Chapter 3:
Real Estate Commission Position Statements[1]

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

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[1] Commission Position Statements are subject to change throughout the year. For the latest version of the Commission Position Statements, please visit: https://dre.colorado.gov/real-estate-manual-and-position-statements

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Introduction:

The Colorado Real Estate Commission Position Statements ("CPs") offer important practice related guidance to real estate practitioners. CPs are not law. CPs are, and should be, interpreted as non-binding direction on relevant laws and regulations including but not limited to the Real Estate Broker Practice Act, sections 12-10-201, C.R.S. *et seq*. and the Colorado Real Estate Commission Rules, 4 CCR 725-1. Since CPs are not law, CPs do not carry the full force and effect of laws and regulations.

When considering the nexus between statutory and regulatory interpretation, on the one hand, and the actual real estate practice, on the other hand, CPs should be read as a series of best practices in the real estate industry. For some licensees, CPs may serve as a starting point to obtain competency in a new type of real estate practice such as commercial or property management. For the general public, CPs may serve as a way to learn what to expect from the established brokerage relationship or when working with a broker who is a party to a transaction. CPs are prepared in plain language so that they are short, concise, and easy to understand.

CPs may be updated, deleted, or added from time to time by the Colorado Real Estate Commission. For practitioners of more than just a few years, those practitioners might be aware that in 2022, the Colorado Real Estate Commission updated and recodified all the CPs. At that time, the Commissioners believed that some CPs required updates, while other CPs should be deleted in their entirety due to changes in the real estate industry. These changes reflect important changes in real estate law, but also in how licensees practice real estate.

As CPs offer important insight into the real estate industry, reviewing and understanding the CPs is an important part of being a licensee. Electronic copies of current CPs can be found on the Division's website at www.dre.colorado.gov . The CPs, as of January 1 of the year of this publication can be found in the remainder of this chapter.

CP-1 Commission Position on Contracts Provided By Principals Selling Real Property

(Recodification adoption August 02, 2022: CP-1 Commission Policy on Homebuilder's Exemption from Licensing recodified to CP 1 – Contracts provided by Principals Selling Real Property)

Unlicensed individuals or entities selling real property ("Selling Principals") such as bank owned properties (REOs), homebuilders, iBuyers (Instant Buyers) and any other individual or entity identified in section 12-10-201(6)(b), C.R.S., are exempt from being licensed and, as sellers, are not required to use Commission-Approved Forms.

<u>Broker Representing Buyer</u>:

Brokers representing a buyer purchasing property from Selling Principals utilizing the Selling Principals' own contract forms are permitted to help the buyer with the transaction; however, the Broker is not permitted to advise the buyer regarding the legalities and risks associated with forms and contracts that are not Commission-Approved Forms as set forth in Rule 7.1. Brokers should advise the buyer to seek legal counsel if the buyer has questions or concerns about the Selling Principals' contract or forms.

<u>Broker Representing Selling Principals</u>:

Many Selling Principals may require the use of their own listing contract and/or sales contract forms. While use of non-Commission-Approved Listing Contracts is permitted, Brokers must also use the Commission-Approved Brokerage Duties Disclosure to Seller (REO and Non-CREC Approved

Listing Agreements). A Broker may not perform any Real Estate Brokerage Services, such as submitting information into a property exchange or multiple listing service, until they have an executed Listing Contract. Additionally, a Broker is required to perform all of the uniform, limited duties imposed by the license law and must maintain a complete transaction file as set forth in Rule 6.20. for every property in which the Broker performs Real Estate Brokerage Services on behalf of a Selling Principal.

Additionally, Brokers should advise Selling Principals that the Commission-Approved Contract to Buy and Sell Real Estate may not be appropriate to use for the sale of the Selling Principals' property. For instance, the Commission-Approved Contract to Buy and Sell Real Estate is appropriate for the purchase and sale of existing construction but should not be used when the seller is selling new, incomplete, or speculative construction. Brokers should advise Selling Principals to seek legal counsel regarding whether a contract form should be drafted specifically for the seller and/or the transaction. Brokers representing the Selling Principal may insert transaction specific information into the Client form provided the Selling Principal has given the Broker written instructions to do so as set forth in Rule 7.1.C.

Broker Acting as a Selling Principal on their own account:

Brokers acting in the capacity of a Selling Principal have a duty to disclose their License status as set forth in Rule 6.17.B. and should exercise care when buying or selling property on their own account. (*see* CP 14 – Broker Buying Property). A Broker acting as a Selling Principal outside of their Brokerage Firm may either use the Commission-Approved Forms or their own contract forms. However, a Broker acting as a Selling Principal through their Brokerage Firm must use the Commission-Approved Forms when appropriate to do so for the transaction. Brokers acting in the capacity of a Selling Principal are still under the jurisdiction of the Commission and must conduct their activity in conformance of the license law and Commission Rules. Brokers acting as a Selling Principal should also consult with their Brokerage Firm's Office Policy Manual regarding their purchase and sale of property as a principal.

CP-2 Commission Position on Broker Commissions

(Recodification adoption June 7, 2022: CP-2 Commission Position on Earned Fees recodified to CP 2 – Broker Commissions and CP 3 – RESPA and Referral Fees)

Commissions:

Section 12-10-217(1)(l), C.R.S., prohibits a Broker or Brokerage Firm from paying a commission or valuable consideration, for performing Real Estate Brokerage Services in Colorado, to any person who is not licensed as a Broker. According to Colorado case law, "negotiating" means "the act of bringing two parties together for the purpose of consummating a real estate transaction". (*see Brakhage vs. Georgetown Associates, Inc.*, 523 P2d 145 (1974)). Therefore, any unlicensed person who directly or indirectly brings a buyer/tenant and seller/landlord together for Colorado property is negotiating and would need a Colorado Broker's License to be compensated. This includes, but is not limited to, such activities as referring potential time-share purchasers to a developer or referring potential purchasers to a homebuilder.

Allowable Referral Fees Paid for Reasonable Cause:

A Broker or Brokerage Firm may pay a referral fee if reasonable cause for payment exists and is not prohibited under the Real Estate Settlement Procedures Act (RESPA). (*see* Rule 6.21. and CP 3 – RESPA and Referral Fees). Pursuant to section 12-10-304(1), C.R.S., a reasonable cause means an actual introduction of business has been made; a contractual referral fee relationship exists; or a contractual cooperative brokerage relationship exists. Section 12-10-304(2)(b)(III), C.R.S., defines a referral fee as "any fee paid by a licensee to any person or entity, other than a cooperative commission offered by a listing broker to a [Colorado] selling broker or vice versa." Brokers and

Brokerage Firms must take care not to pay a referral fee to an unlicensed person or entity performing activities requiring a License.

Referral Fees Paid to Out-of-State Brokers:

A Broker or Brokerage Firm who cooperates with a broker who is licensed in another Jurisdiction or country but is not licensed in Colorado may pay the out-of-state brokerage firm a “finder’s fee”, a “share of the commission”, or a “referral fee” when an actual introduction of business exists. The out-of-state broker must hold an active real estate license; reside and maintain an office in their Jurisdiction or county; must not perform any Real Estate Brokerage Services in Colorado; and all funds collected must be deposited into the Colorado Brokerage Firm to be distributed to the out-of-state brokerage firm. (*see* Rule 6.21.C.). If the payment is made to citizens or residents of a country which does not license real estate brokers, the payee must then represent that they are in the business of selling real estate. A referral fee must be paid to the out-of-state brokerage firm from the Colorado Brokerage Firm and may not be paid directly to the out-of-state brokerage firm from the closing. However, the Colorado Brokerage Firm may direct the closing company (e.g., title company or attorney) to pay the referral fee directly to the out-out-state brokerage firm provided that the settlement statement accurately discloses the Colorado Brokerage Firm as the recipient of all commissions and a properly executed commission disbursement instrument is retained in the transaction file as set forth in Rule 6.20.

Administrative Fees:

As a result of the United States Supreme Court’s decision in Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034 (2012), Brokerage Firms may charge administrative fees, either for services performed by the Broker or the Brokerage Firm, in addition to the Brokerage Firm’s commission. The Supreme Court held that while RESPA prohibits the splitting of fees if the charges are divided between two or more persons (i.e., settlement service providers); dividing or splitting fees amongst a single settlement service provider is not prohibited. A Broker and their Employing Broker or Brokerage Firm is considered a single provider of settlement services and fees may be split amongst them.

CP-3 Commission Position on RESPA and Referral Fees

(Recodification adoption June 7, 2022: CP-2 Commission Position on Earned Fees recodified to CP 2 – Broker Commissions and CP 3 – RESPA and Referral Fees)

Section 8 of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* (RESPA) and certain provisions of 12 CFR § 1024 (Regulation X) are complex and nuanced regulations. If found in violation of any of the provisions, a person may face penalties including fines up to $10,000, imprisonment for not more than one year, or both. Brokers should consult with their Employing Broker, Supervisory Broker, or legal counsel prior to offering any referral fees to unlicensed persons. Additionally, under Colorado law, paying a referral fee requires both compliance with RESPA and reasonable cause for payment of the referral fee. (*see* C.R.S. § 12-10-304(1) and CP 2 – Broker Commissions). Brokers or Brokerage Firms who pay or receive a prohibited referral fee in violation of RESPA Section 8(a) or 8(b) would also be considered in violation of section 12-10-304, C.R.S., and Rule 6.21. Moreover, section 12-10-217(10), C.R.S., requires the Division to refer such matters to the Consumer Financial Protection Bureau (CFPB) for investigation as a potential violation of RESPA.

Applicable Sections of RESPA and Regulation X:

RESPA Section 8(a) prohibits kickbacks for business referrals involving a federally related residential mortgage loan as defined in 12 CFR § 1024.2(b)(9). Brokers are prohibited from giving and/or accepting kickbacks (e.g., cash or other “things of value” as defined in RESPA, 12 U.S.C. 2602(2)) pursuant to any agreement or understanding to refer settlement service business or business incident

to a real estate settlement service provider in connection with those loans. (*see* 12 USC § 2607(a) and 12 CFR § 1024.14(b)).

RESPA Section 8(b) prohibits unearned fee arrangements (i.e., splitting charges made or received for settlement services, except for services actually performed, in connection with federally related residential mortgage loan transactions). (*see* 12 USC § 2607(b) and 12 CFR § 1024.14(c)).

RESPA Section 8© identifies certain payments that are not prohibited by Section 8 (e.g., Brokerage Firm to Brokerage Firm referrals). (*see* 12 USC § 2607© and 12 CFR § 1024.14(g)).

Appendix B to Regulation X provides examples to illustrate the application of RESPA to fact patterns under Section 8(a), 8(b), and 8(c) indicating whether or not a violation occurred. (*see* Appendix B to 12 CFR § 1024).

RESPA Section 8(d) details specific penalties for violations of Section 8(a) and 8(b). (*see* 12 USC § 2607(d)).

<u>Referral Fees in Connection with Non-Federally Related Residential Mortgage Loan Transactions</u>:

Regulation X, 12 CFR § 1024.5, provides exemptions to the coverage of RESPA. Section 8 does not apply to business purpose loans, temporary financing, vacant land, assumption without lender approval, loan conversions, and secondary market transactions. In such transactions, a Broker or Brokerage Firm may accept or distribute, directly or indirectly, a placement fee, commission, or other thing of value for referring a settlement service provider so long as the Broker or Brokerage Firm first discloses in writing such compensation to whomever the Broker or Brokerage Firm is referring at the time of making such referral. (*see* Rule 6.21.B.2.). Likewise, for such exempt transactions, the Broker or Brokerage Firm may pay an unlicensed individual or real estate broker with an inactive or expired license a referral fee so long as reasonable cause for payment of the referral fee exists. (*see* CP 2 – Broker Commissions). Many transactions that appear exempt under Regulation X and/or 12 CFR § 1024.5 may not actually be exempt. Brokers and Brokerage Firms are advised to seek legal counsel specializing in RESPA before making any such referral payments under the exemptions.

<u>Brokerage Firm to Brokerage Firm</u>:

Since making and, in the case of a RESPA transaction, receiving a referral requires an active real estate broker license, all referral agreements must be entered into between the Brokers' respective Brokerage Firms at the time the referral is made. Additionally, any referral compensation must be paid to the Broker by the Brokerage Firm the Broker was affiliated with at the time of the referral. However, payment of a referral fee to a Broker that has moved Brokerage Firms by the Broker's previous Brokerage Firm is not prohibited. (*see* CP 7 – Assigning Listing Contracts, Relationships and Commissions). Likewise, if the Broker receiving the referral moves Brokerage Firms and the Broker's previous Brokerage Firm permits the Broker to continue working with the referred client, the obligation to pay the referral fee may be assigned to the Broker's new Brokerage Firm. In the case of an exempt transaction (i.e., a non-federally related residential mortgage loan transaction), a referral fee may be paid directly to an unlicensed individual or real estate broker with an inactive or expired license so long as the compensation was properly disclosed in writing.

<u>Marketing Service Agreements</u>:

Marketing Services Agreements (MSAs) are agreements that commonly involve an arrangement where one person or entity agrees to market or promote the services of another and receives compensation in return. MSAs that involve payments for referrals are prohibited under RESPA Section 8(a), whereas MSAs that involve payments for marketing services may be permitted under RESPA Section 8(c)(2), based on the facts and circumstances of the structure and implementation of the agreement.

Brokers or Brokerage Firms contemplating entering into an MSA should take care prior to entering into an MSA as the agreements remain a subject of scrutiny with the CFPB and they remain committed to vigorous enforcement of RESPA Section 8. Ultimately, the determination of whether an MSA itself or the payments or conduct under an MSA is lawful depends on whether it violates the prohibitions under RESPA Section 8(a) or RESPA Section 8(b) or is permitted under RESPA Section 8(c). The analysis under RESPA Section 8 depends on the facts and circumstances, including the specific details of the MSA and how it is both structured, implemented, and documented as well as scrutiny regarding the underlying intent (e.g., is the MSA merely a structure for providing illegal referrals).

CP-4 Commission Position on Broker's Payment or Rebating a Portion of an Earned Commission

(Recodification adoption June 7, 2022: CP-12 Commission Position on the Broker's Payment or Rebating a Portion of an Earned Commission recodified to CP 4 – Broker's Payment or Rebating a Portion of an Earned Commission)

The license law forbids a Broker from paying a commission or valuable consideration for performing Real Estate Brokerage Services to any person who is not licensed as a Broker. (*see* CP 2 – Broker Commissions). However, rebating a portion of a Brokerage Firm's earned commission to the Consumer with whom the Broker has a working Brokerage Relationship is not prohibited.

In a Listing Contract with a Consumer, the Broker and Brokerage Firm are principal parties to the contract and the consideration offered by the Broker and Brokerage Firm is the Real Estate Brokerage Services. The Broker may add to this consideration the payment of money or other concession to the seller or buyer to secure the listing. This is not a violation of the license law. Additionally, RESPA Section 8 does not prohibit a Broker or other settlement service provider from giving a Consumer a gift or an incentive (e.g., a discount, refund of fees, chance to win a prize) for doing business with that entity and not conditioned on any referral of business. (*see* CP 3 – RESPA and Referral Fees).

