

**Texas Real Estate Commission
Chapter 535, GENERAL PROVISIONS
Rules Adopted at the November 15, 2010 Commission Meeting**

**Subchapter B. General Provisions
Relating to the Requirements of
Licensure**

**§535.2, §535.3, new §535.4,
§535.5, §535.16, §535.17, §535.20**

The Texas Real Estate Commission (TREC) adopts amendments to §535.2, regarding Broker Responsibility; §535.3, regarding Compensation to or Paid by a Salesperson; §535.16, regarding Listings; Net Listings; §535.17, regarding Appraisals; and §535.20, regarding Referrals from Unlicensed Persons; new §535.4, regarding License Required; and new §535.5, regarding License Not Required. Section 535.2 is adopted with changes to the proposed text as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8249) and will be republished. Sections 535.3 - 535.5, 535.16, 535.17, and 535.20 are adopted without changes and will not be republished.

The differences between the rule as proposed and the rule as finally adopted are as follows: §535.2(g) changes the reference "of this chapter" to "of this title (relating to Advertising)" and in §535.2(i)(8) a typographical error was corrected to reference "subsection (h)" instead of "subsection (f)."

TREC renames the subchapter name from "Definitions" to "General Provisions Relating to the Requirements of Licensure".

The amendments to §535.2 articulate a broker's responsibilities to their sponsored salespersons, the public, and other brokers. Under the rule, a broker is required to advise a sponsored salesperson of the scope of the salespersons authorized activities under the act and clarifies the liability of the broker for the activities of the salesperson if the broker permits a salesperson to engage in activities beyond the scope originally authorized. The amendments clarify that a broker is responsible for any property management activity conducted by their sponsored

salespersons and for advertising of sponsored salespersons. The amendments permit a broker to designate in writing another licensee to be responsible for day-to-day supervision of sponsored salespersons; however, the broker would continue to have overall responsibility of the salespersons. The amendments require a broker to maintain records of transactions for a period of 4 years; maintain written policies and procedures addressing specified activities; and promptly deliver commission correspondence to sponsored salespersons. The amendments clarify that the broker responsibility rules are not meant to create an employer/employee relationship where there is none.

The amendments to §535.3 regarding Compensation to or Paid by a Salesperson require that an agreement between a broker and sponsored salesperson regarding the compensation a salesperson receives or pays to other licensees must be in writing. New §535.4 regarding License Required is a compilation of existing rules that are put together into one comprehensive rule that addresses the instances in which a license is required under the Act, as well as a new provision which clarifies that a corporation or limited liability company owned by a broker or salesperson which receives compensation on behalf of the licensee must be licensed as a broker under the Act. New §535.5 regarding License Not Required is a compilation of existing rules that are put together into one comprehensive rule that addresses the instances in which a license is not required under the Act. The amendments to §535.16 change the name of the section and reorganize the subsections. The amendments to §535.17 reorganize the subsections. The amendment to §535.20 changes the name of the rule from "Procuring Prospects" to "Referrals from Unlicensed Persons."

Generally speaking, the amendments and new rules correct typographical errors, reorganize, clarify, and streamline existing rules, and update cites to new laws and codes.

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The reasoned justification for the amendments is more streamlined, consistent and readable rules, and clarification regarding a broker's responsibility to consumers and sponsored salespersons.

The Texas Association of Realtors, the Texas Apartment Association and the Metrotex Association of Realtors commented on several rules proposed under Subchapter B. The commission received a total of four comments on the rules as proposed.

Comment: One person commented favorably on 22 TAC §535.2 and §535.4 as proposed.

Comment: One person commented favorably on §535.4 and §535.5 as proposed.

Comment: One person commented favorably on proposed §535.4.

Comment: One commenter expressed concerns about whether an agent may assign their commission to a third party once the agent receives the commission.

Response: The rule does not prohibit an agent from assigning any fees the agent earns to a third party, such as a principal to a transaction or a company who advances loans to agents, as long as the agent is not paying the third party for brokerage services provided by the third party. Also, according to the new rule, a company created for the express purpose of collecting fees for the agent would be required to have a broker license.

Comment: One commenter suggested adding a rule to preclude brokers from recruiting agents by advertising that an applicant may complete a program of study in less time than the number of credit hours awarded.

Response: The commission appreciates the suggestion but believes that the issue is addressed

in the new rules simultaneously being adopted under Subchapter F of Chapter 535 regarding misleading advertising by schools.

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.

§535.2. Broker Responsibility.

(a) A broker is required to advise a sponsored salesperson of the scope of the salesperson's authorized activities under the Act. Unless such scope is limited or revoked in writing, a broker is responsible for the authorized acts of the broker's salespersons, but the broker is not required to supervise the salespersons directly. If a broker permits a sponsored salesperson to conduct activities beyond the scope explicitly authorized by the broker, those too will be deemed to be authorized acts for which the broker is responsible.

(b) A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obliged to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision.

