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HOUSE OF REPRESENTATIVES

143rd GENERAL ASSEMBLY

HOUSE BILL NO. 122
AS AMENDED BY
HOUSE AMENDMENT NO. 1
AND
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 24 OF THE DELAWARE CODE RELATING TO BROKERAGE RELATIONSHIPS AND REAL ESTATE BROKERS, SALESPERSONS, AND APPRAISERS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 2931(a), Title 24 of the Delaware Code, by striking the first sentence thereof in its entirety and by substituting in lieu thereof the following:

“All licensees in a common law agency relationship must disclose, in writing, whom they represent.”.

Section 2. Amend § 2931, Title 24 of the Delaware Code, by inserting therein the following new subsection:

“(d) Licensees shall not function in the capacity of a common law agent for transactions concerning one to four family residential property unless they have established that relationship in writing and the company policy of the Brokerage Organization is to represent only the seller or buyer as a single agent for each transaction and never as a dual agent.”

Section 3. Amend § 2901(a), Title 24 of the Delaware Code, by striking paragraph (2) thereof in its entirety and by substituting in lieu thereof the following:

“(2) ‘Real estate broker’ or ‘Broker’ means any person who holds a broker’s certificate from the commission and who, for a compensation or valuable consideration, is self employed or is employed, either directly or indirectly by a Broker Owner, Broker of Record, or Brokerage Organization to sell or offer to sell, or to buy or to offer to buy, or to negotiate the purchase, sale, or exchange of real estate or to lease or rent or offer for rent any real estate, or to negotiate leases

or rental agreements thereof or of the improvements thereon, as a whole or partial vocation. This definition shall not apply to an 'auctioneer' as that term is defined in § 2301(a)(3) of Title 30."

Section 4. Amend § 2901(a), Title 24 of the Delaware Code, by striking paragraph (3) thereof in its entirety and by substituting in lieu thereof the following:

- "(3) 'Real Estate Salesperson' or 'Salesperson' means any person who holds a salesperson certificate from the commission and who, for a compensation or valuable consideration, is employed, either directly or indirectly by a Broker, Broker Owner, Broker of Record, or Brokerage Organization to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease or rent or offer for rent any real estate, or to negotiate leases or rental agreements thereof or of the improvements thereon, as a whole or partial vocation. This definition shall not apply to an 'auctioneer' as that term is defined in § 2301(a)(3) of Title 30."

Section 5. Amend § 2901(a), Title 24 of the Delaware Code, by inserting therein the following new paragraphs:

- "(8) 'Broker of Record' means that individual broker who is primarily responsible for the day to day management of a real estate brokerage office.
- (9) 'Brokerage Organization' means that individual or entity which is not licensed but is acting as a broker under § 2910 of this title.
- (10) 'Broker Owner' means the licensed Broker who is also an owner of the Brokerage Organization but does not included owners, partners, members, shareholders or other holders of an equity interest who do not actively participate in the brokerage business of the organization.
- (11) 'Client' means the principal in a statutory agency or common law agency relationship.
- (12) 'Consumer' or 'Prospect' means a member of the public who has not yet become a 'Client' or 'Customer'.
- (13) 'Customer' means someone working with a Broker or Salesperson as a potential buyer, seller, exchangor, tenant, or landlord of real property or is consulting with a Broker or Salesperson in one of these capacities for the purpose of entering into a Brokerage agreement or transaction, but who is not yet in the statutory agency or common law agency relationship of principal and agent with the Broker or Salesperson.
- (14) 'Consumer Information Statement' or 'CIS' means the disclosure form required by § 2972 of this title.

