

CHAPTER 20 - CONSIDERATIONS in REAL ESTATE RELATED BUSINESSES

Notes:

BUSINESS OPPORTUNITIES (Sale of a Business with Real Estate)

The sale of a business opportunity requires a real estate broker's license when the transaction involves a change of ownership of real estate or a leasehold (12-61-101(2)(i) C.R.S.) The Colorado Attorney General has interpreted this statute to hold that the conveyance of a business opportunity is not severable from a leasehold or an interest in land. Furthermore, an unlicensed person may not receive a commission on the portion (business opportunity) of the conveyance not involving real estate, if the transfer as a whole involves the transfer of an interest in land or a leasehold interest in land. (See Chapter 3.)

The sale of a business opportunity may be less or more complicated than the sale of real estate. There are usually more representations to be made. A portion of the sale is intangible and therefore values are difficult to determine. The broker should recommend to each party to the transaction that each be represented by an attorney.

MATTERS TO BE CONSIDERED

The following is itemized information which a broker should ascertain if listing, selling and closing a business opportunity transaction.

1. Name of business

2. Location of business

3. Name of owner, address, phone.

4. Price. Ensure the price quoted in the listing contract includes the broker's fee.

5. Terms. The amount of cash the seller demands and how large a note and purchase money chattel mortgage the seller will carry. Lending institutions do not usually finance business opportunity transactions and therefore it is important to make financing arrangements with the seller at the time of securing the listing contract.

6. License, Franchise, or Distributorship. Some businesses involve a license, a franchise or distributorship contract.

Arrangements will have to be made to see that rights are transferred and perhaps become a condition of the contract. In the sale of a business which involves the sale of liquor, a license must be obtained from the appropriate municipal agency and also from the Department of Revenue of Colorado. The requirements are stringent and the investigation of the applicant is quite thorough. Requirements will include a copy of the purchase agreement, evidence of the transfer if corporate stock is sold, a copy of the lease, lease assignment, or deed, trade name affidavit, health and hospital inspection certificate, bill of sale, receipt for personal property taxes paid, the source of financing, fingerprinting, etc.

If a distributorship contract is involved in the sale the consent of the manufacturer must be obtained who may demand certain financial standards before they will consent to a transfer of the distributorship.

Other businesses also may require licenses of various kinds before the buyer may operate the business that has been purchased.



7. Lease. The licensee should inspect the lease in order to determine any special conditions and how many more years are remaining under the lease. The monthly rental is always important for its relationship to the business income. Determine if the lease is assignable. Since most leases prohibit assignment without the consent of the lessor, such consent must be obtained. If the lessor charges for consent, the seller will be obligated for this expense and should be told so. It benefits the seller for the buyer to obtain a new lease. If it is merely *assigned* the seller will remain liable to the lessor should the buyer later default on the rent. The licensee might also propose a sale to the lessor.

8. Fixtures. When the sale includes fixtures, check to make sure that they belong to the seller. For example, under some lease provisions, fixtures belong to the lessor on termination of the lease and cannot therefore be included in the sale.

9. Equipment. It is advisable to prepare a list of the equipment to determine if it is marketable and if the price is fair.

10. Stock or Inventory. Without an actual inventory the broker should establish the value of the stock as closely as possible based on wholesale cost. Inquire if there is any unsalable stock. Of course at the time of closing there must be an accurate and detailed inventory.

11. Number of Employees. It is important to establish the dollar amount of the payroll, and especially the status of payroll taxes.

12. Income: Gross and Net. The broker should review C.P.A. reports or a copy of income tax returns for previous years, or both. This is a risky situation for the licensee insofar as representations to the buyer. Agency laws on representation and disclosure apply with particular force in a business sale because there are so many different facts that may be material to the purchase. The seller's attorney may want to include a clause in the contract stating that the seller has made no representations regarding the business and that the buyer has made their own inspection of the business and takes all goods, fixtures, and other property "as is," without any warranties. Such a clause gives only limited protection and will not safeguard the seller against a clear showing of fraudulent misrepresentation. The broker should choose records that can be verified when he or she uses them for purposes of making a sale. It may be advisable to provide the seller with an income or profit-and-loss statement to complete.

13. Accounts Receivable. Sometimes a business sale includes all the outstanding customer accounts receivable, that is the right to collect all outstanding bills owed to the seller by previous customers. In such a case the seller "assigns" these accounts to the buyer. Such an assignment should be in the contract. But even with the assignment made, the buyer should effect the transfer. The buyer should notify each account of the change in ownership, the assignment of the account, and provide instructions on how and where to make future payments. Otherwise, the customer may continue to make payments to the original owner and the buyer would have no recourse.

Sometimes the agreement of sale may provide for a notice or letter to go out to all customers over the signatures of both seller and buyer, announcing the change in management and reassuring the customer that they will get the same good service from the new owner. Such a letter could also include notice of assignment of the accounts. In assigning accounts, the seller should affirmatively

make no representations or warranties regarding the ability to collect such accounts. Only in rare cases would a seller be willing to guarantee full or a percentage of collection on accounts receivable.

14. Number of Years Business Operated. This fact is important to establish the stability of the business.

15. Reason for Selling. The buyer will want to know this.

16. Covenant Not to Compete. The buyer of a going business may seek assurance that the seller will not go back into business on a competitive basis at some other location. Thus if buying a restaurant from a seller who expresses an intent to retire, the buyer would do well to obtain a specific contractual promise that the seller will neither operate nor buy another restaurant in the same locality for a specified period of time (e.g. five years). Otherwise if the seller finds that retirement is not as expected he or she may decide to go back into business and draw from previous loyal customers. This kind of clause is called a “restrictive covenant” or “covenant not to compete” and is enforceable. It should be limited as to time and territory to the extent necessary to protect the goodwill for which the buyer is paying. If the agreement does not include such a covenant, there is no protection for the buyer, and the seller may compete immediately after the sale.

The buyer can, of course, show by oral evidence that the seller represented that they would not compete (constituting grounds for rescission for fraud) or that there was a verbal promise that the seller would not compete. (This may be difficult to prove absent a carefully written contract embodying their entire agreement.) If the agreement does not include such a covenant, however, there is no protection for the buyer, and the seller may enter into competition after sale of the business. The buyer can, of course, show by oral evidence that the seller represented that they would not compete (constituting grounds for rescission for fraud) or that there was a promise made orally that the seller would not compete. (This may be proved unless there is a carefully drawn contract in writing embodying their entire agreement.)

THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code repeals the past laws on **chattel mortgages**. This means that there no longer is such a thing as a “chattel mortgage” in each state. The U.C.C. standardizes the forms and procedures for financing and securing a construction loan that *includes the price the borrower will pay* for “personal property” (as opposed to “real property”). Examples of personal property in the case of a construction loan would be lumber, concrete, etc.

Under the current code there must be a security agreement of some type between the parties. A chattel mortgage may still be the security agreement although other forms of security agreements are superseding the chattel mortgage form. The code further provides, with a few exceptions, that a financing statement must be filed in order to perfect the security interest. When the financing statement covers timber, minerals or other fixtures that are or will become attached to real estate, it must be filed with the county clerk and recorder in which the real property exists. In other instances, the financing statement is filed with the Secretary of State. (4-9-401 C.R.S.)

In 1994 and 1995 a board was created within the Colorado Department of State charged with implementing a central indexing system for simplifying the filing and retrieval of all security interests. The system does not replace the need to record documents affecting real estate with the county clerk and recorder pursuant to 38-35-109 C.R.S. A security agreement is sufficient for filing if it contains the same information that is required by law to be included in the financing statement. The necessary information consists of the names and addresses of the debtor and secured party, the social security number and tax ID of the debtor and a statement indicating the types and description of the collateral. (See the examples in this chapter.)

A maturity date extending 5 years or less is effective until the maturity date plus 60 days. With longer maturity dates the statement is effective for 5 years from date of filing. One may file a continuation statement within certain time limitations (4-9-403 C.R.S.). Failure to file a continuation statement within the required period does not affect the validity of the security agreement. The filing is merely for giving constructive notice that the debt exists. The complete Uniform Commercial Code effective July 1, 1966 covers many facets of personal property sales, therefore business opportunity transactions may be affected by the law on sales, commercial paper, bank deposits and collections, letters of credit, warehouse receipts, bills of lading, investment securities and other documents of title.

THE COLORADO USE TAX



The Colorado Use Tax, (39-26-Part 2 C.R.S.) is a form of sales tax, is payable on the transfer of furniture, equipment, etc. The obligation to pay this tax is by statute placed upon the buyer. It will be the duty of the broker to inform the buyer of this obligation.

