



WINTER 2007

Sign of the Times and Unlicensed Activity

By D. Philip Lasater, Executive Director

You knew it required a real estate license to engage in real estate brokerage. Now it is unlawful to engage in real estate brokerage without a license.

I would draw your attention to two notices within this edition. One is notice of Act 2006-601 becoming effective October 1 and the other is the rule amendment clarifying how a real estate company is properly identified as a real estate office.

The primary purpose of the real estate commission has been to insure that individuals applying for real estate sales and brokers licenses meet the qualifications as

established by the legislature. And likewise the Commission's jurisdiction extended only to those individuals who held a license. With the new Act, the Commission now has jurisdiction over individuals who practice real estate without a real estate license. The Act authorizes the Commission to issue cease and desist orders which would likely be the first step taken upon our learning of the unlawful practice of real estate. If that is not effective or given other circumstances where transactions involving consumers have been completed, the Commission may issue formal complaints, subpoenas, and hold hearings.

Fines equivalent to those Commissioners may levy against licensees may be levied against unlicensed individuals and in addition they may impose a fine in the amount of any gain or economic benefit derived from a transaction. Failure to comply can be enforced by civil court.

This new Act is not to be confused as interfering in any way with the existing "owners" exemption within license law. Any individual may sale or lease property he or she owns without being required to have a real estate license. The Act does not change that. The Act addresses the circum-

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New Appointments to Nine Member Commission



Janet R. Morris



Dorothy P. Riggins

We are pleased to announce the appointment of **Janet R. Morris** and **Dorothy P. Riggins** to the Alabama Real Estate Commission. The new Commissioners were appointed by Governor Bob Riley and confirmed by the Alabama Senate during the 2006 Regular Session.

Representing the Third Congressional District is Janet R. Morris owner and broker of Morris VIP Realty in Montgomery, Alabama. Commissioner Morris began her

real estate career twenty-seven years ago and since 1989 her company has specialized in property management and residential sales.

Commissioner Morris' distinguished real estate career includes serving in various leadership positions in the Alabama Association of REALTORS®, National Association of REALTORS®, Alabama CRS Chapter, National Women's Council of REALTORS®, Alabama Women's Council of REALTORS® and Montgomery Women's Council of REALTORS®.

In addition to her leadership roles, Commissioner Morris has been the recipient of numerous awards, most notably the National Association of REALTORS® Omega Tau Rho Honor Fraternity, Alabama Association of REALTORS® Robert Jemison, REALTOR® of the Year, Top Forty REALTORS®, Alabama Association of REALTORS® Honor Society,

Alabama Association of REALTORS® Arthur B. Pope Education Achievement and Alabama Association of REALTORS® Long Serving Committee Member Award.

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Sign of the Times...*Continued from page 1*

stances where someone would procure prospects for or list for sale or lease or show property on behalf of another he or she does not own. In other words, any activity requiring a real estate license set out in Section 34-27-30 performed by an unlicensed person now becomes subject to the Commission's enforcement jurisdiction.

There are individuals acting in isolated instances that for whatever reason do not understand this and generally upon learning will cease and desist and become licensed or let their business idea go. There are other more deliberate attempts to circumvent by deceit or fraud actual real estate transactions on behalf of others without having met the qualifications for having a license issued and the authorization it allows. Experience from other jurisdictions alerts us particularly to unlicensed individuals who would link qualification and approval for consumer financing to properties they do not own nor may not be

otherwise listed. It will continue to be important for anyone who has knowledge of illegal or unlicensed activity to report to the Real Estate Commission. Our investigators and attorneys need the opportunity to evaluate situations that potentially require our intervention or action.

Enactment of the authority is the first step in compliance and enforcement. Education of licensees and the general consumer public will be an important aspect over the coming months. Commissioners are currently evaluating the cost feasibility and potential effectiveness of a statewide public information campaign. The purpose would be to inform the public that any real estate transaction in which they do not own the property for which buyers or tenants are being solicited requires using a licensed real estate salesperson or broker. How does one determine if an individual is licensed or not? Every company and broker are required by license law to have the licenses of those for which they are responsible for available for public viewing. Since Alabama licensees

do not carry pocket cards referral to the Association of Real Estate License Law Officials license/registration search Web site www.arello.com would be the fastest and most efficient way for another licensee or consumer to verify whether an individual is licensed in Alabama or any other jurisdiction.

The second area to which I draw your attention relates to the signage of the place of business. The statute states that a real estate company among other things shall be properly identified as a real estate office. The place of business rule as amended defines the minimum standard for how compliance with this requirement is met. (See Rule 790-X-2.-07 in the revised insert of the License Law book.)

At least once every five years a broker and company should incur a random compliance audit from the Commission. The Audit checklist which may be referenced in the back of the license law book on page A-2 will now contain, along with all the other items on the check list, review of how the company signage meets the rule. ■

Act 2006-601: An Explanation

The license law has been amended to include some new provisions regarding practicing real estate without a license and the extent of the Commission's jurisdiction. Some explanation is in order to help in understanding these provisions, because they are significant.

Unlicensed Activity

Until now the Commission had no jurisdiction over unlicensed activity. What this means is that the Commission had no authority to deal directly with persons and companies who engaged in the practice of real estate without being licensed. The new act changes that and has two key provisions. Now the Commission will be able to issue cease and desist orders to persons and companies who are practicing real estate without a license. In addition, the Commission now has authority to hold a hearing, and to impose a fine for these activities. The fine may be calculated as follows:

(1) the same fine as may be imposed upon licensees for violations of the law, and in addition (2) a fine in the amount of any gain or economic benefit derived, and in addition

(3) the amount of the Commission's costs incurred. These provisions are incorporated into Section 34-27-36 Ala. Code.

