

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #7

Do Not Mark In This Box  
Filing Date

**FILED**

2006 JAN 31 P 1:18

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Real Estate Commission TITLE NUMBER: 174

CITE AUTHORITY: WV Code §30-40-8

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: Series 1

TITLE OF RULE BEING AMENDED: Requirements in licensing Real Estate Brokers, Associate  
Brokers, and Salespersons and the conduct of Brokerage  
Business

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME  
EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER  
FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE  
AS FOLLOWS:

The United States Department of Justice notified the Real Estate Commission that the provisions of 174  
CSR 1-11 must be amended in order to comply with the provisions of the Sherman Anti-Trust Act.

*Richard E. Strader*  
Authorized Signature

Use additional sheets if necessary

\$5.40

**EMERGENCY RULE QUESTIONNAIRE**

DATE: January 31, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Real Estate Commission  
300 Capitol Street, Suite 400 Charleston, WV 25301  
304-558-3555

EMERGENCY RULE TITLE: Requirements in licensing Real Estate Brokers, Associate Broker

1. Date of filing January 31, 2006

2. Statutory authority for promulgating emergency rule:  
WV Code §30-40-8

3. Date of filing of proposed legislative rule: January 31, 2006

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? \_\_\_\_\_  
Amends current Legislative Rule

5. Has the same or similar emergency rule previously been filed and expired?  
NO

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.  
The United States Department of Justice notified the Real Estate Commission that the provisions of 174 CSR 1-11 must be amended in order to comply with the provisions of the Sherman Anti-Trust Act.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

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NA

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8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

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As determined by the United States Department of Justice, the Rule, as currently written, is in violation of the Sherman Anti-Trust Act.

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**State of West Virginia  
Real Estate Commission**

300 Capitol Street, Suite 400  
Charleston, West Virginia 25301  
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FAX (304) 558-6442  
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JERRY D. ZAFERATOS  
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RICHARD E. STRADER, CPA  
EXECUTIVE DIRECTOR

**SUMMARY OF PROPOSED LEGISLATIVE RULE**

AGENCY: Real Estate Commission  
RULE: 174-1  
STATUTORY  
AUTHORITY: WV Code §30-40-8

**SUMMARY**

To amend an existing rule by:

1. Amending 174 CSR §1-11, to comply with a request made by the United States Department of Justice. The Department of Justice determined that the language of 174 CSR §1-11 was in violation of the Sherman Anti-Trust Act. The proposed language filed as an emergency rule has been reviewed and approved by the Department of Justice.



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EXECUTIVE DIRECTOR

**STATEMENT OF CIRCUMSTANCES  
REQUIRING PROPOSED LEGISLATIVE RULE**

AGENCY: Real Estate Commission  
RULE: 174-1  
STATUTORY  
AUTHORITY: WV Code §30-40-8

**STATEMENT OF CIRCUMSTANCES**

1. The United States Department of Justice notified the Real Estate Commission that the provisions of 174 CSR §1-11 was in violation of the Sherman Anti-Trust Act. Therefore, the Real Estate Commission filed an amendment to the existing Rule in order to comply with the United States Department of Justice request.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Requirements in licensing Real Estate Brokers, Associate Brokers, and Salespersons

Type of Rule:  Legislative  Interpretive  Procedural

Agency: Real Estate Commission

Address: 300 Capitol Street, Suite 400  
Charleston, WV 25301

Phone Number: 304-558-3555 Email: wvrec@wvrec.org

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The purpose of the rule change is to afford real estate licensees the ability to offer rebates, inducements and other discounts, in compliance with a United States Department of Justice request. There will be no impact on the revenues nor any costs to the State of West Virginia.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

<b>FISCAL YEAR</b>			
Effect of Proposal	Current Increase/Decrease (use "--")	Next Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: \_\_\_\_\_

Rule Title: Requirements in licensing Real Estate Brokers, Associate Brokers, and Salespers

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

NONE

**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

NONE

Date: January 31, 2006

Signature of Agency Head or Authorized Representative

Richard E. Strader, Executive Director

**TITLE 174  
LEGISLATIVE RULE  
REAL ESTATE COMMISSION**

**FILED**

2006 JAN 31 P 1:18

**SERIES 1  
REQUIREMENTS IN LICENSING REAL ESTATE BROKERS, ASSOCIATE BROKERS, AND  
SALESPERSONS AND THE CONDUCT OF BROKERAGE BUSINESS**

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**§174-1-1. General.**

1.1. Scope. -- This legislative rule establishes general regulations for the filing of applications for real estate licenses and the requirements necessary to renew licenses and for the enforcement and administration of the provisions of W. Va. Code §§30-40-1 et seq.