Occasionally, but perhaps more often than in other real estate transactions, the broker may wish to receive an advance fee for their services in the sale because of the expense involved in the promotion of a particular transaction. In such a case there must be compliance with Commission Rule E-2.

AFFILIATED BUSINESS ARRANGEMENTS

Summary



The issue is that a Title Company (and sometimes lenders, appraisers, etc.) want to induce the broker to send their closings to that Title Company. To do so, they may want to give the broker gifts or special rates. For one, this is a violation on the Title Company's part of the Insurance Division's rules saying that the Title Company must "file" their rates and charge *everyone* the same rates (not give special deals). To do otherwise would possibly lead to "injuring" (financially) the public/consumer.

But we aren't here to learn about Title Company rules. As far as *real estate brokers* are concerned, you are *not allowed* to accept gifts (or reduced rates) from Title Companies (or lenders, appraisers, etc.) If you *do* set up such an arrangement, then that is considered an "Affiliated Business Arrangement".

Why are “Affiliated Business Arrangements” so bad? Well, they don’t *seem* bad for the *broker* because it would mean that they get a “deal”. And it is conceivable that it isn’t “bad” for their client at that time, because they are paying less. But when a company or a person (such as a licensee) “gets in bed” with another company like a title company and sets up special deals, then that means that one person is being charged *less* and therefore another person is being charged *more* – without even realizing it. In general, this harms “the public” because companies are making secret deals. This is the *definition* of **corruption**, which the Colorado Real Estate Commission wants its brokers to have no part of. They will come down hard on brokers who make “secret deals” – have “affiliated business arrangements” – with title companies, lenders, or other “settlement providers”

I. Introduction (from Commission’s Real Estate Manual)

Section 8 of the Real Estate Settlement Procedures Act of 1974 (RESPA) prohibits anyone from giving or receiving a fee, kickback, or any thing of value for the referral of settlement service business associated with a federally related mortgage loan. The purpose of this and similar laws is to protect consumers from unnecessary fees that increase the cost of real estate settlement services.

When several businesses that offer settlement services are owned or controlled by a common corporate parent, those businesses are considered “affiliates.” Similarly, family members, partners, contractors, or other relationships used to refer settlement service business are considered affiliates. Real estate brokers, lenders, title insurance companies, or other settlement service providers must inform consumers of an existing “affiliated business arrangement” when making a referral during the settlement process. Generally, consumers are not required to use an affiliate and can shop for other service providers. If, however, a consumer chooses to use an affiliate, the only thing of value that may be received for the arrangement, except for services actually rendered, is a return on an ownership interest.

Although it is lawful to participate in an affiliated business arrangement that is in compliance with RESPA, such joint ventures must actually be providers of settlement services. The Department of Housing and Urban Development (HUD) issued Policy Statement 1996-2 to identify factors that HUD uses to determine whether a controlled business arrangement is a sham under RESPA or a bona fide provider of settlement services.

Colorado has implemented statutes concerning affiliated business arrangements and the Colorado Real Estate Commission has adopted a rule specifically addressing participation by licensees. Among other requirements, licensees must submit appropriate forms to disclose these arrangements to the Division of Real Estate and the Division of Insurance. Violations of laws and rules related to affiliated business arrangements carry serious consequences. Therefore, licensees should familiarize themselves with allowed business arrangements, disclosure requirements, and payment prohibitions set forth in the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et. seq.), Colorado Real Estate Statutes (§§ 12-61-113.2 and 10-11-124(2), C.R.S.), and Colorado

Real Estate Commission Rules E-46 and E-22. Licensees who have questions about their affiliated business arrangements are encouraged to seek legal advice.

II. Real Estate Settlement Procedures Act (RESPA)



12 U.S.C. § 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting

(1) the payment of a fee

(A) to attorneys at law for services actually rendered or

(B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or

(C) by a lender to its duly appointed agent for services actually performed in the making of a loan,

(2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed,

(3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers,

(4) affiliated business arrangements so long as

(A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred

(i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business);

(ii) in the case of a referral made by telephone, [FN1] within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or

(iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided

(notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral),

(B) such person is not required to use any particular provider of settlement services, and

(C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or

(5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

III. Colorado Real Estate Statutes (Note: C.R.S. § 12-61-113.2 is also contained in Chapter 14.)

Colorado Revised Statutes § 12-61-113.2. Affiliated business arrangements – definitions - disclosures – enforcement and penalties – reporting – rules – investigation information shared with the division of insurance.

(1) As used in this section, unless the context otherwise requires:

(a) “Affiliated business arrangement” means an arrangement in which:

(I) a provider of settlement services or an associate of a provider of settlement services has either an affiliate relationship with or a direct beneficial ownership interest of more than one percent in another provider of settlement services; and

(II) a provider of settlement services or the associate of a provider directly or indirectly refers settlement service business to another provider of settlement services or affirmatively influences the selection of another provider of settlement services.

(b) “Associate” means a person who has one or more of the following relationships with a person in a position to refer settlement service business:

(I) a spouse, parent, or child of such person;

(II) a corporation or business entity that controls, is controlled by, or is under common control with such person;

(III) an employer, officer, director, partner, franchiser, or franchisee of such person, including a broker acting as an independent contractor; or

(IV) anyone who has an agreement, arrangement, or understanding with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement service business to benefit financially from referrals of such business.

(c) “Settlement service” means any service provided in connection with a real estate settlement including, but not limited to, the following:

(I) title searches;

(II) title examinations;

(III) the provision of title certificates;

(IV) title insurance;

(V) services rendered by an attorney;

(VI) the preparation of title documents;

(VII) property surveys;

(VIII) the rendering of credit reports or appraisals;

(IX) real estate appraisal services;

(X) home inspection services;

(XI) services rendered by a real estate broker;

(XII) pest and fungus inspections;

- (XIII) the origination of a loan;
- (XIV) the taking of a loan application;
- (XV) the processing of a loan;
- (XVI) underwriting and funding of a loan;
- (XVII) escrow handling services;
- (XVIII) the handling of the processing; and
- (XIX) closing of settlement.

(2) (a) An affiliated business arrangement is permitted where the person referring business to the affiliated business arrangement receives payment only in the form of a return on an investment and where it does not violate the provisions of section 12-61-113.

(b) If a licensee or the employing broker of a licensee is part of an affiliated business arrangement when an offer to purchase real property is fully executed, the licensee shall disclose to all parties to the real estate transaction the existence of the arrangement. The disclosure shall be written, shall be signed by all parties to the real estate transaction, and shall comply with the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq.

(c) A licensee shall not require the use of an affiliated business arrangement or a particular provider of settlement services as a condition of obtaining services from that licensee for any settlement service. For the purposes of this paragraph (c), "Require the use" shall have the same meaning as "required use" in 24 CFR 3500.2 (b).

(d) No licensee shall give or accept any fee, kickback, or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving an affiliated business arrangement shall be referred to any provider of settlement services.

(e) Nothing in this section shall be construed to prohibit payment of a fee to:

- (I) an attorney for services actually rendered;
- (II) a title insurance company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;
- (III) a lender to its duly appointed agent for services actually performed in the making of a loan.

(f) Nothing in this section shall be construed to prohibit payment to any person of:

- (I) a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;
- (II) a fee pursuant to cooperative brokerage and referral arrangements or agreements between real estate brokers.

(g) It shall not be a violation of this section for an affiliated business arrangement:

- (I) to require a buyer, borrower, or seller to pay for the services of any attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction; or
- (II) if an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title

insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or her law practice.

(h) No person shall be liable for a violation of this section if such person proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adopted to avoid such error,

(3) On and after July 1, 2006, a licensee shall disclose at the time the licensee enters into or changes an affiliated business arrangement, in a form and manner acceptable to the

commission, the names of all affiliated business arrangements to which the licensee is a party. The disclosure shall include the physical location of the affiliated businesses.

(4) On and after July 1, 2006, an employing broker, in a form and manner acceptable to the commission, shall at least annually disclose the names of all affiliated business arrangements to which the employing broker is a party. The disclosure shall include the physical location of the affiliated businesses.

(5) The commission may promulgate rules concerning the creation and conduct of an affiliated business arrangement, including, but not limited to, rules defining what constitutes a sham affiliated business arrangement. The commission shall adopt the rules, policies, or guidelines issued by the United States Department of Housing and Urban Development concerning the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq. Rules adopted by the commission shall be at least as stringent as the federal rules and shall ensure that consumers are adequately informed about affiliated business arrangements. The commission shall consult with the insurance commissioner pursuant to section 10-11-124 (2), C.R.S., concerning rules, policies, or guidelines the insurance commissioner adopts concerning affiliated business arrangements. Neither the rules promulgated by the commissioner nor the real estate commission may create a conflicting regulatory burden on an affiliated business arrangement.