Jurisdiction

Until now the Commission's jurisdiction was limited to Alabama real estate transactions. This meant that only those transactions that had the major provisions of the negotiations, etcetera conducted in Alabama were subject to the requirements for an Alabama real estate license. This also meant, for example, that out-of-state companies could list Alabama real estate on their Web sites and claim that this activity did not require an Alabama real estate license, since the listing, selling, etcetera occurred outside Alabama. The new provisions make it clear that an Alabama real estate license is required any time one engages in any activity requiring a license concerning real estate situated within the state of Alabama. In other words the mere fact that Alabama real estate is the subject of the transaction activities will make an Alabama real estate license mandatory, regardless of where the listing, selling, etcetera occurred. These provisions are incorporated into Section 34-27-30 Ala. Code.

New Rule Changes Effective October 1, 2006

790-X-3.-03. Deposit of Funds.

(1) The deposit and accounting for at all times of all funds belonging to or being held for others in a separate federally insured account or accounts in a financial institution located in Alabama shall require that the qualifying broker be a customer of the financial institution holding all such accounts and the qualifying broker shall have full authority to deposit and withdraw funds and to write or make checks as necessary on all such accounts.

Explanation

It has come to the attention of commissioners that some companies have qualifying brokers who are not authorized to write checks on the company escrow accounts. The rule change will prevent a company from engaging the services of a real estate qualifying broker who does not have full authority as a signatory on the company escrow accounts. It should also insure that the broker has access to the bank statements thereby increasing the broker's accountability. The rule is not intended to prevent a company or broker from designating other signatories on the escrow accounts.

790-X-2.-21. License Transfers. Repealed

~~(1) A \$25.00 fee shall be required of a licensee when a change on a license certificate necessitates the issuance of a new license certificate, i.e., name change, address change, transfer, etc.~~

~~(2) The qualifying broker is responsible for the immediate return of any license certificate which is in need of any change.~~

Explanation

Paragraph (1) of this rule was repealed because transfer fees are set out in the law. Paragraph (2) was repealed so that license certificates would not have to be returned to accommodate online transfers. It is important to note that this rule does not change the places in the law where license certificates are required to be returned. Here are the pertinent parts of those two statutes:

34-27-34. Who may serve as qualifying broker; responsibility of qualifying broker; change of broker; termination of qualifying broker's status.

(c) A person who wishes to terminate his or her status as qualifying broker for a licensee may do so by notifying the licensee and the commission in writing and sending the licensee's license certificate to the commission or verifying in writing to the commission that the certificate has been lost or destroyed.

Section 34-27-35. License certificates generally.

(f) The license of a salesperson who is subsequently issued a broker's license automatically terminates upon the issuance of his or her broker's license certificate. The salesperson's license certificate shall be returned to the commission in order for a bro-

ker's license to be issued. No refund shall be made of any fee or recovery fund deposit pertaining to the salesperson's, broker's, or company's license.

790-X-2.-07. Place Of Business and Signage

A place of business shall be identified by a sign which sets out the name of the company as licensed with the commission. In places where an exterior sign is permitted a sign shall be posted outside of the office so that it is plainly and readily visible to the public. In places where an exterior sign is not permitted, an interior sign shall be posted. The interior sign shall be in keeping with the building restrictions, and if permitted, shall be posted in the entry area and on the door of the office or suite of offices. Appropriate files and records shall be maintained in the place of business.

Explanation

The place of business requirements of the law set out in Section 34-27-2(a)(11) require that a place of business be "properly identified as a real estate office." This rule says that a sign reflecting the company name is required to satisfy the requirement of the law. Of course, some building restrictions and some local zoning restrictions will dictate what exact kind of signage is appropriate. The rule is designed to accommodate those restrictions. If an outside sign is permitted, one must be posted. If not, an interior sign or signs must be posted, consistent with what is allowed locally.

790-X-1.-12. was amended to specify the acceptance of ARELLO-certified distance education courses as reciprocal CE credit.

(15) Any licensee who completes a continuing education classroom course or an ARELLO certified distance education course in another state which is approved by any state may receive credit in Alabama for successful completion of that course by submitting appropriate documentation as prescribed by the Commission. Such courses will count as elective continuing education credit only. These courses are not subject to renewal procedures, instructor application and fee or the course review fee.

Explanation

Therefore, an Alabama licensee may take either a classroom course or an ARELLO certified distance education course while he or she is physically in another state and receive credit for that course by submitting proper documentation. The documentation includes verification the licensee successfully completed the course, verification the course is approved by any real estate commission and the number of hours for which the course is approved. The credit received can be up to 12 elective hours of CE.

BRIEFLY LEGAL**EARNEST MONEY DISPUTES***By Charles R. Sowell, General Counsel*

We get many, many questions about this subject. The answers are found in Alabama Real Estate Commission Rule 790-X-3-.03(4) and (5.) Here is what the relevant part of the rule says with underlining for emphasis:

790-X-3-.03. Deposit of Funds.

