizes dual agency and, if so, the compensation the company will receive when acting as a dual agent. Accurately completing both paragraphs may significantly reduce the oral disclosures a buyer agent/dual agent must make to the company's buyer-principal, as the agent then must only disclose to the buyer-principal when the compensation offered on any property is more or less than the amount stated in the agency agreement to be received by the company when acting as a buyer agent or a dual agent, as applicable.

Commercial Transactions

Brokers who engage in commercial sales transactions are also subject to the Rule A.0109(c) disclosure requirements, but it does not appear that the NCAR standard buyer agency agreements in the commercial arena (Forms 530, 531, and 532) have been revised to allow disclosure of the alternate fees depending on whether the broker is acting as a buyer agent or dual agent. In Forms 530 (Exclusive Buyer/Tenant Representation Agreement) and 531 (Non-Exclusive Buyer/Tenant Representation Agreement) the fee due the buyer/tenant agent is stated, the broker agrees to seek that fee first from the listing company or seller, but if the listing company or seller will not pay the buyer/tenant agent, then the buyer/tenant is liable for the fee. Both of these agency agreements also allow the client to indicate whether s/he will authorize dual agency and what both the firm's obligations and the client's obligations will be when in dual agency, but there is no space to indicate what the company's fee will be when acting as a dual agent.

Form 532 also is a Non-Exclusive Buyer/Tenant Representation Agreement wherein the parties agree that the firm will act as a buyer/tenant agent, it states whether the firm is authorized to act as a dual agent, but the *agreement is absolutely silent as to the compensation the firm will receive whether as a buyer agent or dual agent*. The agreement expressly states that the buyer/tenant will not be liable to pay any fee to the firm and that the firm will be and is authorized to receive compensation from a cooperating seller/landlord/listing firm.

Nonetheless, the firm is acting as a buyer agent or dual agent; as noted earlier, the failure to establish any base or floor regarding expected compensation to the firm will require the broker to orally disclose the offered compensation on every property the broker shows the buyer-client. The only way to avoid that result would be to indicate, preferably in writing, the amount of compensation the company expects to receive when acting as a buyer agent. Having established a base or reference point, brokers then would only be required to orally disclose when the amount offered on any given property was more or less than the amount previously told the buyer-client.

A similar problem arises under all three commercial buyer agency agreements regarding the amount of compensation to be received by the firm when acting as a dual agent. All three forms incorporate provisions regarding dual agency and permit the client to authorize dual agency, yet none of the agreements indicate what the firm's compensation will be when acting as a dual agent. Thus, to comply with the Rule A.0109(c) disclosure requirements, a commercial broker who shows a buyer-client a property listed with the broker's firm must orally disclose to the buyer-client *all compensation*, including commissions, fees, and bonuses or incentives the firm expects to receive from its seller-client or any source other than the buyer and this information must be confirmed in writing before any offer is made. To avoid this result, the parties could state in the underlying buyer/tenant agency agreement the amount the company expects to receive when acting as a dual agent, as was done with the residential buyer agency forms. If the firm's compensation as a dual agent is not stated in the underlying agency agreement, then a commercial broker might use NCAR Form 561, Confirmation of Compensation, to confirm in writing prior to preparing an offer the oral disclosure previously given at the time of showing the property.

Lastly, understand that *even if the buyer agency agreement indicates that the buyer will not be liable for paying any fees to the company, it does not mean that the broker is absolved from complying with the rule*; rather, the broker must still timely disclose to its buyer-client the amount of compensation the company will receive and from whom, and the disclosure must be confirmed in writing prior to the buyer making or accepting any offer. This is true of any sales transaction, residential, commercial, or vacant land.

What and How to Disclose?

The following examples attempt to illustrate the concepts discussed above concerning both what must be disclosed and the timeliness of the disclosures. Included are examples of buyer agency only and seller subagency for contrast, before discussing the required disclosures when acting as a dual agent. Again, virtually all of these disclosures are addressed to the company's buyer-client, as a seller client knows what s/he is paying to the company because it is stated in the written listing agreement. However, if the company/broker was offered consideration by anyone other than its seller-principal, it would be required to make the same disclosures to its seller-principal as it must to its buyer-principal, i.e., a description of the amount or value of all consideration to be received by the company and by who paid.