<u>Seller</u>:

A Broker representing a seller in a transaction may rebate a portion of the commission to the seller. This is merely a reduction in the amount of the earned commission and does not violate the license law or RESPA. If the rebate to the seller is being offered only if the seller purchases another property, then the rebate would normally be given at the time of closing on the property being sold by that seller. Otherwise, if the rebate is to be paid upon closing of the property the seller is purchasing, the rebate must comply with the requirements for rebating to the buyer as stated below.

<u>Buyer</u>:

Payment to the buyer is often referred to as "rebating" and the intention to pay money to the buyer is sometimes advertised and promoted as a sales inducement. The payment to the buyer and the advertising of the inducement is not a violation of the license law or RESPA. However, any money rebated to a buyer who is obtaining financing must be disclosed to the lender, included on the settlement statement, and approved by the lender. Money rebated to a buyer that is not disclosed and approved by the lender may constitute loan fraud. Brokers and Brokerage Firms are advised to set forth the terms of the rebate in a written document (e.g., Buyer Listing Contract). Terms should include: the amount of the rebate, whether the rebate will either be disbursed as cash to the buyer or used towards closing costs, the rebate is contingent on lender approval, the rebate amount will be disclosed on the settlement statement and notice that a portion and/or all of the rebates will not be paid out to the buyer if disallowed by the buyer's lender. Under no circumstances should a rebate be paid "outside of closing."

Gratuitous Gifts:

Gratuitous gifts to a seller or buyer after closing and not promised or offered as an inducement to buy or as a referral of business (*see* CP 3 – RESPA and Referral Fees) would also be allowed (e.g., a door knocker, housewarming plant, cleaning services, or dinner) as marketing. Such gifts would not require disclosure and consent.

CP-5 Commission Position on Interest Bearing Trust or Escrow Account

(Recodification adoption June 7, 2022: CP-4 Commission Position on Interest Bearing Trust Accounts recodified to CP 5 – Interest Bearing Trust or Escrow Accounts)

Section 12-10-217(1)(i), C.R.S., requires Brokers to place Money Belonging to Others in a Trust or Escrow Account with a Recognized Depository and permits the type of account to be interest bearing. The Commission has taken the position that in the absence of a specific written agreement to the contrary, any interest accumulating on a Brokerage Firm's Trust or Escrow Account does not belong to the Brokerage Firm. The position is based upon section 12-10-217(1)(h), (i) and (t), C.R.S., and Rule 5.17. which prohibits a Broker or Brokerage Firm from taking any secret or undisclosed amount of compensation, commission, or profit, and establish the protocols for how a Broker must handle the funds of another.

Earnest Money:

Contracts calling for earnest money deposits or other payments that accrue interest should contain a provision specifying which party is entitled to interest earned and under what conditions. The Commission-Approved Contract to Buy and Sell Real Estate provides that all interest may be paid to a fund established for affordable housing (e.g., Colorado Association of REALTORS® Foundation) if the earnest money holder has agreed to do so.

Money Belonging to Others Received by a Brokerage Firm for Property Management:

If interest will accrue on Money Belonging to Others received by the Brokerage Firm for Property Management, the Brokerage Firm's Management Agreement must contain a provision specifying who is entitled to interest earned and under what conditions relating to both the rental receipts and tenant's security deposits. Additionally, the lease agreement must contain a similar provision addressing interest earned on the security deposit. (Note: Some cities and counties mandate a set interest rate to be earned for a tenant's security deposit.)

Any interest income accrued in the Property Management Trust and Escrow Accounts must be accounted for as set forth in Rule 5.14.

CP-6 Commission Position on Release of Earnest Money Deposits

(Recodification adoption June 7, 2022: CP-6 Commission Position on Release of Earnest Money Deposits recodified to CP 6 – Release of Earnest Money Deposits)

The Commission will not pursue disciplinary action against a Brokerage Firm for refusal to disburse disputed funds when the Brokerage Firm is acting in accordance with the terms and provisions of the contract.

Brokerage Firm Holding Earnest Money Deposits:

In the Commission-Approved Contract to Buy and Sell Real Estate, a Brokerage Firm, if selected by the parties, holds the earnest money on behalf of both buyer and seller. If there is no dispute as to the disposition of the earnest money, the Brokerage Firm should disburse funds as directed by the parties within a timely manner.

Some Brokerage Firms unnecessarily require a signed release by both parties even when there is no disagreement as to the distribution of an earnest money deposit. Audits have disclosed many instances

where Brokerage Firms have held earnest money deposits for extended periods of time because one or both parties will not sign a release. While good judgment is always encouraged, releases are not required by the Commission. In addition, when one party has given written authorization to release an earnest money deposit to the other party, a written release by the other party is not required.

Exculpatory provisions in releases holding the Brokerage Firm harmless or otherwise relieving the Brokerage Firm of liability are prohibited as set forth in Rule 7.4. Unless otherwise stated in the contract, a Brokerage Firm is not required to take any action, other than as specified in the contract when there is a controversy regarding the release of an earnest money deposit.

Unclaimed Earnest Money Deposits:

If the Brokerage Firm is unable to locate the party entitled to a distribution of an earnest money deposit, the Brokerage Firm may be required to transfer the earnest money deposit to the Colorado State Treasurer after proper notice under the provisions of Colorado's Unclaimed Property Act found at section 38-13-101 et seq., C.R.S. Further information and reporting forms may be obtained from that office.

Third Parties Holding Earnest Money Deposits:

If an earnest money deposit is held by a third party (e.g., a title company or attorney), the Brokerage Firm is not responsible for the disposition of the earnest money deposit.

CP-7 Commission Position on Assigning Listing Contracts, Relationships and Commissions

(Recodification adoption June 7, 2022: CP-8 Commission Position on Assignment of Contracts and Escrowed Funds recodified to CP 7 – Assigning Listing Contracts, Relationships and Commissions)

While all Listing Contracts, relationships with Consumers and the subsequent commissions for those transactions are owned by the Brokerage Firm, there are circumstances when it is appropriate for these Listing Contracts, relationships, and commissions to be transferred to another Brokerage Firm.

Whether a Listing Contract, relationship, or commission may be assigned from a Brokerage Firm to another Brokerage Firm is largely dependent on the original Brokerage Firm's Office Policy Manual and consent. This Position Statement offers guidance to how a Brokerage Firm may prohibit or restrict any/all assignments of Listing Contracts, relationships, or rights to commission.

Listing Contracts:

Listing Contracts are contracts entered into between a Brokerage Firm and a Consumer. It is the Brokerage Firm rather than the Designated Broker that has the rights within the Listing Contracts. A Brokerage Firm may assign Listing Contracts to another Brokerage Firm under the following conditions: 1) the Consumer who signed the Listing Contract must consent, in writing, to the transfer from one Brokerage Firm to another (Although a Listing Contract (i.e., Property Management) that contains an assignment provision would not necessarily require consent by the Consumer, it is recommended to obtain written consent); 2) the original Brokerage Firm must execute an assignment transferring its rights in the Listing Contract to the new Brokerage Firm; and 3) the new Brokerage Firm must accept the assignment, in writing. As an alternative, the original Brokerage Firm may terminate the Listing Contract with the consent of Consumer and the new Brokerage Firm can execute a new Listing Contract with the Consumer.

For Listing Contracts involving Property Management, assignments should also include an assignment of any applicable Trust or Escrow Account funds and the new Brokerage Firm must disclose to the owner and tenant, in writing, the status of any security deposit, including the amount of the security deposit and confirmation of receipt of the funds, within thirty (30) days after signing of the Management Agreement as set forth in Rule 5.8.B.

It is not sufficient to use the Commission-Approved Listing Contract Amend/Extend to transfer Listing Contracts between Brokerage Firms unless authorized signors from both Brokerage Firms as well as the Consumer execute such Commission-Approved Listing Contract Amend/Extend. Additionally, MLS authorizations are generally insufficient as they may not properly assign the Listing Contracts from one Brokerage Firm to another.

Under Contract:

Once a Consumer is under contract to purchase or sell a property, the commission to the Brokerage Firm is contingent upon closing. If the original Brokerage Firm consents to an assignment of the Listing Contract and commission, the exiting Broker may continue to represent the Consumer and perform all Real Estate Brokerage Services through the new Brokerage Firm. However, the original Brokerage Firm may still be liable for acts of the Broker prior to the execution of the assignment. The exiting Broker may be paid a commission from the new Brokerage Firm in conjunction with the terms of the assignment and the compensation agreement with the new Brokerage Firm. Conversely, if the original Brokerage Firm declines to assign the Listing Contract and commission, such Brokerage Firm must designate another Broker to perform Real Estate Brokerage Services for the Consumer through consummation of the transaction. The exiting Broker may continue to communicate with the Consumer with the express knowledge and consent of the original Brokerage Firm pursuant to section 12-10-217(1)(f), C.R.S. The exiting Broker may be paid an agreed upon commission directly from the original Brokerage Firm as set forth in Rule 3.14.B.

CP-8 Commission Position on Compensation and Assignment of Commission

(Recodification adoption June 7, 2022: CP-10 Commission Position on Compensation Agreements Between Employing and Employed Brokers and CP-11 Commission Position on Assignments of Broker’s Rights to a Commission and CP-18 Commission Position on Payments to a Wholly Owned Employee’s Corporation recodified to CP 8 – Compensation and Assignment of Commission)

All Commission Paid to Broker’s Brokerage Firm:

Pursuant to section 12-10-221, C.R.S., a Broker may not accept a commission or valuable consideration for performing any Real Estate Brokerage Services except from the Broker’s Brokerage Firm. The Brokerage Firm may allocate any earned commission amongst any Brokers within the Brokerage Firm as set forth in its compensation agreements and/or Office Policy Manual.

Commissions Assigned to Broker’s Entity:

Brokerage Firms and Brokers typically execute some form of a compensation agreement which enumerates the commission sharing arrangements between the parties for performing Real Estate Brokerage Services. The Commission receives frequent inquiries relating to the payment of commissions or fees pursuant to a compensation agreement by the Brokerage Firm to an entity that is wholly owned by a Broker. Section 12-10-203(8), C.R.S., prohibits Brokers from being licensed as an entity and section 12-10-203(9), C.R.S., requires a Broker to conduct or promote Real Estate Brokerage Services only under the name which the Broker is licensed.

However, a Brokerage Firm may make payment of earned commissions and fees to an entity owned by a Broker without violating the license law. Such entity must be wholly owned by the Broker or any Brokers that are acting as a Team. To properly pay any such entity, the Broker(s) must assign all interest in commissions to their entity.

Such arrangements do not relieve the Brokerage Firm of any duty to supervise the Broker or any other requirement of the license law and Commission Rules. Additionally, such arrangements do not relieve the Broker personally from civil responsibility for any Real Estate Brokerage Services by assigning the Broker’s commission to an entity.

Compensation Disputes between Broker and Brokerage Firm:

Regarding a Broker's claim for compensation from a Brokerage Firm, the Commission has no legal authority to render a monetary judgment in a money dispute nor will it arbitrate such a matter. A Brokerage Firm's failure to pay a Broker does not constitute a violation of the license law. The Commission's position is:

1. A Broker is an "employee" of the Brokerage Firm under license law.
2. A Broker may not accept a commission or valuable consideration for Real Estate Brokerage Services except from their Brokerage Firm pursuant to section 12-10-221, C.R.S.
3. A commission or compensation paid to the Brokerage Firm in the performance of Real Estate Brokerage Services is money belonging to the Brokerage Firm and is not Money Belonging to Others as defined in sections 12-10-217(1)(h) and (i), C.R.S. and Rule 1.34.
4. A claim by a Broker for money allegedly owed by a Brokerage Firm should be decided by the civil courts or through arbitration based on the compensation agreements, Office Policy Manual, or quantum meruit.
5. A Brokerage Firm pays their licensed or unlicensed "employees" pursuant to an oral (not recommended) or written compensation agreement.

CP-9 Commission Position on Working With a For Sale By Owner (FSBO)

(Recodification adoption June 7, 2022: CP-13 Commission Policy on Single-Party Listings recodified to CP 9 – Working with a For Sale by Owner)

Representing a Buyer Interested in a FSBO:

Brokers representing a buyer who engage an owner with a property for sale by owner should have an open and frank discussion with their client on how they would like to move forward with a possible purchase offer prior to contacting the owner for a showing. The Broker should review the Listing Contract with the buyer, specifically Section 7 titled Compensation to Brokerage Firm, and how it applies in those circumstances. The Broker should also discuss any potential implications of the Brokerage Relationship with the buyer when entering into a Listing Contract with the owner, such as changing the Brokerage Relationship with the buyer by completing the Change of Status Form if applicable or in the alternative treating the owner as a Customer. (Note: The ability to be able to submit a Change of Status form will be dictated by how the buyer Listing Contract was executed in Section 4.3.).

Treating the Owner of a FSBO as a Customer:

A Broker representing a buyer may also decide to treat the owner as a Customer for the purchase of the owner's property. If the owner is offering a cooperating success fee, the Broker should have a written compensation agreement executed with the owner of the property. The compensation agreement should specify the success fee to be paid to the Brokerage Firm upon successful closing of the transaction. The Broker must properly disclose the working relationship with the owner by giving the Commission-Approved Brokerage Disclosure to Seller and checking the box indicating that the Broker will be treating the owner as a Customer. While there is no Brokerage Relationship with the owner, the Broker may perform ministerial tasks as set forth in Rule 6.8. to include showing the property, preparing, and conveying written offers, counteroffers, and agreements to amend or extend the contract.

Single-Party Listing with an Owner of a FSBO:

A Broker may secure a single-party Listing Contract with the unrepresented owner when the Broker believes they have a buyer interested in purchasing the property. The listing period is typically for

only a few days and is limited to only one buyer while the Broker works with that buyer to submit the Commission-Approved Contract to Buy and Sell Real Estate.

If the Broker chooses to request a single-party Listing Contract, the Broker must explain the terms and conditions of the Listing Contract fully to the owner. For instance, the owner may not realize that if the owner signs a Listing Contract with another Broker, the owner may become liable for the payment of two commissions for the same buyer.

Open House of a FSBO Property:

A Broker who contemplates holding an open house for an owner not represented by a Brokerage Firm to assist the owner in securing a buyer for their property or for purposes of prospecting future clients should take care not to violate the license law. A Broker needs to have a discussion on Brokerage Relationships with the owner and the options available to the owner for holding an open house. The Broker and owner may decide to enter into a short-term (i.e., 48 hours) seller Listing Contract. On the other hand, the Broker may decide to treat the owner as a Customer.