(4) Each qualifying broker shall promptly disburse to the appropriate party or parties any trust funds within 7 days of the consummation of the transaction for which the funds were deposited. If for any reason the transaction is not consummated, or if for any reason there is a disagreement involving to whom trust funds should be disbursed, the qualifying broker shall not disburse any trust funds except pursuant to a written agreement signed by all parties or pursuant to a court order.

(5) This Rule shall not prohibit a broker from depositing with the appropriate court any trust funds which are the subject of disagreement among or between parties under the rules of interpleader or other lawful procedure.

First, let's look at how this rule is applied to security deposits in property management situations. A lease or rental agreement is consummated when a tenant enters into a lease agreement or deposit agreement with the landlord or its agent.

This means the property management company is free to apply the terms of the agreement, and disburse funds received under the terms of the agreement. This includes forfeiture of the security deposit. The property management company is not required under any circumstances to get written permission from the tenant to forfeit all or part of a security deposit.

Earnest money under a sales contract is different. A sale is not consummated until it is closed. Pay careful attention to what the rule says about a sale that does not close. The reason it does not close does not matter. It does not matter if a financing contingency cannot be met, for example. It does not matter what the contract says. Even if the contract says the earnest money is "non-refundable," whatever that means, the rule controls. If the money is supposedly "non-refundable," what is it doing in an escrow account? If it is truly non-refundable, then it should be paid directly to the seller under a written, signed addendum to the contract clearly setting out the fact that the broker is relieved of responsibility for the money.

The rule says flatly that if a sale does not close, or if there is some dispute about to whom the earnest money should be disbursed, the broker shall not disburse the money without written, signed authorization from the parties to the contract. This authorization may not be contained in the original contract or addendum to it. I will repeat: It does not matter what the contract says. There must be a separate, written and signed authorization coming after it is established that that contract will not close. Notice the rule does not require the parties to give a full release of all claims. The parties usually do want to do this so they can walk away without any further consequences. Brokers typically encourage a full release for this reason.

When the parties just cannot agree, then the broker must continue to hold the money in the escrow account. Brokers usually do not file an interpleader action, because that requires a lawsuit with court costs and attorney's fees. Some contracts provide that the earnest money can be used to pay these expenses right out of the earnest money in the event an interpleader action is filed. Perhaps the best remedy is for one party to file a civil action against the other for the money. Small claims courts are appropriate, provided the amount in dispute does not exceed \$3,000. When a judge enters an order deciding the question, the rule allows the broker to disburse the money to the prevailing party. Another possible remedy lies with the State Treasurer's office. In some circumstances a broker might be able to pay the money over to the State Treasurer's office as unclaimed property, provided three years have lapsed since the apparent owner last communicated to the broker an interest in the money. The State Treasurer's Web site has information regarding unclaimed property that is easy to access.

If you are waiting for an exception to the rule, there is one. It concerns foreclosed upon sellers. Here is the scenario. The seller (owner) has entered into a contract that is waiting to be closed. During this time the seller is foreclosed upon, and the sale does not close. In this case it is not necessary to get authorization from the seller to disburse the earnest money to the buyer. The law in

Alabama is that a foreclosed upon owner of property is essentially stripped of all interest in the property, except the owner's right to redeem the property within one year. This is commonly referred to as the statutory right of redemption. Since this is the only right remaining, the seller's signature on a disbursement authorization is worthless. Our rule does not supersede the law in this instance, nor does it require that a worthless signature be obtained.

It is important to understand that this rule governs what a broker can and cannot do. The language of the contract is very important to establish the rights and responsibilities of the buyer and seller. The parties themselves and the courts will look to the contract to ultimately decide who is entitled to earnest money when a contract does not close. Our rule just prevents the broker from being the one who makes the decision. Some other states have similar rules, while some do not. The reason for the rule is simple. It protects both the buyer and seller from arbitrary disbursements by brokers. Judges struggle with many contract issues that come before them in court. Brokers have no business deciding on their own who is entitled to earnest money. ■

New Appointments to Commission...

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Commissioner Morris is an active member of Heritage Baptist Church. She is married to Wayne and they have a son and daughter.

Serving in the consumer-at-large commission position is Dorothy P. Riggins. Commissioner Riggins is employed full-time as an Education Administrator in the Federal Programs Section of the Alabama Department of Education. A leader and expert in adult and education administration, Commissioner Riggins holds B.S., M.Ed., Ed.S. and Ph.D. degrees. She has held positions with Trenholm State Technical College and Tuskegee University.

A native Alabamian, Commissioner Riggins is known in and around Montgomery, for her beautiful singing voice and is often the featured singer of the national anthem at local sporting, private and public events. She is a member of St. John's A.M.E. Church of Montgomery and is a member of Beta Nu Omega Chapter of Alpha Kappa Alpha, Phi Delta Kappa honor society, Alabama Education Association, Alabama State Employees Association, National Education Association and National Association for the Education of Homeless Children and Youth. ■

EDUCATION CORNER

STRESS-FREE CE

By Ryan Adair, Education Director

Many licensees are convinced that the "CE Year" is always the second year of a license period. Well, a clarification needs to be made. Every year is a "CE Year!" Let me explain why I say that. Approximately 3,000 licensees were forced inactive on October 1 because of a failure to have the proper education requirements for license renewal on record with the Commission. Now, there were many reasons for the absence of education qualifications on record, all of which can be avoided in the future. Here are five suggestions to avoid the stress and worry associated with education required for license renewal:

- 1. Take your CE now!** Don't wait until the second year or, much worse, the last month of the license period. CE is offered throughout the two year license period so go ahead and take your 15 hours now and don't worry about it in September of 2008.
- 2. Make sure the courses you take are approved.** You may verify the approval of courses by using the Real Estate Course Search feature on the Commission's Web site. All approved course offerings are required to be entered into CMap for public viewing prior to their offering. Make use of the Real Estate Course Search to verify approval of courses.
- 3. Provide proper documentation for out-of-state courses.** If you take a CE course while in another state and it is approved by any state, you may receive credit in Alabama for successful completion of that course. The Commission will accept up to 12 elective hours of CE credit for courses taken while physically in another state. The course may be a classroom course or an ARELLO-certified distance education course. Proper documentation must be provided to the Commission in order to receive credit.
- 4. Check your credit online.** Always check the Commission's Web site two weeks after completing a CE course to make sure your credit has been entered. If you do not see the credit, you must contact the provider of the course and let them know that the credit can not be viewed.
- 5. Reciprocal licensees send documentation prior to the renewal deadline.** All reciprocal licensees who hold active licenses in another state at the time of Alabama license renewal may provide a copy of that license or a certification of licensure to satisfy the education requirement for renewal. This must be provided when requested by the Commission and prior to the license renewal deadline.

These five suggestions can help licensees avoid trouble during license renewal. You are encouraged to keep a record of these suggestions and make license renewal in 2008 a stress-free and even enjoyable experience. Please contact the Education Division at **334.242.5544** if you have any questions. ■

DISCIPLINARY ACTIONS TAKEN

June through October 2006

DISPOSITION

The below were found guilty for violation of Section 34-27-36(a)(16) by presenting to the Alabama Real Estate Commission, as payment for a fee or fine, a check which was returned unpaid by the bank upon which it was drawn.

Jennifer R. Cade

Salesperson; Gulf Breeze, Florida
Date of Hearing: June 23, 2006
Fined \$250

Kerry C. Glenn

Salesperson; Columbus, Georgia
Date of Hearing: June 23, 2006
Fined \$250

Jennifer Eileen Middleton

Inactive Salesperson;
Bay Minette, Alabama
Date of Hearing: June 23, 2006
Fined \$250

James Ryan Jackson

Salesperson; Jasper, Alabama
Date of Hearing: August 18, 2006
Fined \$250

Jody Lynn Marsh

Salesperson; Gulf Shores, Alabama
Date of Hearing: August 18, 2006
Fined \$250

Jason S. Graviet

Temporary Salesperson;
Ardmore, Alabama
Date of Hearing: September 15, 2006
Fined \$250

Kim Smalley Robinson

Temporary Salesperson;
Clanton, Alabama
Date of Hearing: September 15, 2006
Fined \$250

Karen Shaw-Nichols

Temporary Salesperson;
Chelsea, Alabama
Date of Hearing: September 15, 2006
Fined \$250



Valley E. O'Neal

Inactive Salesperson; Mobile, Alabama
Date of Hearing: October 20, 2006
Fined \$250

Jonathan R. Long

Salesperson; Rainbow City, Alabama
Date of Hearing: October 20, 2006
Fined \$250

Deborah Ann Sisley

Salesperson; Daphne, Alabama
Date of Hearing: October 20, 2006
Fined \$250

Randy S. Morris

Qualifying Broker; Mobile, Alabama
Date of Hearing: October 20, 2006
Fined \$250

DISPOSITION

The below were found guilty for violation of Section 34-27-36(a)(19) by failing to comply with Rule 790-X-1-.12(8) and Rule 790-X-1-.12(9) by failing to provide to the Commission, upon request, original certificates of completion of all the requested hours of approved continuing education courses.

Rodney E. Barstein

Inactive Broker; Birmingham, Alabama
Date of Hearing: June 23, 2006
Fined \$1000 and license suspended for 30 days.

Kevin M. Kendall

Salesperson; Alexander City, Alabama
Date of Hearing: June 23, 2006
Fined \$1000 and license suspended for 30 days.

Carol A. Lersch

Associate Broker; Mobile, Alabama
Date of Hearing: August 18, 2006
Reprimanded

Dorothy M. Walther

Inactive Salesperson; Mobile, Alabama
Date of Hearing: August 18, 2006
License Revoked

Jeffrey L. Stinson

Inactive Salesperson;
Pawley's Island, South Carolina
Date of Hearing: September 15, 2006
License Revoked

Sara B. Batson

Salesperson; Huntsville, Alabama
Date of Hearing: October 20, 2006
Fined \$1000 and license suspended for 30 days.

Eunice Y. Baker

Associate Broker; Daleville, Alabama
Date of Hearing: October 20, 2006
Reprimanded

Jimmy A. Dichiaro

Qualifying Broker;
Gulf Shores, Alabama
Date of Hearing: October 20, 2006
Fined \$1000 and reprimanded

Kenneth E. Harve

Salesperson; Bessemer, Alabama
Date of Hearing: October 20, 2006
Fined \$250

Anne S. Deakle

Inactive Salesperson;
Mobile, Alabama
Date of Hearing: October 20, 2006
Fined \$1000 and license suspended for 30 days.

DISPOSITION

The below were found guilty for violation of Section 34-27-36(a)(19) for a real estate licensee to violate or disregard a Commission order by failing to pay an ordered fine.

