



717 Green Valley Road • Greensboro, NC • 27408

336.273.7771 DIRECT

336.230.0005 FAX

800.752.7771 TOLL FREE

allentate.com

December 18, 2009

Marsha H. Jordan
Chair, NC Real Estate Commission
Apple Realty
513 East Main Street
Lincolnton, NC 28092

Mr. Phillip Fisher
Executive Director
NC Real Estate Commission
PO Box 17100
Raleigh, NC 27619-7100

Dear Ms. Jordan and Mr. Fisher,

I served on the November 2007 NC Real Estate Commission's *Incentive Disclosure Advisory Committee* regarding the proposal to modify Commission Rule A.0109 – Brokerage Fees and Compensation. This meeting covered a lot of ground regarding the need for real estate brokers to timely disclose to their principal any compensation “of more than nominal value” the broker will receive during a real estate transaction. And more specifically, a lot of our discussion centered on “extra” compensation, especially in the realm of “bonuses”. At the conclusion of this one-day committee meeting, it was my understanding that the *intent* of the NC Real Estate Commission would be to revise Rule A.0109 in such a manner that the revised Rule would address the disclosure of “extra” compensation in various examples; meaning, those extra compensation amounts that were defined as being “more than nominal value.”

At no time do I recall any discussion during this one-day Committee meeting about a broker (firm) having any obligation under the proposed Rule revision to disclosure to both a seller principal and a buyer principal the total compensation being paid to a firm when acting in a dual agency capacity. Albeit, a seller principal would be aware of the firm's total compensation as stated in the listing agreement executed by and between the seller and the broker (firm) that represents the seller. And similarly, a buyer principal would be aware of the firm's ‘expected’ compensation as stated in the buyer agency agreement executed by and between the buyer and the broker (firm) that represents the buyer.

Allen Tate Family of Companies

Allen Tate Realtors • Relocation Services • Insurance Services • Mortgage Services • Master Title Agency, Inc. • Home Services



On October 7, 2009, Miriam Baer, Assistant Director, Legal Counsel with the NC Real Estate Commission, wrote a letter to the NC Association of REALTORS, providing an opinion on the application of Rule A.0109 as it relates to disclosure of compensation when a firm represents both a seller and a buyer in the same transaction, and are therefore acting in a dual agency capacity. In reading Ms. Baer's letter, it is my understanding that it is the opinion of the NC Real Estate Commission's legal department that disclosure of a firm's total compensation when acting in a dual agency capacity is needed in order for a broker (firm) to be compliant with Rule A.0109 (as amended effective October 1, 2008).

I am writing this letter because I fail to understand the reasoning, the logic, or even the consumer benefit, in having the real estate brokers in NC disclose the firm's total compensation in a dual agency transaction to the buyer client, especially in light of the fact that a buyer is made aware of the firm's compensation on the buyer side of the transaction within the terms of any buyer agency agreement. Why must any further disclosure have to occur if the buyer purchases a property from the firm who has the property listed for sale? Don't you think most buyers are aware that if their buyer agent is receiving "x" as their representative that the other side of the transaction, the sellers agent, is receiving "y", for a total of "z" compensation?

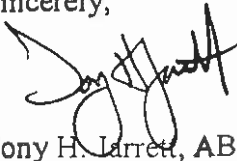
When a broker (firm) receives the compensation that is stated within the terms of the agency agreement, and this is the same amount that is disclosed in MLS as being offered to a buyer's agent (by the listing firm), and no one is receiving any additional compensation that would be considered "extra" compensation, such as a bonus, why do we have to disclose the firm's total compensation to the buyer?

