Utah Department of Commerce

Division of Real Estate NEWS

A publication for Utah's real estate, appraisal, and mortgage professionals.

Gary R. Herbert, Governor Francine A. Giani, Executive Director Jonathan Stewart, Division Director

THIRD QUARTER 2011

Director's Message

Jonathan Stewart

As the new Director for the Division of Real Estate, I am excited for the challenges and opportunities it will bring. I have been a state employee for almost seven years, starting in the Division of Consumer Protection, and then spending the last five years in the Division of Securities. My time with the state has been focused on investigating fraud, and I hope my experience will help the State of Utah become a safer place for real estate transactions.

I look forward to the future of the Division because I believe that the Division is in a good position to support and assist the industry and the public. I have been impressed with the Division employees, and I am confident that we can provide you with the services and assistance you need to be successful in your professions.

Part of the Division of Real Estate's mission is "to protect the public." The Division has always been responsible for investigating and enforcing applicable statutes, but we will be referring more cases for criminal prosecution. We want the public and the industry to know that taking advantage of people in connection with a real estate transaction will not be tolerated. I know that the number of people involved in fraud is very small compared to those who are honest and hard-working. We encourage the public and the industry to report fraudulent activity to the Division so that those who are involved can be dealt with appropriately. We want you to know that your license means something, that your profession is valuable to the community, and that you have a state agency that is looking out for you and your interests.

I want to encourage open communication with the industry and the public. You are the eyes and ears of the Division, and we need your assistance. When you have a problem or concern that you feel the Division should be aware of, do not hesitate to bring it to our attention. If you are aware of a licensee--or a non-licensee--that may be involved in fraudulent activity, we encourage you to file a complaint with the Division so that we are better able to regulate the industry and protect the public from harm.

I am excited to work with all of you and look forward to the future of the Division with your input.

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Thank You Deanna Sabey & Best Wishes

The DRE staff wish to thank our former director Deanna Sabey, for her leadership during the nearly two years she served in the position. During Ms. Sabey's time with the DRE and under her direction, we made great strides in updating our processes and procedures to make better use of technology. We reorganized our all of our rules and significant portions of our statutes to make them easier to understand and apply. We also worked hard to give our licensees online access to resources and information, including our quarterly newsletter. Ms. Sabey's legal skills and experience in the mortgage profession were invaluable in helping the DRE transition its mortgage licensing process onto the nationwide system. Her awareness of due process and other legal and procedural issues was also a great benefit. It was a very busy two years, and we will miss her! But we wish her all the best as she pursues her career goals in her personal law practice.

PLEASE TAKE NOTE

OUR HOURS HAVE CHANGED

The Division of Real Estate hours are 8:00 AM to 5:00 PM, Monday through Friday (Excluding State and Federal Holidays)

Mortgage Licensees Face Fewer Renewal Requirements

The license renewal period is fast approaching for mortgage licensees (November 1 through December 31, 2011). This year's license renewal procedure features several reductions in renewal requirements. (Hurray!) Three specific regulatory procedures that have been eliminated in Utah for the 2011 renewal period are:

- No Credit Report Authorization
- No Criminal Background Check
- No Call Report

It is anticipated that credit report authorization, criminal background checks, and periodic call reports will be required at some point in the future. As of this writing, the Division's projected timetable for these three requirements will be in 2012 for quarterly call reports and during the fall 2013 license renewal period for credit reporting and criminal background checks.

Enjoy your "streamlined" 2011 mortgage license renewal procedures!

FILING A COMPLAINT

The Division of Real Estate is part of the Department of Commerce and has direct oversight of three different professions: real estate licensees, including jurisdiction over timeshare and subdivisions; mortgage brokers and loan originators, now also under the jurisdiction of the Department of Housing and Urban Development (HUD) which utilizes the Nationwide Mortgage Licensing System and Registry (NMLS); and appraisers and appraisal management companies (AMCs).

The Division's investigative process is largely complaint driven. Prior to the Division initiating an investigation, jurisdictional authority must be established. There is a two-part basic test to determine jurisdictional authority (to establish if a complaint or investigation should be conducted by the Division). This two-part test is:

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FILING A COMPLAINT

1. The individuals and/or companies are licensed with the Utah Division of Real Estate or, alternatively, the individuals and/or companies are conducting activities for which a license would be required in Utah and;

2. The complaint/investigation relates to the potential violation of Utah statutes, rules, and/or the applicable federal law for these same professions.