If entering into a short-term seller Listing Contract with the owner, the Broker should discuss the terms of the holdover period and that the Broker will provide a written list of prospects to the owner that the Broker negotiated with during the listing period. The Broker must perform all the uniform duties which includes presenting all offers even if the offer is from a buyer who has a Brokerage Relationship with another Broker during the listing period. Should Broker elect to establish an agent relationship with the owner, Broker will be required to perform the additional duties of seller's Agent as outlined in Section 6 of the Listing Contract in addition to the uniform duties.

If the Broker will be treating the owner as a Customer during the open house, the Broker must give the Commission-Approved Brokerage Disclosure to Seller indicating that the Broker will be treating the owner as a Customer. The Broker must take care not to engage in any Real Estate Brokerage Services for the owner and may only perform ministerial tasks as set forth in Rule 6.8 and/or Advertise the property as set forth in Rule 6.10.F.2. Additionally, the Broker must disclose to all prospective buyers that the Broker is not representing the owner. For those buyers that are not working with another Broker, the Broker must provide the Commission-Approved Brokerage Disclosure to Buyer stating that they will be acting as a Transaction-Broker for the buyer. Alternatively, the Broker may also execute a Listing Contract with the buyer and establish either an Agent or Transaction-Broker relationship.

Advertising a FSBO:

A Broker who Advertises property for an owner who is not represented by a Brokerage Firm must have the owner's written permission and disclose in a conspicuous manner that the owner is not represented by a Broker as set forth in Rule 6.10.F.2. The dissemination of the owner's Advertising cannot include submitting the information into a property exchange or multiple listing service.

CP-10 Commission Position on Sale of Manufactured Homes By Brokers

(Recodification adoption June 7, 2022: CP-14 Commission Position on Sale of Modular Homes by Licensees recodified to CP 10 – Sale of Manufactured Homes by Brokers)

With some exceptions, Colorado law requires any third party selling manufactured homes as defined in section 24-32-3302(20), C.R.S., must be registered with the Division of Housing within the Colorado Department of Local Affairs.

One such exemption applies to Brokers selling manufactured homes when the sale of the manufactured home includes the "negotiation" of real property. This means the sale of the manufactured home must accompany the sale of real property not owned by the Broker or the sale of the manufactured home involves the transfer or signing of a lease for real property. (*see* C.R.S. § 24-32-3323(4)(b)). This exemption is commonly referred to as the Broker exemption.

For the purposes of the Broker exemption, depending on the circumstances of the transactions, "negotiation" includes:

- Conveying the terms of the sale to the buyer or seller (i.e., a manufactured home and land);
- Conveying the terms of the current lease to the buyer;
- Conveying the terms of the property owner's new lease to the buyer;
- Aiding the buyer with signing a new lease with the property owner; or
- Aiding the seller with the termination of their existing lease.

This exemption does not permit a Broker to sell manufactured homes for third party owners, builders, or park owners where the buyer will be purchasing a manufactured home with no real property or lease included. Transactions without the involvement of real property require the Broker to be registered as a dealer with the Division of Housing.

For manufactured home transactions permitted to be performed by Brokers, the Commission has approved several forms for use by Brokers. These Commission-Approved Forms include:

- Manufactured Home Addendum – for use when the sale of the manufactured home includes the sale of real property.
- Manufactured Home Contract, Counterproposal and Amend/Extend – for use when the sale of the manufactured home includes a lease for real property.

Manufactured home transactions are very different from traditional residential real estate transactions. As such, Brokers participating in such transactions need to ensure they are competent to do so as set forth in Rule 6.2.

CP-11 Commission Position on Sale of Items Other Than Real Estate

(Recodification adoption June 7, 2022: CP-15 Commission Position on Sale of Items Other Than Real Estate recodified to CP 11 – Sale of Items Other Than Real Estate)

Some real estate transactions may include the sale of personal property. A seller may include personal property to consummate the sale of the real estate transaction. This may cause complications with the buyer's financing that could result in both appraisal concerns and the reduction in the mortgage amount. The lender may deduct the value of the personal property from the lesser of the sales price or appraised value of the real property.

For instance, some real property may be advertised as "fully furnished" meaning that the transaction is to include personal property (e.g., furniture, artwork, pool table, hot tub, tractor, etc.) that resides and will transfer with the property as a condition of the sale. While including personal property as part of a real estate transaction is permissible, Brokers must be careful in how they structure these transactions as to not violate federal, state, or local laws particularly if the buyer is getting a loan.

In some of these transactions (particularly when the buyer is getting a loan), Brokers may be improperly advised to omit the personal property from the Commission-Approved Contract to Buy and Sell Real Estate and handle the personal property "outside of closing." Sometimes, Brokers are advised to leave the personal property in the Commission-Approved Contract to Buy and Sell Real

Estate, but claim the personal property has “zero value” or is being left “for the seller’s convenience”. Handling personal property in this manner may have an adverse impact on the Broker’s buyer client and might constitute loan fraud or another criminal violation under federal and state law.

When the buyer is purchasing personal property with the real property and the buyer’s lender expresses concerns about the personal property remaining part of the real estate contract, the best practice is for the Broker to utilize the Commission-Approved Personal Property Agreement and check the appropriate box in the Commission-Approved Contract to Buy and Sell Real Estate disclosing that the full agreement between the buyer and seller includes a separate Commission-Approved Personal Property Agreement. When using the Commission-Approved Personal Property Agreement, the purchase price for the personal property must be paid by the buyer separately from the real property purchase at closing and must be for a fair market value. Brokers should not determine fair market value. The purchase price for the personal property cannot be for $0 or some unrealistic amount. Doing so may also constitute loan fraud or another criminal violation.

In transactions involving personal property, buyers and sellers should be advised that the personal property may be subject to sales and use tax. If the sales and use tax is not collected or paid at closing (which is typical), the buyer and seller should be advised that the responsible party may be obligated to pay the sales and use tax after closing.

Additionally, for transactions utilizing the Commission-Approved Personal Property Agreement, any personal property paid for separate from the real property closing should not be included on the Real Property Transfer Declaration as the personal property was not part of the real property purchase price.

CP-12 Commission Position on Short-Term Rentals

(Recodification adoption June 7, 2022: CP-19 Commission Position on Short Term Occupancy Agreements recodified to CP 12 – Short Term Rentals)

Short-Term Rentals:

A short-term rental is typically a furnished residential property (e.g., apartment, townhome, condo, or house) that is suitable or intended for occupancy for dwelling, sleeping, and lodging purposes, and is available to be rented for a short period of time. A short-term rental is considered an alternative to a hotel where the guest may feel more at home.

License vs. Lease:

A short-term rental or occupancy agreement can be distinguished from a lease in that a short-term rental or occupancy is a license to use property and is not considered Real Estate Brokerage Services. An example of a license to use property would be a hotel reservation where an individual is allowed to use the property but has no rights to it. Conversely, a lease creates an exclusive interest in the property requiring judicial action to extinguish that interest. If the parties follow the terms of the lease, the lease may not be revoked prior to the agreed-upon expiration date. A license to use, on the other hand, allows the owner to have significantly more control over how the property is used and can revoke the license and have the guest removed for violating the terms of the license.

Another characteristic of a short-term rental or occupancy in Colorado is the responsibility of collecting and remitting sales tax to the Colorado Department of Revenue. Dependent on the local jurisdiction where the property is located, the owner may also need to obtain a business license, a lodger’s tax license, a short-term permit, and collect and remit additional county or city sales taxes. Taxes are generally collected from guests for rental periods of 30 days or less. While taxing authorities consider rental periods of 30 days or less as short-term rentals, stays longer than 30 days are not automatically considered a lease. While length of stay is one consideration in determining a lease versus a license, other factors to consider include the regular use of the property, the agreement between the parties, the user’s expectation of privacy, the conveyance of rights to the property, and

how much control the owner has over certain aspects of a guest's conduct. As such, if a property is regularly marketed and used as a short-term rental and a guest books a property for a period longer than 30 days this may not necessarily convert a license into a lease.

CP-13 Commission Position on Office Policy Manuals

(Recodification adoption June 7, 2022: CP-21 Commission Position on Office Policy Manuals and CP-22 Commission Position Statement on Handling of Confidential Information in Real Estate Brokerage recodified to CP 13 – Office Policy Manuals)

Rule 6.4. specifies certain requirements for an Office Policy Manual. Additionally, Rule 6.3. sets forth Employing Broker's responsibilities regarding supervision. This Commission Position Statement sets forth what policies are required and what policies should be considered by Brokerage Firms.

1. **Personal Identifying Information ("PII")**. Pursuant to Colorado law, all Brokerage Firms, Independent Brokers, and any Brokers utilizing documents that contain PII must exercise care with the maintenance and destruction of these documents.

    a. Section 6-1-713(2)(b), C.R.S. defines PII as the following:

        i. a social security number,

        ii. a personal identification number,

        iii. a password,

        iv. a pass code,

        v. an official state or government-issued driver's license or identification card,

        vi. a government passport number,

        vii. biometric data as defined in section 6-1-716(1)(a), C.R.S.,

        viii. an employer, student, or military identification number, or

        ix. financial transaction device as defined in section 18-5-701, C.R.S.

    b. Must have the following policies and procedures:

        i. procedures and practices for the reasonably secure maintenance and protection of PII. (*see* C.R.S. § 6-1-713.5).

        ii. procedures for the destruction or proper disposal of paper or electronic records by shredding, erasing, or otherwise modifying the following information to make it unreadable or indecipherable through any means.

        iii. procedures and practices for the identification and notification of a security breach of PII. (*see* C.R.S. § 6-1-716).

    c. A Broker who fails to protect or properly destroy PII may be found to be unworthy or incompetent. If a Broker has been found to have violated any provision of the Colorado Consumer Protection Act, the Commission may also discipline the Broker pursuant to section 12-10-217(1)(d), C.R.S.

2. **Brokerage Relationships**. All Employing and Independent Brokers must adopt a written policy identifying and describing the working relationships (i.e., Transaction-Broker, seller agent, buyer agent, landlord agent, and/or tenant agent) offered by the Brokerage Firm or Independent Broker in any transactions conducted by the Brokerage Firm or the Independent Broker. (*see* Rule 6.4.A.).

3. **Confidentiality**. Brokerage Firms with an Employing Broker and at least one Associate Broker must have a written office policy that identifies and provides adequate means and procedures for the maintenance and protection of confidential information as defined in Rule 6.4.B.4. Example of procedures for the maintenance and protection of

confidential information may include locked transaction files or no confidential information in transaction files.

a. Brokers should exercise care to prevent inadvertent disclosure of confidential information. Situations where inadvertent disclosure may occur, include, but are not limited to:

i. sales meetings or marketing sessions,

ii. shared fax or copy machines,

iii. shared computer networks, printers, and file directories,

iv. in-office mailboxes,

v. handwritten telephone messages,

vi. phone conversations or meetings with clients,

vii. documents relating to relocation, divorce, pending foreclosure, and other sensitive documents left unsecure on a computer or desk,

viii. conversations with affiliated business providers,

ix. production boards, and

x. social functions.

b. An Associate Broker is permitted to share confidential information with an Employing Broker or Supervisory Broker without changing or extending the Brokerage Relationship beyond the Designated Broker.

4. **Additional Required Office Policies**. For Brokerage Firms with an Employing Broker and at least one Associate Broker, the Brokerage Firm's written office policies must include:

a. how the Employing Broker and/or Associate Broker(s) are designated, in writing, as a Designated Broker for each Consumer consistent with the Brokerage Firm's Brokerage Relationship policy in #2 above.

b. permit the Employing Broker to supervise transactions in which the Employing Broker is also a Designated Broker in the same transaction.

c. Brokerage Firms with Trust and Escrow Account(s) must have a written policy regarding accounting controls to ensure adequate checks and balances over the accounts as set forth in Rule 5.1.

5. **Recommended Office Policies**. While office policies on the following topics are not required under Colorado law, they are highly recommended for Brokerage Firms with Associate Brokers:

a. property listing procedures, including release of listings

b. review of contracts

c. handling of earnest money deposits, including release of earnest money

d. back-up contracts

e. closings

f. owner financing and non-qualifying assumptions

g. guaranteed buyouts

h. investor purchases

i. Associate Brokers' personal purchase and sale of property

j. monitoring of license renewals and transfers

k. delegation of authority for additional supervisors

l. property management

m. training
   i. dissemination of information
   ii. sales meetings
n. use of real estate administrative professionals
o. fair housing
p. listing syndication
   i. brokerage participation
   ii. entry and maintenance of information
q. performance of and compensation for non-Real Estate Brokerage Services (i.e., broker price opinions, short-term rentals, broker owned rentals, etc.)
r. Trust and Escrow Account requirements for activities not involving Real Estate Brokerage Services as set forth in Rule 5.11.

Brokerage Firms are encouraged to add other office policies as appropriate to their area of practice. If one or several of these suggested topics (e.g., guaranteed buyouts) are not applicable in a particular Brokerage Firm, it is recommended that the policy should still be addressed by stating that the Brokerage Firm does not participate in that activity.

6. **Other Office Policies**. While Brokerage Firms are permitted to add other office policies, such as office policies on commission disputes and independent contractor agreements, the Commission may not have jurisdiction over the enforcement or interpretation of such office policies.

7. **Requirements for Brokerage Firms**. For Brokerage Firms with an Employing Broker and at least one Associate Broker, the Brokerage Firm's policies must:

   a. apply to all Associate Brokers in the Brokerage Firm, and
   b. be given to, and each Associate Broker must sign that they received, the Office Policy Manual.

CP-14 Commission Position on Broker Buying Property

(Recodification adoption June 7, 2022: CP-23 Commission Position on Use of "Licensee Buyout Addendum" and CP-35 Commission Position on Brokers as Principals recodified to CP 14 – Broker Buying Property)

Brokers act in the capacity of a principal when buying or selling real property for their own personal use or investment. Brokers should exercise care when acting as a principal in a transaction, both when buying or selling real property on their own account and when entering a contract to purchase a property where the Broker is the Broker on a Listing Contract working with the seller.

<u>Brokers as Principals</u>:

Even though a Broker acting as a principal in negotiating the sale or purchase of real estate for their own personal use or investment may not include providing Real Estate Brokerage Services, the Broker is under the jurisdiction of the Commission and must conduct their activity in conformance with the license law and Commission Rules. The Commission commonly receives complaints against Brokers who are acting as principals transactions, alleging the Broker failed to disclose an adverse material fact; failed to disclose Brokerage Relationships; failed to ensure that the contract documents and/or settlement statement were accurate; filed a document that unlawfully clouds the title to the property; failed to disclose the Broker's License status; mismanaged Money Belonging to Others; or falsified information used for the purpose of obtaining financing (including their intent to occupy the property as a primary residence or not).

The Commission's jurisdiction to discipline a Broker who violates the license law while acting in the capacity of a principal in a real estate transaction. Was determined by the Colorado Court of Appeals in *Seibel v. Colorado Real Estate Commission*, 530 P.2d 1290 (1974). The Colorado Court of Appeals' decision affirmed that Brokers are subject to the license law and Commission Rules when they participate in real estate matters as principals. In such transactions, Brokers must disclose in writing that they are licensed Brokers as set forth in Rule 6.17.B. and should give the appropriate Commission-Approved Brokerage Disclosure and check the box indicating that the Broker will treat the buyer or seller as a Customer.

