Subchapter N. Suspension and Revocation of Licensure
§535.141, §§535.143 - 535.149, §535.153, §§535.159 - 535.161

The Texas Real Estate Commission (TREC or the commission) adopts amendments to §535.141, regarding Initiation of Investigation; §535.143, regarding Fraudulent Procurement of License; §535.144, regarding When Acquiring or Disposing of Own Property or Property of Spouse, Parent or Child; §535.145, regarding False Promise; §535.146, regarding Failure to Properly Account for Money; Commingling; §535.147, regarding Splitting Fee with Unlicensed Person; §535.148, regarding Receiving an Undisclosed Commission or Rebate; §535.149, regarding Lottery or Deceptive Trade Practice; §535.153, regarding Violating an Exclusive Agency; amendments to §535.159, regarding Failing to Properly Deposit Escrow Monies; §535.160, regarding Failing to Properly Disburse Escrow Money; and §535.161, regarding Failing to Provide Information with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8268);§535.148(e) was changed to add an effective date for that subsection of March 1, 2011.

The amendments to §535.141 streamline the section, update the cites and clarify existing subsections; subsection (h) is amended to include advertising in the laundry list activities that a licensee may not engage in while the person's license is under suspension; subsection (i)(3) and (4) are added to include home inspectors; subsection (j) is added to address matters relating to automatic suspension of a license for violating a term or condition of an agreed probated revocation or suspension.

The amendments to §535.144 clarify that a licensee must disclose the information required by §1101.652(a)(3) in writing.

The amendments to §535.146 clarify existing requirements that apply to maintenance of trust accounts, including that a broker is ultimately responsible for compliance with the trust account requirements in the Act and Rules; subsection (h) is amended to require a broker to notify all parties in writing agreed to in writing; new subsection (k) clarifies that a broker may deposit and maintain additional amounts in a trust account to cover bank service fees.

Subsection (a) of §535.147 is deleted and moved to the definitions in §535.1; new subsection (a) clarifies that a licensee may not share a commission with an unlicensed person except as provided by the Act or Rules; new subsection (b) authorizes an unlicensed person to share in the income earned by a licensee as long as the person does not engage in real estate brokerage activity; new subsection (c) clarifies that a broker or salesperson may not share a commission with an unlicensed corporation or limited liability company created by a licensee for the purpose of collecting a commission or fees on behalf of the licensee.

New subsection (c) is added to §535.148 to prohibit a licensee from entering into contracts with service providers which prohibits a licensee from entering into or offering similar service on behalf of a competing service provider; new subsection (d) prohibits contingent fee arrangements where the licensee accepts a fee that is contingent upon a party purchasing a contract or services from a specific service provider; new subsection (e) adopts by a reference RSC-1, Disclosure of Relationship with Residential Service Company which licensees are required to use as of March 1, 2010 to disclose compensation for services provided to or on behalf of a residential service company.

The amendments to §535.149 clarify the definition of "lottery" and "deceptive practices."

Amendments to §§535.143, 535.145, 535.153, and 535.159 - 535.161 clarify and streamline existing provisions.

The revisions to the rules as adopted do not change the nature or scope so much that they could be deemed different rules. The rules as adopted do not affect individuals other than those contemplated by the rules as proposed. The rules as adopted do not impose more onerous requirements than the proposed versions and do not materially alter the issues raised in the proposed rules. The changes in the rules reflect a non-substantive variation from the proposed rules to make the affected rule consistent with other rules.

The reasoned justification for the amendments is more streamlined, consistent and readable rules.

Additional justification is provided below in response to the comments on the advertising rules as proposed.

The Texas Association of Realtors, the Texas Apartment Association, and the Metrotex Association of Realtors commented on the rules proposed under subchapter N.

The commission received 86 comments on the rules as proposed

Comments: Two commenters commented in favor of §535.146 as proposed.

Comment: One commenter asked whether §535.147 as amended permits a licensee to pay a commission to unlicensed persons for referrals.

Comments: Approximately 82 comments expressed concerns about the costs and burden of complying with §535.154 as proposed.

