



INFORMATION LETTER

DATE: August 23, 1999

TO: Licensed Brokers and Salespersons

FROM: Corrina Dugger, Associate Boating Administrator
Dave Trillo, Associate Boating Administrator
Department of Boating and Waterways
Yacht and Ship Broker Licensing Unit

SUBJECTS: Topics discussed at the “Yacht Sales and the Law” Seminar: Role as Regulators, Inspections, Offers, Broker Responsibilities. **Other Issues:** Digital Photos, New Applications,

To those of you who attended the “Yacht Sales and the Law” Seminar on August 18, 1999 at the Long Beach Yacht Club, thank you, it was a great success! For those of you who were unable to attend, below, we have re-capped the topics we discussed.

Our Role as Regulators:

Our role as state regulators is to ensure not only consumer protection, but to continue a successful working relationship with industry associations, brokers and salespeople for compliance of the laws, rules and regulations. Also, to work with all of you and establish a rapport where you feel comfortable in coming to us for questions, clarification and especially on informing us of what’s happening in our industry.

In order to accomplish our goal, we will continue to further educate the industry by distributing information letters that provide updated information and procedural changes, new laws and regulations. As well as create and distribute publications that are informative to consumers as well as the individual’s working in our industry. We truly feel that if you know the laws and abide by them, there should be no room for problems. Another key factor in continuing education is of course, continuing to conduct routine inspections to ensure compliance.

We then informed attendee’s of areas that are covered during an inspection

INSPECTIONS:

First of all, as a past courtesy, the Department has made every attempt to notify brokers in writing before an inspection is conducted. However, there may be times when it is necessary to conduct an unannounced inspection.

Before an inspection is conducted, we review your licensing and complaint history to verify any licensing issues, past violations, or problem areas in which you've received a letter of warning or letter of correction.

During an inspection, we check for compliance in the following areas:

- ?? Licenses are current and displayed in view (**Pursuant to Harbors and Navigation (H&N) Section 735 (b)**)
- ?? Broker/Salesperson Relationship Agreements are in order and each salesperson must receive their copy (**Pursuant to California Code of Regulations (CCR) Section 7615**)
- ?? Compare your advertisements to authorized listing agreements (**Pursuant to H & N 732 a**)
- ?? Is the listing agreement complete? Type of listing (Open or Exclusive only), description of vessel, gross asking price, registration number or name (*undocumented*), official number and homeport (*documented*), owner information and original signature, agreed upon commission and any repairs authorized to be made.
- ?? Trust Accounts. We verify that the bank deposits and withdrawal receipts coincide with your ledger records. Also for those of you that use the software program Quicken, you are required to maintain these same records (deposit receipts, withdrawal receipts). If you are holding a deposit check, we verify written authorization from potential buyer to hold such funds.
(Pursuant to H & N 714 & CCR 7604)
- ?? Review closed files to ensure four year retention (**Pursuant to CCR 7620**)
- ?? Review closing statements to ensure all charges and credits are itemized and broker has signed closing statement attesting to facts (**Pursuant to H & N 715**)

If we encounter violations, the reprimand and penalty assessment is based on a case by case situation depending on the following:

- 1) Nature of violation
- 2) Severity of violation
- 3) Impact of violation on the complainant/consumer
- 4) Repetition of the offense
- 5) History of past complaints

The Department does not take **any** violations lightly, of course our goal is to work with you, however sometimes, we have no other choice than to assess with civil penalties. Civil penalties can be levied up to \$1,500 per violations, pursuant to H & N 739.

If civil penalties are assessed, the Department will attempt to resolve the matter by offering a monetary settlement short of litigation. There are of course, some cases, that civil penalties will not be assessed and it may be necessary to refer the matter to the Department of Justice, Attorney General's office for administrative action (license suspension or revocation.)

In a situation when a broker refuses a settlement offer, the case is automatically forwarded to the Attorney General's office for administrative action.

Lastly, we strongly believe that the majority of brokers and their salespersons strive for excellence by complying to all the laws, rules and regulations. Many of you have had excellent inspections with little or no problems and we like to commend you and thank you for that.

The Department then took questions ~

OFFERS:

We have received many questions and complaints lately about offers! The most commonly asked questions are:

1. Do I have to present all offers?
2. Do I have to present an offer after there has been an acceptance?
3. Do I need to inform co-op brokers of competing offers?

The answers to these questions are as follows:

#1 Do I have to present all offers?

You are required to present all offers until the sale is completed. Pursuant to California Code of Regulations, Title 14, Section 7623, "*a licensee must present or cause to be presented to the owner of the vessel any offer to purchase, prior to the completion of a sale, unless expressly instructed by the owner not to present such an offer.*" As stated in Section 7601, the definition of completion "all the conditions of the purchase agreement have been met and the bill of sale has been passed from the seller to the buyer."

