

DEPARTMENT OF BOATING AND WATERWAYS

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**"SEA LINES"****Information Letter**

DATE: *October, 2008*

TO: *Yacht and Ship Brokers & Salespeople*

FROM: *Department of Boating and Waterways (DBW)*

SUBJECT:
*CYBA Law Seminar
Additional Issues of Interest
DBW Contacts*

CYBA LAW SEMINAR, JULY 2008

DBW's Yacht & Ship unit was requested to provide information to brokers and salespersons during the 2008 CYBA Southern California Law Seminar held in Newport Beach on July 8, 2008. Licensing and Enforcement staff presented the following issues:

- Broker/Salesperson Licensing Information
- Co-operative Sales Agreements
- Presenting Offers
- Supervision of Sales Staff
- Inspection Schedule
- Advertising on Craig's list or E-bay

BROKER/SALESPERSON LICENSING INFORMATION

Presented by Fahim Buksh and Marinda Isley

General application information

- Salesperson licensing applications are controlled documents and not available on DBW's Web site. Applications must be requested by the sponsoring broker and will only be mailed to the broker's main office.
- The processing time for applications is 10 days pursuant to Section 7606.1 of the California Code of Regulations (CCR).

- Next day packages will not be expedited. Applications are processed in the order in which they are received.
- Brokers must contact DBW licensing staff on behalf of salespeople when inquiring about the status of a license or the results of an exam. DBW staff is limited and unable to address calls from individual salespeople.
- DBW only accepts original application packages, no fax or copies.
- It is the broker's responsibility to review and make sure all applications are completed. All questions must be answered, the application must be signed and dated, picture must be attached and all paperwork must be submitted with correct fees.
- Application fees and renewal/reinstatement forms must be sent together in the same package. On numerous occasions, DBW has received renewal, reinstatement, transfer or application documents separate from payments. Incomplete packages will not be accepted and late fees will apply.
- Questions 19-20 of the application are not being answered honestly. It is important that applicants be honest regarding their criminal backgrounds. DBW will have access to this information once fingerprint results are obtained.
 - Question #19 ~ Have you EVER been convicted of any law violation?
 - *Minor traffic citations may be omitted. They do not constitute as a misdemeanor or felony offense.*
 - Question #20 ~ Are there ANY criminal charges pending against you at this time?
 - *Any past convictions, including Driving-Under-the-Influence need to be included.*

Grounds for denial of application and suspension/revocation of license

- Section 733 of the Harbors & Navigation Code (HNC) describes additional grounds for denial, suspension or revocation if such information is omitted or incorrectly answered in the application.
- DBW may deny an application or may suspend or revoke the license of a yacht broker or yacht salesperson who, within four years immediately preceding, has committed any of the following acts:
 - Procured a license under this article for him or her or another by fraud, misrepresentation or deceit.
 - Convicted of a felony or any crime involving moral turpitude.
 - Withheld information from DBW that he or she at any time has been convicted of a felony or any crime involving moral turpitude.

Enforcement staff evaluates possible denials on a case-by-case basis using set criteria which

includes severity and nature of the crime, subsequent rehabilitation and current status. By law, the department can not disclose denial information to the broker.

Live Scan Requirements and Background Checks

All applicants MUST be printed through both the Department of Justice (State) and the Federal Bureau of Investigations. DBW is receiving background results for only one level of service. The Live Scan form clearly states the level of service is for both. By ensuring that salespeople are printed for both agencies, processing delays can be avoided.

DBW's Web site provides a list of locations and hours of operations under the Broker Licensing link. The Department of Justice and the majority of sheriff and/or police departments have live scan fingerprint services.

Salesperson Transfer Process

Salespeople need to notify their broker if transferring to another brokerage. They also need to forward a transfer form with a \$10 payment to DBW. It is the broker's responsibility to make sure the current license is sent to DBW as soon as the broker is notified that the salesperson is transferring. DBW cannot process a transfer without the transfer form, fees and the current license.