1.2. Authority. -- W. Va. Code §30-40-8.

1.3. Filing Date. --

1.4. Effective Date. --

**§174-1-2. Definitions.**

2.1. Commission. -- The term "Commission" means the West Virginia Real Estate Commission as authorized by W. Va. Code §30-40-6.

2.2. Licensee. -- The term "licensee" means a broker, an associate broker, and a salesperson as defined in W. Va. Code §30-40-4.

2.3. Applicant. -- The term "applicant" means any person who is making application to the commission for a license.

**§174-1-3. License Fees.**

3.1. License year. -- The license year begins on July 1 and ends June 30 of each fiscal year. The Commission may issue licenses on an annual or biannual basis. Fees are not prorated.

3.2. Proper fee. -- Each application for a license shall be accompanied by a separate check or money order for the proper fee for that particular application. When a salesperson, who is duly licensed, desires to become a broker, his or her employing broker shall surrender his or her salesperson's certificate to the Commission before a broker's certificate is issued. He or she shall pay the fee for the broker's license as set forth in separate rule. The Commission shall not give credit for the fee paid for the salesperson's license.

**§174-1-4. License Certificates.**

4.1. License certificates. -- The Commission shall issue to each licensee a license in such form and size as shall be prescribed by the Commission. A broker's license shall show the broker's name, business name and business address. An associate broker's and salesperson's license shall show the name of the real estate broker by whom he or she is employed.



4.2. Designated Broker -- No broker's license shall be issued in the name of a partnership, association, corporation, or other form of business organization, until the governing body of the business organization executes a subordination resolution which grants full authority to the partner/member/officer acting as the broker for the business organization. The subordination resolution must be submitted on a form provided by the Real Estate Commission and be sworn to and notarized.

**§174-1-5. Branch Offices.**

5.1. Register of branch office. -- Every licensed broker who desires to conduct brokerage transactions at any location other than the principal place of business must make application for a branch office license and pay the required fee in order to receive a license certificate for each branch office. A mere temporary shelter on a subdivision being sold by the broker, for the convenience and protection of licensees and customers, and at which transactions are not closed and licensees are not permanently assigned is not considered to be a branch office. The permanence, use, and character of activities conducted at the office or shelter shall determine whether it must be registered.

5.2. Manager of Branch Office. -- Every broker who obtains a license for a branch office must designate one associate broker or salesperson as manager of each branch office. A broker shall not employ, as manager of his or her branch office, a real estate salesperson with less than two (2) years actual experience as a licensed real estate salesperson: Provided, That a broker may designate himself or herself as the manager of a branch office if the broker is capable of adequately supervising all associate brokers and salespersons assigned to the branch office.

**§174-1-6. Cancellations And Transfers.**

6.1. Custody of license certificates. -- The broker shall maintain in his or her custody and control the license certificates of each salesperson and associate broker. Upon the termination of employment, the broker shall immediately notify the salesperson or associate broker and return the license certificate to the Commission for cancellation.

6.2. Change of employing broker by salesperson or associate broker. -- In the event a salesperson or associate broker wishes to transfer his or her real estate license to a broker other than the broker under whom he or she is presently employed, he or she must first notify his or her present employer, in writing, and must submit a properly executed application for change of employing broker on a form provided by the Commission for this purpose, and pay the required fee.

6.3. Sworn statement by broker. -- In the event a real estate salesperson or associate broker makes application for change of employing broker, the application shall include a sworn statement by the broker in whose employ the applicant desires to enter certifying that the applicant is to be employed by him or her.

**§174-1-7. Qualifications For Real Estate Broker's License.**

7.1. Experience requirement. -- W. Va. Code §30-40-12 among other required qualifications for a broker's license, provides that "an applicant for a broker's license shall have served an apprenticeship as a licensed salesperson for two years or shall produce evidence satisfactory to the Commission, in its sole discretion, of real estate experience equivalent to two years full-time experience as a licensed salesperson".