If an owner expresses that they do not want you to present any additional offers, then you are not required to. If this does occur, we highly recommend you obtain something in writing from the owner instructing you **not** to present additional offers. This is not required by law, however it may cover you during a complaint and also will assure the Department that you were authorized not to submit additional offers.

#2 Do I have to present an offer after there has been an acceptance?

Even though an offer has been accepted, you are still required to present offers to the seller until the sale is completed or otherwise expressed not to present offers (see question #1). However, additional offers are to be considered as back up offers in the event that the original offer is not completed. The benefit of having a back-up offer, is if the first deal defaults, the additional offers may be considered and you will not have to re-start negotiations.

In addition, it is in your best interest to inform your principal that if the first offer is accepted and he backs out to accept another offer, for purposes not provided in the terms and/or conditions, he could be liable for a civil lawsuit for breach of contract.

To cover yourself, the Department suggests that you provide a written addendum or indicate as a condition that this deal, being the 2nd offer, would be accepted contingent to the first deal defaulting.

#3 Do I have to inform the co-op broker of additional offers?

You as brokers, have a fiduciary duty to disclose all relevant facts during a transaction, therefore the Department believes that you should be honest when dealing with each other and let the co-op broker know when there is multiple offers or an offer accepted.

During the lunch break, the Department's legal counsel discussed the issue of California broker's acting as sub-agents for foreign brokers and the licensing requirements for Florida Yacht Brokers. (see attached letter regarding sub-agents)

The following issues were not discussed during the seminar:

DIGITAL PHOTOS:

In the last "Information Letter" dated February 1999, we informed you that the Department does not accept digital photos. A Digital Photo is defined as a picture that is taken using a computerized digital camera that processes the image through a computer. The Department is still receiving "Digital Photos" in place of standard camera photos when submitting their picture with initial applications for a "Salesperson" and/or "Broker" license. Since these photos can be easily altered, the Department **will not** accept such photos unless they are hand delivered along with their application for licensure. This will ensure proper identification by staff members. **Any digital photos submitted by mail will be rejected and may delay the issuance of the original license.**

NEW APPLICATIONS:

In June 1999, the Department revised the Yacht and Ship Broker and Salespersons application. If you have any past applications, please discard them as they are no longer accepted. The current application is dated (6/99). If an old application is submitted, the application will be rejected. Therefore, if you have new salespersons or wish to become a broker, please contact us to obtain the new application. No exceptions!

OPEN LISTING AGREEMENTS V. EXCLUSIVE LISTING AGREEMENTS

A situation occurred regarding the following question:

“If a seller signs an “Open” listing agreement and later signs into an “Exclusive” listing agreement with a different broker, does the exclusive agreement automatically supercede the pre-existing open listing agreement?”

The “exclusive” listing agreement does not automatically cancel the pre-existing “open” listing agreement unless it is stated in the terms of the agreement. Meaning, the “open” listing agreement must provide a clause, which would allow it to be cancelled if the seller signs into an exclusive listing agreement. If no such language exist, and the seller has not cancelled the agreement according to its cancellation term, the listing is still valid regardless if the seller signs into an “exclusive” listing agreement.

If you are the broker obtaining the exclusive listing agreement, and you are aware that there are or may be existing “open” listings, you should inform your client that he/she may be responsible to the pre-existing contracts until they have been cancelled according to the terms of the contract.

Deposits Checks Held Uncashed:

The Department has been requested to provide further clarification regarding the broker’s responsibility to deposit checks received by his/her principal into the trust account. Section 714 of the H & N Code states *“A licensed broker who accepts funds from others in connection with any transaction subject to this article who does not **as soon as possible** place such funds into a neutral escrow depository, shall place such funds into a trust fund account maintained by the broker in some bank or recognized depository and shall retain all such funds in the account until such time as such broker has made a disbursement of the funds in accordance with written instructions from the person entrusting the money.....”*

However, the only legal exception to holding a deposit check uncashed is specified in California Code of Regulations, Title 14, Section 7604(3) (e), which states *“A check received from the offeror may be held uncashed by the broker until acceptance of the offer if, (1) the check by its terms is not negotiable by the broker or if the offeror has written instructions that the check shall not be deposited nor cashed until acceptance of the offer and (2) the offeree is informed that the check is being so held before or at the time the offer is presented for acceptance.”*

PLEASE SHARE THIS INFORMATION WITH YOUR SALESPERSONS AND STAFF! As always, if you have any questions, please call either of us!

For broker licensing questions, please contact Deb Durant at (916) 263-8197, and for salesperson licensing questions and exam results, please contact Darla Yohner at (916) 263-8196.

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