Allow me to list just a few examples and questions that may well arise with an in-house transaction as per my understanding of the letter referenced above. For example, what happens when a third-party company is due a referral fee, such as broker-to-broker referral, or a relocation account for the buyer side? Is the disclosure required for the net or gross amount of compensation? And if the answer is the gross amount paid to the company, then this is not a true representation of the fee paid to the broker (firm). And the same question applies if a third party is due a referral fee for the seller side – is that a compensation disclosure? What if the listing agent charges additional commission that funds a marketing program, such as a new construction development – this is not a bonus but is a significant part of the listing agreement. Based on the opinion provided within the letter reference above, we are forced to have this discussion within the parameters of an in-house sale, but not if it is within the parameters of a co-broke sale. How is this inequality made "fair" by disclosures on in-house sales only? This recent opinion by the NC Real Estate Commission legal department will only create more confusion among licensees, more firm policy, more forms to be created, and more communication with consumers, which quite frankly is unnecessary and often uncomfortable and awkward. I completely understand the need to disclose bonuses and extra compensation incentives, but I don't understand the reason why a broker (firm) must disclose their consistent compensation agreements simply because the broker (firm) has both sides of the transaction.

It is my opinion this type of "total" compensation disclosure was not the intent of discussion at the *Incentive Disclosure Advisory Committee* meeting, which was simply to address a media story of real estate licensees receiving bonuses to "steer" buyers to a certain product without disclosure of these financial incentives. Due to that reaction, we agreed in principal to create a bonus disclosure rule to avoid this kind of bad consumer experience from happening again in the future. However, now this rule appears to becoming more and more complicated, with inconsistent applications, and it is creating more hurdles for the real estate licensee in regards to delivering the best consumer experience. Disclosing bonuses is one thing, but having to discuss our seller compensation agreements with a buyer client simply because that buyer bought our seller's listing is another matter entirely.

I respectfully ask the Commissioners at your next scheduled meeting to please reconsider the opinion of Dual Agency Compensation disclosure and to reinforce the rule's intent of timely disclosing compensation of more than nominal value. I am more than happy to appear before the Commission to discuss this matter. I appreciate the Commission's due diligence in serving both the NC consumer and the NC licensee in these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony H. Jarrett", written over a horizontal line.

Tony H. Jarrett, ABRM, CRB, CRS, CSP, GRI
Regional Vice President

cc: Mr. Tom Miller, Legal Counsel, NCREC
cc: Ms. Miriam Baer, NCREC
cc: Ms. Sandra O'Connor, NC Association of Realtors
cc: Ms. Cady Thomas, NC Association of Realtors
cc: Mr. Will Martin, NC Association of Realtors



**NORTH CAROLINA
REAL ESTATE COMMISSION**

P.O. Box 17100 • Raleigh, N.C. 27619-7100
919/875-3700 • www.ncrec.state.nc.us

Members

Marsha H. Jordan
Chairman
Lincolnton

Melvin L. "Skip" Alston
Greensboro

Benjamin Cone, III
Charlotte

Everett "Vic" Knight
Raleigh

Jeffery J. Malarney
Manteo

Jerry A. Mannen, Jr.
Wilmington

Alice L. Mosteller
Waynesville

S. R. "Buddy" Rudd, Jr.
Oak Island

Matthew J. "Rick" Watts
Fayetteville

October 7, 2009

Mr. G. Wilson Martin
Ms. Cady Thomas
NC Association of REALTORS®
4511 Weybridge Lane
Greensboro, NC 27407-7877

Re: Application of Rule A.0109 to Dual Agency

Dear Will and Cady:

Thank you for your inquiry on behalf of the North Carolina Association of REALTORS® about the application of Commission Rule A.0109 in dual agency situations. It was helpful to hear input from the members of the NCAR Forms Committee in September about the practical implications of compliance with the rule.

Rule A. 0109 requires brokers to fully and timely disclose to their principal any compensation of more than nominal value that they will receive, or expect to receive, from any other party or person in connection with a real estate sales transaction. The rule was adopted following revelations that some real estate brokers were receiving compensation from third parties in exchange for steering clients to particular properties, without the clients' knowledge or consent. Thus, one purpose of the rule was to assure that the consumer is made aware of the compensation his or her broker is receiving from third parties. This allows the consumer to evaluate whether the broker might have a vested interest in the consumer engaging in one transaction, as opposed to another, perhaps because a bonus or other financial incentive has been offered to the broker.

