

Commission Position 4 – 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).

Seller:

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.

Buyer:

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.

All defined terms referenced in the Commission Position statements are codified in 4 CCR 725-1, Chapter 1 of the Rules regarding Real Estate Brokers.