- (15) 'Licensee' means a person licensed under this Chapter as a Broker or Salesperson without implying what legal relationship they have with a consumer.
- (16) 'Ministerial Task' means a task that does not involve discretion or the exercise of the licensee's own judgment for example:
- a. performing tasks for a Client or Customer according to the Brokerage Agreement or other form of consent before or after the signing of an agreement of sale or lease such as arranging an inspection; or
 - b. assisting other people to perform their part of the transaction such as providing information to the mortgage lender.
- (17) 'Statutory Agent' or 'Agent' means a licensee functioning as principal in an agency relationship created according to Subchapter IV as an independent contractor and not as a fiduciary. The Agent offers products and services to the public to make a market in real estate by bringing buyer and seller, or landlord and tenant together for the transaction and assisting the parties with advice, assistance with negotiations, and performing Ministerial Tasks to complete the transaction. Every Licensee shall be presumed to be a statutory agent and may refer to themselves as agent or statutory agent unless specifically identified as a common law agent in their brokerage agreement.

Section 6. Amend Chapter 29, Title 24 of the Delaware Code, by inserting therein a new Subchapter IV thereto as follows:

“Subchapter IV Business Relationships with Consumers

- § 2971. Applicability, interpretation, and the common law of agency.
- § 2972. Consumer Information Statement; confidentiality.
- § 2973. Broker and Salesperson as a Statutory Agent.
- § 2974. Financial Information.
- § 2975. Internet and World Wide Web.
- § 2976. Compensation agreements.
- § 2977. Vicarious liability; protections when working with a Statutory Agent.
- § 2978. Commencement and termination of duties.
- § 2979. Duty to cooperate.

§ 2971. Applicability, interpretation, and the common law of agency

- (a) This Subchapter applies to licensees in their business relationships with Consumers, Customers, and Clients for all types of real estate transactions whether they are sales, leases, exchanges, management of real estate for others, or real estate counseling conducted by real estate licensees. In applying this subchapter to leasing transactions, the word “Landlord” may be substituted for “Seller”, the word “Tenant” may be substituted for “Buyer”, and the word “Lease” may be substituted for “Agreement of Sale” where applicable. The terms “Rental Agreement” and “Lease” may be used interchangeably.
- (b) The common law of agency relative to brokerage relationships in real estate transactions established pursuant to this Chapter is expressly abrogated for any real estate licensee functioning as a Broker, Salesperson, Broker of Record, Broker Owner, or Brokerage Organization as defined in this chapter as a Statutory Agent. This chapter is intended to occupy completely the field of law relative to brokerage relationships for those real estate transactions with the licensee(s) functioning as Statutory Agents. For those areas where the public, licensees, regulators, or courts need further guidance as to the conduct of an Agent, the Clients and Customers, the law governing independent contractor relationships shall apply to the extent it is not inconsistent with the provisions of this Chapter. For transactions where the consumer hires a Broker as a common law agent, and the Broker agrees in writing to become the consumer’s common law agent, the common law of agency applies to the extent it is not inconsistent with the provisions of this chapter.

§ 2972. Consumer Information Statement; confidentiality.

- (a) The Real Estate Commission shall establish by regulation a Consumer Information Statement (CIS). The Commission may provide alternative Consumer Information Statements for residential properties, properties that do not contain any residential units, commercial transactions, property management, or other brokerage situations as the Commission deems appropriate. At a minimum, the form shall provide a summary of what a Broker and Salesperson are permitted or prohibited from doing as provided by § 2973 and § 2974 of this title. The CIS shall explain the circumstances when the consumer may hire the licensee as a common law agent, but that this would require other detailed disclosures of conflicts of interests and could involve significant potential legal liability and financial risk for the consumer.
- (b) The Consumer Information Statement required by this Chapter shall be delivered to the consumer no later than the first scheduled appointment or showing of a property (whichever is earlier) unless they have already been given the CIS by another licensee involved with the transaction. The licensee shall give the

consumer an opportunity to read the CIS before the consumer completes and signs it. The licensee shall retain a copy of the CIS for the file of the Broker of Record and the consumer shall be given a copy. A listing licensee who knows that the buyer is working with another licensee is not required to give that buyer a CIS. A licensee working with a buyer who knows that the seller is working with another licensee is not required to give a CIS to that seller. If a consumer refuses to sign the CIS, the licensee may indicate on the licensee's copy the date it was provided to the consumer. For a transaction begun or conducted without a face to face meeting, the licensee shall provide the CIS with other papers sent to the consumer by mail or by electronic transmission.

