

DEPARTMENT OF BOATING AND WATERWAYS

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Information Letter

DATE: *June 24, 2003*

TO: *Licensed Yacht and Ship Brokers*

FROM: *David Trillo, Lead Investigator*

SUBJECTS: *1) eBay, 2) Private Label Search (PLS), 3) Toll-Free Number Online Forms, and 5) 2003 Licensing Directory* **4)**

1. eBay:

In June 2001, the California Yacht Brokers Association (CYBA) complained to the Department that eBay was engaging in unlicensed activity and requested that we take appropriate regulatory action against eBay. The Department's staff counsel gathered relevant facts regarding eBay and issued an opinion finding that eBay was not a yacht broker under the Code. Subsequently the Department decided not to license eBay.

About the same time, the Department of Real Estate (DRE) issued an opinion requiring eBay to obtain a Real Estate license pursuant to the Real Estate Law (Bus. & Prof. Code sec. 10,000 et seq.). Although the facts and the law forming DRE's decision differed from the facts and law forming the Department's decision, the Department recognized that e-commerce is having a significant impact upon the brokerage industry. Therefore, the Department requested a formal opinion from the Attorney General concerning this matter.

In April of 2003, the Attorney General issued its formal opinion determining that the activities of eBay in connection with the purchase and sale of previously owned yachts do not require it to be licensed as a yacht broker under the provisions of the Yacht and Ship Brokers Act.

The Department has posted a copy of the Attorney General's formal opinion in its entirety on our website at <http://www.dbw.ca.gov/yacht.htm>.

2. Private Label Search:

Recently a California yacht broker filed a complaint against several other licensed yacht brokers for advertising a vessel for sale on yachtworld.com ("YW") without first obtaining written authorization

from their principal/owner. According to the complaint, the named brokers were utilizing a service provided by yachtworld.com known as Private Label Search ("PLS") to advertise the vessel. In recognizing that there may be an unlimited number of California brokers subscribing to the PLS system, the Department worked closely with YW and the Office of the Attorney General in determining whether a California broker who subscribes to the PLS system may be subject to disciplinary action under the Harbors and Navigation Code. Based upon our review of the documents produced by YW, the Department has determined that the online PLS advertising service currently offered to California brokers may subject those licensed brokers to discipline for violations of the Harbors and Navigation Code. Additionally, any broker using the PLS listing service may also be subject to civil action for violating various California statutes, including those pertaining to unfair business practices.

As the online service for the sale of vessels is in its infancy and we have little practical experience in dealing with these online transactions, it is not possible to identify all violations that could result from the proper use of the PLS service. This information letter will not, therefore, include all potential violations, but will instead focus on those violations raised by the yacht brokerage industry to the Department. The following addresses some of the most significant violations:

1. PLS subscribers that do not obtain the required written authorization from the principal to sell or list the vessel for sale are subject to violations of Section 716(a) of the Harbors and Navigation Code.

Under California law, a yacht and ship broker is required to obtain a vessel owner's written consent before engaging in "any transaction for which a license is required" which includes the sale and listing of a vessel for sale. Section 716(a) of the Harbors and Navigation Code states:

"No broker shall engage in any transaction for which a license is required under this article without first obtaining a signed written authorization to do so from the broker's principal. An authorization to sell shall contain a description of the vessel, including the undocumented vessel's registration number or the name, official number, and home port if the vessel is documented with a federal agency. The written authorization shall also state the type of listing, the gross listing price, the agreed upon commission or other compensation of the broker, and any repairs authorized to be made."

The procedure for listing a vessel on YW's PLS service, as the Department understands it, requires a broker with a listing agreement for the subject vessel to transmit relevant information regarding the vessel to YW. If the broker designates that the vessel is "available for co-brokerage" then YW will repackage the information and make it available to subscribers of its online PLS service. According to a January 3, 2003 press release by YW, the repackaging for the PLS service by YW involves the removal of any information referencing the listing broker for the vessel and the third party subscribers to the PLS listing may identify themselves as the sole contact for the vessel.

The resulting listing on the PLS online system identifies only the third party broker/subscriber as the contact for the vessel, notwithstanding the absence of any written agreement to do so from the

principal or listing broker, who should have obtained written authorization to share the listing as required under Title 14, California Code of Regulations, section 7605, which states:

“If a broker intends to or does share a listing with other brokers, he must obtain authorization in writing from his principal to do so in his authorization to sell (listing agreement).”

In this latter case, by industry practice, a third party broker must enter into a written cooperative agreement with the listing broker. This cooperative agreement constitutes the listing broker's written authorization to the third party broker, and when it is in place, the Department has not required the third party broker to obtain written authorization directly from the principal.

Any third-party broker who subscribes to the PLS service and lists a PLS vessel on their own website is, in effect, listing a principal's boat without the principal's or listing broker's written authorization. The mere designation by the listing broker that a listing is "available for co-brokerage" is not, in the opinion of the Department, sufficient to fulfill the industry practice of establishing a written cooperative agreement between the two brokers sufficient to excuse the third party broker from obtaining written authorization directly from the principal.