Broker as Buyer Agent Only

Example #1

ABC Homebuilders offers to pay to any broker who procures a buyer for one of its inventory homes between stated fixed beginning and ending dates a **bonus** payable at closing as follows: 1st Sale – \$1,000; 2nd Sale – \$2000; 3rd or subsequent sale – \$3,000. This bonus is payable in addition to any commission the broker may be entitled to receive under a listing agreement with ABC or under a commission-sharing agreement with the listing firm. Broker X intends to show her buyer-client one or more of ABC's homes, has already procured one buyer during the eligibility period, and has other buyer-clients to whom she is showing ABC's homes. Broker X is operating under an oral buyer agency agreement with her client and has orally disclosed that she intends to seek a 2.4% commission from the seller.

What must Broker X disclose? Broker X must disclose the bonus program to her buyer client when showing the property AND the fact that Broker X has already sold one of ABC's homes and that her bonus will be at least \$2,000 if the buyer purchases one of ABC's homes within the bonus eligibility period. Broker X must confirm the value of the bonus in writing to the buyer prior to the buyer making an offer on that property, or may include the total amount of compensation to be received in the written buyer agency agreement that must be reduced to writing before Broker X present an offer on her buyer's behalf.

What if the promised bonus (in addition to any brokerage commission earned under a listing contract or a brokerage cooperation agreement) in the above example was 3% commission for the first sale, 4% commission for a second sale and 5% commission for a third or subsequent sale instead of a lower fixed dollar amount. *Then, again, preferably when showing the property the Broker must orally disclose the promised commission percentages, that she has already sold one of ABC's homes, and that her bonus would be at least 4% commission if the buyer purchases one of ABC's homes within the incentive eligibility period.*

What if ABC Homebuilders had promised to pay a brokerage **firm** incentives based on the number of properties sold by its affiliated agents? For example, when brokers with a certain firm sell ten properties belonging to the builder, the firm receives a bonus of \$10,000. Broker X of XYZ Realty is planning to show a buyer-client of XYZ Realty some of ABC's houses. Broker X is operating under a written buyer agency contract that says the company will seek a 3% commission from the seller. **What must the real estate company disclose to its buyer-client?** The company must disclose to the buyer-client the fact that XYZ Realty, as the buyer's agent, may receive a \$10,000 bonus if the firm procures ten buyers during the incentive eligibility period. If Broker X knew or should have known about the bonus, then she should orally disclose the amount of the bonus when showing the property to the firm's buyer client.

Example #2

A broker working with a buyer as the buyer's agent under a written buyer agency agreement prepares a list of possible properties listed for sale that may meet the buyer-client's needs and reviews these possible properties with the buyer-client. From the list, the buyer selects the properties s/he would like to see and the broker shows those properties to the buyer. At the time the broker presented the list to the buyer client, the broker knew that the sellers of two of the properties selected by the buyer were offering a bonus to the buyer agent who produced a purchaser for their properties. The broker said nothing to his buyer about the bonuses as he showed the buyer the properties. After seeing all of the properties, and revisiting a

few, the buyer decided to make an offer on one of the two properties which were offering a bonus. At that time, the broker told his buyer client that the seller would pay the broker a \$3,000 bonus over commissions. The broker confirmed this with a written statement to the buyer. By then, several of the other properties on the original list had sold to other buyers.

Comments: *Even though the broker provides a **written** confirmation of the disclosure prior to the buyer making an offer, the **oral** disclosure is **NOT timely** because disclosure at this point in the transaction does not provide the buyer-client sufficient time to make a fully-informed decision as to which property is the most appropriate for him/her to purchase. Moreover, the broker should have informed the buyer about the bonus offered by the seller of the other property at the time of showing so the buyer could evaluate the properties in light of that information.*

Additional Facts: Suppose the broker in the above fact situation had sent this email message to his buyer client: “Jim, attached please find the showing appointments for next Saturday. Note that the sellers of the Oak Street and Second Avenue properties are offering a bonus to the buyer agent.” Would this have made a difference?