7.2. Apprenticeship. -- The Commission defines the word "apprenticeship," as used in W. Va. Code §30-40-12 to mean a broker-salesperson relationship wherein the salesperson apprentice is taught the methods, techniques and terminology of the real estate business under the guidance and direction of a broker.

In order to satisfy the apprenticeship requirement, the applicant shall submit to the Commission, written documentation outlining the applicant's experience in the real estate business. The documentation must demonstrate that the applicant has gained experience in all aspects of the real estate business equal to that which would be gained by a person engaged in the real estate business on a full time basis during a minimum two year period of time.

7.3. Written Documentation of Experience -- In order for the Commission to determine the experience of an applicant for a broker's license, the applicant shall submit, on forms prepared by the Commission, a complete list of all the real estate transactions in which the applicant has been involved. The information submitted must, at a minimum, cover the current calendar year and the preceding two calendar years.

7.4. Affidavit of Broker. -- Each and every broker, with whom a real estate salesperson has been employed, shall furnish the Commission with an affidavit attesting to the applicant's experience and qualifications. The broker shall submit the affidavit on a form prepared by the Commission.

7.5. Equivalent Experience -- An applicant for a broker's license may qualify for waiver of all or part of the two year apprenticeship requirement under the following guidelines:

a. Four or more years full-time experience as a licensed real estate appraiser within the last ten years;

b. Four or more years full-time experience as a trust officer handling real property within the last ten years;

c. Four or more years full-time experience as a subdivider, developer, or general contractor who has developed, financed and sold 50 or more lots, residential units or commercial units within the last ten years. To qualify under this provision, the applicant must have been directly involved in all phases of the development activities;

d. Four or more years full-time experience as a loan officer of a bank, lending institution, or mortgage company in a capacity directly related to the financing of real estate within the last ten years, or;

e. Licensed as a real estate broker in another jurisdiction within the past five years. Provided, That if an applicant for a broker's license is licensed in another jurisdiction as a broker at the time the application is submitted to the Commission, he or she shall be granted a full waiver of the apprenticeship requirement.

**§174-1-8. Office Signs.**

8.1. Sign requirement. -- All registered real estate brokers, holding an active certificate, shall erect, and maintain a sign on or about the entrance of their principal office and each branch office, which shall be easily observed and read by persons about to enter any of the offices. Every sign shall contain the name of the broker, together with his or her trade name, if any, beneath which shall be the word "Broker," all in letters not less than 1 inch in height. If the broker so desires, the names of the salespersons or associate brokers may be placed below the name of the broker.

**§174-1-9. Advertising.**

9.1. Advertising by licensees -- When advertising real estate, through linear advertisement, radio, television, web sites or any other media, each advertisement shall include the firm name, the name of the broker, office location information, and the term "Broker" or "Realtor" as the case may be. The names of

associate brokers and salespersons may be included in the advertisement as long as they are clearly identified as such. Provided, That if the licensee is the owner of the property, the licensee has all the rights of an unlicensed person.

9.2. Advertising by salespersons and associate brokers. -- Salespersons and associate brokers may not advertise any property under their own names. All advertising by an associate broker or salesperson must be under the direct supervision of and in the name of the employing broker.

**§174-1-10. Trade And Fictitious Names.**

10.1. Use of trade name. -- An individual broker may use a trade name. Any broker who wishes to use a trade name must disclose the trade name in an application for license and upon approval by the Commission, the trade name will be placed upon the broker's license certificate. The trade name shall not be the same as that currently being used by another broker in the same locality. A broker shall not use any trade name not registered with the Commission. Provided, That a broker that chooses to operate under a franchise agreement shall not be required to register the name of the franchise organization with the Commission and the name of the franchise organization will not be registered by the Commission.

10.2. Change of trade name. -- Each broker shall notify the Commission in writing of any change of trade name. The notice shall be made on a form supplied by the Commission and accompanied by the original license certificate and proper fee. The Commission shall issue a new certificate with the new trade name for the unexpired period.