(6) The division may share information gathered during an investigation of an affiliated business arrangement with the division of insurance.

Affiliated business arrangements--rules--investigative information shared with the division of real estate.

(1) (a) An affiliated business arrangement is permitted where the person referring business to the affiliated business arrangement receives payment only in the form of a return on an investment and where it does not violate the provisions of section 10-11-108(1).

(b) A title insurance company or a title insurance agent making a referral as part of an affiliated business arrangement shall disclose the affiliation in accordance with the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq.

(c) Neither a title insurance company nor a title insurance agent shall require the use of an affiliated business arrangement or a particular settlement

producer as a condition of obtaining title insurance services from the company or agent. For the purposes of this paragraph (c), “require the use” shall have the same meaning as “required use” in 24 CFR 3500.2 (b).

(2) The commissioner may promulgate rules concerning the creation and conduct of an affiliated business arrangement, including, but not limited to, rules defining what constitutes a sham affiliated business arrangement. Nothing in this subsection (2) shall be construed to increase a fee or create a licensure program for affiliated business arrangements. The commissioner shall adopt the rules, policies, or guidelines issued by the United States department of housing and urban development concerning the federal “Real Estate Settlement Procedures Act of 1974”, as amended, 12 U.S.C. sec. 2601 et seq. Rules adopted by the commissioner shall be at least as stringent as the federal rules and shall ensure that consumers are adequately informed about affiliated business arrangements. The commissioner shall consult with the real estate commission pursuant to section 12-61-113.2(5), C.R.S., concerning rules the real estate commission may promulgate concerning affiliated business arrangements. Neither the rules promulgated by the commissioner nor the real estate commission may create a conflicting regulatory burden on an affiliated business arrangement.

(3) The division may share information gathered during an investigation of an affiliated business arrangement with the division of real estate.

IV. Colorado Real Estate Commission Rules

E-22. Inducements from settlement producers prohibited



Pursuant to 12-61-113.2, C.R.S and the Federal Real Estate Settlement and Procedures Act, 12 U.S.C. Sec. 2601 et. seq., a real estate broker, whether engaged in an affiliated business arrangement or not, shall not accept or give any incentive, disincentive, remuneration, commission, fee or other thing of value to or from a settlement service provider for the referral of business in a real estate transaction involving a federally related mortgage loan. Real estate brokers are allowed to pay a referral fee to another licensed real estate broker if reasonable cause exists as set forth in 12-61-203.5, C.R.S. nothing in this rule shall prohibit a person or entity from receiving a bona fide salary, commission or other compensation for services rendered or as a return on their ownership interest in an affiliated business.

Rule E-46. Affiliated Business Arrangements

A. This rule concerns creation and conduct of an “affiliated business arrangement” as defined in Section 12-61-113.2(1)(a). This rule governs real estate licensees and is not intended to extend the regulatory authority of the Commission or the Division to any person other than real estate licensees.

B. A “provider of settlement services” for purposes of Section 12-61-113.2 et seq includes but is not limited to brokers acting as agents or transaction brokers, real estate brokerage firms, and employing brokers.

C. A licensee or employing broker of a licensee shall disclose the existence of an affiliated business arrangement pursuant to Section 12-61-113.2(2)(b) by disclosing the affiliation to the party they are referring, either seller, buyer or both,

by using and having that party sign the Affiliated Business Arrangement Disclosure Statement promulgated by HUD pursuant to the Real Estate Settlement Procedures Act. The disclosure shall be made prior to, but no later than, the referral of settlement services business.

D. A copy of the signed disclosure shall be retained in the file and a copy given to the referred party.

E. Sham affiliated business arrangements are prohibited.

1. In considering whether a real estate broker is a legitimate affiliated business arrangement or a “sham” affiliated business arrangement, the factors the Commission will consider include the following:

a. Whether the real estate broker operates in a manner that evidences a good faith effort to conform to applicable real estate laws;

b. Whether the title entity maintains a separate and distinct, verifiable physical location. In the event the real estate broker shares office space with another settlement service provider, the Commission may consider the factors set forth in paragraph F5 of Rule E22, inclusive, in determining compliance with this provision.

c. Whether the employees of the real estate broker are shared with other settlement service providers within the affiliated business arrangement. In determining whether an individual is an employee of the real estate broker, the Commission may consider the following factors:

i. Whether the real estate broker issues or causes to be issued an annual Internal Revenue Service Form W-2 to the employee;

ii. Whether the employee is subject to the real estate broker's supervision and control;

iii. Whether the employee devotes fixed periods of time exclusively to the business of the real estate broker or whether the employee is compensated on a fluctuating per hour basis or per transaction basis;

iv. Whether the employee is physically located in the office of the real estate broker.

d. Whether the real estate broker performs core title services, by and through its employees. In accordance with the HUD Statement of Policy 1996-4 the real estate broker shall not collect premiums for services not actually performed.

e. What, if any, the settlement services the real estate broker has contracted to other sources.

2. In addition to the above factors, the Commission will consider the guidelines set forth in the HUD statement of Policy 1996-2, Sham Controlled Business Arrangements (commonly referred to as the “HUD 10-Step Sham Test”) and that statement is incorporated by reference. A copy of this document is available for public inspection at the office of the Division of Real Estate, 1560 Broadway, Ste. 925, Denver, CO, 80202, weekdays between 8 a.m. and 5 p.m.; excluding state observed holidays. The Commission may also consider any other

relevant facts and circumstances relating to the above factors and to those elements set forth in the 10-Step Sham Test.

3. The disclosures to the Commission required by Section 12-61-113.2 (3) and (4) shall be made in a form or manner required by the Commission and shall be:

a. At the time of a new application for active licensure or at the time of activation of an inactive license, the licensee shall disclose to the Commission the names of all affiliated business arrangements to which the licensee is a party. The written disclosure shall include the physical location of the affiliated business.

b. Upon the transfer of an active license to another brokerage firm, the active licensee shall disclose to the Commission the names of all affiliated business arrangements to which the licensee is a party. The written disclosure shall include the physical location of the affiliated business.

c. On an annual basis, each employing broker shall disclose to the Commission the names of all affiliated business arrangements to which the employing broker is a party. The written disclosure shall include the physical location of the affiliated business.

F. Noncompliance with this rule, whether defined or reasonably implied under this rule E-46, may result, after proper notice and hearing, in the imposition of any of the sanctions available in the Colorado statutes pertaining to the business of real estate brokers or other laws which include the imposition of fines and/or discipline of a license.

G. The following are hereby incorporated by reference as written on or before the effective date of this rule. This rule does not include later amendments to or editions of the incorporated material. A copy of these references may be examined at any state publications depository library. For additional information regarding how to obtain a copy please contact Rulemaking Coordinator, Colorado Division of Real Estate, 1560 Broadway Ste. 925, Denver, CO 80202.

1. The HUD policy statement 1996-2, which is the Policy Statement on Sham Controlled Business Arrangements.

2. The HUD policy statement 1996-4, which is the Statement of Enforcement Standards: Title Insurance Practices in Florida; Final Rule.

MORTGAGE BROKERS

I. Introduction

In 2003, the Department of Regulatory Agencies received a request to initiate a review of the mortgage broker industry to determine whether regulation was appropriate. Accordingly, pursuant to section 24-34-104.1(2), Colorado Revised Statutes, a sunrise review was conducted and completed October 14, 2005. In summary, the review addressed Colorado's current regulatory environment with respect to mortgage transactions and the possibility for public harm.

Colorado was one of two states, the other being Alaska, that had no regulatory oversight of mortgage brokers. The sunrise review also concluded there was significant risk to consumers, as mortgage financing often represented their largest financial transaction. The review highlighted an inherent conflict of

interest between the consumer, who seeks the lowest possible interest rate, and the mortgage broker, who receives compensation from higher interest rates. Ultimately, the sunrise review identified a need for regulatory oversight to ensure consumer protection. As a result, the Mortgage Broker Registration Act, House Bill 06-1161, was passed by the Colorado General Assembly in 2006.