Additional Comments: *Yes and No.* The disclosure is timely because it is made before any showings occurred. It afforded the buyer an opportunity to evaluate the properties and his broker’s advice concerning them knowing that the advice he received might be colored by the prospect of the seller-paid bonus. The form of the disclosure – a written email – also satisfies the rule’s requirement for written confirmation, as the disclosure could have been oral at this point, and need only be reduced to writing if the buyer chose to make an offer on one of the properties paying a bonus. *The problem with the disclosure is not its timing or form, but its completeness, or lack thereof. The rule requires the broker to include the value of the incentive or bonus in the disclosure.* Here the broker failed to describe either the dollar amount of the bonus or the formula by which the value of the offered bonus would be determined.

The Commission recommends that required disclosures relating to broker compensation be made, at least orally, to a broker’s buyer-client prior to or at the time of showing properties to the buyer. Note, however, that no two transactions are exactly alike and there may be circumstances where a later disclosure may still be timely. Written confirmation of the prior oral disclosure can then be made anytime prior to the buyer making an offer.

Broker Acting as Seller Agent or Subagent

Example #3

A broker is approached by a buyer who is interested in one of the firm’s listings. The broker reviews and explains the Working with Real Estate Agents brochure with the buyer and offers to act both as a buyer agent and dual agent. The buyer decides that he doesn’t need representation and signs an acknowledgment that the broker/company will be working with the buyer as a seller’s agent or subagent. What disclosures must the broker provide to the buyer regarding any compensation to be paid to the company? *None.* Because the buyer declined to hire the company to be his agent, neither the company nor any of its affiliated brokers owe any fiduciary duties to the buyer as he is not their principal.

Thus, whether showing the buyer property listed with the company or listed with other companies that permit seller subagency, neither the company nor its affiliated brokers must reveal anything about the amount or value of any compensation to be paid to the company or by

whom, as there are no duties of loyalty, obedience or disclosure of all information owed to this buyer-customer.

Broker as Dual Agent

Example #4

XYZ Realty represents a seller. In its listing agreement, the seller agrees to pay the Company a 5.5% commission and authorizes the Company to pay 2.5% to any buyer agent or seller subagent who brings a buyer. The listing agreement also specifies that the seller will pay any selling agent a \$2,000 bonus above the commission split offered a selling agent, and that the seller authorizes the Company to act as a dual agent. An agent with XYZ Realty is working with a buyer as a buyer agent under an oral buyer agency agreement. The buyer agent told his buyer client initially that the broker expects to receive a commission from the listing company or seller equal to 3% of the sales price of any property on which the buyer makes an offer that is accepted by the seller. After showing the buyer several properties listed with other companies, the buyer now decides she wants to see XYZ's listing. *Prior to showing the property*, the buyer agent orally informs the buyer client that they are now in a dual agency situation, explains what that means, and obtains the buyer's consent thereto. The broker also tells the buyer client that the seller of this property will pay a total commission of 5.5% of the contract price plus a \$2,000 bonus to the Company which is acting as the agent for both parties. After viewing the property, the buyer decides she wants to make an offer on the property. What must the buyer/dual agent do?

Comments: Because as yet there is no written agency agreement with the buyer, the buyer agent must prepare and have the buyer client sign a written buyer agency agreement in which the buyer also authorizes the Company to act as a dual agent. Since the buyer agent already knows what compensation is being offered on this particular property, the agent should specify that the buyer authorizes the Company to receive a 5.5% commission plus a \$2,000 bonus as its compensation when acting as a dual agent, all paid by the seller, if the buyer's offer is accepted. After obtaining the buyer's signature on the agency agreement, the broker may prepare an offer on behalf of the buyer.