- (c) The CIS shall be available to the consumer at open houses, but does not need to be personally presented by the licensee and signed by the consumer unless the consumer asks for more than factual information about the property or expresses interest in making an offer on the property during the open house.
- (d) There is no form of Brokerage relationship and no duties between a licensee and consumer other than the duties of confidentiality required by § 2973(c) until the Consumer Information Statement is completed and received by the consumer and if applicable, the listing agreement or other brokerage agreement is signed.
- (e) Nonrenewable leases of 120 days or less are exempt from the requirement to provide the CIS to the potential tenant; provided, however, that the duties of confidentiality required by § 2973(c) and the rest of this chapter still apply to those leases. The Broker of Record may still choose to provide the CIS as a matter of office policy.

§ 2973 Broker and Salesperson as a Statutory Agent.

- (a) *Licensee is a Statutory Agent and Broker may designate others.* -- Unless specifically hired as a common law agent by a written brokerage agreement, a licensee is a Statutory Agent and not common law agent for any party. The Broker Owner or Broker of Record may from time to time designate one or more Brokers or Salespersons licensed under that Broker of Record or Broker Owner to be the designated Broker(s) or Salesperson(s) of a Client or Clients to the exclusion of all others in the Brokerage Organization.
- (b) *Obligations and responsibilities.* -- A Broker Owner, Broker of Record, Brokerage Organization, Broker and Salesperson shall to the extent applicable to their functions have the following obligations and responsibilities.
 - (1) Performing the duties required by this chapter;
 - (2) Performing the terms of the written brokerage agreement, if any;

- (3) Exercising reasonable skill and care as a Broker or Salesperson;
 - (4) Advising the parties to obtain expert advice on material matters about which the Broker or Salesperson knows but the specifics of which are beyond the expertise of such Broker or Salesperson;
 - (5) Accounting in a timely manner for all money and property received;
 - (6) Helping to keep the parties informed regarding the progress of the transaction;
 - (7) Performing Ministerial Tasks to assist the parties in complying with the terms and conditions of any contract;
 - (8) Disclosing to all prospective buyers or tenants any adverse material facts actually known by the Broker or Salesperson;
 - (9) Informing the parties that they shall not be vicariously liable for acts of the Broker or Salesperson;
 - (10) Informing the parties that notice given to the Broker or Salesperson is considered notice to the party;
 - (11) Informing the parties that oral or written statements made by a Broker or Salesperson without the consent of the party do not bind the party and may not be relied upon by anyone as binding a party. As such, all statements and negotiations shall need to be authorized by or signed by the parties themselves to be binding on the parties unless otherwise stated in the Brokerage Agreement, Agreement of Sale, Lease, or power of attorney;
 - (12) Complying with all requirements of this chapter and any rules promulgated pursuant to this chapter;
 - (13) Complying with any applicable federal, state, or local laws, rules, regulations, or ordinances; and
 - (14) Following fair housing and civil rights laws and regulations.
- (c) *Confidentiality.* -- The following information shall not be disclosed by a Broker Owner, Broker of Record, Brokerage Organization, Broker, or Salesperson without the informed consent of the affected party:
- (1) That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
 - (2) That a seller or landlord is willing to accept less than the asking price or lease rate for the property;
 - (3) What the personal motivating factors are for any party to a transaction if the party requests them to be kept confidential;