The Mortgage Broker Registration Act provided a minimal registration program for mortgage brokers. Registration required a completed criminal background check, a \$25,000 surety bond, a completed application, and payment of the \$200 application fee. Due to the wave of foreclosures and the mortgage fraud epidemic, the Colorado General Assembly passed four new mortgage broker bills in the 2007 session. These included House Bill 07-1322, Senate Bill 07-085, Senate Bill 07-216, and Senate Bill 07-203. Governor Bill Ritter, Jr. signed all four bills into law on June 1, 2007. This new legislation created a significant change in Colorado's regulatory environment. House Bill 07-1322 contains measures to prevent mortgage fraud and establishes comprehensive definitions of prohibited conduct for mortgage brokers. Senate Bill 07-085 prohibits mortgage brokers from coercing or intimidating appraisers for the purpose of influencing an appraiser's independent judgment. Senate Bill 07-216 establishes that mortgage brokers have a duty of good faith and fair dealing in all communications and transactions with a borrower. Finally, Senate Bill 07-203 requires the development of a licensure program and the establishment of grounds for disciplinary actions.

The Colorado Division of Real Estate now has the tools to protect Colorado consumers and ensure fair competition through aggressive enforcement and responsible implementation.

II. Mortgage Broker Registration Act (Effective January 1, 2008)

"Mortgage Broker Licensing Act".

12-61-902. Definitions

As used in this part 9, unless the context otherwise requires:

(1) "Affiliate" means a person who, directly or indirectly, through intermediaries controls, is controlled by, or is under the common control of another person addressed by this part 9.

(1.5) "Borrower" means any person who consults with or retains a mortgage broker in an effort to obtain or seek advice or information on obtaining or applying to obtain a residential mortgage loan for himself, herself, or persons including himself or herself, regardless of whether the person actually obtains such a loan.

(2) "Broker a mortgage" means to directly or indirectly act as a mortgage broker.

(3) "Director" means the director of the division of real estate.

(4) "Division" means the division of real estate.

(5) "Mortgage broker" means an individual who negotiates, originates, or offers or attempts to negotiate or originate for a borrower, and for a commission or other thing of value, a residential mortgage loan to be consummated and funded by a mortgage lender.

(6) "Mortgage lender" means a lender who is in the business of making residential mortgage loans if:

(a) The lender is the payee on the promissory note evidencing the loan; and

(b) The loan proceeds are obtained by the lender from its own funds or from a line of credit made available to the lender from a bank or other entity who regularly loans money to lenders for the purpose of funding mortgage loans.

(7) "Originate" means to submit an application or documentation to a mortgage lender or underwriter in an attempt to obtain a residential mortgage loan.

(8) "Residential mortgage loan" means a loan that is primarily for personal, family, or household use and that is secured by a mortgage or deed of trust on residential real estate upon which is constructed or intended to be constructed a single-family dwelling or multiple-family dwelling of four or fewer units.

12-61-903. License required – rules

(1) (a) On or after January 1, 2008, unless licensed by the director, a person shall not broker a mortgage, offer to broker a mortgage, act as a mortgage broker, or offer to act as a mortgage broker.

(b) A licensed mortgage broker shall apply for license renewal in accordance with subsection (4) of this section every three years.

(c) A mortgage broker who was registered under the predecessor to this section on or before January 1, 2008, shall have his or her registration converted to a license upon satisfaction of all initial licensing requirements that he or she had not already satisfied when applying for registration. The initial term of licensure of such a mortgage broker shall expire on the third anniversary of his or her initial registration.

(2) An applicant for initial licensing shall submit to the director the following:

(a) A criminal history record check in compliance with subsection (5) of this section;

(b) A disclosure of all administrative discipline taken against the applicant concerning the categories listed in section 12-61-905 (1) (c); and

(c) The application fee established by the director in accordance with section 12-61-908.

(3) (a) In addition to the requirements imposed by subsection (2) of this section, on or after January 1, 2009, each individual applicant for initial licensing as a mortgage broker shall have satisfactorily completed, within the three years immediately preceding the date of the application, a mortgage lending fundamentals course approved by the director and consisting of at least nine hours of classroom instruction in subjects related to mortgage lending. In addition, the applicant shall have satisfactorily completed a written examination approved by the director.

(b) The director may contract with one or more independent testing services to develop, administer, and grade the examinations required by paragraph (a) of this subsection (3) and to maintain and administer licensee records. The contract may allow the testing service to recover from applicants its costs incurred in connection with these functions. The director may contract separately for these functions and may allow the costs to be collected by a single contractor for distribution to other contractors.

(4) An applicant for license renewal shall submit to the director the following:

(a) A disclosure of all administrative discipline taken against the applicant concerning the categories listed in section 12-61-905 (1) (c); and

(b) The renewal fee established by the director in accordance with section 12-61-908.

(5) Prior to submitting an application for a license, an applicant shall submit a set of fingerprints to the Colorado bureau of investigation. Upon receipt of the applicant's fingerprints, the Colorado bureau of investigation shall use the fingerprints to conduct a state and national criminal history record check using records of the Colorado bureau of investigation and the federal bureau of investigation. All costs arising from such criminal history record check shall be borne by the applicant and shall be paid when the set of fingerprints is submitted. Upon completion of the criminal history record check, the bureau shall forward the results to the director.

(6) Before granting a license to an applicant, the director shall require the applicant to post a bond as required by section 12-61-907.

(7) The director shall issue or deny a license within twenty-one days after receiving the completed criminal history record check, completed application, application fee, and proof of the posting of the surety bond.

(8) (a) The director may require, as a condition of license renewal on or after January 1, 2009, continuing education of licensees for the purpose of enhancing the professional competence and professional responsibility of all licensees.

(b) Continuing professional education requirements shall be determined by the director; except that licensees shall not be required to complete more than nine credit hours of continuing education within a three-year period. The director may contract with one or more independent service providers to develop, review, or approve continuing education courses. The contract may allow the independent service provider to recover from licensees its costs incurred in connection with these functions. The director may contract separately for these functions and may allow the costs to be collected by a single contractor for distribution to other contractors.

(9) (a) The director may require contractors and prospective contractors for services under subsections (3) and (8) of this section to submit, for the director's review and approval, information regarding the contents and materials of proposed courses and other documentation reasonably necessary to further the purposes of this section.

(b) The director may set fees for the initial and continuing review of courses for which credit hours will be granted. The initial filing fee for review of materials shall not exceed five hundred dollars, and the fee for continued review shall not exceed two hundred fifty dollars per year per course offered.

(10) The director may adopt reasonable rules to implement this section.

12-61-903.5. Errors and omissions insurance – duties of the director – certificate of coverage – when required – group plan made available – effect – rules

(1) Every licensee under this part 9, except an inactive mortgage broker or an attorney licensee who maintains a policy of professional malpractice insurance that provides coverage for errors and omissions for activities as a licensee under this part 9, shall maintain errors and omissions insurance to cover all activities contemplated under this part 9.

(2) The director shall determine the terms and conditions of coverage required under this section, including the minimum limits of coverage, the permissible deductible, and permissible exemptions. Each licensee shall maintain evidence of coverage, in a manner satisfactory to the director, demonstrating continuing compliance with the required terms.

12-61-904. Exemptions

(1) Except as otherwise provided in section 12-61-911, this part 9 shall not apply to the following:

(a) Employees of an agency of the federal government, of the Colorado government, or of any of Colorado's political subdivisions;

(b) An owner of real property who offers credit secured by a mortgage or deed of trust on the property sold;

(c) A bank, savings bank, savings and loan association, building and loan association, industrial bank, industrial loan company, credit union, or bank or savings association holding company organized under the laws of any state, the District of Columbia, a territory or protectorate of the United States, or the United States, subject to regulation and supervision by a federal banking agency, or an operating subsidiary or affiliate of such entities, or an employee or exclusive agent of any of such entities, including, without limitation, a subsidiary or affiliate of such entities;

(d) An attorney who renders services in the course of practice, who is licensed in Colorado, and who is not primarily engaged in the business of negotiating residential mortgage loans; or

(f) A person who:

(I) Funds a residential mortgage loan that has been originated and processed by a licensed person or by an exempt person;

(II) Does not solicit borrowers in Colorado for the purpose of making residential mortgage loans; and

(III) Does not participate in the negotiation of residential mortgage loans with the borrower, except for setting the terms under which a person may buy or fund a residential mortgage loan originated by a licensed or exempt person.

(2) The exemptions in subsection (1) of this section shall not apply to persons acting beyond the scope of such exemptions.

12-61-904.5. Broker's relationship to borrower – rules

(1) A mortgage broker shall have a duty of good faith and fair dealing in all communications and transactions with a borrower. Such duty includes, but is not limited to:

(a) The duty to not recommend or induce the borrower to enter into a transaction that does not have a reasonable, tangible net benefit to the borrower, considering all of the circumstances, including the terms of a loan, the cost of a loan, and the borrower's circumstances;

(b) The duty to make a reasonable inquiry concerning the borrower's current and prospective income, existing debts and other obligations, and any other information known to the mortgage broker and, after making such inquiry, to make his or her best efforts to recommend, broker, or originate a residential mortgage loan that takes into consideration the information submitted by the borrower; and

(c) The duty not to commit any unconscionable act or practice listed in section 38-40-105 (1.7), C.R.S.