Christopher Allen Cummings

Qualifying Broker;
Orange Beach, Alabama
Date of Hearing: June 23, 2006
Fined \$500

Linda M. Bartlett

Inactive Salesperson;
Birmingham, Alabama
Date of Hearing: September 15, 2006
License is suspended for one year.

Marie Knight

Temporary Salesperson;
Orange Beach, Alabama
Date of Hearing: September 15, 2006
License is suspended for 60 days.

DISPOSITION

The below was found guilty for violation of Section 34-27-36(a)(1) by procuring a license by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for license and Section 34-27-32(a)(5) that states the Commission may deny a license for having been convicted of or plead guilty to a crime of moral turpitude.

William Clarence Scruggs, Jr.

Inactive Temporary Salesperson;
Mobile, Alabama
Date of Hearing: June 23, 2006
Licensed Revoked

DISPOSITION

The below was found guilty for violation of Section 34-27-36(a)(19) by failing to comply with Section 34-27-30(10) to present to the public a company as being able to perform an act for which a real estate license is required while not actually being licensed as a real estate company.

Sonya Bovee-Partridge

Qualifying Broker; Enterprise, Alabama
Date of Hearing: August 18, 2006
Reprimanded

DISPOSITION

The below were found guilty for violation of Section 34-27-36(a)(8)a. and Section 34-27-36(a)(8)b. for failure to deposit and account for at all times all funds being held for others by having a shortage funds in this account.

Clarence P. Evans, Jr.
and

**Bo Evans Realty and Auction Company LLC
DBA Bo Evans Realty**

Qualifying Broker;
Prattville, Alabama
Date of Hearing: August 18, 2006
Fined \$1,000

Sunset Properties and John Bobe

Qualifying Broker;
Gulf Shores, Alabama
Date of Hearing: August 18, 2006
Fined \$1,500, license suspended for 90 days, suspension stayed pending completion of three hour continuing education course containing information on trust or escrow accounting.

DISPOSITION

The respondent Martin was found guilty of violating Section 34-27-36(a)(3) by making a material misrepresentation to the buyer concerning the lot that was for sale by his company and respondent Fedder was found guilty of violating of Section 34-27-36(a)(2) for failing to see that the actions of Martin complied with the provisions of the cited Code of Alabama.

Robert J. Fedder,

Qualifying Broker and

Donald W. Martin,

Salesperson;
Daphne, Alabama
Date of Hearing: July 14, 2006

Mr. Fedder fined \$500 and Mr. Martin fined \$1,000

DISPOSITION

The below was found guilty for violation of Section 34-27-2(a)(11)b. via Section 34-27-36(a)(19) to operate within the city limits of a municipality without having an office place of business that meets the requirements of the aforementioned section.

Lorraine S. Nichols

Qualifying Broker;
Gulf Shores, Alabama
Date of Hearing: June 23, 2006
Fined \$1,000

DISPOSITION

The below was found guilty of Count #1 for violation of Section 34-27-36(a)(19) to fail to comply with Section 34-27-31(j) in the failure of real estate licensee to notify the Commission within 10 days of the institution of criminal prosecution against him and subsequent arrest; Count #2 for violation of Section 34-27-36(a)(23)a. for having entered a plea of guilty or nolo contendere to, or having been found guilty of or convicted of a felony or a crime involving moral turpitude.

Richard E. Hilley

Salesperson;
Gulf Shores, Alabama
Date of Hearing: June 23, 2006
License revoked; appeal pending.

DISPOSITION

The below were found guilty of Count #1 for violation of Section 34-27-36(a)(19) to fail to comply with Rule 790-X-3-.01 for moving his place of business and failure to notify the commission within 30 days of the change; Count #2 Section 34-27-2(a)(11)b. for failure to establish a place of business; Count #3 Section 34-27-36(a)(8)a. and Section 34-27-36(a)(8)b. for failure to properly account for or remit money coming into his possession which belongs to others; and Count #4 Section 34-27-36(a)(28) for failure or refuse to produce a record

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LICENSING TIDBITS

By Annie Hall, Licensing Supervisor

It's Not Too Late

The biggest part of the 2006 license renewal process has come and gone. Hopefully, everyone has received their 2007-2008 real estate licenses. Licenses not renewed by October 1, 2006 have expired. Real Estate License Law allows an expired license to be renewed during the 12-month period following the license renewal for which the license was current. An expired license can be renewed by paying the license renewal fees plus \$150.00 penalty fee. These fees must be received in our office or post-marked by the US Postal Service by September 30, 2007. Failure to renew a license by that date will result in a lapsed license and shall be subject to all requirements applicable to persons who have never been licensed. Individuals may renew their license

online at www.arec.alabama.gov. An inactive company cannot be renewed online. The fees must be mailed to the Commission office.

Please remember that when you renew your license, that license is renewed on inactive status. To activate the license, individuals must first complete the required continuing education courses. You must then complete an Application for License Activation and submit it with the required activation fee(s). The application can be obtained from our Web site at www.arec.alabama.gov. Once there, click on "Forms and Applications" and download the application. For faster service, you may also activate your license online at the above Web site. From our homepage, click on "Online Services" and follow the prompts. Company and qualifying broker

licenses cannot be activated online. Those activations must be mailed to the Commission office. If the activation forms are mailed by Certified or Registered mail, you may resume your real estate activities. Activation forms are processed in the order in which they are received.