- (4) That a seller, buyer, landlord, or tenant will agree to terms other than those offered;
 - (5) Any material confidential information about the parties or property unless disclosure is required by statute or regulation or failure to disclose such information would constitute fraud or intentional misrepresentation;
 - (6) Any facts or suspicions regarding circumstances which may psychologically impact or stigmatize any real property pursuant to § 2930 unless required to be disclosed by § 2930; or
 - (7) Any facts or suspicions that any party or someone in the community is a registered sex offender under Title 11 Delaware Code Subchapter III as amended from time to time, but if asked shall refer the person to the Delaware State Police to seek this information.
- (d) *Actions permitted by Broker and Salesperson.* -- A Broker Owner, Broker of Record, Broker, and Salesperson may do the following as an Agent without breaching any obligation, duty, or responsibility to a Client or Customer:
- (1) List and advertise competing properties for sale or lease;
 - (2) Show Clients or Customers alternative properties not owned by Broker's other Clients;
 - (3) Show properties in which one Client or Customer is interested to other Clients or Customers;
 - (4) Disseminate information that is generally available to licensees. For example, providing information on comparable sales and the licensee's interpretation, advice, and opinion about this information with the Client or Customer retaining the authority to decide what to do with this information;
 - (5) Assist buyers and sellers in preparing offers and counteroffers providing the forms used advise the parties that they may seek legal advice prior to signing. Presenting all offers and counteroffers in a timely manner regardless of whether the property is subject to a contract for sale, lease or letter of intent unless instructed otherwise by the Client;
 - (6) Develop negotiating strategies or options for how to proceed with a transaction;
 - (7) Perform Ministerial Tasks;
 - (8) Serve as a single agent, subagent, or disclosed dual agent for the same parties in different transactions or different parties concerning the same property. For example, the licensee could be a Statutory Agent for the sellers in one transaction and a common law agent for the same people as buyers in another transaction.

- (9) Cooperate with other Brokers; however, for owner occupied residential property they shall not engage any common law subagents from other companies, Brokers, or Brokerage Organizations.
 - (10) Disclose information concerning a transaction among the designated Broker, designated Salesperson(s), Broker Owner, Broker of Record, and office staff working for the Brokerage organization on that transaction.
 - (11) Provide Customers with factual information they request. Provide Clients with relevant factual information. Tell Clients about their choices of how to proceed and provide them with relevant information. Provide Clients with information and advice when presented with questions from the Client or a request for advice.
- (e) *No imputed knowledge.* -- There is no imputation of knowledge or information by operation of law among or between the Consumers, Customers, Clients, Broker Owner, Broker of Record, Broker, Salesperson, Brokerage Organization and other licensees or persons within an organization.
 - (f) *Notice.* – Notice as defined by law or in the agreement of sale or lease given to a party shall be considered effective notice. Unless specified otherwise in the agreement of sale or lease, notice only given to a Designated Broker or Designated Salesperson shall also be considered effective notice to the Client of that Broker or Salesperson. Notice to the Broker Owner or Broker of Record is not considered notice to the designated Broker, designated Salesperson, or Client. Notice only to the designated Broker or designated Salesperson is not considered notice to the Broker Owner, Broker of Record, or the rest of the Brokerage Organization.
 - (g) *Statutory Interpretation.* -- Performing the functions of a Statutory Agent as described in this Chapter and the rules and regulations of the Commission shall not be construed to automatically or by implication create a common law agency relationship. Subsections (b) through (f) of this section shall not apply to a common law agency relationship. Subsections (b) through (f) shall be construed as rules of conduct describing how a Broker or Salesperson works for Clients, works with Customers, or interacts with the public as a Statutory Agent in the capacity of an independent contractor and not as a common law agent.

§ 2974 Financial Information

Licenses do not have a duty to conduct an independent investigation of the Consumer's, Client's, or Customer's financial condition and do not have a duty to independently verify the accuracy or completeness of financial statements made by the Consumer, Client or Customer or any independent inspector, auditor, or lender, but

if the licensee has actual knowledge of false financial information, the licensee shall advise the party to correct it and shall not pass on the information known to be false.

§ 2975 Internet and World Wide Web.