<u>Brokers Purchasing Own Listing and Discontinuing the Marketing of the Property</u>:

Sometimes, a Broker may enter into a Listing Contract with a seller and, after marketing the property, decide that the Broker wants to purchase the property for their own personal use or investment. This creates the potential for a conflict of interest because the Broker likely has confidential information about the seller, and now the Broker will also be a principal contrary to the seller's interest. While the Commission strongly discourages Brokers from purchasing property under these circumstances, Brokers who choose to do so should do the following:

1. Either terminate the Listing Contract or amend the Listing Contract to designate another Broker in the Brokerage Firm to represent the seller;
2. Disclose in writing to the seller that the Broker will be acting as a principal and that the seller understands that the Broker previously had access to confidential information about the seller;
3. Disclose in the contract that the Broker is a licensed Real Estate Broker in the state of Colorado; and
4. Include in the contract an option for the seller to terminate the contract at any time before or on the day of closing. A Broker who purchases the property of a client may lose inspection, appraisal, or other fees if the seller chooses to exercise their right to terminate the contract.

<u>Broker Purchasing Own Listing and Continuing the Marketing of the Property (Licensee Buy-Out Addendum)</u>:

A Broker or Brokerage Firm may offer a guaranteed buyout or sale program to a seller who is contemplating entering a Listing Contract with the Brokerage Firm. Examples include:

1. When a Broker enters into a contract to purchase a property concurrent with the listing of such property.
2. When a Broker enters into a contract to purchase a property as an inducement or to facilitate the property owner's purchase of another property, the purchase or sale of which will generate a commission or fee to the Broker.
3. When a Broker enters into a contract to purchase a property from an owner but continues to market that property on behalf of the owner under an existing Listing Contract.

These circumstances are generally different than when a Broker is purchasing a property they previously had listed. A Broker engaging in a guaranteed buyout or sale program with Consumers should first review their Brokerage Firm's Office Policy Manual to see if it is permissible. Additionally, the Broker should ensure their funding sources are in order and, if they are financing the transaction, get prequalified as most lenders will consider this a non-owner-occupied purchase which usually entails a greater down payment, a higher credit rating, and proof of a stable income stream.

Additionally, a Broker must use a Commission-Approved Form when such form exists and is appropriate for the transaction as set forth in Rule 7.1.A. In circumstances where the Broker is offering a guaranteed buyout or sale program to the seller, the Broker must use the Commission-Approved Licensee Buy-Out Addendum to Contract to Buy and Sell Real Estate. Brokers should be

aware that the Commission-Approved Licensee Buy-Out Addendum to Contract to Buy and Sell Real Estate requires the Broker to continue to market the property as "active" in the MLS or other advertising.

CP-15 Commission Position on Leasing and Property Management

(Recodification adoption June 7, 2022: CP-27 Commission Position on the Performance of Residential Leasing and Property Management Functions recodified to CP 15 – Leasing and Property Management)

Property Management is one of the leading sources of complaints received by the Commission. This position statement is designed to identify common issues in Property Management found during a complaint investigation or an audit; however, it does not encompass all potential issues associated with Property Management. Any Broker interested in performing Property Management Services is strongly encouraged to complete educational offerings specific to Property Management, co-list with a Broker experienced in Property Management, and familiarize themselves with Chapter 5 of the Commission Rules.

State and local laws have been rapidly evolving with regard to the obligations and rights of landlords and tenants. Significant modifications that were adopted in 2021 include restrictions on late fees (*see* C.R.S. § 38-12-105) and monetary penalties for violating these restrictions. There are also limitations on a landlord's ability to increase rents (*see* C.R.S. § 38-12-702) and specific prohibitions on certain lease provisions (*see* C.R.S. § 38-12-801). There are also statutory penalties for unlawfully removing a tenant from a property. (*see* C.R.S. § 38-12-510). These are only a sampling of revised state guidelines and several jurisdictions, including Boulder and Denver, have specific licensing requirements for rentals and additional notice requirements.

License Requirements:

Pursuant to section 12-10-201(6), C.R.S., the leasing and subsequent management of real estate for a fee or compensation is included among the activities for which a License is required. Given the rapidly evolving law, the number of complaints received, and the issues identified in investigations and audits, the Commission considers Property Management to be a complex area of practice. Section 12-10-217(1)(q), C.R.S., and Rule 6.2. require that a Broker be worthy and competent when providing Real Estate Brokerage Services. If the Broker does not have the competency necessary to fulfill and perform leasing and/or subsequent management of the real estate, the Broker must comply with Rule 6.2.B. before providing such Real Estate Brokerage Services. Property Management Services must be performed and contracted in the name of the Brokerage Firm. A Broker who agrees to lease a property or perform Property Management Services must review the Brokerage Firm's Office Policy Manual, and have permission from the Broker's Employing Broker. Similarly, the Employing Broker has the responsibility to ensure that they are also competent to supervise an Associate Broker that performs leasing and/or Property Management Services.

Leasing v. Property Management:

While leasing and Property Management are similar, they are two distinctively different services. Leasing is a one-time activity in which the Broker acts as a special agent, while Property Management is an ongoing relationship in which the Broker is a general agent. If a Broker is performing leasing with a Commission-Approved Exclusive Right-to-Lease Listing Contract, the Broker may list a property for lease, advertise the property, help screen tenants, and/or help negotiate a lease. The lease should be signed by the owner and tenant. Once the lease is signed, the Broker's duty/relationship with the owner or tenant is over. Conversely, with Property Management, a Broker's obligations continue beyond the formation of the lease. Therefore, a Broker performing Property Management Services may also perform leasing services. A Broker who only performs leasing services is not performing Property Management Services.

Generally, a Broker will function in one of three capacities with regards to rental properties. In the first scenario, the Broker may provide leasing services only for an owner where the Broker is involved in procuring a tenant and negotiating the lease terms (i.e., Commission-Approved Exclusive Right-to-Lease Listing Contract). In the second scenario, the Broker may provide leasing services on behalf of the tenant in locating a suitable rental property and negotiating a lease (i.e., Commission-Approved Exclusive Tenant Listing Contract). In the third scenario, the Broker agrees to provide leasing services and is also responsible for one or more of the following: maintaining the property's physical condition, communicating with tenants, collecting rent, and/or collecting security deposits (i.e., Management Agreement and Commission-Approved Brokerage Duties Addendum to Property Management Agreement). In the first two scenarios, the Broker's services are completed once the lease is executed and thereafter the Broker is not involved in the transaction any further. In the third scenario, the Broker's duties are ongoing; therefore, the Broker is conducting Property Management Services. Regardless of whether the Broker is working with the owner or the tenant, the Broker must establish clear expectations regarding the services the Broker agrees to provide and communicate these expectations to the Consumer.

Supervision:

Before engaging in Property Management or leasing, the Associate Broker must discuss with their Employing Broker whether the Associate Broker is capable of and allowed to perform Property Management or leasing services. The Brokerage Firm is responsible for maintaining all Trust or Escrow Accounts and all transaction records, and the Employing Broker is responsible for exercising authority, direction, and control over the Associate Broker's conformance to statutes and Commission Rules. (*see* Rule 6.3.). This includes ensuring all contracts are reviewed to maintain assurance of competent preparation and ensuring all transaction files are reviewed for the required documents. If the Employing Broker does not allow Brokers to perform leasing and/or Property Management Services as part of their employment and in the name of the Brokerage Firm, the Office Policy Manual should clearly state that the Broker needs to refrain from leasing and/or Property Management Services or seek employment elsewhere. If the Brokerage Firm does allow leasing and/or Property Management, regardless of how minor, the Employing Broker must ensure that the Office Policy Manual addresses these activities, including management of the Associate Broker's own property. (*see* Rule 5.11.). Both the Associate Broker and the Employing Broker need to be aware of state and local laws that impact the performance of Property Management Services, which include, but are not limited to, laws about security deposits, habitability, carbon monoxide alarms, asbestos, lead-based paint, handling of confidential information, zoning, and agency.

Forms:

A Broker may complete Standard Forms pursuant to section 12-10-403(4)(a), C.R.S., and as set forth in Rule 7.1. including those promulgated by the Commission. The appropriate disclosure document must be provided to the owner or tenant before performing Real Estate Brokerage Services for the owner or the tenant.

There are no Commission-Approved leases or Management Agreements. These forms must be drafted by an attorney engaged by the specific Brokerage Firm as set forth in Rule 7.1.B. Therefore, obtaining and using a copy of a Management Agreement and/or lease from another Brokerage Firm does not comply with the requirements that these forms be drafted by an attorney. However, if the owner provides the lease, as set forth in Rule 7.1.C. (i.e., Client Form), the Broker must maintain written confirmation that the lease form was provided by the owner. In all situations, Brokers need to provide copies of executed contracts to the Consumers. Tenants need to be provided with copies of leases and owners need to be provided with copies of the Management Agreements.

Brokers performing leasing services for either an owner or a tenant may draft Letters of Intent (e.g., Brokers specializing in Commercial Real Estate); however, the Letter of Intent must comply with

Rule 7.1.H. which states that the Letter of Intent is nonbinding and that the form has not been approved by the Commission.

If the Broker is going to provide Property Management Services, the Broker needs to provide a Management Agreement drafted by a licensed Colorado attorney. The Management Agreement should outline the duties and responsibilities of both parties. The Management Agreement should, at the very least, address:

- Duration of the relationship;
- The parties;
- Identify the lease form (i.e., Attorney Form or Client Form);
- Identify the authority to execute leases (i.e., Owner or Broker);
- Identify the property to be managed;
- General duties performed by the Broker, including interior walk-through expectations and exterior drive-by expectations;
- Fees for the manager's services, including disclosure of any mark-ups. (*see* Rule 5.17.). Before a mark-up can be charged, the Broker must obtain prior written consent to assess and receive mark-ups and/or other compensation for services performed by any third party or affiliated business entity;
- A unilateral clause allowing fee changes are prohibited;
- Tenant selection criteria. If the decision to lease will be based on criminal history or financial worthiness, the Management Agreement should indicate who is responsible for collecting this data and what sources will be used. Be aware of the restrictions on screening of tenants laid out in the Rental Fairness Act. (*see* C.R.S. § 38-12-901). Additionally, the Broker must ensure compliance with the Fair Housing and Fair Credit Acts;
- Posting of eviction notices. If a Forcible Entry and Detainer (also known as an eviction) is necessary, an attorney should represent the owner or Broker in the filing of the Forcible Entry and Detainer. Special attention should be given to any local requirements that may be in effect, that modify the eviction process. A Broker that files a Forcible Entry and Detainer without the assistance of an attorney may be practicing law without a license;
- The process to be followed for any subsequent transfer of the owner's monies, security deposits, keys, and documents (*see* Rule 5.8.A.); and
- Date that the owner receives regular monthly accounting of all funds received and disbursed.

While these general duties should be addressed in the Management Agreement, it is not an all-inclusive list of all the duties that may be performed by a property manager or that should be addressed within the Management Agreement. Brokers are encouraged to pay close attention to Commission Rules and changes to state laws and local ordinances.

Regardless of whether the Broker is acting as a leasing Broker or a property manager before engaging in any of the activities that require a License, the Broker is required to disclose in writing the different Brokerage Relationships that are available to the tenant. (*see* Rule 6.5.). The Commission-Approved Brokerage Disclosure to Tenant must be used to disclose the Brokerage Relationships available.

<u>Trust Accounts and Record Keeping</u>:

Any Broker performing Property Management Services in which the Broker is responsible for the collection and distribution of rent or security deposits needs to be especially cognizant of the Commission Rules pertaining to the management of Money Belonging to Others and records

retention contained in the Chapter 5 of the Commission Rules. Section 12-10-217(1)(h), C.R.S., requires that a Broker account for and remit, within a reasonable time, any monies coming into the Broker's possession that belongs to others. All Money Belonging to Others which is received by a Broker acting as a property manager must be deposited in the Brokerage Firm's Trust or Escrow Account within five (5) business days of receipt. (*see* Rule 5.7.A.).

If a Broker is going to deposit rent or security deposits into the Brokerage Firm's Trust or Escrow Account(s), the Broker is required to keep records relative to these monies. Rule 5.10. requires that all Money Belonging to Others that is accepted by the Broker be deposited in one or more accounts separate from money belonging to the Broker or Brokerage Firm. Separate Trust and Escrow Accounts must be maintained in the name of the Employing Broker or Independent Broker acting as a sole proprietor or the name of the licensed business entity. Additionally, the maintenance of the separate accounts is the responsibility of the Employing Broker or Independent Broker. (*see* Rules 5.3. and 5.6.). This includes rent checks. Rule 5.5. requires that "[a] Brokerage Firm who engages in Property Management must deposit rental receipts and security deposits and disburse money collected for such purposes in separate Trust or Escrow Accounts, a minimum of one for rental receipts and a minimum of one for security deposits." As an alternative to Trust or Escrow Accounts, a Broker may perform "conduit" Property Management by depositing rent monies or security deposits directly into an account solely owned and controlled by the owner.

Rule 5.8.A. prohibits a Broker who receipts for security deposits from delivering such deposits to an owner unless the tenant's written authorization is given in the lease or written notice is given to the tenant. The notice must identify who is holding the security deposit and the procedure the tenant must follow to request the return of the deposit. If the security deposit is held by or transferred to the owner, the Management Agreement must specify that the owner is responsible for the security deposit's return and that, in the event of a dispute, the Broker is authorized to reveal the true name and current mailing address of the owner. The Broker may not use any portion of the security deposit (e.g., late fees, tenant charges, or owner charges) for the Broker's benefit.

Rule 5.14. requires an Employing Broker or Independent Broker to maintain a record keeping system, at the Brokerage Firm's licensed place of business that consists of a journal, a ledger, and a bank reconciliation worksheet. All Trust or Escrow Accounts must be reconciled on an ongoing monthly basis. The Employing Broker must also maintain supporting records that detail all cash received and disbursed under the terms of the management and rental agreements. If personal funds have been deposited into the Trust or Escrow Account to open and maintain the Trust or Escrow Account, the journal and ledger must contain entries documenting this money. (*see* Rule 5.14.D.). These personal funds must also be included in the bank reconciliation worksheet. All deposits of funds into a Trust or Escrow Account must be documented, as must all disbursements of funds from a Trust or Escrow Account.