**§174-1-11. Offer Of Inducements And Gifts: Consumer Rebates, Inducements and Other Discounts.**

11.1. ~~No A licensee may offer, directly or indirectly, door prizes, gifts, or anything of value, in exchange for the sale or listing of any real estate or while engaged in any other activity regulated by the Commission. Provided, That it shall not be improper for a licensee to:~~ to clients or consumers rebates of commission fees, inducements, or other discounts, if such licensee:

a. ~~Provide a closing gift of nominal value to a party to the transaction, as long as it has not been used as an inducement; Discloses to the client or consumer, in a clear and conspicuous manner, in writing, the terms of any rebate of commission fees, inducement or other discount offered;~~

b. ~~Discuss or negotiate the compensation the licensee agrees to charge for his or her services; or Discloses to the client or consumer, in a clear and conspicuous manner, in writing, the fair market value of any rebate of commission fees, inducement or other discount offered; and~~

c. ~~Disseminate information about special terms, conditions or other inducements which are bona fide offers made by a principal to a real estate transaction. Offers the rebates of commission fees, inducements or other discounts only under the direct supervision and in the name of the employing broker.~~

11.2. No licensee may accept, give or charge any form of undisclosed compensation, consideration, rebate, inducement or other discount to a client or consumer.

11.3. Advertisements of lotteries, contests, prizes, certificates, gifts and lots.

a. An advertisement by a licensee that employs lotteries or contests or that offers prizes, certificates, gifts or free lots shall be under the direct supervision and in the name of the employing broker and shall contain:

1. A description of each prize, certificate, gift, lot or other valuable consideration offered;
2. The prerequisites for receiving each prize, certificate, gift, lot or other valuable consideration offered;
3. Limitation on the number of prizes, certificates, gifts, lots or other valuable consideration offered;
4. The fair market value of each prize, certificate, gift or lot offered. If the advertisement is in a print medium, the statement of fair market value shall be in the same size type as the description of the prize, certificate, gift or lot offered. For purposes of this paragraph, "fair market value" is the price or value that a prospective buyer would expect to pay, or be charged for, if he/she were to acquire a similar item of like quality and quantity in a retail outlet that offers the item for sale to the general public; and
5. The odds of winning or receiving each prize, certificate, gift or lot offered. If the advertisement is in a print medium, the statement of odds shall be the same size type as the description of the prize, certificate, gift or lot, and shall appear immediately adjacent to the description.

b. A licensee who offers prizes, certificates, gifts or lots shall maintain records that contain:

1. The number and description of each prize, certificate, gift or lot distributed or awarded;
2. The name and address of each person who received a prize, certificate, gift or lot; and
3. The name and address of each person who responded to the advertisement or solicitation but did not receive a prize, certificate, gift or lot.

c. The Commission will regard the following as unlawful conduct within the meaning of West Virginia Code § 30-40-19(a)(37):

1. Failure to comply with subsection (a) or (b);
2. Failure to disclose the possibility that a particular prize, certificate, gift or lot may not be distributed or awarded;
3. Advertising the availability of a prize, certificate, gift or lot when it is not available for distribution or awarding; and
4. Giving a misleading description of a prize, certificate, gift or lot.

11.4 Nothing contained in this section shall be construed to prohibit a licensee from:

a. Providing a closing gift of nominal value to a party to the transaction, without the approval of the licensee's employing broker;

b. Discussing or negotiating the compensation the licensee agrees to charge for his or her services;  
or

c. Disseminating information about special terms, conditions or other offers which are bona fide offers made by a principal to a real estate transaction.

**§174-1-12. Location Of Office.**

12.1. Usual place of business. -- Usual place of business is defined as the physical location from which a broker carries on his or her business and which the broker holds forth to the public as his or her usual place of business. The broker may maintain his or her usual place of business in a licensee's residence, but the residence must be sufficient to maintain the records and accounts required in Section 16 of this rule and of sufficient space within which to permit the Commission's inspection of the accounts and records without interference by other users of the property.

12.2. Beer sales. -- A broker shall not maintain an office or display a sign, where beer or other alcoholic beverages are sold. If a real estate office is located adjoining to or in the same building where beer or other alcoholic beverages are dispensed, the office shall have a private entrance. The Commission shall determine if the location of a real estate office is in keeping with the standards of the real estate trade.

**§174-1-13. Renewal Of License.**

13.1. Duty to renew. -- All licenses expire June 30 regardless of the date the license was issued. It is the duty of all licensees to register with the Commission and to renew their licenses by paying the renewal fee for a license as set forth under separate rule.