Comment: One commenter noted that the requirements of subsection (d) of §535.154 are also overly burdensome because it places potential liability on a licensee for inadvertent advertising inaccuracies.

Comment: One commenter suggested that adding the broker's license number to advertisements and requiring the broker's name to be identified in a clear and conspicuous manner will potentially clutter advertisements making them harder to read by the general public.

Response: The commission will continue to seek recommendations from interested parties regarding proposed new §535.154, and therefore did not take final action to adopt proposed new §535.154. Similarly, the commission decided not to take final action to repeal existing §535.154 until such time that a decision is made on a provision to replace it.

The amendments and new rules are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this adoption are Texas Occupations Code, Chapter 1101 and Chapter 1102. No other statute, code or article is affected by the adoption.

§535.141. Initiation of Investigation.

(a) As used in this section, the term "licensee" includes a person licensed or registered under the Act and Chapter 1102 and the term "license" includes a registration issued by the commission.

(b) Except as authorized under Texas Government Code §402.031(b), the commission may not conduct an undercover or covert investigation of a person under the Act and Chapter 1102. Notwithstanding §1101.204(d), the commission shall not disclose to any person who is the subject of an investigation involving [~~of~~] fraudulent activity, that the activity has been reported to the proper authority pursuant to Texas Government Code §402.031.

(c) A complaint which names a licensed real estate salesperson as the subject of the complaint but does not specifically name the salesperson's sponsoring broker, is a complaint against the broker sponsoring the salesperson at the time of any alleged violation for the limited purposes of determining the broker's involvement in any alleged violation and whether the broker fulfilled his or her professional responsibilities provided the complaint concerns the conduct of the salesperson as an agent for the broker.

(d) The broker designated by a licensed business entity to act as its officer, manager or partner is responsible for all real estate brokerage activities performed by, on behalf of, or through the business entity. A complaint which names a business entity licensed as a broker as the subject of the complaint but which does not specifically name the broker designated as the officer, manager or partner of the business entity, is a complaint against the broker acting as the designated officer, manager or partner at the time of any alleged violation for the limited purposes of determining the designated broker's involvement in any alleged violation and whether the designated broker fulfilled his or

her professional responsibilities. A complaint which names a salesperson sponsored by a licensed business entity but which does not specifically name the designated broker of the business entity is a complaint against the designated broker at the time of any alleged violation by the salesperson for the limited purposes of determining the designated broker's involvement in any alleged violation and whether the designated broker fulfilled his or her professional responsibilities provided the complaint concerns the conduct of the salesperson as an agent of the business entity.

(e) Once a written and signed complaint has been filed with the commission, the commission has jurisdiction to consider, investigate and take action based on the complaint. Complaints may be withdrawn only with the consent of the commission.

(f) If information obtained during the course of an investigation of a complaint reveals reasonable cause to believe the respondents to the complaint may have committed other violations of the Act or a rule of the commission, no additional authorization shall be required to investigate and take action based upon the information.

(g) If the commission suspends or revokes a license or probates an order of suspension or revocation against a licensee, the commission may monitor compliance with its order and initiate action based on the authority of the original complaint or original authorization by the members of the commission.

(h) A person whose license has been suspended may not during the period of any suspension:

(1) perform, attempt to perform, or advertise to perform any act for which a license is required by the Act or Rules; or

(2) unless instructed otherwise in writing by both principals to the transaction, continue to hold any trust funds received in a real estate transaction in which the person acted as a broker or salesperson.

(i) A person whose license is subject to an order suspending the license must prior to the suspension taking effect:

(1) if the person is a salesperson, notify his or her sponsoring broker in writing that his or her license will be suspended;

(2) if the person is a broker, notify in writing any salespersons he or she sponsors, or any corporation, limited liability company or partnership for which the person is designated as an officer, manager or partner that:

(A) his or her broker license will be suspended; and

(B) once the suspension is effective any salesperson he or she sponsors or who is sponsored by the corporation, limited liability company or partnership will not be authorized to engage in real estate brokerage unless the salespersons associate with another broker and file a change of sponsorship with the commission or the business entity designates a new broker and files a change of designated officer, manager or partner with the commission;

(3) If the person is an apprentice inspector or real estate inspector, notify his or her sponsoring professional inspector in writing that his or her license will be suspended;

(4) if the person is a professional inspector, notify in writing any apprentice or real estate inspectors he or she sponsors that:

(A) his or her professional inspector license will be suspended; and

(B) once the suspension is effective any apprentice or real estate inspectors he or she sponsors will not be authorized to inspect any real property unless the apprentice or real estate inspectors associate with another professional inspector and file a change of sponsorship with the commission.