Had the buyer agency agreement already been in writing and authorized dual agency, but stated only that the company expected to receive a commission of 3% paid by the seller when acting as a buyer agent, then the buyer/dual agent would have been required to orally disclose to the buyer that the Company would receive a 5.5% total commission and a \$2,000 bonus paid by the seller, preferably when showing the property. *Prior to preparing the offer, the agent would also confirm in writing to the buyer the amount of the total commission and bonus the Company would receive from the seller.* Total commissions and bonuses or consideration to be paid to the Company by either the buyer or the seller must be disclosed to each principal in a dual agency situation as there is no "split" – the Company receives all consideration paid by either principal.

Where Compensation is Less than that Stated in Agency Agreement

What if the buyer agency agreement indicated that the broker expected to receive compensation equal to 3% of the purchase price from the seller/listing company when acting as a buyer agent and a commission of 6% when acting as a dual agent, based on the general fee schedules dictated in the office policy. The broker makes no other disclosures when showing properties to the buyer-principal, as the broker is not aware of any variances from the amounts stated in the parties' agency agreement. The buyer decides to make an offer on one of the

company's listings. Before preparing the offer, a prudent agent should first contact the broker handling the listing to confirm the amount of compensation to be paid to the company by the seller when the company is acting as a dual agent. What if the broker learns that the compensation to be received by the company as a dual agent is only 5.5%, and not 6% as stated in the buyer agency/dual agency agreement? The broker should immediately disclose the lesser amount of commission to the buyer in writing and whether the company intends to hold the buyer liable for the .5% differential. If yes, the company must then disclose orally and in writing *to its seller-principal* that it is receiving .5% of the purchase price from its buyer-principal.

Marketing Fees

A builder-seller may agree to pay a listing brokerage firm a fee for marketing a subdivision, in addition to a commission. These marketing fees often are a percentage of the sales price and are paid to the brokerage firm at closing as each property sells. If the listing company represents only the builder-seller, then no additional disclosures are required so long as the listing company is not receiving any consideration or fee from anyone other than the seller as set forth in the listing agreement. No disclosure is required to a buyer-customer, as the buyer is not the company's principal and the agency fiduciary duties do not attach.

However, if the brokerage company is also representing the buyer, and thus acting as a dual agent, it must disclose to its buyer client that the firm receives fees for marketing the subdivision, that the fees are paid by the seller upon the closing of each property, and the amount to be paid based on the sale of the subject property, in addition to disclosing the amount of all commissions and/or bonuses, incentives, etc. to be paid to the brokerage company. The seller/builder is aware of all amounts to be paid to the real estate company/broker because all such amounts should be specified in the listing agreement with the real estate company. The disclosure to the buyer-client may be oral initially, but must be confirmed in writing and the buyer's written consent obtained (if not already authorized in the written buyer/dual agency agreement) prior to any offer being made or accepted by either party.

As with everything else, the amount of any commissions, fees, and any incentive or bonus, whether cash or a non-cash item such as a trip, must be disclosed on the HUD-1 closing statement. Whether a company practices traditional dual agency or a designated agent form of dual agency is irrelevant as to the implementation of Rule A.0109(c). The company remains a dual agent under either scenario and is still receiving the entire compensation and fees to be paid by its seller-principal and the company's buyer-principal is entitled to know that amount.

Employee Relocation Situations

When an individual must sell his/her residence, because s/he is being transferred by the employer to a new city, the individual employee may or may not be entitled to benefits under the employer's corporate relocation policy, if any. Employee relocation programs can be complex and may take myriad forms. How benefits are paid, by and to whom, may have differing tax implications. Some employers may administer their relocation program internally through Human Resources or some other department, while other employers may contract with a third party relocation company to oversee and coordinate the transfer. Due to the complexity of these transactions, coupled with the fact that the vast majority of real estate brokers do not become involved with such transactions, the inner workings and processes will not be explored in-depth here. The relevant question for purposes of this discussion is: *what disclosures must a broker make to its principals regarding the expected fees, commissions and bonuses to be received by*

the company when acting as the listing agent, or buyer agent or dual agent, assuming proper authorization for each? Basically, the required compensation disclosures are no different than those discussed in the preceding examples.