(2) For purposes of implementing subsection (1) of this section, the director may adopt rules defining what constitutes a reasonable, tangible net benefit to the borrower.

(3) A violation of this section constitutes a deceptive trade practice under the "Colorado Consumer Protection Act", article 1 of title 6, C.R.S.

12-61-905. Powers and duties of the director

(1) The director shall deny, refuse to renew, or revoke the license of an applicant who has:

(a) Filed an application with the director containing material misstatements of fact or omitted any disclosure required by this part 9;

(b) Within the last five years, been convicted of or pled guilty or nolo contendere to a crime involving fraud, deceit, material misrepresentation, theft, or the breach of a fiduciary duty; or

(c) Within the last five years, had a license, registration, or certification issued by Colorado or another state revoked or suspended for fraud, deceit, material misrepresentation, theft, or the breach of a fiduciary duty, and such discipline denied the person authorization to practice as:

(I) A mortgage broker;

(II) A real estate broker, as defined by section 12-61-101 (2);

(III) A real estate salesperson, as defined by section 12-61-101 (3);

(IV) A real estate appraiser, as defined by section 12-61-702 (5);

(V) An insurance producer, as defined by section 10-2-103 (6), CRS;

(VI) An attorney;

(VII) A securities broker-dealer, as defined by section 11-51-201 (2)

(VIII) A securities sales representative as defined by section 11-51-201 (14)

(IX) An investment advisor, as defined by section 11-51-201 (9.5), or

(X) An investment advisor representative, as defined by sec 11-51-201 (9.6)

(d) Been enjoined within the immediately preceding five years under the laws of this or any other state or of the United States from engaging in deceptive conduct relating to the brokering of a mortgage loan;

(e) Been found to have violated the provisions of section 12-61-910.2.

(f) Been found to have violated the provisions of section 12-61-911.

(2) The director may investigate the activities of a licensee or other person that present grounds for disciplinary action under this part 9 or that violate section 12-61-910 (1).

(3) (a) If the director has reasonable grounds to believe that a mortgage broker is no longer qualified under subsection (1) of this section, the director may summarily suspend the mortgage broker's license pending a hearing to revoke the license. A summary suspension shall conform to article 4 of title 24, C.R.S.

(b) The director shall suspend the license of a mortgage broker who fails to maintain the bond required by section 12-61-907 until the licensee complies with such section.

(4) The director or an administrative law judge appointed pursuant to part 10 of article 30 of title 24, C.R.S., shall conduct disciplinary hearings concerning mortgage brokers. Such hearings shall conform to article 4 of title 24, C.R.S.

(5) (a) Except as provided in paragraph (b) of this subsection (5), a person whose license has been revoked shall not be eligible for licensure for two years after the effective date of the revocation.

(b) If the director or an administrative law judge determines that an application contained a misstatement of fact or omitted a required disclosure due to an unintentional error, the director shall allow the applicant to correct the application. Upon receipt of the corrected and completed application, the director or administrative law judge shall not bar the applicant from being licensed on the basis of the unintentional misstatement or omission.

(6) (a) The director or an administrative law judge may administer oaths, take affirmations of witnesses, and issue subpoenas to compel the attendance of witnesses and the production of all relevant papers, books, records, documentary evidence, and materials in any hearing or investigation conducted by the director or an administrative law judge.

(b) Upon failure of a witness to comply with a subpoena or process, the district court of the county in which the subpoenaed witness resides or conducts business may issue an order requiring the witness to appear before the director or administrative law judge and produce the relevant papers, books, records, documentary evidence, testimony, or materials in question. Failure to obey the order of the court may be punished as a contempt of court. The director or an administrative law judge may apply for such order.

(7) (a) If the director has reasonable cause to believe that a person is violating this part 9, including but not limited to section 12-61-910 (1), the director may enter an order requiring such person to cease and desist such violations.

(b) The director, upon his or her own motion may, and, upon the complaint in writing of any person, shall, investigate the activities of any licensee or any person who assumes to act in such capacity within the state. In addition to any other penalty that may be imposed pursuant to this part 9, a person violating any provision of this part 9 or any rules promulgated pursuant to this article may be fined upon a finding of misconduct by the director as follows:

(l) In the first administrative proceeding, a fine not in excess of one thousand dollars per act or occurrence;

(II) In a second or subsequent administrative proceeding, a fine not less than one thousand dollars nor in excess of two thousand dollars per act or occurrence.

(c) All fines collected pursuant to this subsection (7) shall be transferred to the state treasurer, who shall credit such moneys to the mortgage broker licensing cash fund created in section 12-61-908.

(8) The director shall keep records of the persons licensed as mortgage brokers and of disciplinary proceedings. The records kept by the director shall be open to public inspection in a reasonable time and manner determined by the director.

(9) (a) The director shall maintain a system, which may include, without limitation, a hotline or web site, that gives consumers a reasonably easy method for making complaints about a mortgage broker.

(b) The director shall review the complaints annually and prepare a report to be issued to the committee of the general assembly that has oversight of mortgage brokers. Such report shall contain the trends in complaints and investigations under this part 9.

(10) The director shall promulgate rules to allow licensed mortgage brokers to hire unlicensed mortgage brokers under temporary licenses. If such an unlicensed mortgage broker has initiated the application process for a license, he or she shall be assigned a temporary license for a reasonable period until a license is approved or denied. The licensed mortgage broker who employs such an unlicensed mortgage broker shall be held responsible under all applicable provisions of law, including without limitation this part 9 and section 38-40-105, C.R.S., for the actions of the unlicensed mortgage broker to whom a temporary license has been assigned under this subsection (10).

12-61-905.5. Disciplinary actions – grounds – procedures – rules

(1) The director, upon his or her own motion, may, and, upon the complaint in writing of any person, shall, investigate the activities of any mortgage broker, and the director has the power to impose an administrative fine in accordance with section 12-61-905 and to censure a licensee, to place the licensee on probation and to set the terms of probation, or to suspend or revoke a license when the director finds that the licensee has performed, is performing, or is attempting to perform any of the following acts:

(a) Knowingly making any misrepresentation or knowingly making use of any false or misleading advertising;

(b) Making any promise that influences, persuades, or induces another person to detrimentally rely on such promise when the licensee could not or did not intend to keep such promise;

(c) Knowingly misrepresenting or making false promises through agents, salespersons, advertising, or otherwise;

(d) Violating any provision of the “Colorado Consumer Protection Act”, article 1 of title 6, C.R.S., and, if the licensee has been assessed a civil or criminal penalty or been subject to an injunction under said act, the director shall revoke the licensee’s license;

(e) Acting for more than one party in a transaction without disclosing any actual or potential conflict of interest or without disclosing to all parties any fiduciary obligation or other legal obligation of the mortgage broker to any party;

(f) Representing or attempting to represent a mortgage broker other than the licensee's employer without the express knowledge and consent of that employer;

(g) In the case of a licensee in the employ of another mortgage broker, failing to place, as soon after receipt as is practicably possible, in the custody of that licensed mortgage broker-employer any deposit money or other money or fund entrusted to the employee by any person dealing with the employee as the representative of that licensed mortgage broker-employer;

(h) Failing to account for or to remit, within a reasonable time, any moneys coming into his or her possession that belong to others, whether acting as a mortgage broker, real estate broker, salesperson, or otherwise, and failing to keep records relative to said moneys, which records shall contain such information as may be prescribed by the rules of the director relative thereto and shall be subject to audit by the director;

(i) Converting funds of others, diverting funds of others without proper authorization, commingling funds of others with the licensee's own funds, or failing to keep such funds of others in an escrow or a trustee account with a bank or recognized depository in this state, which account may be any type of checking, demand, passbook, or statement account insured by an agency of the United States government, and to so keep records relative to the deposit that contain such information as may be prescribed by the rules of the director relative thereto, which records shall be subject to audit by the director;

(j) Failing to provide the parties to a residential mortgage loan transaction with such information as may be prescribed by the rules of the director;

(k) Failing to maintain possession, for future use or inspection by an authorized representative of the director, for a period of four years, of the documents or records prescribed by the rules of the director or to produce such documents or records upon reasonable request by the director or by an authorized representative of the director;

(l) Paying a commission or valuable consideration for performing any of the functions of a mortgage broker, as described in this part 9, to any person not licensed under this part 9; except that a licensed mortgage broker may pay a finder's fee or a share of any commission on a cooperative sale when such payment is made to a mortgage broker licensed in another state or country. If such state or country does not license mortgage brokers, then the payee shall be a citizen or resident of said state or country and represent that the payee is in the mortgage brokerage business in said state or country.