(c) A broker is responsible for the proper handling of trust funds placed with the broker, although the broker may authorize other persons to sign checks on behalf of the broker.

(d) A broker is responsible for any property management activity which requires a real estate license that is conducted by the broker's sponsored salespersons.

(e) A broker may designate another licensee to assist in administering compliance with the

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Act and Rules, but the broker may not relinquish overall responsibility for the supervision of licensees sponsored by the broker. Any such designation must be in writing.

(f) Listings may only be solicited and accepted in a broker's name.

(g) A broker is responsible to ensure that a sponsored salesperson's advertising complies with §535.154 of this title (relating to Advertising).

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the following records, at a minimum, shall be maintained for at least four (4) years from the date of closing or termination of the contract in a format that can readily be made available to the commission.

(1) Disclosures;

(2) Commission Agreements such as listing agreements, buyer representation agreements or other written agreement relied upon to claim compensation;

(3) Work files;

(4) Contracts and related addenda;

(5) Receipts and disbursements of compensation for services subject to the Act;

(6) Property management contracts;

(7) Documents required by USPAP for appraisals; and

(8) Sponsorship agreements between the broker and sponsored salespersons.

(i) A broker shall maintain on a current basis written policies and procedures to ensure that:

(1) Each sponsored salesperson is advised of the scope of the salesperson's authorized activities subject to the Act and is competent to conduct such activities.

(2) Each sponsored salesperson maintains their license in active status at all times while they are engaging in activities subject to the Act.

(3) Any and all compensation paid to a sponsored salesperson for acts or services

subject to the Act is paid by, through, or with the written consent of the sponsoring broker.

(4) Each sponsored salesperson is provided on a timely basis, prior to the effective date of the change, notice of any change to the Act, Rules, or commission promulgated contract forms.

(5) In addition to completing statutory minimum continuing education requirements, each sponsored salesperson receives such additional sponsored educational instruction the broker may deem necessary to obtain and maintain on a current basis competency in the scope of the sponsored salesperson's practice subject to the Act.

(6) Each sponsored salesperson complies with the commission's advertising rules.

(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are handled by the broker with appropriate controls.

(8) Records are properly maintained pursuant to subsection (h) of this section.

(j) A broker must promptly respond to sponsored salespersons, clients, and licensees representing other parties in real estate transactions.

(k) A sponsoring broker shall deliver to or otherwise provide, within a reasonable time after receipt, mail and other correspondence from the commission to their sponsored salespersons. A broker may deliver such correspondence by facsimile or email.

(l) When the broker is a business entity, the designated broker is the person responsible for the broker responsibilities under this section.

(m) This section is not meant to create or require an employer/employee relationship between a broker and a sponsored salesperson.

§535.3. Compensation to or Paid by a Salesperson. A salesperson may not receive a commission or other fee except with the written consent of the salesperson's sponsoring broker or the broker who sponsored the salesperson when the salesperson became entitled to the commission or fee. A salesperson may not pay a commission or other fee to another person

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except with the written consent of the salesperson's sponsoring broker.

§535.4. License Required.

(a) The Act applies to persons acting as real estate brokers or salespersons while physically within this state, regardless of the location of the real estate involved or the residence of the person's customers or clients. For the purposes of the Act, a person conducting brokerage business from another state by mail, telephone, the Internet, email or other medium is also considered acting within this state if all the prospective buyers, sellers, landlords, or tenants are legal residents of this state, and the real property concerned is located wholly or in part within this state.

(b) This section does not prohibit cooperative arrangements between non-resident brokers and Texas brokers pursuant to §1101.651(a)(2) of the Act and §535.131 of this title (relating to Unlawful Conduct: Splitting Fees).

(c) Unless otherwise exempted by the Act, a person must be licensed as a broker or salesperson to show a broker's listings.

(d) The employees, agents or associates of a licensed broker, including a business entity licensed as a broker, must be licensed as brokers or salespersons if they direct or supervise other persons who perform acts for which a license is required.

(e) A real estate license is required for a person to solicit listings or to negotiate in Texas for listings.

(f) A corporation or limited liability company owned by a broker or salesperson which receives compensation on behalf of the licensee must be licensed as a broker under the Act.

(g) Unless otherwise exempted by the Act, a person who manages real property or collects rentals for an owner of real property and also rents or leases the property for the owner for valuable consideration must be licensed.

(h) A person must be licensed as a broker to operate a rental agency.

(i) A real estate license is required of a subsidiary corporation, which, for

compensation, negotiates in Texas for the sale of its parent corporation's real property.

(j) Arranging for a person to occupy a residential property is an act requiring a real estate license if the actor:

(1) does not own the property or lease the property from its owner;

(2) receives a valuable consideration; and

(3) is not exempted from the requirement of a license by §1101.005 of the Act.

(k) Except as provided by this section a real estate license is required for a person to receive a fee or other consideration for assisting another person to locate real property for sale, purchase, rent, or lease, such as the operation of a service which finds apartments or homes.

