

COLORADO REAL ESTATE COMMISSION
Rules Adopted November 14, 2006

The purpose of this rule is to implement the provisions of § 12-61-113.2, C.R.S. concerning affiliated business arrangements under the authority granted in §12-61-113.2 (5), C.R.S.

E-22 - Inducements from settlement producers prohibited.

- A. In addition to the provisions of section 12-61-113.2, C.R.S., and the federal Real Estate Settlement Procedures Act, 12 U.S.C. sec. 2601 et seq., no licensed real estate broker, whether or not engaged in a prohibited affiliated business arrangement, shall pay, furnish, impose, or agree to pay or furnish or impose, or accept, agree to accept or arrange to accept, either directly or indirectly, any incentive, disincentive, remuneration, commission, fee or other thing of value to or from another person or entity in any form in connection with any past, present, or future title insurance business, any closing and settlement services or any other title insurance business except for “services actually rendered” as defined in section 12-61-113.2 (2) (e), C.R.S., to or on behalf of any of the following:
1. Any “settlement producer” as defined in section 10-11-102(6.5), C.R.S., or a person that provides settlement services as defined in section 12-61-113.2 (1) (c), C.R.S.
 2. Any owner or prospective owner, lessee or prospective lessee of real property or any interest in the real property;
 3. Any obligee or prospective obligee of any obligation secured or to be secured either in whole or in part by real property or any interest in the real property; or,
 4. Any person who is acting as or who is in the business of acting as agent, representative, attorney or employee of any of the persons described in 1, 2 or 3 above, or any other party to the instant transaction.
- B. The factors the Commission will consider when determining whether incentive, disincentive, remuneration, commission, fee or other thing of value for the referral of title insurance business exists or will exist include, but are not limited to:

1. Whether the costs of any settlement producer are being or will be defrayed by the licensee's actions;
 2. Whether the remuneration is being or will be given to a discrete settlement producer as opposed to a bona fide association of settlement producers;
 3. Whether a pattern or practice of referrals to the real estate broker exists or will exist; and
 4. Consideration of the advertising value of the incentive, disincentive, remuneration, commission, fee or other thing of value.
- C. Bona fide advertising, marketing, or other acts in furtherance of maintenance and development of client relationships are not prohibited unless such conduct otherwise constitutes violation of the statutes or rules applicable to licensed real estate brokers.
- D. Section 12-61-113.2 (2)(a), C.R.S., permits an affiliated business arrangement where the person referring the business to the affiliated business arrangement receives payment only in the form of a return on an investment and where it does not violate section 12-61-113, C.R.S.
- E. Prohibited acts, practices, incentives, disincentives, remuneration, commissions, fees or other things of value include, but are not limited to, the following:
1. Affiliated business arrangements prohibited by section 12-61-113.2, C.R.S., that mandate the referral of title insurance business. Prohibited arrangements include, but are not limited to the following:
 - a. Arrangements in which the amount of the return on the ownership interest is in some fashion conditioned on the number of or premium volume of referrals made, such as where owners or stockholders receive dividends or bonuses based on the number of referrals generated or achievement of certain referral plans or goals;
 - b. Arrangements in which the ownership interests themselves are conditioned on the referrals, such as where the stock certificates are distributed based on the number of or

premium volume of the referrals made in the past or to be made in the future;

- c. Arrangements in which owners or stockholders receive anything of value that is directly tied to the referral of business; and
 - d. Arrangements in which the cost of the ownership opportunity is not equivalent for all investors.
2. “Sham” affiliated business arrangements as defined in Commission Rule E-46.
3. Receiving, attempting to receive, or arranging for, from a settlement producer, discounts primarily based on the volume of business the broker refers to the provider of settlement services.
4. Violation of Commission Rule E-36 regarding “good funds”.
5. Except as otherwise permitted in Section 38-35-125 (2), C.R.S., arranging for the disbursement of closing and settlement services funds before all necessary conditions of the transaction have been met.
6. Arranging for or accepting a title commitment without charge or at a reduced charge, unless, within a reasonable time after the date of issuance, appropriate title insurance coverage is issued for which the scheduled rates and fees are paid. Any title commitment charge must have a reasonable relation to the cost of production of the commitment and cannot be less than the minimum rate or fee for the type of policy applied for, as set forth in the insurer's current schedule of rates and fees. This provision does not apply where a title commitment is furnished in good faith in furtherance of a bona fide sale, purchase or loan transaction that for good reason is not consummated.
7. Accepting or arranging for any portion of the following:
 - a. Advertising or promotional material or activity, including, but not limited to, any obligation, product, service, seminar, convention or publication for the benefit of any settlement producer, or ostensibly for the benefit of the real estate broker, the end result of which is the substantial subsidization

of an obligation, product, service, seminar, convention or publication of any settlement producer. This prohibition applies to ads placed in subdivision or tract brochures, multiple listing services or books, exchange bulletins, newsletters, information sheets, programs, announcements and periodicals or similar matter associated with meetings, seminars or conventions of such settlement producers as well as registers and directories of such persons;