13.2. Operating without license. -- Any licensee who does not register as required by this section, but continues to operate when a license is required, is in violation of W. Va. Code §§30-40-1 et seq.

13.3. Examination required. -- Any licensee who does not renew his or her license by June 15 of the year subsequent to the license's expiration shall be required to comply with all the requirements for obtaining an original license.

13.4. Continuing education. -- Each licensee applying for the renewal of his or her license on active status, shall furnish proof, as established by the Commission, showing he or she has completed, during the term of the preceding license, seven (7) hours of instruction in an approved real estate course, for each year covered by the term of the previous license. It is the responsibility of the broker to see that all licensees in his or her employ comply with this requirement prior to applying for a renewal of their licenses.

a. This requirement does not apply to any licensee who qualified to obtain an original license in the fiscal year preceding the annual renewal date. Provided, That if the Commission issues a license that covers more than one fiscal year, the licensee shall be required to submit proof that he or she has completed approved continuing education credits for all years other than the year immediately following the year in which he or she qualified to obtain an original license.

b. A licensee in an inactive status is not required to comply with the continuing education requirement. A licensee on an inactive status who desires to be placed on active status must furnish satisfactory evidence to the commission that he or she has completed the approved continuing professional education that would have been required for active status at the time the license was renewed. The licensee must comply with this requirement prior to being placed on active status.

c. Non-resident licensees must comply with the continuing education requirement. However, if the non-resident's jurisdiction has a comparable continuing education requirement and recognizes West Virginia continuing education credits as fulfilling that jurisdiction's continuing education requirement, the Commission will accept continuing education credits earned in the other jurisdiction.

**§174-1-14. Examinations.**

14.1. Appear for examination. -- An applicant who is required to take an examination shall appear for and be administered an examination at the time and place specified by the Commission. If the applicant fails to appear at the time and place specified by the Commission for the examination, the applicant may be scheduled for the next available examination. If the applicant fails to appear for the next examination, his or her application will be canceled and he or she must then reapply.

14.2. Application for examination -- An application for license shall only be valid for two attempts at passing the examination. Upon the applicant's second unsuccessful attempt at passing the examination, the applicant will be required to submit a new application which shall be valid for two more examinations.

14.3. Rules. -- The following examination rules will prevail and violation of any rule is grounds for disqualification of the applicant:

- a. Examinees may not refer to any notes, books or memoranda.
- b. The examinee must show all computations on the blank pages of the examination paper.
- c. The copying of questions or the making of notes is prohibited.
- d. Examinees may not talk or ask questions of another examinee during the course of the examination.
- e. All examinees must present identification which contains a current recognizable photograph and their signature. Any examinee who does not present the required identification will be prohibited from sitting for the examination.
- f. All examinees must pay the required examination fee at the time of sitting for the examination.

14.4. Reexamination. -- The Commission will give a notice of failure to an applicant who fails to attain a passing grade on the examination. The Commission will schedule another examination and will give the applicant written notice of when and where to appear.

14.5. Review of examination. -- An applicant for a real estate license who fails the examination after two (2) attempts may review the examination papers, to verify that they were properly graded, by making written request to the Commission.

14.6. Payment of license fee. -- An applicant for a real estate license, upon successfully passing the examination, must pay the required license fee within three months from the date of sitting for the examination. The Commission will cancel the application of any applicant who does not pay the required license fee within three months. Any applicant that fails to pay the license fee in compliance with this rule, will be required to reapply and successfully pass the examination. Provided, That the Commission may grant a three month extension for time to pay the license fee if good cause to do so is

demonstrated by the applicant. Each request for an extension will be considered on a case by case basis and shall be granted if extenuating facts or circumstances warrant.

#### **§174-1-15. Complaints.**

15.1. Filing of Complaint. -- The Commission will consider complaints of alleged violations of W. Va. Code §§30-40-1 et seq. only when they are submitted in writing on forms supplied by the Commission and set forth all details of the transaction, giving full names of all persons having knowledge of such transactions, together with specific addresses, dates, monetary amounts involved, copies of contracts, closing statements, correspondence and other pertinent documents and information. Only in this way can the Commission handle such matters expediently and satisfactorily.