(5) if the person has a contractual obligation to perform services for which a license is required by law or commission rule, notify in writing all other parties to the contract that the services cannot be performed during the suspension;

(6) if the person is a salesperson and is directly involved in any real estate transaction in which the salesperson acts as an agent, notify in writing all other parties, including principals and other brokers, that the person

cannot continue performing real estate brokerage services during the suspension; and

(7) if the person holds money in trust in any transaction in which the person is acting as a broker, remit such money in accordance with the instructions of the principals.

(j) If, in conjunction with an application or disciplinary matter, an applicant or licensee agrees to automatic suspension or revocation of his or her license for failing to comply with an administrative term or requirement of an agreed order such as_payment of a penalty or completion of coursework, the license may be automatically suspended or revoked with no further action by the commission.

(k) A licensee may not assign to another licensee a listing agreement, buyer's representation agreement or other personal service contract to which the licensee is a party and which obligates the licensee to perform acts for which a license is required without first obtaining the written consent of the other parties to the contract.

§535.143.Fraudulent Procurement of License. A violation of, §1101.652(a)(2) of the Act occurs if an applicant, including a designated broker for any business entity eligible for licensure under this chapter, omits material information or makes material misstatements, written or oral, in connection with the filing of an application or renewal application to obtain licensure. This does not include an unintentional mistake of fact the determination of which is within the discretion of the commission and subject to judicial review.

§535.144.When Acquiring or Disposing of Own Property or Property of Spouse, Parent or Child.

(a) For purposes of §1101.652(a)(3) of the Act a person related to the license holder within the first degree by consanguinity" means a license holder's parent or child.

(b) A licensee, when engaging in a real estate transaction on his or her own behalf, on behalf of a business entity in which the licensee is more than a 10% owner, or on behalf of the licensee's spouse, parent, or child, is obligated to disclose in writing to any person with whom the licensee deals that he or she is a licensed real estate broker or salesperson acting on his or her own behalf or on behalf of the licensee's spouse, parent or child in any contract of sale or rental agreement or in any other writing given prior to entering into any contract of sale or rental agreement. A licensee shall not use the licensee's expertise to the disadvantage of a person with whom the licensee deals.

§535.145.False Promise. For purposes of §1101.652(a)(5) of the Act "false promise" includes both oral and written promises. The fact that a written contract between the parties to a real estate transaction does not recite a promise made by a real estate licensee to one of the parties or that a person did not detrimentally rely on the false promise will not prevent the commission from determining that a false promise was made. In determining whether this section has been violated, neither a written contractual provision disclaiming oral representations nor the Texas Rules of Evidence Rule 1004, the parol evidence rule, shall prevent the commission from considering oral promises made by a licensee.

§535.146.Failure to Properly Account for Money; Commingling.

(a) A broker who maintains trust funds shall either keep a separate trust account or use an escrow agent for all such trust funds.

(b) A broker may designate a salesperson as an authorized signatory on any trust account; however, the broker shall be solely responsible and accountable for all trust funds received by the broker and all deposits to or disbursements from the trust account.

(c) A salesperson shall immediately deliver to the sponsoring broker any trust funds received in connection with a real estate transaction not otherwise deposited with a title company.

(d) A licensee maintaining a trust account shall retain for a period of four years a documentary record of each deposit or withdrawal from the account.

(e) A licensee shall not commingle trust funds with personal funds or other non-trust funds and shall not deposit or maintain trust funds in a personal account or any kind of business account except a specifically designated trust account in the name of the sponsoring broker.

(f) If a licensee accepts money belonging to others, the licensee holds such money in a fiduciary capacity.