Absent a written agreement that indicates otherwise, the "cash basis" of accounting is required for maintaining all required Trust or Escrow Accounts and records. Funds from one owner cannot be used to supplement operating capital or to finance expenditures of other owners or a Broker. An owner's ledger may never have a negative balance. (*see* C.R.S. §§ 12-10-217(1)(h) and (i), and Rules 1.34. 5.9., 5.11., 5.18., and 6.3.B.). The Broker and Brokerage Firm is required to retain accurate, ongoing records which verify disclosure of and consent to any mark-ups assessed or received, and fully account for the amounts or percentage of compensation assessed or received, (*see* Rule 5.17.). For Commission purposes, Brokers and Brokerage Firms may maintain their records in electronic format as long as the records are stored in a format that can be continually retrieved and legibly printed. (*see* Rule 6.24.). Section 12-10-217(1)(k), C.R.S., requires Brokers to maintain possession of their records for four (4) years.

Security Deposits:

Brokers have to be very careful how they handle security deposits. The security deposit law is complicated and legal assistance is advisable. Wrongful withholding of a security deposit may result

in the owner, and the Broker as the owner's agent, being liable for treble the amount wrongfully withheld, plus reasonable attorneys' fees and court costs. Section 38-12-103, C.R.S., requires that the security deposit be returned to the tenant within one (1) month after a lease is terminated or the premises have been vacated and accepted, whichever occurs last. The lease may indicate a longer period to return the security deposit to the tenant; however, state law does not allow this extension of time to exceed sixty (60) days. Security deposits cannot be retained to cover normal wear and tear. Section 38-12-102, C.R.S., defines normal wear and tear as:

> "deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises or equipment or chattels by the tenant or members of his household, or their invitees or guests."

Normal wear and tear are at the core of most security deposit disputes. Security deposits may be retained for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repairs or cleaning contracted for by the tenant in the lease. If there is cause to retain any portion of the security deposit, the tenant must be provided with a written statement listing the exact reasons why all or a portion of the security deposit is being retained. The statement must be delivered with the difference between the amount of the security deposit and the amount retained. The Broker or the owner is deemed to have complied with this requirement by mailing the statement and the payment to the tenant's last known address. Payment may also be sent electronically to the tenant's account. If the Broker or the owner fails to provide the statement to the tenant as required by law, the owner may forfeit their right to retain any portion of the security deposit to offset amounts owed. The owner does not lose the right to pursue amounts due, they just lose the right to utilize the security deposit to offset amounts owed. Furthermore, if the tenant pursues court action regarding any portion of the security deposit being retained, the owner bears the burden to prove that retention of any portion of the security deposit was not wrongful.

If a lease is nullified and voided due to the owner's failure to repair a condition covered by the Warranty of Habitability laws (*see* C.R.S. §§ 38-12-501 – 38-12-511) or otherwise, the owner or the Broker must by Colorado law deliver all, or the appropriate portion of, the security deposit plus any rent rebate owed to the tenant for the period that the tenant vacated the premises. If a portion of the security deposit is retained, the tenant must be provided with a written statement listing the exact reasons why all or a portion of the security deposit is being retained and payment of the remaining balance of the security deposit. If the tenant does not receive all or a portion of the security deposit with the statement within the required deadlines, the tenant may be entitled to three (3) times the amount of the security deposit and reasonable attorney fees (*see* C.R.S. § 38-12-103).

<u>Transfer of Services</u>:

If a Broker no longer will be managing a property, the Broker must transfer a copy of the entire file to the owner or, upon written authorization from the owner to the new Broker engaged to perform the Property Management. At a minimum, the entire file should include:

(a) Copy of existing lease
(b) Copy of check-in condition report
(c) Keys, access codes, passwords
(d) Outstanding tenant balances
(e) Tenant(s) security deposit(s)
(f) Accounting of owner's funds (subject to outstanding obligations)

Although the Commission Rules do not specifically address the transfer of Management Agreements, the Rules do specify when and how to transfer the tenant's security deposit to either the owner or the new Brokerage Firm *(see* Rule 5.8.). The previous Brokerage Firm must give written notice to the tenant that the security deposit has been transferred to the owner or new Brokerage Firm along with the owner's or new Brokerage Firm's contact information. The new Brokerage Firm must also notify the tenant of its receipt of funds. (*see* Rule 5.8.B.). Timely transfer of the deposit protects the Broker from getting caught between the owner and the tenant regarding the accounting of the deposit. The Brokerage Firm must also provide the owner with a final accounting of all trust funds held by the

Brokerage Firm. Although the Brokerage Firm may delay the transfer of the owner's funds until all outstanding invoices or debts have been resolved, the transfer of the owner's funds needs to occur within a reasonable amount of time. A Brokerage Firm that fails to transfer funds in a reasonable amount of time may be subject to discipline by the Commission. Likewise, the new Brokerage Firm must give written notice to the owner and tenant of the status of any security deposit held by the previous Brokerage Firm, to include the amount, within thirty (30) days of receipt of the security deposit.

For additional requirements regarding the transfer of Management Agreements, see Commission Position 7 – Assigning Listings, Relationship and Commissions. When one managed portfolio is purchased by another Brokerage Firm, a new Management Agreement, or an assignment of a Management Agreement along with the assignment of any Trust or Escrow Accounts must be executed. (*see* CP 7 – Assigning Listing Contracts, Relationship and Commissions).

Managing Broker's Own Property:

Brokers are subject to the license law and Commission Rules when they participate in real estate matters as principals (*see* CP 1 – Contracts provided by Principals Selling Real Property and CP 14 – Commission Position 14 – Broker Buying Property), including managing the Broker's own property. (*see Seibel v. Colorado Real Estate Commission*, 530 P.2d 1290 (Colo. App. 1974)). A Broker who manages their own rental property must disclose known conflicts of interest and that the Broker possesses a Colorado Real Estate Broker's License (*see* Rule 6.17.). The Broker also needs to use a lease drafted by an attorney for the transaction, along with disclosing in writing to the tenant the Brokerage Relationships under the license law. (*see* Rule 6.5.).

If the Broker is an Associate Broker, it is important for the Broker to consult with their Employing Broker regarding the Brokerage Firm's requirements or limitations regarding managing a Broker's own property. When a Broker personally manages and receipts for a security deposit on their own property, the license law requires that the security deposit be placed in a Trust or Escrow Account. (*see* Rule 5.11. and CP 29 – Holding Money Belonging to Others for Activities not Involving Real Estate Brokerage Services).

CP-16 Commission Position on Acting as a Transaction-Broker in Particular Types of Transactions

(Recodification adoption June 7, 2022: CP-31 Commission Position on Acting as a Transaction Broker or Agent in Particular Types of Transactions recodified to CP 16 – Acting as a Transaction-Broker in Particular Types of Transactions)

A Consumer may enter into either a Transaction-Broker relationship or an Agency relationship with a Broker for any type of real estate transaction (e.g., residential sale, commercial sale, Property Management, commercial leasing, or residential leasing). The fundamental differences between a Single Agent and a Transaction-Broker relationship are that a Single Agent is an advocate with fiduciary duties, while a Transaction-Broker should "remain neutral", and not advocate. While the license law does not prohibit a Broker from acting as a Transaction-Broker in most real estate transactions, Brokers need to be aware of situations when acting as a Transaction-Broker for one or both parties in the transaction may be problematic, if not impossible. Examples when acting as a Transaction-Broker where neutrality could be difficult are provided below and are not an exhaustive list.

1. Selling or purchasing on a Broker's own account (whether the property is solely or partially owned or to be acquired by the Broker). When the Broker is acting as a principal in the real estate transaction, it is impossible for the Broker to "remain neutral". A Broker that is a principal in a transaction has an obligation to disclose their License status (*see* Rule 6.17.B.) and should give the Commission-Approved Brokerage Disclosure to Buyer or Brokerage Disclosure to Seller and check the box indicating that the Broker will treat the buyer or seller as a Customer (*see* CP – 14 Broker Buying Property).

2. Selling or purchasing property for the Broker's spouse or family member. While acting as a Transaction-Broker in these circumstances is not specifically prohibited, the Broker must exercise care deciding if they can truly "remain neutral" under the circumstances without inadvertently advocating for their spouse or family member. Brokers that reasonably believe they can "remain neutral" must fully disclose their relationship as the spouse or family member of a party and should obtain written informed consent to act as a Transaction-Broker from both parties before proceeding.

3. Selling or purchasing property for a close friend, business associate, or other person where it would be difficult for the Broker to remain neutral. While acting as a Transaction-Broker in these circumstances is not specifically prohibited, the Broker must exercise care deciding if they can truly "remain neutral" under the circumstances without inadvertently advocating for their personal friend, business associate, or such other person. Brokers that reasonably believe they can "remain neutral" must fully disclose their relationship and should obtain written informed consent to act as a Transaction-Broker from both parties before proceeding.

4. Selling or purchasing property for the account of a repeat or regular Consumer where it would be difficult for the Broker to remain neutral (e.g., undertaking as a Transaction-Broker the listing of multiple units, lots or properties such as listing a real estate development or condominium complex for a single developer, listing multiple residential or commercial properties for the same seller that will be sold to different buyers, or listing for lease a multiple unit residential or commercial property that will be leased to different tenants). Acting as a Transaction-Broker in these circumstances is not specifically prohibited. In some instances, the Consumer (e.g., builder) may require the Broker to act as a Transaction-Broker to list multiple properties meaning acting as Transaction-Broker for both parties may not create any conflict. However, the Broker must exercise care deciding if they can truly "remain neutral" under the circumstances. Brokers that reasonably believe they can "remain neutral" must disclose their relationships. In instances where the Broker previously acted as a Single Agent for one of the Consumers, the Broker should obtain written informed consent from both parties before proceeding.

5. A Broker on a Team wanting to purchase a property on their own account that is listed by the Team. The Team should obtain written informed consent from both parties to act as a Transaction-Broker in the transaction. If consent is granted, the Team must remove the buying Broker from the Listing Contract and take appropriate steps to place a firewall relating to the transaction between the Team and the buying Broker.

6. A Broker representing a family member as a buyer's agent and the family member wants to put an offer on a property listed by Broker. In this circumstance, a conflict of interest arises. Disclosure of the conflict and consent from both parties would be required to move forward as a Transaction-Broker in the transaction. If one or both parties don't consent to the conflict, then the Broker should remove themselves entirely from the transaction. The Broker may still be able to collect a referral fee for an introduction of business. (*see* CP 3 – RESPA and Referral Fees).

Before acting as a Transaction-Broker in transactions where neutrality could be difficult, the Broker should consider whether the Transaction-Brokerage relationship is suitable under the circumstances by consulting with the Broker's Employing or Supervisory Broker, making any necessary disclosures, and obtaining written informed consent if the Broker and the Consumers wish to continue with the Broker's involvement in the transaction.

CP-17 Commission Position on Single Agent vs. Transaction-Broker

(Recodification adoption June 7, 2022: CP-32 Commission Position on Brokerage Disclosures recodified to CP 17 – Single Agent vs. Transaction-Broker)

A Broker must be either a Single Agent or a Transaction-Broker for at least one Consumer in the transaction. While a Transaction-Broker facilitates a real estate transaction without advocacy, the duties of a Single Agent go beyond facilitation of the transaction as a neutral party and require representing the interests of the Broker's principal over the interests of the other party. A Broker who enters into an agency relationship must fulfill the duties of advocacy, fidelity, loyalty, and other fiduciary duties of a Single Agent. In circumstances where the Broker may not be able to fulfill the duties imposed on a Single Agent, the Broker should consider whether that agency relationship is appropriate, consult with the Broker's Employing Broker or Supervisory Broker, and act accordingly.

<u>Buyer/Tenant vs. Seller/Landlord Listing Contracts</u>:

If a Broker is a Single Agent, there must be a Listing Contract between the Broker and the Consumer. The Commission believes that a Broker who intends to act as a Consumer's Single Agent in a transaction should attempt to secure a written Listing Contract as early in the Brokerage Relationship as possible.

However, the Commission recognizes that in some instances, a buyer or tenant may not immediately execute a written Listing Contract. In those situations, the Broker will function as a Transaction-Broker pursuant to section 12-10-403(2), C.R.S., and should present the Consumer with the Commission-Approved Brokerage Disclosure to Buyer or Brokerage Disclosure to Tenant. The Broker may then engage as a Transaction-Broker and perform the seventeen (17) uniform duties as enumerated in section 12-10-407, C.R.S. Before the Broker begins to work as the buyer's or tenant's Single Agent and providing the three (3) additional duties (i.e., fiduciary duties), the parties must execute a Listing Contract with the "Agency" box checked. The Broker may then perform the uniform duties and the additional duties of a Single Agent enumerated in sections 12-10-405 and -406, C.R.S.

In situations where the seller or landlord, regardless of the intended Brokerage Relationship, refuses to execute a Listing Contract, the Broker may not perform any Real Estate Brokerage Services until a Listing Contract is executed and a Brokerage Relationship is established as either a Single Agent or a Transaction-Broker. (*see* Rule 6.14.C.).

<u>Treating Consumers on the Other Side of the Transaction</u>:

A Broker who has an existing Brokerage Relationship as a Transaction-Broker with a buyer or tenant may either treat the seller or landlord as a Customer or act as a Transaction-Broker by obtaining consent and giving the seller or landlord the Commission-Approved Brokerage Disclosure to Seller or Brokerage Disclosure to Landlord. (*see* Rule 6.7.). Conversely, a Broker who has an existing Brokerage Relationship with a Listing Contract as a Transaction-Broker with a seller or landlord may either treat the buyer or tenant as a Customer or act as a Transaction-Broker by obtaining consent and giving the buyer or tenant the Commission-Approved Brokerage Disclosure to Buyer or Brokerage Disclosure to Tenant. (*see* Rule 6.7.)

When a Broker has an existing Brokerage Relationship as a Single Agent with a Consumer, the Broker may either treat the Consumer on the other side of the transaction as a Customer or change the Brokerage Relationship to act as a Transaction-Broker for both sides of the same transaction with informed consent from the Broker's client as set forth in Rule 6.9.

<u>Change in Brokerage Relationship</u>:

When a Broker changes from Single Agent to Transaction-Broker for a specific transaction, the Broker must send the Commission-Approved Change of Status form to the Consumer as set forth in

Rule 6.9. However, if that transaction terminates, the Broker's relationship status automatically reverts to the relationship as designated by the Listing Contract.

When a Brokerage Relationship changes with a Consumer, either from a Single Agent to a Transaction-Broker or vice versa, a Broker must be aware of how they are representing their client and what duties to perform or not to perform. A Single Agent relationship comes with fiduciary duties and not performing them increases legal liability for the Broker and is a violation of the license law and Commission Rules. On the other hand, a Transaction-Broker has no fiduciary duties and performing such fiduciary duties increases legal liability and is also a violation of the license law and Commission Rules.