Renewal Problems

We have some licensees who are performing activities that require an active real estate license, but either the company or qualifying broker (or both) have not met all renewal requirements, and therefore does not hold an active real estate license. Both the company and qualifying broker must hold an active real estate license in order for them or agents registered to that company to engage in real estate transactions. Qualifying brokers must make sure that their license and their company license have met all renewal requirements and the licenses are active. Failure to do so will result in the company, qualifying broker and all agents registered to that company being placed on inactive status.

Online Transfers

Qualifying brokers are notified by email immediately after an agent completes an online transfer of his/her license from that company followed by written notification. The law requires that licenses be returned in cases where the qualifying broker has terminated his/her status as the qualifying broker. Otherwise, licenses for transfers do not have to be returned to the Commission office as provided by the recent repeal of Rule 790-X-2-.21. ■

REMINDER: Commission's Fund Receipt Policy

In accordance with the Alabama Real Estate License Law Rule 790-X-1-.01(2), the Commission adopted the following policy that became effective November 21, 2003:

"It shall be the policy that all fees must be accompanied by the appropriate corresponding application or form for which the fees are being submitted. The amount of the fees must be exact as set out in the statute and as reflected on the most recently revised prescribed application or invoice form. Failure to comply in either case will result in the check or application/form being returned. The return will contain information regarding the specific nature of the deficiency and provide 10 business days from the date of return for receipt of the transaction to accommodate any crossed deadline."

Please be sure to submit appropriate fees, forms and licenses (if applicable) for all transactions. Failure to follow the above policy will result in the delay of processing your requests.

New Employees Join Commission Staff

We are pleased to announce and welcome the following people to the staff of the Alabama Real Estate Commission.



Connie Rembert

Connie Rembert joined the Education Division in the position of Education Assistant. Connie is relatively new to state service, having spent her career in the non-profit sector in the Blood Services Unit of the American Red Cross in Montgomery. Connie is a graduate of Auburn University of Montgomery where she received a Bachelor's in Business Administration. Connie has one son, Joseph, III.



Jamyla Genous

Jamyla Genous recently joined the staff as the Executive Assistant to the Executive Director, Philip Lasater. Jamyla has six years public service with the state of Alabama and comes to the Real Estate Commission from the Department of Rehabilitation Services. Additionally, Jamyla has worked in the Department of Public Health and the Alabama Office of the Attorney General. Jamyla is married to Minister Kevin Genous and they are the proud parents of four year old Kevin, II.



Pam Oates

Pam Oates has joined the Education Division in the role of Education Specialist. Pam holds a Bachelor's degree in Education from Troy University and a Master's degree in Education from Troy University in Montgomery. While assisting in all areas of education, Pam's primary duties are to audit real estate schools, courses and instructors throughout the state. Pam began her teaching career in Alabama's public schools in 1987 and has taught at all grade levels.



Matt Davis

Matt Davis, a graduate of Gadsden State Community College has joined the Information Technology Division in the position of computer programmer. Matt holds an associate degree in Computer Information Systems and an associate degree in Telecommunications. He has completed additional course work at Jacksonville State University. Matt and his wife Cara just celebrated their first wedding anniversary.



Molli Jones

Molli Jones has been appointed staff accountant in the Accounting Division to assist with accounting and business administration duties of the Commission. Molli has a total of twenty-one years of public service starting with the Alabama Department of Education. A graduate of Auburn University Montgomery, Molli holds a bachelor's degree in business administration. Molli who enjoys reading, camping and is married to Doug Jones. They are the parents of eleven year old Adam. ■

Disciplinary Actions...

Continued from page 7

in his possession for inspection by the commission.

Corey Demetrui Springs and Springs Realty

Qualifying Broker;
Montgomery, Alabama
Date of Hearing: October 20, 2006
Fined \$500 each for Counts 1 and 2; Licenses revoked on Count 3 and Fined \$2,500 on Count 4.

DISPOSITION

The below were found guilty for violation of Rule 790-X-3-.01 via Section 34-27-36(a)(19) for a real estate licensee to change their place of business as set out on their numbered license certificate, and to fail to notify the commission in writing within 30 days after the change.

Peter B. Jones

Qualifying Broker;
Dauphin Island, Alabama
Date of Hearing: September 15, 2006
Reprimanded

Wayne Sturgis

Qualifying Broker; Marietta, Georgia
Date of Hearing: September 15, 2006
Fined \$250

William T. McLemore

Qualifying Broker; Lebanon, Tennessee
Date of Hearing: September 15, 2006
Fined \$250

OTHER ADMINISTRATIVE ACTIONS

Determination for Licensure

Approved 21
Denied 6

Determination of Eligibility

Approved 11
Denied 6

COMPLAINTS AND INQUIRIES HANDLED BY LEGAL AND INVESTIGATIVE STAFF

From Licensees 2342
From Public 1237
Anonymous 13

Tax Rules for Foreign Investors in U.S. Real Property

By Nora S. Gunn, Senior Stakeholder Liaison, Internal Revenue Service

NOTE: This headliner is current through the publication date. Since changes may have occurred after the publication date that would affect the accuracy of this document, no guarantees are made concerning the technical accuracy after the publication date.

Headliner Volume 162, May 11, 2006

U.S. real estate licensees and rental agents/property managers are encountering an increasing number of situations that involve foreign persons, defined as persons other than U.S. persons, acquiring U.S. real property. The tax rules governing disposition of any U.S. real property interest by foreign persons vary in many ways from those that apply to U.S. persons. Understanding the tax laws is critical for real estate professionals to avoid personal liability for improper U.S. federal income tax compliance.