Entering a name and email address on an internet or world wide web site is sufficient to establish a broker-consumer relationship for the use of that system, but does not in of itself create a broker-Customer or Client relationship for any other purpose. The Broker may deliver the CIS by the internet or world wide web and the consumer may acknowledge receipt of it electronically. However, an exclusive business relationship or obligation for the consumer to pay any compensation may only be created by a written brokerage agreement signed by the consumer as a separate document. If the brokerage agreement is signed electronically it may not be part of a general consent to the terms of use of an internet or world wide web site or other electronic device, but must be a conspicuous separate document.

§ 2976 Compensation agreements.

- (a) *Written brokerage agreements.* -- Nothing in this chapter obligates a buyer, tenant, seller or landlord to pay compensation to a Broker or Brokerage Organization unless that party has entered into a written brokerage agreement with the Broker or Brokerage Organization specifying the compensation terms. The compensation agreement may specify that the Brokerage Organization, Broker Owner, Broker of Record, Broker and Salespersons may cooperate with other licensees. Brokers or Brokerage Organizations may compensate other Brokers or Brokerage Organizations participating in the transaction without further permission of the party. The source of compensation does not by itself determine brokerage relationships. If a brokerage agreement contemplated one type of transaction such as a sale, but then through the course of continuous negotiations the initial transaction changes to another type of transaction such as a lease, the Broker is still entitle to compensation; however, if the initial transaction was a lease which later became a sale, the Broker is not entitled to compensation unless the listing agreement, other compensation agreement, or lease provided for compensation for a later sale.
- (b) *Additional terms.* -- Nothing in this Chapter shall prohibit consumers from entering into written brokerage agreements with a Broker or Brokerage Organization which contain duties, obligations, or responsibilities which are in addition to those specified in this chapter.
- (c) *Different relationships permitted for different transactions or jurisdictions.* -- A licensee or Brokerage Organization may work with a single party in separate transactions pursuant to different brokerage

relationships including but not limited to selling one property as a seller's agent and working with that seller in buying another property as buyer's agent, or seller's subagent where permitted; provided, however, that the licensee or Brokerage Organization complies with this Chapter in establishing the relationships for each transaction. A licensee who is licensed in another jurisdiction may function as a licensee for properties in that jurisdiction even if the brokerage relationship is different in that jurisdiction such as a "transaction broker", without being considered that status in Delaware.

- (d) *Compensation to entity of licensee.* -- The Broker or Brokerage Organization may pay the licensee's individual compensation to an entity created by the licensee to receive compensation providing the entity is either already approved by the Real Estate Commission as a Brokerage Organization or the entity does not need to be approved because it does not engage in the brokerage business but is only established for business purposes to receive the licensee's compensation. The Salesperson or Broker paid by the Brokerage Organization may employ licensed or unlicensed staff or team members who shall be paid an hourly wage, salary, or commission according to their agreement with the employing Salesperson or Broker. Nothing in this Act shall authorize unlicensed personal assistants, independent contractors, or employees to engage in activities which by statute or regulation of the Commission must be performed by a licensed individual.

§ 2977 Vicarious liability protections when working with a Statutory Agent.

- (a) A Client shall not be liable for a wrongful act, error, omission, or misrepresentation of the Brokerage Organization, Broker Owner, Broker of Record, Broker or Salesperson except to the extent the Client had actual knowledge of the wrongful act, error, omission, or misrepresentation.
- (b) A Brokerage Organization, Broker Owner, Broker of Record, Broker and Salesperson shall not be liable for a wrongful act, error, omission, or misrepresentation of the Client except to the extent the Broker Owner, Broker of Record, Broker, or Salesperson had actual knowledge of the wrongful act, error, omission, or misrepresentation.
- (c) Nothing in this section shall be construed to diminish or limit any of the other duties or responsibilities of the Brokerage Organization, Broker Owner, Broker of Record, Broker, or Salesperson under this chapter, or the rules promulgated hereunder.

- (d) This section does not otherwise limit the liability of a Brokerage Organization, Broker Owner or Broker of Record, for an act, error, or omission of a Broker or Salesperson licensed through that Brokerage Organization, Broker Owner, or Broker of Record.
- (e) This section does not apply if the licensee or Brokerage Organization is hired as a common law agent.