In general, there is no practical issue associated with the requirement of Rule A.0109 that a buyer agent disclose to his or her client the amount of commission being offered by the listing agent. This information is readily accessible in the MLS. Likewise, because the listing agent's compensation is clearly set out in the listing contract with the firm's seller client and the listing agent and firm generally do not receive compensation from third parties, the rule's disclosure requirements are not of significant concern on the listing side. Rather, your members have expressed concern primarily about the situation where a real estate company represents both the buyer and seller in the same transaction, thereby resulting in dual agency.

Phillip T. Fisher
Executive Director

**Division
Directors**

Larry A. Outlaw
Education & Licensing

Mary Frances Whitley
Administration

Emmet R. Wood
Audits & Investigations

Thomas R. Miller
*Special Deputy Atty. General
Legal Counsel*

Miriam J. Baer
*Asst. Dir. Legal Services
Legal Counsel*

Mr. G. Wilson Martin
Ms. Cady Thomas
October 7, 2009
Page Two

In accordance with the provisions of Rule A. 0109(c), a firm and its broker-associates acting as dual agents must disclose to each of the firm's clients the firm's full compensation. Inasmuch as this compensation is specifically set out in the listing contract, disclosure to the dual agent's seller-client is handled easily. The issue, then, lies in the dual agent's disclosure to its buyer-client the full amount of the commission the firm expects to receive. While the listing contract setting out this information is contained in a paper file, you have indicated that broker-associates are usually not given access to this information by their own firm. Further, for some firms, the contracted-for compensation is not captured in any readily accessible internal computer database, nor is it even inputted into the MLS. Thus, when buyer agents working for such a firm are out of the office showing properties, they may not be able to readily determine the firm's expected compensation as to any given property.

We discussed the following scenario:

Buyer agent makes appointments to show houses to her buyer-client on a Sunday. When the agent takes the buyer to see one of the scheduled showings, the buyer notices a house across the street listed by the buyer agent's own firm (dual agency) and wants to see it. The buyer agent has had no opportunity to research this property in advance of showing and does not know what compensation her firm has contracted to receive from the seller. The MLS provides her with information about the amount or percentage of commission being offered to the buyer agent, but not the full commission. How does the buyer agent satisfy her duty to timely disclose, at least orally, the firm's compensation (which generally should be prior to showing)? And, if upon showing, the buyer wants to make a written offer, how then can the broker comply with the rule's requirement that she provide her client written confirmation of the firm's compensation?

There are several avenues for compliance with the rule. One is to make compensation information available on a company database accessible only by the firm's own agents. Other restrictions could be imposed by the firm to limit access to "need-to-know" situations. Some firms do this already, but others do not because the expense of creating the necessary programs would be prohibitive and/or for other reasons which they deem undesirable. Another avenue is to simply create a company policy requiring the agent to contact the listing agent for the information, and to require the listing agent to keep that information and make it available in this circumstance. If the listing agent cannot be reached, then the agent showing the firm's in-house listing should be directed to contact other identified associates of the firm who have access to the information (e.g., the broker-in-charge, managers, a duty agent at the office, etc.).

Mr. G. Wilson Martin
Ms. Cady Thomas
October 7, 2009
Page Three

You asked for clarification of the agent's duty when the foregoing strategies fail and the agent is unable to immediately determine the firm's compensation. Under these circumstances, the agent should make a good faith estimate of the firm's compensation based upon what she reasonably knows, or should know, about the firm's listing practices and the property in question, and then proceed with the showing. Thereafter, the agent should check with her firm as soon as possible to confirm the accuracy of her disclosure and to promptly correct any discrepancy, in order to satisfy the rule's requirement that disclosure be made in sufficient time to aid a reasonable person's decision-making.