#### **§174-1-16. Trust Funds.**

16.1. Maintain records. -- Every broker shall maintain at the broker's usual place of business, for a minimum of five (5) years, books, records, contracts, closing statements, bank records, and other necessary documents so that the Commission may determine the adequacy of the trust fund account. The accounts and other records shall be open to inspection by the Commission and its duly authorized representatives at all times during regular business hours at the broker's usual place of business. The Commission will consider material discrepancies in the accounts and records a violation of W. Va. Code §§30-40-1 et seq. by the broker.

16.2. Salesperson and associate broker with trust funds. -- Every real estate salesperson and associate broker who receives any trust funds shall immediately, or at the first opportunity, pay over or deliver the trust funds to the broker, under whom he or she is registered as a salesperson or associate broker. No real estate salesperson or associate broker shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of and with the consent of the licensed real estate broker under whom he or she is licensed. Upon receipt of any trust money, the salesperson or associate broker shall immediately turn it over to his or her employing broker. The Commission will consider the failure of a salesperson or an associate broker to comply with this rule to be a violation of W. Va. Code §§30-40-1 et seq.

16.3. Interest bearing accounts. -- Trust funds may be deposited into an interest-bearing account under the following conditions:

a. The trust funds must first be deposited into a trust fund account established in compliance with W. Va. Code §30-40-18;

b. The broker must obtain, from all parties to the transaction, a written agreement which must contain, at a minimum:

1. Authorization to remove the funds from the trust fund account for the express purpose of depositing the funds into an interest bearing trust fund account established in compliance with W. Va. Code §30-40-18;

2. Identification of the financial institution, and the type of account to be opened;

3. Identification of who will earn the interest on the funds; and,

4. How and when the interest will be disbursed.

c. No interest, privilege, or other compensation recognized by virtue of establishing or maintaining any interest bearing account established in compliance with this rule shall inure to the benefit of the broker or any other licensee; and

d. Upon closing any interest-bearing account established in compliance with this rule, the total proceeds of the account must be deposited in the broker's trust fund account prior to any disbursements being made.

**§174-1-17. Commingling Defined.**

17.1. Commingling within the meaning of W. Va. Code §30-40-19 is defined as failure to deposit or place trust funds received in: (1) a neutral escrow depository or (2) the hands of principals or (3) a trust fund account by the next business day following receipt. However, it is not commingling to hold an uncashed check until acceptance of an offer when the contract terms clearly require such conduct and it is not commingling to hold an uncashed check after acceptance of an offer when the contract terms clearly require such conduct. Each licensee must make certain that the real estate contract specifically provides for a check to be held in an uncashed form when requested to do so by the seller or purchaser.

**§174-1-18. Closing Statements.**

18.1. Deliver to Seller and Buyer. -- Every broker shall make certain that the seller and buyer, receive a complete, detailed closing statement showing all of the receipts and disbursements for their side of the transaction.

**§174-1-19. Requirements Of Broker.**

19.1. Broker becoming licensed salesperson. -- The holder of a broker's license may, during the term of that license, request inactivation of the broker's license and upon filing the appropriate application and payment of the proper fee, be issued a salesperson's license. Under this procedure he or she need not qualify by taking the salesperson's examination. The salesperson may reinstate the broker's license at any future date upon filing the appropriate application and fee, as long as the licensee maintains a current license. A broker's examination is not required under this procedure if the broker applicant is the holder of a current salesperson's license.

19.2. Brokers who rent desk space in a real estate office. -- A broker who rents desk space within a real estate office and whose own brokerage business is conducted separately and apart from that of the broker from whom the desk space is rented, shall maintain a sign on the main entrance door or on a wall or window immediately adjacent to the door, and comply with all other requirements of holding a broker's license.

19.3. Broker to refund deposit money. -- When for any reason the owner fails, refuses, neglects or is unable to consummate the deal as provided for in the contract and through no fault or neglect of the purchaser, the real estate transaction cannot be completed, the broker has no right to any portion of the deposit money which was deposited by the purchaser, even though the broker's compensation may have been earned. The broker shall return the deposit to the purchaser at once and the broker should look to the owner for his or her compensation. The Commission will consider a violation of this subsection to be a violation of W. Va. Code §30-40-19.

**§174-1-20. Court Action.**



20.1. Licensee to inform Commission of civil action. -- When any licensee is a party to any civil suit or proceeding arising out of any transaction involving real property other than actions for eviction or for the collection of back rent, it is the duty of each licensee to supply the Commission with a copy of the judgement or final disposition of the case.