Broker as Listing Agent

Absent an outright employer purchase of the employee's property, which is believed to be infrequent at present, the employee-owner typically will enter into a listing agreement with a real estate company to list and sell the employee's property. The listing agreement should specify all compensation to be paid to the brokerage company and by whom. Often such listing agreements may have addenda appended outlining the process to be followed once the owner-seller receives an offer s/he deems acceptable and is ready to go under contract to sell the property.

So long as the real estate company acts only as a listing agent and does not receive any consideration other than as specified in the listing agreement and/or addenda, then no other disclosures are required, as the broker's principal is aware of all sums the broker will receive and from whom. If the listing company receives any fees or compensation other than that specified in the listing agreement, then it must orally disclose to its seller-principal the amount of the additional consideration and who is paying that consideration. The oral disclosure must be confirmed in writing *and* the seller's written consent obtained (if not already authorized in the listing agreement) prior to any offer being presented. Note that any amounts paid by the employer to the owner-employee are irrelevant to the disclosures the broker must provide to its principals, as such payments are not related to any consideration to be received by the real estate company.

Broker as Buyer Agent

A real estate company/broker in North Carolina who agrees to work with the employee/transferee as a buyer agent would follow the same procedures discussed in the "Broker as Buyer Agent Only" subsection discussed above.

Real Estate Company Acting as Dual Agent

A listing company that is authorized by its seller-principal to act as a dual agent must make the same disclosures to each of its principals as discussed in the foregoing "Broker as Dual Agent" subsection.

Bottom Line: The underlying intent of Rule A.0109(c) and the common thread throughout **all** of the foregoing situations is that a broker's principals have a right to know the amount and value of all compensation, fees, incentives, bonuses or other consideration, however denominated, to be received by the agent/real estate company arising from that transaction and who will be paying that consideration to the real estate company. The principal must consent in writing to the company's receipt of that consideration.

POTENTIAL DISCIPLINARY ACTION FOR FAILURE TO DISCLOSE COMPENSATION

As with all disclosure requirements, the Commission will look at all the circumstances and facts surrounding a particular transaction before deciding whether a broker acted inappropriately in disclosing compensation. Some of the factors that would be considered in

reviewing a complaint that a consumer was not given full and timely disclosure of the firm's compensation as required by the rule include whether:

- the broker gave the consumer a good faith estimate and how close the estimate was to the actual compensation paid;
- the broker had any reason to suspect the compensation might be different than the amount agreed upon in the parties' agency agreement;
- the compensation received was more, or less, than the amount disclosed;
- systems were in place by the firm to make the information available;
- the broker utilized the firm's systems but, because of unusual circumstances, was unable to obtain the necessary information;
- the failure to disclose was exceptional, or the standard operating procedure of either the broker or the firm; and
- all other relevant facts and circumstances concerning the particular transaction.

The Commission generally will not impose discipline against a licensee who has made an error acting in good faith, particularly when the licensee has taken reasonable steps to obtain and disclose the correct information, and when an error occurs, it is corrected without harm or significant risk to a member of the public.

SUMMARY

In a *dual agency situation*, because the Company has two principals and does not share the commissions, fees, bonuses or other consideration with any person or entity outside of the Company and its associated agents, it ***must disclose to both parties/principals the total commissions, fees, bonuses, incentives, or other consideration the Company will receive from either its seller or buyer client or any other person or entity.*** Typically, the seller already is aware of the total compensation the Company will receive as it generally is paid by the seller and should be set forth in the listing agreement. The buyer should be informed orally of all consideration the Company will receive when showing an in-house listing (regardless of whether the Company is practicing traditional dual agency or designated dual agency) and the total consideration to be received by the Company should be confirmed in writing prior to either principal making or accepting an offer, if it is not already in writing. Where the Company also is receiving consideration from its buyer client in addition to any consideration paid by its seller client, then the form and value of the consideration paid by the buyer client must be orally disclosed to the seller client and confirmed in writing before either principal makes or accepts any offer from the other.