The disposition of a U.S. real property interest by a foreign person (transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. FIRPTA authorized the United States for the first time to tax foreign persons on disposition of U.S. Real Property Interests (USRPI).

A USRPI includes any sale of an interest in parcels of real property, as well as sale of any shares in certain U.S. corporations that are considered U.S. real property holding corporations. Any purchaser (transferee) of a USRPI from a transferor must withhold ten percent (10%) of the amount realized and remit such amount to the IRS within 20 days of the date of transfer, using Form 8288, and Form 8288-A.

The transferee of the property must determine if the transferor is a foreign person. If the transferor is a foreign person and withholding does not take place in accordance with the law, the transferee and the agent may be held liable for the tax.

There are exemptions to the withholding requirements of Internal Revenue Code section 1445. One of the most common exemptions to FIRPTA withholding is that the transferee does not have to withhold in a situation where the real property is purchased for use as a residence and the purchase price is not more than \$300,000. A listing of the exemptions from FIRPTA withholding is in IRS Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, and at IRS.gov, using "FIRPTA" as a key search word.

In certain situations, such as when the tax due on the transferor's gain from the sale is less than the withholding, the foreign transferor (or the transferee) can request from the IRS a reduction or elimination of withholding. The FIRPTA Withholding section on IRS.gov has more information about reducing the withholding rate.

Withholding on Rental Income Paid to a Foreign Person

If a foreign person owns U.S. rental property and receives rental/investment income not connected with a U.S. business, the renter must withhold a flat rate of 30% (without deductions) of the rents, unless a tax treaty provides a lower rate or an exemption. Here are some basic rules regarding withholding on rent:

- IRC section 1441 provides for the withholding of tax paid by a withholding agent to a nonresident alien on various items of income, including rental income. The person paying rent, as well as the real property manager who collects rent on behalf of a foreign owner, are considered withholding agents.
- The person making payment of U.S. source rents to a foreign person must withhold 30% unless the foreign person claims reduced withholding based on a tax treaty (W-8BEN) or makes an irrevocable election with the IRS to treat the

income as effectively connected to a U.S. trade or business (W-8EIC).

- Withholding agents must use Form 1042 and 1042S to report the tax withheld.
- The requirement to withhold 30% extends to the manager of the rental property if the tenant has not met the 30% withholding. Property managers who do not comply with these rules will be held liable for 30% of gross rent, plus penalties and interest.

Withholding Required on Certain U.S. Real Property Transactions Involving Foreign Persons, IRS Warns

FS-2005-16, September 2005

The IRS today reminds all real estate and tax professionals of the withholding tax and the filing obligations with respect to two transactions in which a foreign person disposes of a U.S. real property interest. The transactions involve the disposition by a foreign person of an option or contract to acquire a U.S. real property interest, and the disposition by a foreign corporation of a U.S. real property interest by way of a transfer to a shareholder.

Disposition of an Option or Contract to Acquire a United States Real Property Interest

Under U.S. tax law, a foreign person that sells or exchanges a U.S. real property interest must report the gain on a U.S. tax return, and the buyer of the U.S. real property interest must withhold and pay to the IRS 10 percent of the gross amount paid to the foreign person. A U.S. real property interest includes options or contracts to acquire land or land improvements and leaseholds of land or land improvements. The disposition of such an option or contract by a foreign seller is reportable on the foreign seller's U.S. tax return and is subject to a 10 percent withholding tax

payable by the buyer to the IRS. Under U.S. tax law, the buyer must determine if the seller is a foreign person. If the seller is a foreign person and the buyer fails to withhold, the buyer can be held liable for the withholding tax.

The IRS has become aware of instances in which foreign persons have acquired options or entered into contracts to purchase U.S. real property interests and sold the options or assigned the contracts before such instruments are exercised or executed and title to the underlying property is taken. Buyers of the options or contracts are failing to withhold and remit to the IRS the required 10 percent from the proceeds of the sale.

Transfer to a Shareholder

The IRS is also aware of potentially abusive transactions where a foreign corporation arranges a sale of its U.S. real property interest to a buyer and then transfers its U.S. real property interest to its foreign individual shareholder. The corporation often uses a quitclaim deed for the transfer, which conveys to the shareholder only the corporation's interest in the property and does not warrant good title, but other deed transfers may present similar issues. The foreign shareholder then sells the U.S. real property interest to the buyer. The foreign shareholder takes the position that, because he or she, rather than the corporation, is selling the property, some or all of the gain inherent in the foreign corporation's U.S. real property interest is subject to a maximum capital gains rate of 15 percent. That is, the foreign shareholder claims that the transfer of the U.S. real property interest by the foreign corporation to the shareholder does not result in a corporate level tax. If the foreign corporation had directly sold the U.S. real property interest, it could be subject to tax at a rate as high as 35 percent.

The shareholder's position is incorrect. Generally, the foreign corporation (and not the foreign individual shareholder) is taxed on all of the gain inherent in the U.S. real property interest. The transaction is treated as a taxable sale of the U.S. real property interest by the corporation, either because the corporation is making a distribution to the foreign shareholder of the U.S. real property interest (which would constitute a deemed sale of such interest at the corpo-

rate level) or because the corporation is viewed as selling the entire U.S. real property interest directly to the buyer. In cases where the foreign corporation is treated as making a distribution of the U.S. real property interest, the foreign corporation is also subject to a withholding tax of 35 percent on the gain in the property, unless it qualifies for reduced withholding.