- b. The cancellation fee for a title report or other fee before or after inducing such settlement producer to cancel an order with another title entity;
- c. Furniture, equipment, office supplies, telephones, or automobiles, including any portion of the cost of renting, leasing, operating or maintaining the above-mentioned items, unless such provider of settlement services pays no more than its allocable share of the actual costs for such goods and services commensurate with the actual usage of such goods services, and facilities actually furnished;
- d. Rent to or from any settlement producer for premises wherever situated, regardless of the purpose, at a rent that is materially in excess of or materially below market value when compared with the amount paid per square foot for comparable space in the geographic area;
- e. Incentives, gifts, prizes, retreats, transportation and vacations, including, but not limited to other similar things of value;
- f. Salary, compensation or services, except for services actually rendered, including, but not limited to:
 - i. All or any part of the time or productive effort of any employee or affiliate of the real estate broker (e.g., office manager, secretary, clerk, messenger) to any settlement producer at less than the fair market value of the services;
 - ii. Compensation of a settlement producer or associate of a settlement producer;

- iii. The salary or any part of the salary of a relative of any settlement producer which payment is in excess of the reasonable value of the work actually performed by such relative on behalf of the real estate broker; and
 - iv. Services by any settlement producer which services are required to be performed by such settlement producer in his or her professional capacity, and for which the settlement producer would not normally charge the real estate broker.
- 8. Paying a settlement producer or other person described in Section A of this rule to make an inspection and appraisal of property, except for services actually rendered.
- 9. Any transaction in which any person receives, or is to receive, securities of the settlement producer or its affiliates at prices below the normal market price, or bonds or debentures that guarantee a higher than normal interest rate, whether or not the consummation of such transaction is directly or indirectly related to the number of closing and settlement services or title orders coming to the title entity through the efforts of such person.
- 10. Accepting or arranging for less than the scheduled rate or fee for a specified real estate or closing and settlement service, or for a policy of title insurance.
- 11. Accepting or arranging for waiver of all or any part of the title entity's established rate or fee for services that are not the subject of rates or fees filed with the Colorado Commissioner of Insurance required to be maintained on the entity's schedules of rates and fees.
- 12. Except as otherwise permitted by 12-61-113(1), C.R.S., and the rules and regulations of the Commission, accepting or arranging for information, including, but not limited to, farm packages, appraisals, estimates of income production potential, information kits or similar packages containing information about one or more parcels of real property without a charge that is commensurate with the actual cost of the work performed and the material furnished, and making a good faith effort to collect payment in the amount of such charge.
- 13. Accepting or arranging for accumulation, credit or deferral of the charge for a title policy or closing and settlement services in order to

"qualify" the charge for said policy and a later transaction for a lower rate, except to the extent that a properly filed and justified rate or fee is in place for a deferred rate.

14. Accepting or arranging for a guarantee, either directly or indirectly, of any loan to any settlement producer, regardless of the terms of the note or guarantee.
15. Accepting or arranging for a guarantee of the performance of closing and settlement services, or the performance of any other undertaking that are to be performed by any settlement producer.
16. Accepting or arranging for, either directly or indirectly, a "compensating balance" or deposit in a lending institution either for the express or implied purpose of influencing the extension of credit by such lending institution to any settlement producer, or for the express or implied purpose of influencing the placement or channeling of title insurance business by such lending institution.
17. Accepting or arranging for the payment of the fees or charges of an outside professional (e.g., an attorney, engineer, appraiser, or surveyor) whose services are required by any settlement producer to structure or complete a particular transaction.
18. Accepting or arranging for real estate broker services (e.g. computerized bookkeeping, forms management, computer programming, or any similar benefit) to or from any settlement producer at less than the fair market value of the services.
19. Accepting, or arranging for payment for, any business form provided to any settlement producer other than a form regularly used in the conduct of the real estate broker that form is furnished solely for the convenience of the real estate broker and does not constitute a direct monetary benefit to any settlement producer.
20. Accepting or arranging for the payment into escrow of any of the title entity funds or "closing short", except as provided in Section 38-35-125 (2), C.R.S.
21. Accepting or arranging for charges that are less than the actual cost of the closing and settlement service of the real estate broker.