(g) If any or all of the parties to a real estate transaction make demand for the money, the licensee must, within a reasonable time, properly account for or remit the money. "Reasonable time" means within 30 days after demand is made for an accounting or for remittance of money belonging to others. "Properly account for or remit" is defined as the licensee's obligation to pay the money to the party or parties entitled to the money if it can be reasonably determined to which party or parties the money should be paid. A licensee may pay the money into the registry of a court and interplead the parties if it cannot be reasonably determined to which party or parties the money should be paid.

(h) If, by written agreement of the parties to the real estate transaction, the licensee holding money belonging to others has the right to require the receipt, release and authorization in writing from all parties before paying the money to any party or parties, and if the licensee chooses to exercise that right, "properly account for or remit" means to furnish every party with a written statement requesting such receipt, release and authorization and detailing the amount and place of custody of the money and to pay the money to the party or parties in accordance with the receipts, releases and authorizations, if obtained. When a broker makes a disbursement to which all parties to the contract have not expressly agreed in writing, the broker must immediately notify all parties in writing of the disbursement. A licensee may pay the money into the registry of a court and interplead the parties if the receipts, releases and authorizations that the licensee has the right to require cannot be obtained.

(i) If trust funds are held by a licensee, they must be maintained in the broker's trust account. Placing such money in a licensee's operating account is prima facie evidence of commingling.

(j) If a licensee acquires ownership of money, including entitlement to a real estate commission for the real estate transaction, held in the licensee's trust account that was originally held in trust for another in connection with the real estate transaction, such money must be removed from the trust account within a reasonable time. "Reasonable time" in this context means within 30 days after the licensee acquires ownership of the money.

(k) The balance of a broker's trust account shall at all times equal the total of the trust funds received for which the broker is accountable, provided, however, the broker may deposit and maintain a reasonable amount of funds in the trust account to cover bank service fees, including fees charged for insufficient funds. Detailed records must be kept for any funds deposited under this exception. Paying operating expenses or making withdrawals from a broker's trust account for any purpose other than proper disbursement of money held in trust is prima facie evidence of commingling money held in trust with the broker's own funds.

§535.147.Splitting Fee with Unlicensed Person.

(a) Except as otherwise provided by the Act or Rules, a broker or salesperson may not share a commission or fees with any person who engages in acts for which a license is required and is not actively licensed as a broker or salesperson.

(b) An unlicensed person may share in the income earned by a business entity licensed as a broker or exempted from the licensing requirements under the Act if the person engages in no acts for which a license is required and does not lead the public to believe that the person is in the real estate brokerage business.

(c) A broker or salesperson may not share a commission or fees with an unlicensed corporation or limited liability company created by a licensee for the purpose of collecting a commission or fees on behalf of the licensee.

(d) It is not a violation of this section for a licensee to rebate or pay a portion of the licensee's commission or fees to a party in the transaction. However, no commission or fees may be paid to any party to the transaction in a manner which would mislead a broker, lender, title company or governmental agency regarding the real estate transaction or the

financial resources or obligations of the buyer. A licensee who intends to pay a portion of the licensee's fee or commission to a party the licensee does not represent must obtain the consent of the party represented by the licensee prior to making the payment.

§535.148.Receiving an Undisclosed Commission or Rebate.

(a) A licensee may not receive a commission, rebate, or fee in a transaction from a person other than the person the licensee represents without first disclosing to the licensee's client that the licensee intends to receive the commission, rebate or fee, and obtaining the consent of the licensee's client. This subsection does not apply to referral fees paid by one licensed real estate broker or salesperson to another licensed broker or salesperson.

(b) If a party the licensee does not represent agrees to pay a service provider in the transaction, the licensee must also obtain the consent of that party to accept a fee, commission or rebate from the service provider. As used in this section, the term "service provider" does not include a person acting in the capacity of a real estate broker or salesperson.

(c) A licensee may not enter into a contract or agreement with a service provider to a real estate transaction in which the licensee represents one or both of the parties if, pursuant to the contract or agreement:

(1) the licensee provides services for or on behalf of the service provider; and

(2) the contract or agreement prohibits the licensee from offering similar services for or on behalf of a competing service provider.