If you are not certain whether a person is licensed by the Division of Real Estate, you can check the list of the real estate and appraisal licensees published on the Division's website at www.realestate.utah.gov. Click on the profession, and then click on "look up a license" under the online services section. Verification of the licensing status of mortgage licensees can be determined on the NMLS Consumer Access website at http://www.nmlsconsumeraccess.org. The Division telephone number is (801) 530-6747.

To file a complaint with the Division, the complainant must provide enough information so that the individuals, companies, properties, and dates can be substantiated. It is most helpful if the complaint includes the following:

1. A written narrative of the precise nature of the complaint. Chronological order is the best method to explain the circumstances and events.

2. The names, addresses, and contact information of all of the individuals and entities involved, including any potential witnesses to the events described in the complaint.

3. Photocopies of the documents that were used in the process. (Do not send the Division original documents, unless they are specifically requested. You might need your originals for later use, perhaps in court proceedings.)

The Division can do the following:

1. Investigate complaints.
2. Initiate investigations on behalf of the Division or others.
3. If an investigation uncovers violations of the laws and rules enforced by the Division, initiate a disciplinary action, which may result in a fine and/or an action on a license (revocation, suspension, or probation).
4. Issue an order to cease and desist so as to stop unlawful activities.
5. Refer cases to a prosecutor for potential criminal prosecution.

The Division cannot do the following:

1. Cancel a contract or order a contract to be cancelled.
2. Obtain restitution for an aggrieved party.
3. Refund money to an aggrieved party.
4. Give legal advice.
5. Act as a court of law, or mediate matters for the public.

If restitution or justice is sought by an aggrieved party, then an attorney should be consulted. If the matter is less than $10,000, an action may be filed in small claims court.

The investigative complaint form can be found on the Division's website at www.realestate.utah.gov. The complaint form may be filled out electronically on the website, but must be either mailed in or copied and pasted into an e-mail for submission. Be as thorough as possible when completing the form as that will reduce the time it takes the Division to act upon the complaint.

Dan Brammer
Appraiser Board Member

Dan Brammer is a graduate from the University of Utah with a bachelor degree in Business Finance. Dan has served on committees with both the Appraisal Institute and the Society of Real Estate Appraisers. He has also served as president of both organizations. Dan also served as President of Utah Association of Appraisers. Dan worked with the Salt Lake County Assessor for 5 years and with Zions Bank for 6 years. He started D.V. Brammer and Associates in 1986 and has been working as an independent fee appraiser since that time. "I am happy to be working with the other members of the appraisal board and also the Division of Real Estate and look forward to serving the appraisal profession in the best way I can."

Steve Hiatt
Mortgage Commissioner

"I am honored for this great opportunity to serve others in my profession through my appointment as a Mortgage Commissioner. I join a team of well educated professionals who truly have the best interests of our industry at heart. I serve as an elected public official in Kaysville, and hope that my experience in community outreach, problem solving and out-of box thinking will be an added benefit to the Mortgage Commission. I began my origination career in 1999, and later formed my own company in 2003. I look forward to many opportunities to serve all of you over the next four years

Appraiser National Registry Fee Increasing

Beginning January 1, 2012, the appraiser national registry fees will increase from $50 to $80 for all initial and license renewal appraisal applications. The registry allows users to determine whether a person is state-certified or state-licensed to perform appraisals in connection with federally-related transactions. Users can also determine whether a person's credential has been suspended, revoked, or surrendered (generally in lieu of state enforcement action). The registry is accessible at the Appraisal Subcommittee's (ASC's) website (https://www.asc.gov), and is open to and used by appraisers, federal and state agencies, regulated financial institutions, users of appraisal services, and consumers.

The registry contains both public and non-public data (e.g., certain disciplinary action information). Access to non-public data is restricted to authorized state and federal agency representatives. Use of the registry is free to the public.

FTC OFFERS LIMITED REPRIEVE FROM MARS RULE FOR REAL ESTATE LICENSEES

As the number of homeowners experiencing financial difficulties increases due to the prolonged recession, many look for alternative options to foreclosure including selling their homes. In some cases, the sale is for less than what is owed on the mortgage, normally called a "short sale." In December of 2010, in an effort to protect distressed homeowners from mortgage relief scams that have sprung up in recent years, the Federal Trade Commission (FTC) placed the Mortgage Assistance Relief Services (MARS) final rule into effect.