(m) Disregarding or violating any provision of this part 9 or of any rule adopted by the director pursuant to this part 9; violating any lawful orders of the director; or aiding and abetting a violation of any rule, order of the director, or provision of this part 9;

(n) Conviction of, entering a plea of guilty to, or entering a plea of nolo contendere to any crime in article 3 of title 18, C.R.S., in parts 1 to 4 of article 4

of title 18, C.R.S., in article 5 of title 18, C.R.S., in part 3 of article 8 of title 18, C.R.S., in article 15 of title 18, C.R.S., in article 17 of title 18, C.R.S., or any other like crime under Colorado law, federal law, or the laws of other states. A certified copy of the judgment of a court of competent jurisdiction of such conviction or other official record indicating that such plea was entered shall be conclusive evidence of such conviction or plea in any hearing under this part 9.

(o) Violating or aiding and abetting in the violation of the Colorado or federal fair housing laws;

(p) Failing to immediately notify the director in writing of a conviction, plea, or violation pursuant to paragraph (n) or (o) of this subsec. (1);

(q) Having demonstrated unworthiness or incompetency to act as a mortgage broker by conducting business in such a manner as to endanger the interest of the public;

(r) Failing to exercise reasonable supervision over the activities of licensed employees;

(s) Procuring, or attempting to procure, a mortgage broker's license or renewing, reinstating, or reactivating, or attempting to renew, reinstate, or reactivate, a mortgage broker's license by fraud, misrepresentation, or deceit or by making a material misstatement of fact in an application for such license;

(t) Claiming, arranging for, or taking any secret or undisclosed amount of compensation, commission, or profit or failing to reveal to the licensee's principal or employer the full amount of such licensee's compensation, commission, or profit in connection with any acts for which a license is required under this part 9;

(u) Exercising an option to purchase in any agreement authorizing or employing such licensee to sell, buy, or exchange real estate for compensation or commission except when such licensee, prior to or coincident with election to exercise such option to purchase, reveals in writing to the licensee's principal or employer the full amount of the licensee's profit and obtains the written consent of such principal or employer approving the amount of such profit;

(v) Fraud, misrepresentation, deceit, or conversion of trust funds that results in the payment of any claim pursuant to this part 9 or that results in the entry of a civil judgment for damages;

(w) Any other conduct, whether of the same or a different character than specified in this subsection (1), that evinces a lack of good faith and fair dealing;

(x) Having had a mortgage broker's license suspended or revoked in any jurisdiction, or having had any disciplinary action taken against the mortgage broker in any other jurisdiction. A certified copy of the order of disciplinary action shall be prima facie evidence of such disciplinary action.

(2) If a firm, partnership, limited liability company, association, or corporation operating under the license of a mortgage broker designated and licensed as a representative of said firm, partnership, limited liability company, association, or corporation is guilty of any of the acts set out in subsection (1) of this section, the director may suspend or revoke the right of the firm, partnership, limited liability company, association, or corporation to conduct its business under the license of said mortgage broker, whether or not the designated mortgage broker had

personal knowledge thereof and whether or not the director suspends or revokes the individual license of said mortgage broker.

(3) Upon request of the director, when any mortgage broker is a party to any suit or proceeding, either civil or criminal, arising out of any transaction involving a residential mortgage loan and when such mortgage broker participated in such transaction in his or her capacity as a licensed mortgage broker, it shall be the duty of such mortgage broker to supply to the director a copy of the complaint, indictment, information, or other initiating pleading and the answer filed, if any, and to advise the director of the disposition of the case and of the nature and amount of any judgment, verdict, finding, or sentence that may be made, entered, or imposed therein.

(4) This part 9 shall not be construed to relieve any person from civil liability or criminal prosecution under the laws of this state.

(5) Complaints of record in the office of the director and the results of staff investigations may, in the discretion of the director, be closed to public inspection, except as provided by court order, during the investigatory period and until dismissed or until notice of hearing and charges are served on a licensee.

(6) When a complaint or an investigation discloses an instance of misconduct that, in the opinion of the director, does not warrant formal action by the director but that should not be dismissed as being without merit, the director may send a letter of admonition by certified mail, return receipt requested, to the licensee against whom a complaint was made and a copy thereof to the person making the complaint, but the letter shall advise the licensee that the licensee has the right to request in writing, within twenty days after proven receipt, that formal disciplinary proceedings be initiated to adjudicate the propriety of the conduct upon which the letter of admonition is based. If such request is timely made, the letter of admonition shall be deemed vacated, and the matter shall be processed by means of formal disciplinary proceedings.

(7) All administrative fines collected pursuant to this section shall be transmitted to the state treasurer, who shall credit the same to the mortgage broker licensing cash fund created in section 12-61-908.

(8) (a) The director shall not consider an application for licensure from a person whose license has been revoked until two years after the date of revocation.

(b) If a person's license was suspended or revoked due to conduct that resulted in financial loss to another person, no new license shall be granted, nor shall a suspended license be reinstated, until full restitution has been made to the person suffering such financial loss. The amount of restitution shall include interest, reasonable attorney fees, and costs of any suit or other proceeding undertaken in an effort to recover the loss.

(2) Any person who willfully fails or neglects to appear and testify or to produce books, papers, or records required by subpoena, duly served upon him or her in any matter conducted under this part 9, is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of one hundred dollars, or imprisonment in the county jail for not more than thirty days for each such offense, or by both such fine and imprisonment. Each day such person so refuses or neglects constitutes a separate offense.

12-61-906. Immunity

A person participating in good faith in the filing of a complaint or report or participating in an investigation or hearing before the director or an administrative law judge pursuant to this part 9 shall be immune from any liability, civil or criminal, that otherwise might result by reason of such action.

**12-61-907. Bond required**

(1) Before receiving a license, an applicant shall post with the director a surety bond, or an alternative authorized by article 35 of title 11, C.R.S., of twenty-five thousand dollars. A licensed mortgage broker shall maintain such bond at all times.

(2) The surety shall not be required to pay a person making a claim upon the bond until a final determination of fraud, forgery, criminal impersonation, or fraudulent representation has been made by a court with jurisdiction.

(3) The surety bond shall require the surety to provide notice to the director within thirty days if payment is made from the surety bond or if the bond is cancelled.

12-61-908. Fees

(1) The director may set the fees for issuance and renewal of licenses under this part 9. The fees shall be set in amounts that offset the direct and indirect costs of implementing this part 9 and section 38-40-105, C.R.S. The moneys collected pursuant to this section shall be transferred to the state treasurer, who shall credit them to the mortgage broker licensing cash fund.

(2) There is hereby created in the state treasury the mortgage broker licensing cash fund. Moneys in the fund shall be spent only to implement this part 9 and section 38-40-105, C.R.S., and shall not revert to the general fund at the end of the fiscal year. The fund shall be subject to annual appropriation by the general assembly.

12-61-909. Attorney general – district attorney – jurisdiction

The attorney general shall have concurrent jurisdiction with the district attorneys of this state to investigate and prosecute allegations of criminal violations of this part 9.

12-61-910. Violations – injunctions

(1) (a) Any natural person, firm, partnership, limited liability company, or association or any corporation violating this part 9 by acting as a mortgage broker in this state without having obtained a license or by acting as a mortgage broker after that person's license has been revoked or during any period for which said license may have been suspended is guilty of a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S.; except that, if the violator is not a natural person, the violator shall be punished by a fine of not more than five thousand dollars.

(b) Each mortgage brokered by an unlicensed person shall be a separate violation of this subsection (1).

(2) (Deleted by amendment, L. 2007, p. 1734, 6, effective January 1, 2008.)

(3) The director may request that an action be brought in the name of the people of the state of Colorado by the attorney general or the district attorney of the district in which the violation is alleged to have occurred to enjoin a person from engaging in or continuing the violation or from doing any act that furthers the violation. In such an action, an order or judgment may be entered awarding such preliminary or final injunction as is deemed proper by the court. The notice, hearing, or duration of an injunction or restraining order shall be made in accordance with the Colorado rules of civil procedure.

(4) A violation of this part 9 shall not affect the validity or enforceability of any mortgage.

12-61-910.2. Prohibited conduct – influencing a real estate appraisal

(1) A mortgage broker shall not, directly or indirectly, compensate, coerce, or intimidate an appraiser, or attempt, directly or indirectly, to compensate, coerce, or intimidate an appraiser, for the purpose of influencing the independent judgment of the appraiser with respect to the value of a dwelling offered as security for repayment of a mortgage loan. This prohibition shall not be construed as prohibiting a mortgage broker from requesting an appraiser to:

- (a) Consider additional, appropriate property information;
- (b) Provide further detail, substantiation, or explanation for the appraiser's value conclusion; or
- (c) Correct errors in the appraisal report.