CP-18 Commission Position on Settlement Service Provider Selection

(Recodification adoption June 7, 2022: CP-34 Commission Position on Settlement Service Provider Selection, Closing Instructions and Earnest Money Deposits recodified to CP 18- Settlement Service Provider Selection and CP 19 – Closing Instructions for Title Company Held Deposits)

Regardless of whether a Broker is acting as a Single Agent or Transaction-Broker, all Brokers acting in their licensed capacities are required to advise their clients to obtain expert advice as to material matters about which the Broker knows, but the specifics of which are beyond the expertise of the Broker. (*see* C.R.S. §§ 12-10-404(1)(c)(V), 12-10-405(1)(c)(V), and 12-10-407(2)(b)(II)). Expert advice includes, but is not limited to, the brokering of a mortgage, performing title searches and issuing insurance, appraising real property, surveying, issuing improvement location certificates, performing property inspections and other due diligence (including environmental), and practicing law (which also includes analyzing the legal implications of the foregoing). Brokers need to ensure that they perform the acts required by the Real Estate Brokerage Practice Act, based on the capacity in which they have agreed to practice, such as a Single Agent or Transaction-Broker, and that they don't perform services for which they do not have the competency, experience, education, or necessary professional licensure.

When assisting a Consumer in finding a settlement service provider (*see* C.R.S. § 12-10-218(1)(c)), a Broker must ensure the Consumer plays an active role in the process and is ultimately responsible for making the selection. A common standard of practice amongst Brokers is to provide several names of settlement service providers in a specific area or practice and allow the Consumer to choose. Brokers must exercise care when providing such referrals as making such referrals may be viewed as the Broker endorsing or vouching for the settlement service provider. If the settlement service is poorly executed, the Broker is putting the Consumer at risk and possibly setting themselves up for a claim for negligent referral. A negligent referral is a claim when the Broker recommends a provider but was negligent in doing so because the settlement service provider had a history of performing poorly or the Broker knew the settlement service provider was not competent to perform the task. When selecting names of settlement service providers, the Broker should only refer those settlement service providers that the Broker believes are competent and will provide quality service to the Consumer. While multiple names are preferred, the Commission does understand there are instances where a Broker may have limited names (or only one name) the Broker is comfortable referring (e.g., industrial hygienist). In those instances, referring only one settlement service provider is acceptable. If a Broker does not have any experience with or a way of verifying whether a settlement service provider is qualified, the Broker should not recommend that service provider. Additionally, a Broker cannot require a Consumer to use a particular settlement service provider. Finally, it is a best practice to include a statement on referral lists given to Consumers that the decision to hire a specific settlement service provider is completely at the Consumer's discretion, and that Consumers are not limited to service providers listed by the Broker.

CP-19 Commission Position on Closing Instructions for Title Company Held Deposits

(Recodification adoption June 7, 2022: CP-34 Commission Position on Settlement Service Provider Selection, Closing Instructions and Earnest Money Deposits recodified to CP 18 – Settlement Service Provider Selection and CP 19 – Closing Instructions for Title Company Held Deposits)

The purpose of closing instructions is for the Consumer to engage the company that will be responsible for ultimately closing the real estate transaction. In most transactions, the company responsible for closing the transaction is a title company. Occasionally, escrow agents, Brokers, and attorneys provide these services.

Broker Performing Closing Services:

If the Broker is performing the closing services, including the preparation, delivery, and recording of closing documents and the disbursement of funds, the Broker is the "Closing Company". Therefore, the Broker is responsible for ensuring the parties complete the Commission-Approved Closing Instructions at the time that the contract for the purchase/sale of the property is executed by the buyer and seller.

Title Company Performing Closing Services:

If a title company is engaged to perform the closing services, the Colorado Division of Insurance requires that a title entity receives written instructions prior to conducting such services. (*see* Division of Insurance Regulation 8-1-2). There should only be one set of closing instructions for a transaction and all amendments to the written instructions should also be in writing. (*see* Division of Insurance Regulation 8-1-2). Although title companies as the "Closing Company" may provide their own closing instructions for the transaction, title company drafted closing instructions may include indemnities and other legal clauses that could be detrimental to the Broker's client. If this occurs, a Broker should recommend that a client seek legal counsel since a Broker is precluded from advising a buyer or seller on title company drafted closing instructions. As a result, Brokers are strongly encouraged to complete the Commission-Approved Closing Instructions, deliver the Closing Instructions to the title company with the earnest money, and have them signed by all parties, including the title company.

Record-Keeping Requirement:

As required by section 12-10-217(1)(k), C.R.S., and Rules 5.21., 6.20. and 6.24., Brokers must retain a copy of the closing instructions for inspection by an authorized representative of the Real Estate Commission whether the Broker is acting as the Closing Company or the closing is being conducted by another third party (e.g., title company, attorney, or escrow company).

CP-20 Commission Position on Licensed and Unlicensed Real Estate Administrative Professions ("REAPs")

(Recodification adoption June 7, 2022: CP-20 Commission Position Statement on Licensed and Unlicensed Real Estate Administrative Professionals ("REAPs") recodified to CP 20 – Licensed and Unlicensed Real Estate Administrative Professionals ("REAPs")

Real Estate Administrative Professionals ("REAPs") are typically employees or independent contractors that perform various functions, including clerical duties, on behalf of Brokers. For purposes of this Commission Position Statement, REAPs include, but are not limited to, Unlicensed On-Site Managers, secretaries, bookkeepers, assistants, transaction coordinators/managers or short sale coordinators. REAPs can be grouped into two separate categories: unlicensed and licensed. The duties a licensed REAP can perform versus an unlicensed REAP vary depending on whether the licensed REAP has a Brokerage Relationship (i.e., named on the Listing Contract) with the Broker's client. A Broker needs to be cognizant of these differences, along with the Broker's individual

supervision responsibilities to the REAP. If a "licensed" REAP's Broker's License is currently on Inactive or Expired status, the REAP is considered to be unlicensed and may only perform those tasks that do not require a Broker's License.

Section 12-10-222, C.R.S., provides that a Broker can be held liable for any unlawful act or violations of the license law committed by a REAP of a Broker, if the Broker had actual knowledge of the unlawful act or violation or had been negligent in the supervision of such REAP. For purposes of the Real Estate Brokerage Practice Act, an employee includes an independent contractor.

Rule 6.3.A. states that Employing Brokers are responsible for supervising all unlicensed employees, including those hired by Associate Brokers, and any Brokers licensed with the Brokerage Firm.

<u>Activities of Unlicensed REAPs or Licensed REAPs without Brokerage Relationship</u>:

The license law prohibits unlicensed persons from performing Real Estate Brokerage Services, which includes negotiating the sale, exchange, or lease of real property on behalf of another person. A Broker should ensure that an unlicensed REAP or a licensed REAP without a Brokerage Relationship promptly discloses that the REAP does not have a License or is not acting as a Broker in the transaction and disclose the name of the Broker for whom the REAP works. Such disclosure should be provided to Brokers representing the party on the other side of a transaction, other industry professionals (e.g., loan originators, lenders, appraisers, property inspectors, etc.), and Consumers. An unlicensed REAP or a licensed REAP without a Brokerage Relationship may complete the following tasks:

1. Complete forms prepared for, and as directed by, a Broker. Unlicensed REAPs or licensed REAPs without a Brokerage Relationship cannot independently complete Standard Forms such as Listing Contracts, and they cannot offer opinions, advice, or interpretations of these forms.
2. Distribute preprinted, objective information prepared by the Broker about a property listed for sale.
3. Perform clerical duties, including gathering information for a listing.
4. If authorized by the seller or listing Broker, provide access to the property, conduct showings or open houses.
5. Deliver paperwork to other Brokers, buyers or sellers, or other professionals.
6. Complete administrative tasks necessary to help Brokers fulfill their uniform duties.
7. Send out disclosure documents to parties to the transaction.
8. Order title commitments and send contract copies to the lender, title company, and others involved in the transaction.
9. Collect due diligence documents to help Broker comply with the contract.
10. Review the entire transaction file to ensure that documents are not missing and the file itself complies with Rule 6.20. and the Broker's Brokerage Firm's Office Policy Manual.
11. Deliver paperwork that requires signatures in regard to financing documents that are prepared by lending institutions.
12. Prepare market analyses on behalf of the Broker, if the analyses are approved and submitted by the Broker to the client with a disclosure that the market analyses were prepared by the REAP. The Broker must ensure that market analyses comply with Rule 6.12.
13. Collect and receipt for earnest money deposits, security deposits, or rents.
14. Schedule property repairs or schedule services on behalf of the Broker, if there is an existing agreement that authorizes the Broker to complete those tasks.

Licensed REAPs:

Individuals acting as REAPs may be licensed, but care must be taken to ensure that violations of the license law do not occur. If a licensed REAP is performing licensed duties (e.g., negotiating the resolution of inspection items, preparing contracts, etc.), the REAP will need to establish a Brokerage Relationship with the principal being represented. For example, if the seller's Broker hires a REAP, who is also a licensed Broker, and the licensed REAP begins performing licensed duties on the seller's behalf, the licensed REAP must establish a Brokerage Relationship with the seller. This would most likely result in the seller's Broker and the licensed REAP "co-listing" to represent the seller. The Brokerage Relationship established by the seller's Broker and the licensed REAP would have to be the same. The REAP does not have to be licensed with the same Brokerage Firm as the Broker, but the REAP must have an Active License and comply with the license law requirements associated with the level of licensure the REAP possesses (i.e., a REAP that has an Associate Broker level license must have an Employing Broker). If the Broker who established the Brokerage Relationship does not want to co-list with the licensed REAP or does not want the licensed REAP to perform Real Estate Brokerage Services, the licensed REAP cannot perform licensed brokerage duties. Licensed REAPs working on behalf of Brokers that fail to establish a Brokerage Relationship with a client but continue to perform Real Estate Brokerage Services are likely violating the license law. Not only would the licensed REAP be subject to discipline, but so would the Broker that hired the licensed REAP and allowed them to do licensed activity without a Brokerage Relationship. Additionally, the Employing Brokers for the licensed REAP and/or the Associate Broker violating the license law could also potentially face discipline for failing to supervise.

Engaging the Services of a REAP:

Brokers seeking to engage the services of a REAP should perform their due diligence to evaluate the qualifications and services provided, along with any liability being assumed. The Broker hiring a REAP should inquire as to whether any of the REAP's activities are covered by the Broker's errors and omissions insurance policy. Furthermore, REAPs, whether licensed or not, may need their own separate errors and omissions insurance policy to cover the acts they perform on behalf of the Broker.

Payment to REAPs for Services Rendered:

REAPs that are licensed and have a Brokerage Relationship with the client must be paid by their Brokerage Firm as required by section 12-10-221, C.R.S. However, if the Broker engages the services of an unlicensed REAP, any payments to such unlicensed REAP that are contingent on the closing of a transaction may result in a violation of the Real Estate Settlement and Procedures Act (RESPA), which precludes the splitting of commissions with unlicensed individuals. In addition, if a Consumer is required to pay separately for the services performed by a REAP, which are done to assist the Broker with fulfilling the Broker's statutorily required duties, it may result in a separate violation of RESPA which precludes the charging of duplicate fees for one service rendered (e.g., a fee is paid to the REAP and the Broker receives remuneration for providing the same services in the same transaction). If a REAP will be paid outside of closing, there may be tax implications affecting the individual remitting the payment. Brokers should seek advice from appropriate tax and/or legal counsel regarding if, when, and how payment may be made to a REAP for services rendered.

CP-21 Commission Position on Auctioning Real Property

(Recodification adoption June 7, 2022: CP-26 Commission Position on Auctioning recodified to CP 21 – Auctioning Real Property)

While the sale of real estate by auction has been traditionally associated with distressed residential property, auction sales can be an effective tool to help various types of sellers sell property in Colorado. To increase efficiency and broaden the reach of advertising, sellers and their representatives have also utilized new online technologies to aid in auction sales.

The license law requires that real estate auctions be conducted by a Broker and defines the activity as ". . . offering, attempting, or agreeing to auction real estate, or interest therein, or improvements affixed thereon." (*see* C.R.S. § 12-10-201(6)(a)(VI))).

Brokers engaged in the sale of real estate by auction need to be aware that auction sales represent special and unique challenges. The Commission does not publish a Listing Contract contemplating auction sales. Accordingly, Brokers working with sellers should obtain an appropriate Standard Form as set forth in Rules 7.1.B. – E. Further, Brokers should ensure proper use of the Commission-Approved Brokerage Duties Disclosure to Seller (REO and Non-CREC Approved Listing Agreements).

<u>Competency and Basic Understanding of Auctions</u>:

Additionally, Brokers engaged in auction sales should ensure competence and a basic understanding of the mechanics of an auction sale, including consideration of certain key questions and terms. (*see* Rule 6.2.). Such questions, for example, can include:

- Is there a minimum bid?
- How are pre-auction showings addressed?
- How are marketing expenses dealt with?
- What Standard Form of the buy-sell contract will be used?
- How are buyer contingencies handled?

Such an understanding might include whether an auction is "absolute" or "without reserve" where the seller is the offeror, and a conditional contract may be formed with each bid. By contrast, in an auction that is "conditional" or "with reserve", the bidders are the offerors permitting sellers to accept, reject, or withdraw the property from auction. This distinction is important because it may determine a listing Broker's duties to the seller, including without limitations the presentation of offers to the seller, among other duties. Performance of a listing Broker's duties sometimes require special care in addressing these and other issues.

Brokers working with buyers on the purchase of real estate through auctions should also ensure competency with auction mechanics, negotiations, and use of appropriate Standard Forms.

<u>Unlicensed Auctioneers</u>:

An unlicensed auctioneer may "cry" the bid at a real estate auction in the presence of a Broker or seller. However, the control of the sale, including listing, advertising, showing the property and writing contracts must remain with the Broker or the auctioneer will be violating the law. Based on the license law and Attorney General's opinion, the following guidelines are established for unlicensed persons involved in the auction process:

1. Auctioneers should never hold themselves out as providing Real Estate Brokerage Services to the public (e.g., listing, advertising, negotiating, contracting, legal document preparation);
2. Inquiries from sellers should be referred to a Broker or licensed attorney;
3. Inquiries from buyers should be referred to the seller, listing Broker or seller's attorney;
4. Only auctioning services should be advertised to buyers and sellers;
5. A potential buyer may be chauffeured to a property, so long as the property is shown by the seller or a Broker;
6. Information on listed properties may be distributed when such information has been prepared by a Broker;

7. Auctioneers may "cry" the sale, but may not engage in subsequent negotiations, document drafting and the handling of earnest money; and

8. Payment should be based on auctioning services performed regardless of the success of a sale.

CP-22 Commission Position on Conflicts of Interest

(Recodification adoption June 7, 2022: CP-38 Commission Position on Disclosure of Affiliated Business Arrangements and Conflicts of Interest recodified to CP 22 – Conflicts of Interest)

A conflict of interest is where a Broker has private interests (i.e., self-serving) that could improperly influence, or be seen to influence, their actions in the performance of their Real Estate Brokerage Services.

Conflicts of interest should be properly disclosed and managed appropriately. The management of risk associated with conflicts of interest is fundamental to ensuring a high level of integrity and public trust. The Commission takes the disclosure and management of conflicts of interest seriously.