But what if the buyer wants to make an offer immediately, before the agent has been able to verify the firm's commission? The rule requires the agent to confirm the firm's compensation before the principal makes an offer to buy or sell. However, with all disclosure requirements, the Real Estate Commission will look at all the facts and circumstances surrounding a particular transaction before making a decision as to whether a broker behaved inappropriately. Some of the factors that would be considered in connection with a complaint that a consumer was not given full and timely disclosure of the firm's compensation as required by the rule will include:

- whether the broker gave the consumer a good faith estimate and how close the estimate was to the actual compensation to be paid;
- whether the broker had any reason to suspect the compensation might be different than disclosed;
- whether the compensation received was more, or less, than disclosed;
- what systems were in place by the firm to make the information available;
- whether the broker utilized the firm's systems but, because of unusual circumstances, was unable to obtain the necessary information;
- whether 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.

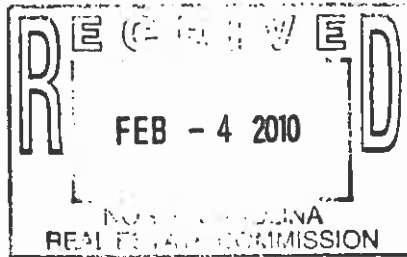
The Commission will not generally impose discipline against a licensee who has made an error acting in good faith, particularly when the licensee has taken reasonable steps to obtain and disclose the correct information, and when any error was corrected without harm or significant risk to a member of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

I hope the foregoing is of assistance to you.

Sincerely,

Miriam J. Baer
Legal Counsel

MJB/



Ms. Marsha H. Jordan, Chair
N.C. Real Estate Commission
Apple Realty
513 East Main Street
Lincolnton, NC 28092

Mr. Phillip Fisher
N.C. Real Estate Commission
P.O. Box 17100
Raleigh, NC 27619-7100

Dear Marsha and Phil:

This letter is to express our concern about the Commission's interpretation of rule A. 0109 (as amended October 1, 2008) as it relates to disclosure of firms total compensation when a firm represents both a seller and a buyer in the same transaction, and are therefore acting in a dual agency capacity. Currently the buyers and sellers have the commission disclosed as it relates to their side of the transaction through the Buyer Agency Agreement and through the listing agreement on the sellers side. Where is the justification for additional disclosure to the seller as it relates to the total compensation? In addition, why are we only targeting dual agency in a firm when you take into account no additional disclosure is required in a non dual agency transaction.

This rule will only create additional confusion in an already very complicated sales process for the licensees, the real estate companies and especially with the buyers and sellers and for what purpose? We agree that there must be disclosure of any "extra" bonuses or additional compensation in a transaction and we believe that was the original intent of this rule.

On behalf of our Board of Directors I respectfully ask that you reconsider your opinion on Dual Agency Compensation disclosure for in-house sales and limit any additional disclosure to "extra" compensation if part of the transaction. We are more than happy to appear at the Commission's meeting when this issue is scheduled on the agenda.

Respectfully submitted,

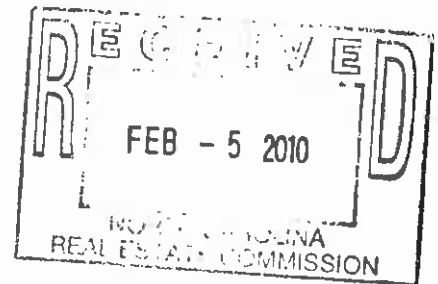
REALTOR® Theresa Clark, President
Raleigh Regional Association of REALTORS®

cc: Mr. Tom Miller, Legal Counsel, NCREC
REALTOR® Mary Edna Williams, President, NCAR
REALTOR® Will Martin, NCAR



Jan. 29, 2010

Mr. Phillip Fisher
Executive Director
NC Real Estate Commission
PO Box 17100
Raleigh, NC 27619-7100



Dear Mr. Fisher,

On behalf of the Charlotte Regional Realtor® Association and Carolina Multiple Listing Services, Inc. (CMLS), I am writing to encourage members of the North Carolina Real Estate Commission and staff to stop interpreting Rule A.0109 so as to require the total compensation being paid to a firm when acting in a dual-agency capacity be disclosed to both a seller and a buyer principal.