12-61-910.3. Rule-making authority

The director shall have the authority to promulgate rules as necessary to enable the director to carry out the director's duties under this part 9.

12-61-910.4. Nontraditional mortgages – consumer protections – rules – incorporation of federal interagency guidance

The director shall adopt rules governing the marketing of nontraditional mortgages by mortgage brokers. In adopting such rules, the director shall incorporate appropriate provisions of the final "Interagency Guidance on Nontraditional Mortgage Product Risks" released on September 29, 2006, by the office of the comptroller of the currency and the office of thrift supervision in the federal department of the treasury, the board of governors of the federal reserve system, the federal deposit insurance corporation, and the national credit union administration, as such publication may be amended.

12-61-911. Prohibited conduct – fraud – misrepresentation – conflict of interest – rules

(1) A mortgage broker, including a mortgage broker otherwise exempted from this part 9 by section 12-61-904 (1) (b) or (1) (c), shall not:

- (a) Directly or indirectly employ any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person;
- (b) Engage in any unfair or deceptive practice toward any person;

- (c) Obtain property by fraud or misrepresentation;
- (d) Solicit or enter into a contract with a borrower that provides in substance that the mortgage broker may earn a fee or commission through the mortgage broker's "best efforts" to obtain a loan even though no loan is actually obtained for the borrower;
- (e) Solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting from a lender with whom the mortgage broker maintains a written correspondent or loan broker agreement under section 12-61-913;
- (f) Fail to make a disclosure to a loan applicant or a noninstitutional investor as required by section 12-61-914 and any other applicable state or federal law;
- (g) Make, in any manner, any false or deceptive statement or representation with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan or engage in "bait and switch" advertising;
- (h) Negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any reports filed by a mortgage broker or in connection with any investigation conducted by the division;
- (i) Advertise any rate of interest without conspicuously disclosing the annual percentage rate implied by such rate of interest;
- (j) Fail to comply with any requirement of the federal "Truth in Lending Act", ... the "Real Estate Settlement Procedures Act of 1974... and Regulation X ... the "Equal Credit Opportunity Act"... and ... the "Gramm-Leach-Bliley Act"... the federal trade commission's privacy rules, 16 CFR 313-314, mandated by the "Gramm-Leach-Bliley Act... the "Home Mortgage Disclosure Act of 1975" ... home mortgage disclosure; the "Federal Trade Commission Act" ... the "Telemarketing and Consumer Fraud and Abuse Prevention Act" ...and the federal trade commission telephone sales rule ... in any advertising of residential mortgage loans or any other applicable mortgage broker activities covered by the acts. The director may adopt rules requiring mortgage brokers to comply with other applicable federal statutes and regulations in any advertising of residential mortgage loans, or any other mortgage broker activity.
- (k) Fail to pay a third-party provider, no later than thirty days after the recording of the loan closing documents or ninety days after completion of the third-party service, whichever comes first, unless otherwise agreed or unless the third-party service provider has been notified in writing that a bona fide dispute exists regarding the performance or quality of the third-party service;
- (l) Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by section 12-61-914 or 12-61-915; or
- (m) Fail to comply with any provision of this part 9 or any rule adopted pursuant to this part 9.

12-61-911.5. Acts of employee – mortgage broker's liability

An unlawful act or violation of this part 9 upon the part of an employee, officer, or member of a licensed mortgage broker shall not be cause for disciplinary action against a mortgage broker unless it appears that the mortgage broker knew or should have known of the unlawful act or violation or had been negligent in the supervision of the employee.

12-61-912. Dual status as real estate broker or salesperson – requirements

(1) Unless a mortgage broker complies with both subsections (2) and (3) of this section, he or she shall not act as a loan originator in any transaction in which:

(a) The mortgage broker acts or has acted as a real estate broker or salesperson; or

(b) Another person doing business under the same licensed real estate broker acts or has acted as a real estate broker or salesperson.

(2) Before providing mortgage services to the borrower, a mortgage broker shall make a full and fair disclosure to the borrower, in addition to any other disclosures required by this part 9 or other laws, of all material features of the loan product and all facts material to the transaction.

(3) (a) A real estate broker or salesperson licensed under part 1 of this article who also acts as a mortgage broker shall carry on such mortgage broker business activities and shall maintain such person's mortgage broker business records separate and apart from the real estate broker activities conducted pursuant to part 1 of this article. Such activities shall be deemed separate and apart even if they are conducted at an office location with a common entrance and mailing address if:

(I) Each business is clearly identified by a sign visible to the public;

(II) Each business is physically separated within the office facility;

and

(III) No deception of the public as to the separate identities of the broker business firms results.

(b) This subsection (3) shall not require a real estate broker or salesperson licensed under part 1 of this article who also acts as a mortgage broker to maintain a physical separation within the office facility for the conduct of its real estate and mortgage broker activities if the director determines that maintaining such physical separation would constitute an undue financial hardship upon the mortgage broker and is unnecessary for the protection of the public.

12-61-913. Written contract required – effect

(1) Every contract between a mortgage broker and a borrower shall be in writing and shall contain the entire agreement of the parties.

(2) A mortgage broker shall have a written correspondent or loan broker agreement with a lender before any solicitation of, or contracting with, any member of the public.

12-61-914. Written disclosure of fees and costs – contents – limits on fees – lock-in agreement terms – rules

(1) Within three business days after receipt of a loan application or any moneys from a borrower, a mortgage broker shall provide to each borrower a full written disclosure containing an itemization and explanation of all fees and costs that the borrower is required to pay in connection with obtaining a residential mortgage loan, and specifying the fee or fees that inure to the benefit of the mortgage broker. A good-faith estimate of a fee or cost shall be provided if the exact amount of the fee or cost is not determinable. Except as required by paragraph (c) of subsection (2) of this section, this subsection (1) shall not be construed to require disclosure of the distribution or breakdown of loan fees, discounts, or points between the mortgage broker and any lender or investor.

(2) The written disclosure shall contain the following information:

(a) The annual percentage rate, finance charge, amount financed, total amount of all payments, number of payments, amount of each payment, amount of points or prepaid interest, and the conditions and terms under which any loan terms may change between the time of disclosure and closing of the loan. If the interest rate is variable, the written disclosure shall clearly describe the circumstances under which the rate may increase, any limitation on the increase, the effect of an increase, and an example of the payment terms resulting from an increase.

(b) The itemized costs of any credit report, appraisal, title report, title insurance policy, mortgage insurance, escrow fee, property tax, insurance, structural or pest inspection, and any other third-party provider's costs associated with the residential mortgage loan;

(c) If applicable, the amount of any commission or other compensation to be paid to the mortgage broker, including the manner in which such commission or other compensation is calculated and the relationship of such commission or other compensation to the cost of the loan received by the borrower;

(d) If applicable, the cost, terms, duration, and conditions of a lock-in agreement and whether a lock-in agreement has been entered, whether the lock-in agreement is guaranteed by the

38-40-101. Mortgage broker fees – escrow accounts – unlawful act – penalty.

(1) Any funds, other than advanced for actual costs and expenses to be incurred by the mortgage broker on behalf of the applicant for a loan, paid to a mortgage broker as a fee conditioned upon the consummation of a loan secured or to be secured by a mortgage or other transfer of or encumbrance on real estate shall be held in an escrow or a trustee account with a bank or recognized depository in this state. Such account may be any type of checking, demand, passbook, or statement account insured by an agency of the United States government.

(2) It is unlawful for a mortgage broker to misappropriate funds held in escrow or a trustee account pursuant to subsection (1) of this section.

(3) The withdrawal, transfer, or other use or conversion of any funds held in escrow or a trustee account pursuant to subsection (1) of this section prior to the time a loan secured or to be secured by mortgage or other transfer of or encumbrance on real estate is consummated shall be prima facie evidence of intent to violate subsection (2) of this section.

(4) Any mortgage broker violating any of the provisions of subsection (2) of this section commits theft as defined in section 18-4-401, C.R.S.

(5) Any mortgage broker violating any of the provisions of subsection (1) or (2) of this section shall be liable to the person from whom any funds were received for the sum of one thousand dollars plus actual damages caused thereby, together with costs and reasonable attorney fees. No lender shall be liable for any act or omission of a mortgage broker under this section.