2. PLS subscribers that do not obtain the required written authorization from the principal or listing broker to sell or list the vessel for sale are subject to violations of Section 732(k) of the Harbors and Navigation Code, which states:

*“The department may deny an application or temporarily suspend or permanently revoke the license of a broker or a salesperson at any time if the licensee, while a broker or salesperson, in performing or attempting to perform any of the acts within the scope of this article, has committed any of the following acts:
... (k) Demonstrates negligence or incompetence in performing any act for which he or she is required to hold a license.”*

As previously stated, under California law, a yacht and ship broker is required to obtain a vessel owner's written consent before engaging in any transaction for which a license is required which includes the sale and listing a vessel for sale. Therefore, a broker who fails to obtain the proper written authorization to sell or list a vessel for sale is considered negligent and incompetent with respect to those activities.

3. PLS subscribers that do not obtain the required written authorization to sell or list the vessel for sale are subject to violations of Section 732(n) of the Harbors and Navigation Code, which states:

“The department may deny an application or temporarily suspend or permanently revoke the license of a broker or a salesperson at any time if the licensee, while a broker or salesperson, in performing or attempting to perform any of the acts within the scope

of this article, has committed any of the following acts:

...(n) Violates any provisions of Section 708, 712, 714, 715, 716, 730, or 731, or the rules and regulations of the department implementing this article.”

In addition to the violations outlined above, if a California broker continues to subscribe to the PLS system in its current format, he or she may be subject to disciplinary action for the following violations:

1. Section 709 of the Harbors and Navigation Code:

“No licensed broker or licensed salesman shall practice any fraud or deceit or make any fraudulent or grossly negligent representation with respect to any act for which a license is required under this article.”

2. Subsections 732 (a), (c), and (i) of the Harbors and Navigation Code:

“The department may deny an application or temporarily suspend or permanently revoke the license of a broker or a salesperson at any time if the licensee, while a broker or salesperson, in performing or attempting to perform any of the acts within the scope of this article, has committed any of the following acts:

...(a) Makes any substantial misrepresentation, including a false advertisement or an omission of relevant facts upon which any person has relied.

...(c) Engages in a continued and flagrant course of misrepresentation or makes false warranties whether or not relied upon by another person.

...(i) Engages in any other conduct constituting fraud or dishonest dealings, either with respect to his or her principal or other persons.”

3. Subsections 733(d) and (e) of the Harbors and Navigation Code:

“The department may deny an application or may suspend or revoke the license of a yacht broker or yacht salesperson who, within four years immediately preceding, has committed any of the following acts:

...(d) Knowingly authorizes, directs, connives, or aids in the publication, advertisement, distribution, or circulation of any material false statements or misrepresentation concerning his or her business or any transaction under this article.

...(e) Has acted or conducted himself or herself in a manner that would warrant the denial of his or her application for a broker's or salesperson's license pursuant to Section 720.”

4. Section 720 of the Harbors and Navigation Code:

“The department may require proof as it deems advisable concerning the honesty, truthfulness, and good reputation of the applicant for a broker's or salesperson's license or

of the officers of any corporation making application before the issuance of a broker's license. For this purpose, the director may call a hearing in accordance with this article, and at the request of the applicant shall call a hearing."

Furthermore, the Department is entitled to assess civil penalties, pursuant to Section 739, and/or request that the local district attorneys office file criminal charges against a broker pursuant to Section 738, for the violations outlined above.

To further protect consumers against acts of misrepresentation, the Department will work closely with YW to discuss solution(s) to the PLS service. Once the Department has completed its discussions with YW, we will issue an *Information Letter* summarizing the results.

3. Toll-Free Number:

The Department is pleased to announce that the Yacht and Ship Brokers Licensing Unit has a toll-free number. You may contact us free of charge at (866) 836-3740.

When calling the Department, whether on the toll free number or a direct line to the Yacht and Ship staff, please leave your name, phone number and a brief message if the call is picked up by voice mail. We are experiencing a number of phone hang-ups, then get complaints from broker/salesmen that we do not return their calls. You **MUST** leave your name and number in order for us to call you back. Because phone lines in the Yacht and Ship Unit are quite busy and the Unit has lost a position due to recent budget cut backs, staff will get back to you as soon as possible (at a minimum within 24 hours within the regular working week).

4. Applications Online:

In order to provide convenient access to licensing applications, you can now access the following applications online at <http://www.dbw.ca.gov/yacht.htm>:

- Renewal Application
- Reinstatement Application
- Branch Office Application
- Salesperson Transfer Application

Once you have completed the application online, you will need to print the completed application from your computer, sign it and mail it with the prescribed fees to the following address:

Attn: Yacht and Ship Broker Licensing
Department of Boating and Waterways
2000 Evergreen Street, Suite 100
Sacramento CA 95815.

If you wish to obtain an application for an original broker or salesperson license, you will need to contact the following persons:

- For brokers, please contact Ms. Darla Yohner at (916) 263-8197.
- For salespersons, please contact Ms. Marinda Isley at (916) 263-8196.

You may also contact the Yacht and Ship Brokers Program free of charge by dialing (866) 836-3740.

5. 2003 Licensing Directory:

The 2003 licensing directory will be available by request in August. However, due to the frequent changes in business structures or licensing status, the Department strongly recommends that you rely on the licensing directory posted on the Department's website. Generally, the Department updates the Internet directory weekly. Therefore, the information on the website is current in comparison to the annual printed version mailed to licensees. You can access the Internet directory at <http://www.dbw.ca.gov/yacht.htm>.

If you do not have access to the Internet, you may request a copy of the printed version of the licensing directory in August 2003 by contacting either Ms. Darla Yohner at (916) 263-8197, Ms. Marinda Isley at (916) 263-8196, or dialing toll-free (866) 836-3740.

Please discuss this *Information Letter* with your staff.