Salesperson Renewal Notices

- Renewal notices are mailed out monthly to brokerages. It is the broker's responsibility to ensure sales staff receives the information.
- Renewal forms for the following year are included in the current license package, as part two. When the current license is printed and mailed, it comes in two-parts, one part being the renewal form for the next year.
- DBW sends renewal notices only as a courtesy. It is the licensee's responsibility to renew their license pursuant to Section 724 HNC.
- Salesperson renewal forms can be downloaded from DBW's Web site at www.dbw.ca.gov.
- A renewal is considered late if it is not postmarked on or before the expiration date.

Broker's Responsibilities

- Brokers must post licenses in public view and notify salespeople when licenses are received from DBW.
- Brokers must notify DBW, in writing of any address and phone number change as soon as possible.
- Brokers must notify DBW regarding closure of their branch office and return licenses to DBW as soon as possible.
- To avoid penalties, the broker must renew their license on time.
- Monthly courtesy renewal notices are mailed as reminders. It is the broker's responsibility to renew their license if they do not receive the notice.
- Broker renewal forms can be downloaded from DBW's Web site at www.dbw.ca.gov.

Brokers Surety Bond

- *Bond Cancellation Notice* – Brokers must renew surety bonds within 30 days from DBW's bond cancellation notice letter to avoid suspension of their license, pursuant to Section 730 (d) HNC.
- *Bond Notices* – DBW and insurance companies mail reminder notices when bonds are set to expire. It is the brokers' responsibility to reinstate the bond in a timely manner. Salesperson licenses will become invalid if the brokers license is suspended due to bond expiration or suspension.
- *Bond Reinstatement Notice* – For record purposes and to maintain an active license, proof of reinstatement notices must be mailed or faxed to DBW by broker or insurance companies, Section 730 (c) HNC.
- *Action on Bond* – Brokers must submit a new bond within 15 days of any action taken against a current surety bond if recovery was made on the bond, pursuant to Section 730 (c) HNC.

BROKERS FIDUCIARY RESPONSIBILITY

Presented by Silvia Holmquist

Definition of fiduciary

- A "fiduciary" is a broker or salesperson who has agreed to act on behalf of a client during a sales transaction.
- Fiduciary duty is defined as an "obligation to act in the best interest of your client".
- A fiduciary relationship is established when a client signs the broker's listing agreement or offer to purchase.

A breach of fiduciary duty may result from the following

- *Failure to disclose dual representation* - Brokers may not represent both a buyer and seller without full disclosure and consent from both parties. This is necessary to avoid a conflict of interest and/or breach the duty of loyalty.
- *Unauthorized Price Change* - Quoting a price different from the gross listing price without the consent of the seller or advertising a vessel for less than what was authorized by the seller on the listing agreement.
- *Failure to Disclose* - Failure to disclose material information to the buyer, thereby not allowing the buyer to make an informed decision.
- *Unauthorized Disbursement of Funds* - Any disbursement of funds without authorization may be a violation of law resulting in disciplinary action.
- *Secret Profit* - Licensees must not place personal interests before fiduciary duties, and must not profit from their positions as fiduciaries, unless the principal consents.
 - e.g. Earning interest on clients' funds (interest bearing account).
 - e.g. Keeping left over money from repair allowances, fees or taxes.

CO-OPERATIVE SALES AGREEMENTS

Presented by Gina Ebling

Co-operative Sales Agreements

Designating a boat as "unavailable for co-op"

Yacht World allows listings to be designated as "unavailable for co-op". While DBW understands there are many reasons why this would be a factor when listing a boat, consider that doing this:

- may be a disservice to clients by blocking potential prospects.
- may only list a boat as *unavailable for co-op* with written authorization from the seller.
- is not in compliance if it cannot be shown that authorization was provided by the seller.

The main purpose of the co-op agreement is to define in writing how the listing agent will share the sale with a buyer's agent. By law, listing brokers are under no obligation to co-op; however a refusal may be a violation of fiduciary responsibility. Most brokers participate because it is in the best interest of the seller.

To avoid possible litigation, the basic terms of a co-op agreement should always include the agreed commission split. There is no "industry standard" or law requiring a specific one. Different splits have traditionally been offered by brokerages from different areas.