As set forth in Rule 6.17., Brokers have a continuing obligation to disclose conflicts of interest. Rule 6.17. applies to all Brokers and encompasses many different areas where conflicts of interest may arise. Examples provided below illustrate some circumstances when written disclosure is required and are not an exhaustive list.

1. A Broker who performs Property Management and has an ownership, financial, or familial interest in other businesses or vendors that provide services during the course of the Property Management must disclose their ownership, financial, or familial interest. The Commission strongly recommends that written disclosure be provided early in the business relationship (i.e., in the Property Management Agreement, prior to signing the Property Management Agreement or prior to utilizing such services) and that the owner has the choice to "opt out" of using such services.

2. The Broker or Brokerage Firm has an Affiliated Business Arrangement. (*see* Rule 6.18.).

3. The Broker is the principal or an owner of a principal in a real estate transaction. (*see* CP 16 – Acting a Transaction-Broker in Particular Types of Transactions and CP 14 – Broker Buying Property).

4. The Broker is acting as a Transaction-Broker for both parties to a transaction but has a relationship (e.g., personal, financial, business, familial, or romantic) with one of the parties that might make remaining neutral in the transaction difficult. (*see* CP 16 – Acting as a Transaction-Broker in Particular Types of Transactions).

5. The Broker receives a fee or other Thing of Value (whether monetary or otherwise) for recommending a non-settlement service provider (e.g., security system, cable, internet providers, moving companies, contractors, etc.) (*see* CP 3 – RESPA and Referral Fees).

6. The Broker receives a fee or other Thing of Value (whether monetary or otherwise) for referring a settlement service provider in connection with a non-federally related residential mortgage loan. NOTE: Brokers and Brokerage Firms are advised to seek legal counsel specializing in RESPA before receiving any referral payments. (*see* Rule 6.21.B.2. and CP 3 – RESPA and Referral Fees).

The duty to disclose a conflict of interest is only the duty of the Broker or the Brokerage Firm that has the actual conflict. Additionally, there are other instances that do not create a conflict of interest so disclosure would not be required, as illustrated in the examples provided below. However, Brokers should err on the side of voluntary disclosure where there may only be a perception and not an actual conflict of interest.

1. An Employing Broker would not have an independent duty to disclose if an Associate Broker was the spouse of the buyer while acting as a Transaction-Broker for both the buyer and the seller. However, the Associate Broker would have a duty to disclose. (*see* CP 16 – Acting as a Transaction Broker in Particular Types of Transactions).
2. A Brokerage Firm does not have an independent duty to disclose conflicting Single Agent relationships within the same Brokerage Firm. That is, if the buyer is represented as a Single Agent by an Associate Broker and the seller is also represented as a Single Agent by an Associate Broker in the same Brokerage Firm, this does not create a conflict of interest, nor does it require disclosure.
3. A Broker representing a family member, personal friend, business associate, or a repeat or regular customer as a Single Agent in a transaction has no duty to disclose the relationship because an agency relationship requires the duties of advocacy, fidelity, loyalty, and other fiduciary duties of a Single Agent.

CP-23 Commission Position on Lease Options, Lease Purchase Agreements, and Installment Land Contracts

(Recodification adoption June 7, 2022: CP-39 Commission Position on Lease Options, Lease Purchase Agreements and Installment Land Contracts recodified to CP 23 – Lease Options, Lease Purchase Agreements, and Installment Land Contracts)

The Commission recognizes that in order to maintain the resilience of the real estate market during times when conventional lending requirements are rigorous, alternative funding practices are utilized to sustain the market conditions of supply and demand. The Commission has received and investigated numerous complaints pertaining to lease options, lease purchase agreements, and installment land contracts (i.e., types of "seller financing" agreements). Although the Commission does not have the authority to prohibit the types of real estate transactions that Brokers participate in, the Commission strongly cautions Brokers to utilize the services of a Colorado licensed attorney when performing Real Estate Brokerage Services in such transactions.

It has been the Commission's observation, based on complaints received, that these types of seller financing agreements are complex and generally contain provisions with significant financial risk posed to the prospective buyer and seller. These agreements afford buyers the opportunity to take possession of the real property and make installment payments to the seller. There is a significant potential for harm to the seller, buyer, or assignee if these contracts are not properly drafted. Both buyers and sellers should seek separate legal representation to advise them and draft the contracts. In all of the above transactions, the seller retains legal title to the property while the buyer may acquire equitable title.

The Commission does not have a Commission-Approved Form sufficient to memorialize the terms and nuances related to these complex transactions, or any jurisdictional regulations that may be relevant. Pursuant to sections 12-10-217 and 12-10-403(4), C.R.S., and Rule 7.1., Brokers are prohibited from drafting a contract document that would reflect the terms of such a transaction to the extent that it would exceed their level of competency and is a matter requiring the expertise and advice of an attorney. Additionally, such behavior may be construed as the unauthorized practice of law by the Broker and subject to civil penalties. The contracts for these transactions should not be prepared by a Broker; rather, the documents should be drafted by a licensed Colorado attorney engaged for the specific transaction.

CP-24 Commission Position on Preparation of Market Analyses and Real Estate Evaluations Used for Loan Purposes

(Recodification adoption June 7, 2022: CP-42 Commission Position on Apartment Building or Complex Management recodified to CP 24 – Apartment Building or Complex Management)

Updated: August 02, 2022

The Commission recognizes that owners of apartment buildings or complexes may engage the services of Brokerage Firms or the services of Unlicensed On-Site Managers, or both. An "owner" includes either a person or an entity recognized under Colorado law that owns the apartment building or complex. The "owner" may form a separate entity to manage the apartment building or complex that might employ the services of Unlicensed On-Site Managers. The entity that owns and/or the entity formed by the owner to manage the apartment building or complex must be under the control of the same person or persons.

Pursuant to section 12-10-201(6)(b)(XII), C.R.S., a regularly salaried employee of the owner of an apartment building or complex or the managing entity is permitted to perform customary duties for their employer without a Broker's License. An Unlicensed On-Site Manager may be employed directly by the owner or may be engaged by the Brokerage Firm and may report to either the owner or the Supervisory or Employing Broker of the Brokerage Firm engaged to manage the property. (*see* Rule 6.3.E.2.). An Unlicensed On-Site Manager may operate at the managed property on a full-time or part-time basis, or from a location designated by the owner or the Brokerage Firm. Because a Broker's License is not held, the Unlicensed On-Site Manager cannot be paid a commission for the work performed. (*see* Rule 1.58.). The Commission views the following to be customary duties of an Unlicensed On-Site Manager:

1. Performance of clerical duties, including gathering information about competing projects.
2. Obtain information necessary to qualify prospective Consumers for a lease. This includes obtaining and verifying information regarding employment history, credit information, references, and personal information as necessary.
3. Provide access to a property available for lease and distribute preprinted, objective information if no negotiating, offering, or contracting is involved.
4. Distribute preprinted, objective information at an on-site leasing office that is prepared by an owner or Broker if no negotiating, offering, or contracting is involved.
5. Quote the rental price established by the owner or the owner's Broker.
6. Act as a scrivener to the owner or the Broker for purposes of completing predetermined lease terms on preprinted forms as negotiated by the owner or Broker.
7. Deliver paperwork to other Brokers.
8. Deliver paperwork to owners and tenants, if such paperwork has already been reviewed by the owner or a Broker or has been prepared in accordance with the Employing or Supervisory Broker's instructions.
9. Collect and deposit rents and security deposits in accordance with the owner's lease agreement or the Brokerage Firm's written Office Policy Manual.
10. Schedule property maintenance in accordance with the Brokerage Firm's Management Agreement or the owner's lease agreement.

If the owner has executed a written delegation of authority or a Power of Attorney form that authorizes the Unlicensed On-Site Manager to sign and execute leases on behalf of the owner, the Unlicensed On-Site Manager may execute those without possessing a License. If the Unlicensed On-Site Manager works for a Brokerage Firm, the Management Agreement must address whether the

Unlicensed On-Site Manager has the authority to sign leases or not. Employing or Supervisory Brokers supervising Unlicensed On-Site Managers with this authority are expected to review the executed documents to ensure compliance with lease terms, Management Agreements, and local, state, and federal laws, including the Real Estate Brokerage Practice Act and Commission Rules.

Employing Brokers must actively and diligently supervise all activities of an Unlicensed On-Site Manager (*see* Rule 6.3.E.) or delegate supervisory authority. (*see* Rule 6.3.F.) Supervisory duties apply whether the Unlicensed On-Site Manager is an employee or independent contractor of the Brokerage Firm or is a regularly salaried employee of the apartment building or complex owner. The Employing Broker should have a written office policy explaining the duties, responsibilities, and limitations on the use of Unlicensed On-Site Managers. This policy should be periodically reviewed with all employees.

CP-25 Commission Position on Resolving Inspection Issues

(Recodification adoption June 7, 2022: CP-43 Commission Position on Property Inspection Resolutions recodified to CP 25 – Resolving Inspection Issues)

The Commission has received inquiries and complaints claiming that Brokers misrepresent property conditions and negotiate repairs in a manner that conceals issues from the buyer's lender, particularly when the property's condition would affect a lending decision. The Commission issues this position statement to clarify how Brokers can advise buyers regarding inspection objection issues and maintain compliance with Commission Rules. Brokers must understand that in working with their clients to resolve inspection issues, Colorado law imposes upon Brokers the duty to avoid misrepresentations (*see* C.R.S. §§ 12-10-217(1)(a) – 217(1)(c)).

Other than terminating the contract based on inspection, there are generally five alternatives available to address property condition issues in a sales transaction: (1) the seller can repair the property prior to closing; (2) the seller can agree to pay a concession or contribution (e.g., a portion of the buyer's closing costs); (3) the buyer and the seller can negotiate a modification to the sales price; (4) at closing, the seller can escrow funds or pay a contractor (if allowed by the lender); or (5) after closing, the buyer can make the repair without assistance from the seller.

If the buyer is obtaining a loan to fund the purchase of the property, any of these alternatives can affect the mortgage financing. Prior to negotiating any of these alternatives, the Broker should advise the buyer to ask their mortgage loan originator or lender whether the resolution may (1) have a detrimental impact on the buyer's ability to get the loan; (2) cause delays in the lender's processing and funding of the loan by closing; and (3) require further inspections and repairs.

Once items to negotiate have been identified, the buyer's Broker should use the Commission-Approved Inspection Objection Notice to identify the inspection issues that the buyer seeks to have resolved. (Note: The Commission-Approved Inspection Objection Notice is a notice form and is not part of the contract). If buyer and seller are able to reach a resolution, the Brokers should memorialize the terms on the Commission-Approved Inspection Resolution or the Commission-Approved Agreement to Amend/Extend Contract.

CP-26 Commission Position on Reducing the Buyer Pool

(Recodification adoption June 7, 2022: CP-44 Commission Position on Coming Soon Listings recodified to CP 26 – Reducing the Buyer Pool)

The Commission has received inquiries and complaints regarding Brokers who advertise properties as coming soon, require a specific contract software, and offer a reduced cooperation fee to Brokers who work for certain Brokerage Firms, are located in a specific geographical location (e.g., a city Broker representing a buyer looking to purchase a property in a mountain resort community), or represent the buyer in different capacities (i.e., Transaction-Broker vs. Single Agent). The common complaint the Commission receives about these types of marketing limitations is that they are not in the best interest

of the Consumer, and they reduce the Consumer's property competitiveness in the marketplace. While the Commission does not impose specific requirements on how a property is marketed for sale or lease, a Broker must comply with the license law.

Among other duties, sections 12-10-404(1) and 12-10-407, C.R.S., require a Broker acting as a Single Agent or a Transaction-Broker engaged by a seller or a landlord, to "exercise reasonable skill and care" for the seller or landlord. A Single Agent is also required to "promote the interests of the seller or landlord with the utmost good faith, loyalty, and fidelity".

During the negotiation of the Listing Contract, and as part of the Broker's duty to exercise reasonable skill and care, a Broker is responsible for advising the seller or landlord "of any material benefits or risks of a transaction which are actually known by the Broker". (*see* C.R.S. § 12-10-404(1)(c)(IV)). This includes benefits or risks of limiting a property's market exposure, requiring a specific contract software, and tiering the cooperation fee based on a specific Brokerage Firm, the geographical location of the Broker, or different working relationships. Motivation for these types of marketing limitations should be carefully considered. Are the intended marketing limitations for the benefit of the Consumer or the Broker? What are the advantages and disadvantages for the Consumer? These types of marketing limitations that reduce the seller or landlord's buyer/tenant pool and risk a lower price and possible extension of the days on the market for the benefit of the Broker could be a violation of the license law because the Broker is not exercising reasonable skill and care. If the Broker is a Single Agent for the seller or landlord, the Broker may be viewed by the Commission as also violating their fiduciary duties. Finally, a Broker who places the importance of receiving a commission or other Broker benefits above their duties, responsibilities, or obligations to the seller or landlord (e.g., not presenting all offers regardless of contract software) is endangering the interest of the public.

Ultimately, the seller or landlord must be fully informed about how, when, and where the property will be marketed and approve such marketing if it potentially reduces the buyer or tenant pool. A Broker who fails to advise a seller or landlord of the material benefits or risks of their marketing plan, and does not obtain the seller's or landlord's approval, may be subject to discipline by the Commission. Any limitations on marketing efforts that might be viewed as reducing the number of buyers or tenants viewing a seller's or landlord's property must be memorialized in writing in the Listing Contract prior to any marketing being performed.

CP-27 Commission Position on Broker Disclosure of Adverse Material Facts

(Recodification adoption June 7, 2022: CP-46 Commission Position on Broker Disclosure of Adverse Material Facts recodified to CP 27 – Broker Disclosure of Adverse Material Facts)

<u>Brokers must disclose known adverse material facts</u>:

In all real estate transactions, Brokers are obligated to disclose known adverse material facts to all parties involved in the transaction. (*see* C.R.S. §§ 12-10-404(1)(c)(III), -404(3)(a), -405(1)(c)(III), -405(3)(a), -407(2)(b)(VI), and -407(2)(b)(VII)). The Commission-Approved Contract to Buy and Sell Real Estate Contracts provide that the seller and landlord are also required to disclose adverse material facts.

<u>What is an adverse material fact</u>:

During the course of a real estate transaction, a Broker for either side of the transaction may become aware of certain information related to the condition of the property. For example, a Broker may become aware that the roof of the property was recently repaired, or that the property was hit by lightning several times, or that one of the owners of the property for sale is a smoker. Brokers may have difficulty in ascertaining whether to disclose such facts.

To answer these types of questions, Brokers should initially consider whether the information is material. Factual information is material when a reasonable person would ascribe actual significance

to the information. (*see Moye White LLP v. Beren*, 320 P.3d 373, 378 (Colo. App. 2013)). Examples of material facts include facts affecting title, facts affecting the physical condition of the property, and environmental hazards affecting the property. "Undisclosed facts are 'material' if the [C]onsumer's decision might have been different had the truth been disclosed." (*see In re Estate of Gattis*, 318 P.3d 549, 554 (Colo. App. 2013) (quoting *Briggs v. Am. Nat'l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009)).