- F. To the extent the activities and information are provided on a non-discriminatory basis, that such acts and practices have not been provided in a manner to circumvent the intent of this rule, and are in no way conditioned, directly or indirectly, upon prohibited referrals, prohibited acts, practices, incentives, disincentives, remuneration, commissions, fees or other things of value do not include, but may not be limited to, the following:
1. Accepting or arranging for, either orally or in writing, an ownership and encumbrance report (“O&E”) or a copy of an instrument of public record, including but not limited to, a deed, deed of trust, mortgage, contract, map, plat, or declaration of covenants, conditions and restrictions. Any such report or instrument may be accepted without charge provided and to the extent that:
 - a. All persons requesting such information are treated equally; and
 - b. The information is provided as presented by the public records and nothing of material value is added to the information; and
 - c. The information furnished contains no advertising or promotional material on behalf of the settlement producer to whom the information is provided.
 - d. Commission rules do not prohibit a real estate broker from imposing a reasonable charge for any and all of the above information, or for additional information, provided the charge is the same for all persons, and is assessed on a non-discriminatory basis.
 2. Accepting or arranging for an insured closing letter or closing protection letter that substantially conforms to an American Land Title Association (“ALTA”) promulgated form.
 3. Accepting or arranging for published or printing real estate industry related educational information or accepting or arranging for educational seminars for the benefit of settlement producers, as long as consistent with all other provisions of this rule.
 4. Accepting or arranging for advertising or marketing in furtherance of the development of client relationships, when performed in the bona

fide and legitimate promotion of the real estate broker's business, as long as consistent with all other provisions of this rule including, but not limited to:

- a. Things of reasonable value given to a bona fide trade or industry association.
- b. Advertising novelties and promotional gift items that bear the name of the real estate broker (but not the name of the recipient) to settlement producers, provided and to the extent that:
 - i. The items constitute advertising directed impersonally at the general consumer public, and are provided to settlement producers on a non-discriminatory basis; and
 - ii. The items are valued at no more than \$10; and,
 - iii. Distribution, if by mail, is made on a nonselective basis to all persons known or reasonably believed to be members of the business or professional group in the natural geographic area or political subdivision toward which the advertising effort is directed.
- c. Customer entertainment provided that:
 - i. It is interactive, personal contact between a real estate broker representative who is physically present and a settlement producer; and
 - ii. It is conducted to promote real estate products and services of the real estate broker; and
 - iii. Any benefit conferred to a settlement producer is incidental to the promotion of the real estate broker's products and services; and
 - iv. The expenditure bears a reasonable relationship to the benefit derived by the real estate broker from the activity.

5. Accepting or arranging for the use of office space or other accommodations within a settlement producer's office or business space, provided that rent is paid in accordance with this rule and the arrangement is consistent with the intent of this rule. In determining whether an office or accommodations sharing arrangement is permitted under this rule, the Commission shall consider the following factors, including, but not limited to:
 - a. Whether written notice has been provided to the consumer disclosing that an office or accommodations sharing arrangement exists and that the consumer has the right to use another real estate broker;
 - b. Whether the real estate broker's space is clearly and conspicuously identified separately from the settlement producer's space;
 - c. Whether the real estate broker's space can be readily locked and secured independently from the settlement producer's space;
 - d. Whether the real estate broker's space is directly and easily accessible to the public without entering the settlement producer's primary workspace, such as where the real estate broker's entrance leads to or from a common area or the exterior of the premises; and
 - e. Whether the real estate broker, directly or indirectly pays for or subsidizes the settlement producer's expenses as proscribed by §12-61-113.2, C.R.S.
- G. Nothing herein shall be construed in a manner that conflicts with the provisions of §§10-11-108(2)(b) or 12-61-113.2, C.R.S. or the rules and regulations of the Colorado Real Estate Commission or the Colorado Division of Insurance.
- H. For the purposes of this rule, "title entity" means a "title insurance company" as defined in section 10-11-102 (10), C.R.S., and a "title insurance agent" as defined in section 10-11-102 (9), C.R.S.
- I. Noncompliance with this rule, whether defined or reasonably implied under this rule E-22, may result, after proper notice and hearing, in the imposition of any of the sanctions available in the Colorado statutes pertaining to the

business of real estate brokers or other laws which include the imposition of fines and/or discipline of a license.

- J. The following are hereby incorporated by reference as written on or before the effective date of this rule. This rule does not include later amendments to or editions of the incorporated material. A copy of these references may be examined at any state publications depository library. For additional information regarding how to obtain a copy please contact Rulemaking Coordinator, Colorado Division of Real Estate, 1560 Broadway Ste. 925, Denver, CO 80202.
1. The federal Real Estate Settlement Procedures Act, 12 U.S.C. sec. 2601 et seq.
 2. The American Land Title Association (ALTA) Closing Protection Letter (rev. 3/27/97); the ALTA Closing Protection Letter – Regulatory (rev. 10-17-98); the ALTA Closing Protection Letter – Non-Residential Limitations (rev. 10-17-98); and the ALTA Closing Protection Letter – Single Transaction Limited Liability (rev. 10-17-98).