Taxpayers may find the following publication, forms, IRS guidance and regulations helpful:

- Publication 515
- Form 8288
- Form 8288-A
- Form 8288-B
- Form W-7
- Form SS-4
- Form 1099-S
- Form 1120F
- Rev. Proc. 2000-35
- IRC Section 1445(a) and (e)
- Treasury Regulation Section 1.1445-1(b)(3)

Exceptions from FIRPTA Withholding

You do not have to withhold or file if any of the following apply.

1. You (the transferee) acquire the property for use as a home and the amount realized (sales price) is not more than \$300,000. You or a member of your family must have definite plans to reside at the property for at least 50% of the number of days the property is used by any person during each of the first two 12-month periods following the date of transfer. When counting the number of days the property is used, do not count the days the property will be vacant.
2. The property disposed of (other than certain dispositions of nonpublicly traded interests) is an interest in a domestic corporation if any class of stock of the corporation is regularly traded on an established securities market. However, if the class of stock had been held by a foreign person who beneficially owned more than 5% of the fair market value of that class at any time during the previous 5-year period, then that interest is a U.S. real property interest if the corporation qualifies as a United States Real Property Holding Corporation (USRPHC), and you must withhold on it.

3. The disposition is of an interest in a domestic corporation and that corporation furnishes you a certification stating, under penalties of perjury, that the interest is not a U.S. real property interest.

Generally, the corporation can make this certification only if the corporation was not a USRPHC during the previous 5 years (or, if shorter, the period the interest was held by its present owner), or as of the date of disposition, the interest in the corporation is not a U.S. real property interest by reason of section 897(c)(1)(B) of the Internal Revenue Code. The certification must be dated not more than 30 days before the date of transfer.

4. The transferor gives you a certification stating, under penalties of perjury, that the transferor is not a foreign person and containing the transferor's name, U.S. taxpayer identification number, and home address (or office address, in the case of an entity).
5. You receive a withholding certificate from the Internal Revenue Service that excuses withholding. Refer to Withholding Certificates.
6. The transferor gives you written notice that no recognition of any gain or loss on the transfer is required because of a nonrecognition provision in the Internal Revenue Code or a provision in a U.S. tax treaty. You must file a copy of the notice by the 20th day after the date of transfer with the Internal Revenue Service Center, P.O. Box 21086, Drop Point N-423 FIRPTA Unit, Philadelphia, PA 19114-0586. In 2007, you must file a copy of the notice by the 20th day after the date of transfer with the Internal Revenue Service Center, P.O. Box 409101, Ogden, UT 84409.
7. The amount the transferor realizes on the transfer of a U.S. real property interest is zero.
8. The property is acquired by the United States, a U.S. state or possession, a political subdivision thereof, or the District of Columbia.
9. The grantor realizes an amount on the grant or lapse of an option to acquire a U.S. real property interest. However,

(Continued on back page)

1201 Carmichael Way
Montgomery, Alabama 36106

Our Mission

To protect the public through the licensing and regulating of Real Estate licensees. (Code 34-27- Article 1, General Provisions)

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Commission Meetings Open to the Public

All Commission meetings are open to the public and that includes real estate licensees. Commissioners welcome and encourage attendance and observation by any licensee in any location. Locations, dates and times can be found on the Commission's Web site at www.arec.alabama.gov

License Renewal Dates

Real Estate licenses expire September 30, 2008. Remember to renew all broker, salesperson and company licenses in every even year.

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Tax Rules for Foreign Investors...

Continued from page 11

- you must withhold on the sale, exchange, or exercise of that option.
10. The disposition (other than certain dispositions of nonpublicly traded interests) is of publicly traded partnerships or trusts. However, if an interest in a publicly traded partnership or trust was owned by a foreign person with a greater than 5% interest at any time during the previous 5-year period, then that interest is a U.S. real property interest if the partnership or trust would otherwise qualify as a USRPHC if it were a corporation, and you must withhold on it.

Certifications

The certifications in items (3) and (4) are not effective if you have actual knowledge, or receive a notice from an agent, that they are false. If you are required by regulations to furnish a copy of the certification to the IRS and you fail to do so in the time and manner prescribed, the certifications are not effective.

Liability of agents

If you receive either of the certifications discussed in item (3) or (4) and the transferor's agent or your agent (the transferee's agent) has actual knowledge that the certification is false, or in the case of (3), that the corporation is a foreign corporation, the

agent must notify you, or the agent will be held liable for the tax. The agent's liability is limited to the amount of pay the agent gets from the transaction.

An agent is any person who represents the transferor or transferee in any negotiation with another person (or another person's agent) relating to the transaction, or in settling the transaction. A person is not treated as an agent if the person only performs one or more of the following acts related to the transaction:

- Receipt and disbursement of any part of the consideration,
- Recording of any document,
- Typing, copying, and other clerical tasks,
- Obtaining title Insurance reports and reports concerning the condition of the property, or
- Transmitting documents between the parties.

A Withholding Agent is personally liable for the full amount of FIRPTA withholding required to be withheld, plus penalties and interest. A Withholding Agent is any person having the control, receipt, custody, disposal or payment of income that is subject to withholding. Generally, the person who pays an amount to the foreign person subject to withholding, must do FIRPTA withholding.

For additional information about Tax Rules for Foreign Investors, please contact the Internal Revenue Service. ■