§ 2978 Commencement and termination of duties.

- (a) *Common Law Agent* -- The duties of a licensee as a common law agent and corresponding liabilities of the client begin and terminate based upon the common law of agency.
- (b) *Commencement of duties for a Statutory Agent.* -- There is no form of brokerage relationship and no duties between a Broker or Salesperson and Consumer other than the duties of confidentiality required by § 2973(c) until the Consumer Information Statement is completed and signed by the Customer or Client and if applicable, the listing agreement or other brokerage agreement is signed.
- (c) *Duties of a Statutory Agent after termination.* -- A Brokerage Organization, Broker Owner, Broker of Record, Broker and Salesperson, owe no further duty or obligation to the Customer or Client after termination, expiration, completion or performance of the transaction or other termination of the brokerage relationship, except the duties of:
 - (1) Accounting in a timely manner for all money and property related to, and received during the relationship; and
 - (2) Treating as confidential information provided by the Client during the course of the relationship that may reasonably be expected to have a negative impact on the Client's real estate activity unless:
 - a. The Client to whom the information pertains grants written consent;
 - b. Disclosure of the information, such as defects actually known by the Licensee or previously disclosed by the seller on the Seller's Disclosure of Real Property Condition Report, is required by law;
 - c. The information is made public or becomes public by the words or conduct of the Client to whom the information pertains or from a source other than the Brokerage Organization, Broker Owner, Broker of Record, Broker or Salesperson; or

- d. Disclosure is necessary to defend the Brokerage Organization, Broker Owner, Broker of Record, Broker or Salesperson against an action of wrongful conduct in an administrative or judicial proceeding or before a committee of a professional association.

§ 2979. Duty to cooperate.

- (a) Brokers and Salespersons shall cooperate with all other Brokers and Salespersons involved in a transaction except when cooperation is not in the Client's or Customer's best interest. The obligation to cooperate does not include any obligation to share commissions or to otherwise compensate another Broker or Salesperson.
- (b) In order to cooperate, Brokers and Salespersons shall be reasonably available when requested by their Client or Customer to:
 - (1) Accept delivery of and present to the Client or Customer offers and counteroffers to buy, sell, or lease the Client's/Customer's property, or the property the Client or Customer seeks to purchase or lease;
 - (2) Assist the Client or Customer in developing, communicating, negotiating, and presenting offers, counteroffers, and notices that relate to offers and counteroffers until the Agreement of Sale or Lease is signed and all contingencies are satisfied or waived; and
 - (3) Answer the Client's or Customer's questions relating to the offers, counteroffers, notices, negotiations, and contingencies; and
 - (4) Hold the deposit money in escrow.
- (c) In order to cooperate, Brokers and Salespersons shall be reasonably available when requested by a cooperating Broker or Salesperson to undertake the activities described in subsection (b) of this section, but only after disclosing the request to their Client or Customer and receiving written authorization to undertake the requested activity. If the Client or Customer fails to authorize the Broker or Salesperson to undertake the requested activity, the Broker or Salesperson shall not undertake such activity.

Section 7. If any clause, sentence, section, subsection, provision or part of this Act, or the application thereof to any set of facts or circumstances, shall be adjudged to be unconstitutional or invalid for any reason by any court of competent jurisdiction, such judgment shall not impair, invalidate or affect the remainder of this Act which shall remain in full force and effect, and the application of the provision in question to other persons not similarly situated or to other circumstances shall not be affected thereby.

Section 8. This Act shall become effective on the sooner of twelve months following its enactment into law or three months following promulgation of the Consumer Information Statement and implementing regulations by the Real Estate Commission, and the Commission is authorized to adopt the CIS and promulgate such regulations prior to this Act becoming effective. Upon becoming effective, this Act shall be applicable to all Brokerage Agreements entered into thereafter and to existing Brokerage Agreements amended by the parties to make this Act applicable.