20.2. Licensee to inform Commission of criminal action. -- When any licensee is a defendant in any criminal proceeding other than misdemeanor traffic violations, it is the duty of the licensee to supply the Commission with a copy of the petition, complaint, warrant, indictment, or information, and the answer filed, if any, and to advise the Commission of the disposition of the case and the nature and amount of any judgment, verdict, finding or sentence made, entered or imposed.

**§174-1-21. Bad Checks.**

21.1. Bad checks. -- Checks tendered to the commission by any course provider, applicant or licensee which are returned marked NSF (Insufficient Funds) or are not honored for any cause, may be considered prima-facie evidence of untrustworthiness or incompetency in such a manner to endanger the interest of the public. The Commission will afford the course provider, applicant or licensee a reasonable opportunity to replace the bad check with a certified check or money order. In the event the bad check is not cured, the Commission may institute appropriate action to collect the funds including court costs and fees paid to a collection agency. The Commission shall refuse to issue or shall cancel a license which was sought or obtained by the issuance of a bad check.

**§174-1-22. Agency Disclosure.**

22.1. Each licensee shall provide a written notice disclosing which party the licensee is representing as agent to all parties to a real estate transaction. The required written notice shall be signed by all parties, and the real estate broker shall maintain a copy of the notice in his or her transaction files. The licensee shall execute this written notice prior to any party signing any contract for representation, offer to purchase, to sell, or to exchange real estate for which a broker's license is required by W. Va. Code §§30-40-1 et seq.

22.2. Any licensee acting as agent of a buyer, shall disclose his or her agency relationship to the seller, or the broker representing the seller, prior to any showing of the property or the initiation of negotiations which ever occurs first.

22.3. A real estate broker shall provide written notice to all parties prior to paying a portion of his or her compensation to a broker representing another party to the transaction.

22.4. A licensee may not be the agent for both the buyer and the seller without obtaining the written consent of both the buyer and the seller.

22.5. If change in a licensee's agency status makes an earlier disclosure inaccurate, incomplete or misleading, the licensee shall prepare a revised disclosure form and immediately present it to all parties to the transaction. The revised disclosure must be dated and must be acknowledged in writing by all parties.

22.6. In any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt of notice of agency disclosure, the licensee shall sign and date a written declaration setting forth the facts of the refusal.



STATE OF WEST VIRGINIA  
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February 1, 2006

**By Hand Delivery**

Judy Cooper  
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FILED  
2006 FEB -1 P 4: 27  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Re: West Virginia Real Estate Commission Emergency Rule

Dear Ms. Cooper:

As you are aware, Richard Strader, Executive Director of the West Virginia Real Estate Commission, has filed with the Office of the Secretary of State an emergency rule relating to 174 C.S.R. § 1-11. Your office, however, has questioned whether the rule should qualify for emergency rule status. In this regard, please be advised that the rule filed by the Commission is a direct result of an investigation performed by the United States Department of Justice ("DOJ"), and the DOJ's opinion that the rule in question violated the federal Sherman Anti-Trust Act.

Specifically, the DOJ investigated states where such states' real estate regulatory authorities had prohibited certain conduct by its licensees. In the instant matter, the State of West Virginia was one of several states that banned certain licensee conduct, which the DOJ determined was a violation of the Sherman Anti-Trust Act.

During its investigation, the DOJ provided the Commission with an opportunity to settle the issues in controversy, amend the offending language in 174 C.S.R. § 1-11, and come into compliance with the Sherman Anti-Trust Act. In order to avoid a legal challenge and lawsuit against the Commission by the DOJ in federal district court, the Commission had to agree to amend the rule, and do so as quickly as possible.

Ms. Cooper  
February 1, 2006  
Page 2

In order to avoid such a suit in federal district court, and in order to come into compliance with federal law, the Commission agreed to the terms offered by the DOJ. The Commission believed it preferable to cooperate with the DOJ and agree to the rule change, than to challenge the DOJ in federal court, expend time and resources, and in the end be ordered by the Court to comply with the Sherman Anti-Trust Act.