(6) As used in this section, unless the context otherwise requires, "mortgage broker" means a person, firm, partnership, association, or corporation, other than a bank, trust company, savings and loan association, credit union, supervised lender as defined in section 5-1-301 (46), C.R.S., insurance company, federal housing administration approved mortgagee, land mortgagee, or farm loan association or duly appointed loan correspondents, acting through officers, partners, or regular salaried employees for any such entity, that engages in negotiating or offering or attempting to negotiate for a borrower, and for commission, money, or other thing of value, a loan to be consummated and funded by someone other than the one acting for the borrower.

38-40-102. Disclosure of costs – statement of terms of indebtedness.

(1) Any person regularly engaged in the making of loans secured by a mortgage or deed of trust on a one-to-four-family dwelling shall provide to any applicant for a loan to be secured by such a mortgage or deed of trust a good faith estimate, as a dollar amount or range, of each charge for a settlement service to be charged by the lender and paid by the applicant or a third party at the time of the making of the loan for which the application is made. Such disclosure shall be delivered to the applicant, and to any third party who will be liable on the loan and to the seller if the name and address of the third party and seller is known to the lender at the time of the application, in the same manner and at the same time as the good faith estimate required by the federal "Real Estate Settlement Procedures Act of 1974", 12 U.S.C. sec. 2601, et seq. If the lender conditionally guarantees any of the terms of the loan for which the application is made, there shall be delivered to the applicant a written statement of the conditions of such guaranty, including the period of time within which the consummation of the loan must occur in order for the guaranty to be honored.

(2) A person shall not state terms of an indebtedness to an applicant which are in conflict with the good faith estimate and which he knows to be false or unavailable at the time of the statement or at the time of closing of the agreement creating the indebtedness.

(3) As used in this section, unless the context otherwise requires, the terms "good faith estimate", "person", and "settlement service" shall have the same meanings as given to such terms in the federal "Real Estate Settlement Procedures Act of 1974", 12 U.S.C. sec. 2601, et seq., and in regulation X, 24 C.F.R. part 3500, issued by the United States secretary of housing and urban development pursuant to such act.

(4) The provisions of this section shall not apply to a loan to be made by a bank, trust company, savings and loan association, credit union, federal housing

administration approved mortgagee, or supervised lender as defined in section 5-1-301 (46), C.R.S., that will be secured by a mortgage or deed of trust other than a first mortgage or deed of trust having priority as a lien on the real property over any other mortgage or deed of trust.

38-40-103. Servicing of mortgages and deeds of trust – liability for interest or late fees for property taxes.

(1) (a) (I) Any person who regularly engages in the collection of payments on mortgages and deeds of trust for owners of evidences of debt secured by mortgages or deeds of trust shall promptly credit all payments which are received and which are required to be accepted by such person or his agent and shall promptly perform all duties imposed by law and all duties imposed upon the servicer by such evidences of debt, mortgages, or deeds of trust creating or securing the indebtedness.

(II) No more than twenty days after the date of transfer of the servicing or collection rights and duties to another person, the transferor of such rights and duties shall mail a notice addressed to the debtor from whom it has been collecting payments at the address shown on its records, notifying such debtor of the transfer of the servicing of his or her debt and the name, address, and telephone number of the transferee of the servicing.

(b) The debtor may continue to make payments to the transferor of the servicing of his or her loan until a notice of the transfer is received from the transferee containing the name, address, and telephone number of the new servicer of the loan to whom future payments should be made. Such notice may be combined with the notice required in subparagraph (II) of paragraph (a) of this subsection (1). It shall be the responsibility of the transferor to forward to the transferee any payments received and due after the date of transfer of the loan.

(2) The servicer of a loan shall respond in writing within twenty days from the receipt of a written request from the debtor or from an agent of the debtor acting pursuant to written authority from the debtor for information concerning the debtor's loan, which is readily available to the servicer from its books and records and which would not constitute the rendering of legal advice. Any such response must include the telephone number of the servicer. The servicer shall not be liable for any damage or harm that might arise from the release of any information pursuant to this section.

(3) The servicer of a loan shall annually provide to the debtor a summary of activity related to the loan. Such a summary shall contain, but need not be limited to, the total amount of principal and interest paid on the loan in that calendar year.

(4) The servicer of a loan shall be liable for any interest or late fees charged by any taxing entity if funds for the full payment of taxes on the real estate have been held in an escrow account by such servicer and not remitted to the taxing entity when due.

(a) If directly engaged in negotiating, originating, or offering or attempting to negotiate or originate for a borrower a residential mortgage loan transaction,

the real estate agent or real estate broker shall not make a false promise or misrepresentation or conceal an essential or material fact to entice either a borrower or lender to enter into a mortgage loan agreement when the real estate agent or real estate broker actually knew or, under the terms and circumstances of the transaction, reasonably should have known of such falsity, misrepresentation, or concealment.

(b) If not directly engaged in negotiating, originating, or offering or attempting to negotiate or originate for a borrower a residential mortgage loan transaction, the real estate agent or real estate broker shall not make a false promise or misrepresentation or conceal an essential or material fact to entice either a borrower or lender to enter into a mortgage loan agreement when the real estate agent or real estate broker had actual knowledge of such falsity, misrepresentation, or concealment.

III. Loan Fraud - Legislative declaration.

(1) The general assembly hereby determines that mortgage lending has a significant effect upon Colorado's economy; an estimated two trillion five hundred billion dollars in mortgage loans were made in the United States in 2005; an estimated eighty percent of reported mortgage fraud involves collusion by industry insiders; and Colorado's per capita incidents of mortgage fraud is one of the ten highest in the nation.

(2) The general assembly hereby declares that the high rates of mortgage fraud in Colorado are unacceptable and that residential mortgage fraud shall not be tolerated. The general assembly further declares that the goals of Colorado law are to deter residential mortgage fraud and to make the victim whole.

18-4-401. Theft.

(9) (a) If a person is convicted of or pleads guilty or *nolo contendere* to theft by deception and the underlying factual basis of the case involves the mortgage lending process, a minimum fine of the amount of pecuniary harm resulting from the theft shall be mandatory, in addition to any other penalty the court may impose.

(b) A court shall not accept a plea of guilty or *nolo contendere* to another offense from a person charged with a violation of this section that involves the mortgage lending process unless the plea agreement contains an order of restitution in accordance with part 6 of article 1.3 of this title that compensates the victim for any costs to the victim caused by the offense.

(c) The district attorneys and the attorney general have concurrent jurisdiction to investigate and prosecute a violation of this section that involves making false statements or filing or facilitating the use of a document known to contain a false statement or material omission relied upon by another person in the mortgage lending process.

(d) Documents involved in the mortgage lending process include, but are not limited to, uniform residential loan applications or other loan applications; appraisal reports; HUD-1 settlement statements; supporting personal documentation for loan applications such as W-2 forms, verifications of income

and employment, bank statements, tax returns, and payroll stubs; and any required disclosures.

(e) For the purposes of this subsection (9):

(I) "Mortgage lending process" means the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

(II) "Residential mortgage loan" means a loan or agreement to extend credit, made to a person and secured by a mortgage or lien on residential real property, including, but not limited to, the refinancing or renewal of a loan secured by residential real property.

(III) "Residential real property" means real property used as a residence and containing no more than four families housed separately.

13-21-125. Civil actions for theft in the mortgage lending process.

A person who suffers damages as a result of a violation of section 18-4-401, C.R.S., in the mortgage lending process, as defined by section 18-4-401 (9) (e) (I), C.R.S., shall have a private civil right of action against the perpetrator, regardless of whether the perpetrator was convicted of the crime. A claim arising under this section shall not be asserted against a bona fide purchaser of a mortgage contract.

18-5-208. Dual contracts to induce loan. ("Dual Contracting")

It is a class 3 misdemeanor for any person to knowingly make, issue, deliver, or receive dual contracts for the purchase or sale of real property. The term "dual contracts", either written or oral, means two separate contracts concerning the same parcel of real property, one of which states the true and actual purchase price and one of which states a purchase price in excess of the true and actual purchase price, and is used, or intended to be used, to induce persons to make a loan or a loan commitment on such real property in reliance upon the stated inflated value.

Loan fraud has become one of the largest areas of white-collar crime and is a recurring subject of Commission disciplinary actions. Loan fraud includes falsified loan applications; fictitious income, employment or deposit verifications; false occupancy claims; undisclosed buyer rebates or credits; and a host of other items, which can be considered dual contracting.

Loan fraud may also result in disbarment by HUD from all federal programs, large fines and federal prosecution. Since virtually all loan programs are affiliated with the federal government in either the primary or secondary mortgage market, disbarment can mean the end of a career in real estate, appraisal and lending or related fields.