E-46 Affiliated Business Arrangements

- A. This rule concerns creation and conduct of an "affiliated business arrangement" as defined in Section 12-61-113.2(1)(a). This rule governs real estate licensees and is not intended to extend the regulatory authority of the Commission or the Division to any person other than real estate licensees.
- B. A "provider of settlement services" for purposes of Section 12-61-113.2 et seq includes but is not limited to brokers acting as agents or transaction brokers, real estate brokerage firms, and employing brokers.
- C. A licensee or employing broker of a licensee shall disclose the existence of an affiliated business arrangement pursuant to Section 12-61-113.2(2)(b) by disclosing the affiliation to the party they are referring, either seller, buyer or both, by using and having that party sign the Affiliated Business Arrangement Disclosure Statement promulgated by HUD pursuant to the Real Estate Settlement Procedures Act. The disclosure shall be made prior to, but no later than, the referral of settlement services business.
- D. A copy of the signed disclosure shall be retained in the file and a copy given to the referred party.
- E. Sham affiliated business arrangements are prohibited.
 - 1. In considering whether a real estate broker is a legitimate affiliated business arrangement or a "sham" affiliated business arrangement, the factors the Commission will consider include the following:
 - a. Whether the real estate broker operates in a manner that evidences a good faith effort to conform to applicable real estate laws;
 - b. Whether the title entity maintains a separate and distinct, verifiable physical location. In the event the real estate broker shares office space with another settlement service provider, the Commission may consider the factors set forth in paragraph F5 of Rule E22, inclusive, in determining compliance with this provision.
 - c. Whether the employees of the real estate broker are shared with other settlement service providers within the affiliated business arrangement.

In determining whether an individual is an employee of the real estate broker, the Commission may consider the following factors:

- i. Whether the real estate broker issues or causes to be issued an annual Internal Revenue Service Form W-2 to the employee;
 - ii. Whether the employee is subject to the real estate broker's supervision and control;
 - iii. Whether the employee devotes fixed periods of time exclusively to the business of the real estate broker or whether the employee is compensated on a fluctuating per hour basis or per transaction basis;
 - iv. Whether the employee is physically located in the office of the real estate broker.
 - d. Whether the real estate broker performs core title services, by and through its employees. In accordance with the HUD Statement of Policy 1996-4 the real estate broker shall not collect premiums for services not actually performed.
 - e. What, if any, the settlement services the real estate broker has contracted to other sources.
2. In addition to the above factors, the Commission will consider the guidelines set forth in the HUD statement of Policy 1996-2, Sham Controlled Business Arrangements (commonly referred to as the "HUD 10-Step Sham Test") and that statement is incorporated by reference. A copy of this document is available for public inspection at the office of the Division of Real Estate, 1560 Broadway, Ste. 925, Denver, CO, 80202, weekdays between 8 a.m. and 5 p.m.; excluding state observed holidays. The Commission may also consider any other relevant facts and circumstances relating to the above factors and to those elements set forth in the 10-Step Sham Test.
3. The disclosures to the Commission required by Section 12-61-113.2 (3) and (4) shall be made in a form or manner required by the Commission and shall be:

- a. At the time of a new application for active licensure or at the time of activation of an inactive license, the licensee shall disclose to the Commission the names of all affiliated business arrangements to which the licensee is a party. The written disclosure shall include the physical location of the affiliated business.
 - b. Upon the transfer of an active license to another brokerage firm, the active licensee shall disclose to the Commission the names of all affiliated business arrangements to which the licensee is a party. The written disclosure shall include the physical location of the affiliated business.
 - c. On an annual basis, each employing broker shall disclose to the Commission the names of all affiliated business arrangements to which the employing broker is a party. The written disclosure shall include the physical location of the affiliated business.
- F. Noncompliance with this rule, whether defined or reasonably implied under this rule E-46, may result, after proper notice and hearing, in the imposition of any of the sanctions available in the Colorado statutes pertaining to the business of real estate brokers or other laws which include the imposition of fines and/or discipline of a license.
- G. The following are hereby incorporated by reference as written on or before the effective date of this rule. This rule does not include later amendments to or editions of the incorporated material. A copy of these references may be examined at any state publications depository library. For additional information regarding how to obtain a copy please contact Rulemaking Coordinator, Colorado Division of Real Estate, 1560 Broadway Ste. 925, Denver, CO 80202.
1. The HUD policy statement 1996-2, which is the Policy Statement on Sham Controlled Business Arrangements.
 2. The HUD policy statement 1996-4, which is the Statement of Enforcement Standards: Title Insurance Practices in Florida; Final Rule.