Other terms and conditions commonly found in co-op agreements

- A condition that the selling broker will not solicit a direct listing.
- Additional percent of commission if the listing agent is called on to perform additional duties such as showing or transporting the boat, performing sea trial, facilitating repairs, etc.
- Agreement that all appointments and offers will be made through the listing agent.
- The broker requesting a co-op agrees not to share the listing with any additional brokers.

Suggestions for Successful Co-ops

- Review agreements for clarity.
- Provide clear understanding of allocation of responsibilities for each broker.
- Verify status and complaint history for selling broker with DBW if unfamiliar with the broker.
- Have a signed co-op before allowing other agents to board or show a clients' boat.

PRESENTING OFFERS

Presented by Gina Ebling

Brokers are required to present all offers

- Brokers must present all offers prior to completion of transaction.
- Transaction is complete when the bill of sale has been passed from seller to buyer.
- The seller may request that no further offers be presented.

Brokers are required to present offers even after acceptance

- Back-up offers are those received after an acceptance.
- Instruct clients that they may only be entertained if the first offer has defaulted.
- Advise the client of the risk of breach and possible legal action should they renege on an accepted offer.

Brokers are required to inform co-brokers of additional offers

- Brokers have a fiduciary duty to their clients to inform all parties of subsequent offers.

SUPERVISION OF SALES STAFF

Presented by Gina Ebling

Broker/Salesperson Relationship Agreement

Brokers are required to have a broker/salesperson relationship agreement on file for each salesperson covering material aspects of the relationship. Material aspects can be interpreted to allow the broker to specify the terms of employment.

An agreement may be designed to prohibit sales agents from contacting clients or taking listings should they leave the brokerage. To avoid conflicts, agreements should clarify duties, obligations, and expectations, and should include compensation and payment terms. Agreements should be signed and dated by both parties and available for inspection by DBW upon request.

Providing “reasonable supervision”

DBW understands that brokers cannot oversee every aspect of a transaction. Nevertheless, DBW expects brokers to be a major source of information for sales staff on subjects such as - industry practices, interpretations of law and licensing issues.

Non-compliance or violations committed by sales staff may result in disciplinary action against the broker’s license or a possible claim against the broker’s bond. Please review the status of transactions with staff on a regular basis.

ADDITIONAL ISSUES OF INTEREST:

INSPECTION SCHEDULE

Yacht & Ship investigators have set new inspection goals for 2008/2009. Staff will attempt to visit and inspect brokerages a minimum of every two to three years. Brokers will be contacted up to a week in advance of scheduled appointments. The inspection will include, but is not limited to, the following issues:

- Salesperson agreements and license status
- Listing agreements
- Pending transactions
- Closed transactions
- Trust account structure and activity relating to transactions

DBW continues to be proactive in its goal to promote a cooperative relationship with brokers throughout California. Inspections are an opportunity for DBW to meet with industry and industry's opportunity to discuss issues of concern regarding compliance standards, clarifications of law and unlicensed activity.

ADVERTISING ON CRAIG'S LIST OR E-BAY

DBW has received complaints from brokers regarding inaccurate advertising on Web sites such as Craig's List or E-Bay. Advertising statutes and regulations must be followed regardless of the type of advertisement (e.g. print or on-line advertisements).

Advertisers in any venue found to be in violation will receive a notice of warning or fine assessment. Please ensure that all advertisements are consistent with the criteria set forth in Section 7602, CCR Title 14 which requires the broker to disclose the name of the business as shown on the required license.

DBW CONTACTS

FOR FURTHER INFORMATION, PLEASE CONTACT:

Brokers Licensing: Fahim Buksh at fbuksh@dbw.ca.gov, (916) 263-8197

Sales Licensing: Marinda Isley at misley@dbw.ca.gov, (916) 263-8196

Investigations: Gina Ebling at gebbling@dbw.ca.gov, (916) 263-8195

Silvia Holmquist at sholmquist@dbw.ca.gov, (916) 263-8182

If there are any items which you would like to see addressed in a future

edition of Sea Lines, please contact Gina Ebling at gebbling@dbw.ca.gov .