(d) A licensee may not accept a fee or payment for services provided for or on behalf of a service provider to a real estate transaction the payment of which is contingent upon a party to the real estate transaction purchasing a contract or services from the service provider.

(e) Effective March 1, 2011, a licensee must use TREC Form RSC-1, Disclosure of Relationship with Residential Service Company, to disclose to a party to a real estate transaction in which the licensee represents one or both of the parties any payments received for services provided for or on behalf of a residential service company licensed under Texas Occupations Code Chapter 1303.

(f) The Texas Real Estate Commission adopts by reference TREC Form No. RSC-1, Disclosure of Relationship with Residential Service Company, approved by the commission for use by licensees to disclose payments received from a resident service company. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§535.149.Lottery or Deceptive Trade Practice.

(a) For the purposes of §1101.652(b)(14) of the Act, the elements of a "lottery" are the award or distribution of a prize or prizes by chance and the payment of consideration for the opportunity to win the prize.

(b) The giving of gifts as an inducement for prospective clients does not violate this section or §1101.652(b)(14) of the Act, but licensees when procuring prospects must otherwise comply with the provisions of §535.20 of this chapter (relating to Referrals From Unlicensed Persons).

(c) "Deceptive practices" include, but are not limited to the acts described in the Texas Business and Commerce Code §17.46, done in a manner defined in that section.

§535.153.Violating an Exclusive Agency. Although a licensee, including one acting as agent for a prospective buyer or prospective tenant, may not attempt to negotiate a sale, exchange, lease, or rental of property under exclusive listing with another broker, §1101.652(b)(22) of the Act does not prohibit a licensee from soliciting a listing from the owner while the owner's property is subject to an exclusive listing with another broker.

§535.159.Failing to Properly Deposit Escrow Monies.

(a) A broker is not required to maintain a trust account unless the broker undertakes to accept trust funds belonging to others.

(b) When money is deposited with a broker to be held in escrow, the broker becomes the

trustee accountable to the party making the deposit and to the party for whose benefit said trust funds are deposited.

(c) It is up to principals to a transaction to decide who shall act as escrow agent for them. A broker may not require the principals to a real estate transaction to designate the broker as their escrow agent.

(d) Nonresident brokers acting as real estate agents in Texas who accept trust funds as escrow agents must deposit said funds in a trust account at a banking institution or title company authorized to do business in Texas.

(e) It is permissible for a broker to establish a savings account as a trust account, provided said funds may be withdrawn at the appropriate time for disbursal. In the absence of an agreement to the contrary signed by the person depositing the funds with the broker, any interest earned on a savings account must be distributed to the person or persons who are the equitable owners of the funds during the time the interest is earned.

(f) A salesperson may not maintain a trust account or act as an escrow agent. Any money received by a real estate salesperson, to be held in trust pursuant to a real estate transaction, must be delivered to the salesperson's sponsoring broker to be deposited in accordance with the agreement of the principals in the transaction.

(g) A broker may, but is not required to, maintain separate trust accounts for earnest money deposits, security deposits received for the management of rental property, and for other trust funds.

(h) If a broker maintains a trust account, that account must be clearly identified as a trust account.

(i) Unless a different time to deposit money is expressly agreed upon in writing by the principals to the transaction, "reasonable time" as used in this section means by the close of business of the second working day after execution of the contract by the principals. If all principals agree, a deposit may be delayed in accordance with their agreement.

(j) If trust funds held by a broker are deposited in a noninterest bearing account, the broker is not liable for interest or for charges on the funds unless there is an agreement to the contrary.

(k) If a broker accepts a check as escrow agent and later finds that such check has been dishonored by the bank on which it was drawn, the broker shall immediately notify all parties to the transaction in writing.

§535.160.Failing to Properly Disburse Escrow Money.A broker shall make no disbursal from the broker's trust account except in accordance with the agreement under which the money was received.

§535.161.Failing to Provide Information. For the purposes of §1101.652(a)(5) of the Act, "reasonable time" means 10 working days from receipt of a request made by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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