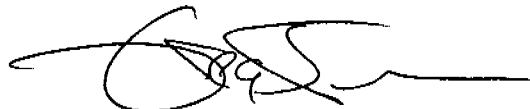
In this regard, the Commission assured the DOJ that it would file the rule as an emergency rule as quickly as possible, in order to avoid a costly and burdensome legal challenge in court by the DOJ. As a result, the Commission assured the DOJ that such rule would be filed and implemented as soon as possible, and would therefore be filed as an emergency rule.

As you will see in the enclosed letter dated August 24, 2005, Attorney Owen Kendler of the DOJ outlined the basic substance of the agreement, while additionally threatening that such action by the Commission was necessary "to avoid a potential legal challenge." Unlike the State of West Virginia, the DOJ did file suit in federal district court on the same issue against the State of Kentucky. Ultimately, the State of Kentucky agreed to terms similar to that of the terms agreed to by the Commission.

Thus, it is apparent that the intent of the rule and the agreement with the DOJ is to avoid the time and costs associated with litigation, to come into compliance with federal law, and to implement the rule as soon as possible "to avoid a potential legal challenge" by the DOJ. Accordingly, the Commission believes it is necessary to file 174 .C.S.R. § 1-11 as an emergency rule.

If you have any questions, concerns, or need additional information, please do not hesitate to contact me at 558-2021. I appreciate your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "GGS", with a long horizontal flourish extending to the right.

Gregory G. Skinner  
Assistant Attorney General

GGs/jd  
Enclosure

cc: Richard Strader, Executive Director



U.S. Department of Justice

Antitrust Division

RECEIVED  
AUG 29 2005  
ATTORNEY GENERAL

*Liberty Place Building  
325 7<sup>th</sup> Street, N.W., Suite 300  
Washington, DC 20530*

FIRST CLASS MAIL

August 24, 2005

Greg Skinner  
State of West Virginia  
Office of the Attorney General  
1900 Kanawha Blvd., East  
Room E-26  
Charleston, WV 25305-9924

Re: *West Virginia Real Estate Commission Rule § 174-1-11*

Dear Mr. Skinner,

I write to follow up on our conversations that occurred over the last few weeks. As we discussed, the West Virginia Real Estate Commission ("WVREC") decided on August 17, 2005 to repeal its rule at § 174-1-11 in order to avoid further investigation and potential legal challenge. We feel that this is a positive step forward to resolve the Division's concerns regarding impediments to price competition in the provision of real estate brokerage services.

As I understand, WVREC wishes to replace § 174-1-11 with a rule that would require a licensee to disclose in writing to his or her client: (a) any rebate or inducement offer; and (b) the fair market value of any inducement offer. You had asked if I was aware of statutes or regulations that mandate similar disclosures. Enclosed is one copy of each of Pennsylvania Real Estate Commission regulation § 35.306, Nebraska statute § 81-885.24(6), and Kentucky Real Estate Commission's emergency regulation 201 KAR 11.121-DOJ(2)(a).

If the WVREC ultimately repeals the rule to avoid potential litigation, the Division believes that West Virginia real estate licensees should be notified of the changes. To that end, the Division seeks notification to be given to licensees by: (1) a letter to be mailed to all licensees; (2) posting the letter on WVREC's website homepage; and (3) publishing an article discussing the changes to WVREC's rules in its newsletter. The contents of the notice letter would be drafted by the WVREC and the Division before or soon after WVREC's September 21, 2005 meeting. An example of a notice letter in a similar matter is available on the South Dakota Real Estate Commission's website at <http://www.state.sd.us/sdrec/>.

To avoid a potential legal challenge, we also would appreciate a letter from WVREC confirming the following points:

- The West Virginia Real Estate Commission agrees not to reinstate any prohibition against rebates, inducements, and other discounts, or against non-misleading and non-fraudulent advertising rebates, inducements, and other discounts.
- Proper notice of the change, as set forth in a notice letter that the WVREC and the Division will later draft, has been given to all licensees presently recognized by the Commission. To accomplish this, we would appreciate a signed copy of the notice letter, the date that the letter was mailed to licensees and the date the letter was posted on the Commission's website, and the date that the notice was published in the Commission's newsletter.

If you have any questions or wish to discuss any of these items, please do not hesitate to contact me at 202-305-8376 or you can email me at [owen.kendler@usdoj.gov](mailto:owen.kendler@usdoj.gov). Thanks once again for your cooperation in this matter.

Sincerely,



Owen Kendler  
Attorney

Enclosures