A seller principal is aware of the firm's total compensation as stated in the listing agreement executed by and between the seller and the broker (firm) that represents the seller. Similarly, a buyer principal is aware of the firm's expected compensation as stated in the buyer agency agreement executed by and between the buyer and the broker (firm) that represents the buyer.

While we completely agree with the intent of the rule, which is to disclose bonuses to buyers, requiring *total* compensation disclosure to a buyer in a dual-agency capacity appears to go beyond the rule's original intent.

Again, we respectfully request that the N.C. Real Estate Commission make it clear that it is not necessary to require that the total compensation being paid to a firm when acting in a dual-agency capacity be disclosed to both a seller and a buyer principal.

Sincerely,

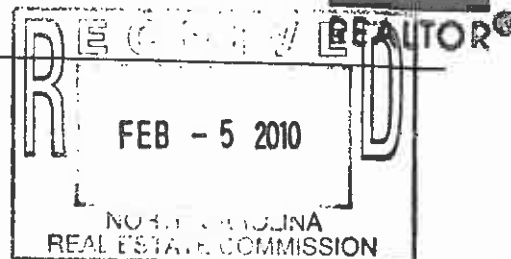
A handwritten signature in cursive script that reads "Lyn Kessie".

Lyn Kessie
Charlotte Regional Realtor® Association/Carolina Multiple Listing Services Inc.
President

Cc: Ms. Miriam Baer, NCREC
Ms. Anne Marie Howard, CEO, Charlotte Regional Realtor® Association



Greensboro Regional REALTORS® Association, Inc.
23 Oak Branch Drive
Greensboro, NC 27407
Telephone: (336) 854-5868
FAX: (336) 292-5416 Email: info@grra.org
<http://www.grra.org>



PRESIDENT

William M. Guill

PRESIDENT ELECT

Kathleen A. Sullivan

TREASURER

Holly D. Lindsey

ASSISTANT TREASURER

S. Burton Kennedy

IMMEDIATE

PAST PRESIDENT

Betty A. Smith

DIRECTORS

Marlys H. Currie

Johnnye C. Letterman

Barbara B. Mann

Kelly R. Marks

Delaine G. Mehder

John E. Newman, Jr.

Michelle W. Porter

Nancy J. Radtke

Thomas Somerville, V

**CHIEF EXECUTIVE
OFFICER**

Michael J. Barr, CAE, RCE

February 3, 2010

Mrs. Marsha H. Jordan
Chair, NC Real Estate Commission
Apple Realty
513 East Main Street
Lincolnton, NC 28092

Dear Mrs. Jordan and Members of the North Carolina Real Estate Commission:

Recently we received a copy of a letter which one our members, Tony H. Jarrett, sent to you, the Chair of the NCREC and to Mr. Phillip Fisher, Executive Director of the Commission regarding Dual Agency Compensation Disclosure (Rule A.0109). Our Association's Board of Directors has discussed this matter at our January Board meeting and unanimously voted to support Mr. Jarrett's position. We share his concern that the rule "is creating more hurdles for the real estate licensee."

Our members expressed concern that this rule seems to set agents up for failure by attempting to make this disclosure in a satisfactory manner. In order to comply, the rule puts the agent in an awkward position. Furthermore, we do not see how such a disclosure will improve the consumer experience nor do we believe that this knowledge will help the Buyer with his transaction.

We want the record to show that in the past we have supported the Commission's requirements regarding disclosure of "additional" compensation. We ask that the Commission reconsider Rule A.0109 as currently written and modify it to address its initial purpose about the disclosing of any "additional" compensation.

Sincerely,

William M. Guill

William Guill
President

cc:

Ms. Miriam J. Baer, Esq., North Carolina Real Estate Commission
Mr. Phillip T. Fisher, Executive Director, North Carolina Real Estate Commission
Mr. Michael Barr, Chief Executive Officer, Greensboro Regional REALTOR® Assn.



MEMBER North Carolina Association of REALTORS® • National Association of Realtors®