Next, Brokers should consider whether that material information is adverse to a party's interest in the transaction. (*see In re Fisher*, 202 P.3d 1186, 1196 (Colo. 2009) and Black's Law Dictionary (11th ed. 2019) (defining "adverse")). A Broker must consider how that material information affects each of the parties in the transaction, not just the individual party they are representing. If that material information is contrary (i.e., "adverse") to the interest of one of the parties, then the Broker must disclose it to all the parties.

An adverse material fact includes but is not limited to a fact that affects the structural integrity of the real property, presents a documented health risk to occupants of the property, including environmental hazards, and facts that have a material effect on title or occupancy of the property. Examples of adverse material facts include building or zoning violations, water damage to the flooring of property caused by marijuana plants, structural damage to a home caused by insect infestations or expansive soils, any type of lien filed against the property, and issues related to the buyer's financial qualifications or requirements.

<u>Brokers need only disclose known adverse material facts</u>:

A Broker need only disclose facts of which the Broker has actual knowledge. (*see Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. App. 2000)). For example, if a property owner knows that the foundation is crumbling but never tells their Broker, the Broker has no duty to disclose that fact because the Broker has no knowledge. Actual knowledge does not include facts that the Broker "should have known" or "should have discovered" through additional investigation, as a Broker has no duty to conduct an independent inspection of the property or to verify the accuracy or completeness of any statement made by the parties.

The Commission believes that disclosure of known adverse material facts is an important requirement that Brokers must undertake to protect Colorado Consumers. Accordingly, Brokers must disclose those facts they actually know, that a reasonable person would ascribe actual significance to, and that are contrary to the interests of a party in a real estate transaction. To the extent a Broker is unclear about whether a known fact that affects the physical property is adverse or material, the Broker should err on the side of disclosing the fact.

<u>Brokers must not disclose circumstances that may psychologically impact or stigmatize real property</u>:

Equally important as a Broker's obligation to disclose known adverse material facts is a Broker's duty not to disclose information that may psychologically impact or stigmatize real property. Without the informed consent of the client, Brokers representing the owner of the property must not disclose facts or suspicions regarding circumstances which may psychologically impact or stigmatize real property. (*see* C.R.S. §§ 12-10-404(2)(e), -405(2)(e), -407(3)(e)). Section 38-35.5-101(1), C.R.S., states:

> [f]acts or suspicions regarding circumstances occurring on a parcel of property which could psychologically impact or stigmatize such property are not material facts subject to a disclosure requirement in a real estate transaction.

There is minimal guidance in Colorado as to what equates to a psychological impact or stigmatization of a property. However, Colorado law identifies two specific circumstances that Brokers are prohibited from disclosing without informed consent due to the potential stigmatization of that property to potential buyers.

The first circumstance that cannot be disclosed without informed consent is when an occupant of real property was suspected to be or was infected with the human immunodeficiency virus (HIV) or diagnosed with acquired immune deficiency syndrome, or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place. (*see* C.R.S. § 38-35.5-101(1)(a)).

The second circumstance that a Broker cannot disclose without informed consent is when "the property was the site of a homicide or other felony or of a suicide." (*see* C.R.S. § 38-35.5-101(1)(b)). Colorado courts have not provided any greater guidance concerning the types of felony crimes that fall under its definition.

A Broker's obligation to avoid disclosure of circumstances which may psychologically impact or stigmatize real property should not impede a party's right to be informed about all known adverse material facts. The Commission concludes that the only circumstances in which a Broker is not obligated to disclose facts or suspicions regarding circumstances that may psychologically impact or stigmatize real property are those two set forth immediately above in sections 38-35.5-101(1)(a) and (b), C.R.S.

<u>Brokers must disclose all known adverse material facts, unless it is one of the circumstances set forth in section 38-35.5-101(1), C.R.S.</u>:

The Commission's primary purpose is to protect the public. (*see Albright v. McDermond*, 14 P.3d 318, 322 (Colo. 2000)). The Commission believes it is in the public's best interest for Brokers to disclose all known adverse material facts to the parties to a real estate transaction because this disclosure increases each party's awareness of those facts prior to completion of the transaction, it reduces the potential for creating an unfair transaction, and it otherwise protects the overall integrity of the transaction.

The Commission suggests that Brokers have robust conversations with their clients about Broker disclosures, with an eye towards full and complete disclosure. Clients should not be encouraged to hide adverse material facts from their Broker. Brokers who are aware of either of the two factual scenarios set forth in section 38-35.5-101, C.R.S., are encouraged to obtain their clients' informed consent to permit disclosure of these facts.

CP-28 Commission Position on Minimum Service Requirements

(Recodification adoption June 7, 2022: CP-36 Commission Position on Minimum Service Requirements recodified to CP 28 – Minimum Service Requirements)

The Commission has received numerous inquiries regarding the minimum services that Brokers must provide to Consumers. Section 12-10-403, C.R.S., requires that any Broker performing Real Estate Brokerage Services, must act in the capacity of either a Transaction-Broker or a Single Agent in the transaction. The uniform duties required to be performed by a Broker acting in the capacity of a Single Agent are set forth in sections 12-10-404 and 12-10-405, C.R.S. The minimum duties required to be performed by a Broker acting in the capacity of a Transaction-Broker are set forth in section 12-10-407, C.R.S.

Most often, the inquiries are about offering some sort of "limited services" or "entry only services" whereby the Broker and Consumer agree to limit the uniform duties as set forth in statute by unbundling the Real Estate Brokerage Services in exchange for a flat fee or greatly reduced commission. In *Colorado Real Estate Commission v. Vizzi*, 488 P.3d 470 (Colo. App. 2019), the Colorado Court of Appeals held that the legislature intended that Brokers assist in the entire real estate transaction and undertake all of the uniform duties set forth in the license law. As such, each of the listed uniform duties is mandatory and a Broker may not waive these duties, in writing or otherwise.

Section 12-10-403, C.R.S., allows Brokers to perform duties in addition to those established in sections 12-10-404, 12-10-405, and 12-10-407, C.R.S. Additional duties may include, but are not

limited to, holding open houses, property showings, providing a lockbox, use of multiple listing services or other information exchanges, etc. Additional duties that Brokers agree to provide their clients must be documented in writing such as in the Listing Contract.

The Commission does not regulate the fees or commissions charged by Brokers for services provided. Fees and commissions are negotiable between the Broker and the Consumer..

CP-29 Commission Position on Holding Money Belonging to Other for Activities Not Involving Real Estate Brokerage Services

(Adoption June 7, 2022: CP 29 – Holding Money Belonging to Others for Activities Not Involving Real Estate Brokerage Services)

The Commission has jurisdiction over a Broker's activities not involving Real Estate Brokerage Services. In the case of *Seibel v. Colorado Real Estate Commission*, 530 P.2d 1290 (Colo. App 1974), the Colorado Court of Appeals held that the Commission has jurisdiction over the acts of a Broker even where those acts do not require licensure.

<u>Money Belonging to Others for Activities Not Involving Real Estate Brokerage Services</u>:

Later, in the case *McDonnell v. Colorado Real Estate Commission*, 361 P.3d 1138 (Colo. App. 2015), the Colorado Court of Appeals concluded that the intent of the legislature was to discipline Brokers for failing to account for or remit Money Belonging to Others within their possession, regardless of whether the money was held for a real estate transaction, because the language in the statute explicitly states, "whether acting as real estate brokers or otherwise." (*see* C.R.S. § 12-10-217(1)(h)) (emphasis added).

Examples of activities not involving Real Estate Brokerage Services may include holding security deposits for Broker-owned properties, short-term rental deposits, holding deposits when a Broker is acting as a builder, holding fundraising contributions on behalf of the sport team of the Broker's child, accepting a deposit to paint a house or any other deposits from others regardless of the activity being related to real estate. Therefore, Brokers should exercise care when holding Money Belonging to Others for activities not involving Real Estate Brokerage Services. Brokers holding Money Belonging to Others for any activities not involving Real Estate Brokerage Services must place such funds into a Trust or Escrow Account, making sure that those monies are not commingled with personal or business operating funds, maintaining appropriate records, and following the accounting practices as set forth in Chapter 5 of the Commission Rules.

<u>Recordkeeping of Funds for Non-Real Estate Brokerage Services</u>:

The Court of Appeals in *McDonnell* further held that the Commission's recordkeeping requirements apply when Brokers are in possession of Money Belonging to Others, regardless of the activity being related to real estate. Consequently, Brokers and Brokerage Firms who accept monies for deposit for activities not involving Real Estate Brokerage Services must deposit the funds into the Broker's or Brokerage Firm's Trust or Escrow Accounts, and those funds are subject to recordkeeping requirements.

A Broker who is engaged in activities not involving Real Estate Brokerage Services must first check the Brokerage Firm's Office Policy Manual to see if such conduct is permissible. If the conduct is permitted and the Office Policy Manual states that all deposits must go into the Brokerage Firm's Trust or Escrow Account, then the Broker must deposit all Money Belonging to Others into the Brokerage Firm's Trust or Escrow Account and the Brokerage Firm must follow all the accounting rules as set forth in Chapter 5 of the Commission Rules. (*see* Rule 5.11.B.1.).

On the other hand, if the Office Policy Manual does not require use of the Brokerage Firm's Trust or Escrow Accounts, the Broker must establish a separate Trust or Escrow Account outside of the Brokerage Firm. A Broker must not divert or convert monies, must maintain a journal of the account and must be able to produce documents and records if requested by the Division. A Broker is also

required to perform a two-way reconciliation monthly to show that on the date of reconciliation the cash balance shown in the journal and the reconciled bank balance are the same. (*see* Rule 5.11.B.2.).

CP-30 Commission Position on Data Security and Privacy

Adopted October 1, 2024

Real estate transactions involve the exchange of sensitive information. Sensitive information is information, the loss, misuse, or unauthorized access to or modification of, that could adversely affect the owner of the information, leading to identity theft, financial loss, and other harms. Sensitive information includes personally identifiable information (PII) that is critical to an individual's privacy, financial security and legal compliance. The exchange of such information by digital methods leads to an increased risk to Brokers and their clients of a data breach. Brokers have an on-going obligation to preserve the confidentiality of all sensitive data and information provided to them by Clients, or on the clients' behalf; this duty continues even after the termination of the brokerage relationship. This obligation exists for all Brokers, whether acting in the capacity of a Transaction-Broker or pursuant to an Agency agreement. License law contemplates the requirement for brokers to comply with local, state and federal laws and regulations, including, but not limited to: Commission Rule 6.4.C., Policy on the Destruction or Disposal of Personal Identifying Information and § 6-1-716, C.R.S. It is also imperative for Brokers to be alert to potential cybersecurity risks and take proactive measures to protect a client's sensitive or confidential information. Some examples of cybersecurity best practices are provided below and are not an exhaustive list.

Conduct a Cybersecurity Threat Assessment: It is recommended that Brokers conduct an inventory of all sensitive information that their business uses. This assessment should evaluate how the information is obtained, how it is received and stored, and who has access to it. This includes identifying the computers and servers where sensitive information is stored, and all means of accessing such information. An assessment should be made of the vulnerability of these systems to commonly known threats.

Email Accounts: Brokers should avoid using a free web-based email service account and should consider using a propriety email account instead. Brokers can also advise Clients about the risk to THEIR free web-based emails. Many times, it is the Client's email that was compromised, leading to a security breach. Brokers should use a regulated email server with firewall and anti-virus protection. It is also recommended that Brokers use encryption software to protect the transmission of financial or other personal information. Brokers should periodically review the security and privacy settings for their email accounts. This can include checking sent emails for responses that the Broker did not send and regularly check email "rules" to ensure nothing has been created without the Broker's knowledge.

Email Use Best Practices: Brokers should avoid using their personal email accounts for any professional emails or a professional account for personal emails. Always log out of your email account when finished. Brokers should never ask for or provide sensitive information in an unsecured email. Brokers should use caution in opening emails from unknown senders and should be particularly cautious of opening attachments or clicking on links in such emails. Some things to consider in evaluating emails that appear suspicious are whether it contains typos, unusual URLs, or requests for personal information, demands an urgent response, or comes from an email address that does not match the company's name.

Passwords: Simple and short passwords should not be used; experts suggest using at least 12 characters and ideally 16 or more. For example, a strong password could include a phrase password with numbers and special characters or a string of words that are unrelated (e.g.: horsehousehallwayhappy). The same password should not be used on more than one system; one example of this is that a password used for any work platforms should not also be used on social media accounts. Passwords should be frequently updated. Consider using a password manager to help track and store all passwords securely.

Protect Networks and Devices: Wi-Fi networks should be secured with strong encryption, unique passwords, and regular monitoring to prevent unauthorized access. A Wi-Fi router's firmware and software should be regularly updated to ensure it has the latest security enhancements and patches. Devices should have antivirus, anti-spyware, encryption, and anti-malware software installed and regularly receive software updates. If sensitive information is not encrypted, anonymized, or otherwise secured, information on lost or stolen devices can be compromised. Brokers should consider using a firewall to protect their systems.

Public Wi-Fi: Using an unsecured public Wi-Fi can leave someone vulnerable to cybercrime. Virtual private networks (VPNs) encrypt internet connections, making it much harder for cybercriminals to intercept and steal data. Consider setting up a VPN on your devices for an extra layer of security when accessing sensitive information over public Wi-Fi networks. VPNS are also beneficial for individuals working remotely, as unsecured home Wi-Fi networks can also expose sensitive data to potential threats.

Multi-Factor Authentication: Multi-factor authentication (MFA) should be used for all networks to verify the identity of a user before they are allowed access to sensitive information. MFA requires at least two forms of identification for added protection such as passwords and security tokens, through a cell phone app or text, as well as biometric options such as facial recognition or fingerprint scans. When MFA is enabled, even if a hacker has access to a password, the account cannot be accessed without an additional authentication. This effectively eliminates phishing as a problem for accounts where it is enabled.

Document Sharing Platforms: It is recommended that Brokers utilize secure document-sharing platforms that allow users to share sensitive information while maintaining confidentiality and security. These platforms utilize access controls, encryption, and other security measures to protect documents from unauthorized access or data breaches.

Wire Transfers: Brokers should advise clients to provide wiring instructions to the title company, in person, at closing. If a Broker will be providing wiring instructions to the title company on behalf of their client, those instructions should be provided to the title company in person, at closing. It is advised that no wire transfer is made based only on an email. However, if it is not possible to provide wiring instructions in person at closing and the title company is willing to accept wiring instructions in a different format (e.g. U.S. mail), wiring instructions should be verified over the phone with the title company. When verifying wiring instructions by phone, only use a phone number that was previously verified; not a phone number found in an email.

Third-Party Vendors: When engaging third-party vendors to whom you are providing sensitive information, thoroughly review their privacy policies carefully to ensure that these vendors meet your security standards and practices and reach a clear agreement on security expectations and response protocols.