

DEPARTMENT OF BOATING AND WATERWAYS

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Information Letter

DATE: *January 11, 2002*

TO: *Licensed Yacht and Ship Brokers*

FROM: *David Trillo, Lead Investigator*
Eddie Chavez, Investigator

SUBJECTS: *1) Written Authorization, 2) eBay, 3) Fiduciary Duty,*
4) Examination Review, and 5) Exclusive/Open Listing Agreements

1. Written Authorization:

Recently, the Department has received inquiries asking whether the initial sentence of Section 716(a) of the Harbors and Navigation Code ("Code") applies to a buyer's broker. The answer is "yes"!

Section 716(a) of the Code states:

716. Transactions, written authorization required and copies. (a) 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 underlined sentence requires that a broker obtain written authorization from his or her principal before acting on their behalf regardless if the principal is the seller or buyer in the transaction.

2. 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.

On the other hand, the Department of Real Estate (DRE) has required 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 differ from the facts and law forming the Department's decision, the Department recognizes that e-commerce is having a significant impact upon the brokerage industry. Therefore, the Department has requested a formal opinion from the Attorney General concerning this matter. Generally, formal opinions conducted by the Attorney General take six to nine months.

The Department believes that the Attorney General's opinion by an expert in the area of e-commerce and the Internet will ensure an accurate decision by the Department.

3. Fiduciary Duty:

The Department has obtained evidence that some brokers are collecting a referral fee for referring their clients to specific lending companies to obtain funding to purchase a vessel. The Code does not specifically prohibit this. However, if the broker fails to disclose to their client that he is obtaining a referral fee, then the broker has breached his fiduciary duty to his client. Furthermore, the broker has breached his fiduciary duty if he fails to take reasonable measures to ascertain that the lending company to which the broker refers his clients is licensed and in good standing.

4. Examination Review Policy:

Upon request, the Department will help those applicants who fail the exam two times within a six-month period to prepare for their third exam. The Department will refer the applicant to a specific section(s) of the study material in which the applicant has demonstrated a need for further review (i.e. Yacht and Ship Brokers Act, Section 715). Recently, the Department has received several requests for this service to be provided prior to the applicant failing the exam for the second time. The Department would like to re-inform the applicants that this service is provided as a courtesy. Please do not contact the Department for assistance before you have failed the examination two times within a six-month period.

5. Exclusive/Open Listing Agreements:

The Department has obtained copies of some exclusive listing agreements that provide terms and conditions which allow the contract to automatically "roll over" to an open listing agreement once the exclusive period has terminated. The Code does not prohibit this so long as the contract provides conditions under which a commission would be paid if the vessel were sold once the contract had become an open listing agreement. Failing to provide the agreed upon commission is a violation of Section

716(a) of the Code (refer to section 1 above).

Please discuss this information with your staff. As always if you have any questions, you may contact either Dave Trillo at (916) 263-8194 or Eddie Chavez (916) 263-8195.