(l) The compilation and distribution of information relating to rental vacancies or property for sale, purchase, rent, or lease is activity for which a real estate license is required if payment of any fee or other consideration received by the person who compiles and distributes the information is contingent upon the sale, purchase, rental, or lease of the property. An advance fee is a contingent fee if the fee must be returned if the property is not sold, purchased, rented, or leased.

(m) A person must be licensed as a broker or salesperson if, for compensation, the person:

(1) advertises for others regarding the sale, purchase, rent or lease of real property;

(2) accepts calls received in response to such advertisements; and

(3) refers the callers to the owner of the property.

§535.5. License Not Required.

(a) Acting as a principal, a person may purchase, sell, lease, or sublease real estate for profit without being licensed as a broker or salesperson.

(b) A person may acquire an option or contract to purchase real estate and then sell it or offer to sell it without having a real estate license.

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(c) A person who owns property jointly may sell and convey title to his or her interest in the property, but to act for compensation or with the expectation of compensation as an agent for the other owner, the person must be licensed unless otherwise exempted by the Act.

(d) A real estate license is not required for an individual employed by a business entity for the purpose of buying, selling, or leasing real property for the entity. An entity is considered to be an owner if it holds record title to the property or has an equitable title or right acquired by contract with the record title holder.

(e) Trade associations or other organizations that provide an electronic listing service for their members, but do not receive compensation when the real estate is sold, are not required to be licensed under the Act.

(f) Auctioneers are not required to be licensed under the Act when auctioning real property for sale. However, a licensed auctioneer may not show the real property, prepare offers, or negotiate contracts unless the auctioneer is also licensed under the Act.

(g) An answering service or clerical or secretarial employees identified to callers as such to confirm information concerning the size, price and terms of property advertised are not required to be licensed under the Act.

(h) A broker may hire an unlicensed person to act as a host or hostess at a property being offered for sale by the broker, provided the unlicensed person engages in no activity for which a license is required.

§535.16. Listings; Net Listings.

(a) A broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the broker has agreed to represent.

(b) A "net listing" is a listing agreement in which the broker's commission is the difference ("net") between the sales proceeds and an amount desired by the owner of the real property. A broker may not take net listings unless the principal requires a net listing and the principal appears to be familiar with current market values of real property. The use of a net listing places an upper limit on the principal's

expectancy and places the broker's interest above the principal's interest with reference to obtaining the best possible price. If a net listing is used, the listing agreement must assure the principal of not less than the principal's desired price and limit the broker to a specified maximum commission.

(c) A real estate licensee is obligated to advise a property owner as to the licensee's opinion of the market value of a property when negotiating a listing or offering to purchase the property for the licensee's own account as a result of contact made while acting as a real estate agent.

§535.17. Appraisals.

(a) Except as provided by this section, appraisals of real property performed in this state by Texas real estate licensees must be conducted in accordance with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation in effect at the time the appraisal is performed. If a real estate licensee, for a separate fee, provides an opinion of value or comparative market analysis which does not conform with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, the licensee shall also provide the person for whom the opinion or analysis is prepared with a written statement containing the following language: "THIS IS AN OPINION OF VALUE OR COMPARATIVE MARKET ANALYSIS AND SHOULD NOT BE CONSIDERED AN APPRAISAL. In making any decision that relies upon my work, you should know that I have not followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation."

(b) The statement required by subsection (a) of this section must be made part of any written opinion or analysis report and must be reproduced verbatim.

(c) The exception allowed by subsection (a) of this section does not apply to a transaction in which the Resolution Trust Corporation or a federal financial institutions regulatory agency has required compliance with the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation.

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(d)A salesperson may prepare, sign, and present real estate appraisals for the salesperson's sponsoring broker, but the salesperson must submit appraisals in the broker's name and the broker is responsible for the appraisals.

(e)The Act does not apply to appraisals performed by the employees of a financial institution or investment firm in connection with a contemplated loan or investment by their employers.

§535.20. Referrals From Unlicensed Persons.

(a)Referring a prospective buyer, seller, landlord, or tenant to another person in connection with a proposed real estate transaction is an act requiring the person making the referral to be licensed if the referral is made with the expectation of receiving valuable consideration. For the purposes of this section, the term "valuable consideration" includes but is not limited to money, gifts of merchandise having a retail value greater than \$50, rent bonuses and discounts.

(b)A person is not required to be licensed as a real estate broker or salesperson if all of the following conditions are met.

(1)The person is engaged in the business of selling goods or services to the public.

(2)The person sells goods or services to a real estate licensee who intends to offer the goods or services as an inducement to potential buyers, sellers, landlords or tenants.

(3)After selling the goods or services to the real estate licensee, the person refers the person's customers to the real estate licensee.

(4)The payment to the person for the goods or services is not contingent upon the consummation of a real estate transaction by the person's customers.

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.

Filed with the Office of the Secretary of State on December 6, 2010

TRD # 201006904

Effective Date January 1, 2011
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