As originally drafted, the rule was intended to apply in its entirety to real estate professionals. However, agents and brokers often found that complying with the MARS rule's disclosure requirements could be misleading or confusing to consumers. Consequently, on July 15, 2011, the FTC issued a statement announcing that it will not enforce most provisions of its MARS rule against real estate brokers and their agents who assist financially distressed consumers in obtaining short sales from their lenders or servicers.

As a result of the stay on enforcement, real estate professionals will not have to make several disclosures required by the MARS Rule that, in the context of assisting with short sales, have been found to be misleading or confusing to consumers. "As more and more American homeowners seek short sales, it is especially important that the Rule not inadvertently discourage real estate professionals from helping consumers with these types of transactions."

The enforcement stay applies to real estate professionals who:

1) Are licensed and in good standing under state licensing requirements;
2) Comply with state laws governing the practices of real estate professionals; and,
3) Assist or attempt to assist consumers in obtaining short sales in the course of securing the sales of their homes.

The stay exempts real estate professionals who meet these requirements from the obligation to make certain specific disclosures. However, real estate professionals are still required to comply with all disclosure requirements mandated by the Utah statutes and rules; i.e., agency disclosures, etc. Similarly, Utah law voids other specific provisions of the stay; specifically, one that would allow a real estate licensee to take an up-front fee for a short sale, and another that contemplates a real estate licensee negotiating a loan modification or engaging in other types of mortgage assistance relief. These activities are clearly prohibited under Utah's statute, which is unaffected by the stay of the MARS rule. In addition, the FTC will still enforce the MARS Rule's prohibition against misrepresentations made by a real estate professional while assisting a consumer in negotiating or obtaining a short sale. A summarized list of "material misrepresentations" of the services provided include:

- The likelihood of consumers getting the results they seek;
- The company's affiliation with government or private entities;
- The consumer's payment and other mortgage obligations;
- The company's refund and cancellation poli cies;
- Whether the company has performed the services it promised;
- Whether the company will provide legal representation to consumers;
- The availability or cost of any alternative to for-profit mortgage assistance relief services;
- The amount of money a consumer will save by using their services; and,
- The cost of the services.

(See 16 CFR 322.3(b) for a complete list of the prohibited misrepresentations.)

On July 21st, the enforcement of MARS was assigned to the Consumer Financial Protection Bureau ("CFPB") so it will ultimately be up to the CFPB as to how the MARS rules will be enforced or whether they might be amended.

Appraisers, Agents, and AMCs

Can we work together?

Special Article Contributions from Appraiser Board Chair Craig Morley and Appraiser Board Member and REALTOR Debra Sjoblom

The relatively recent addition of the appraisal management company as a player in a real estate transaction has changed some fundamental aspects of the industry. These changes have caused appraisers and real estate agents a fair bit of confusion, which has too frequently resulted in misunderstanding and frustration as to whether appraisers and real estate agents can communicate with each other and work together to get a deal closed. This article is intended to do two things:

1. Separate fact from fiction as to the types of communications that real estate and appraisal professionals are allowed to engage in under the law.

2. Provide guidance for how professionals in all industries can better work together in the current marketplace.

Background. In 2009, several of the nationwide federal lending/servicing institutions promulgated the Home Valuation Code of Conduct (HVCC). Although this document and its provisions were not law—neither federal nor state—they were extremely influential in the marketplace because any loan that did not comply could not be sold on the secondary market. The most significant aspect of the HVCC was to require appraisals to be brokered through an AMC. The intent behind this requirement was to curb communication between appraisers and loan officers (or other individuals with a financial interest in the transaction, such as real estate agents) who might try to steer—or, in some cases, coerce—the appraiser to come in at a predetermined value.

The HVCC is no longer in effect, but many of its provisions have been incorporated into federal law through the Dodd Frank Act. Our job now is to figure out how to comply with these new mandates while still getting transactions closed in a distressed real estate market. We all have the same goal—home ownership—but we must work together and understand the challenges and limitations of each industry in order to achieve that goal.

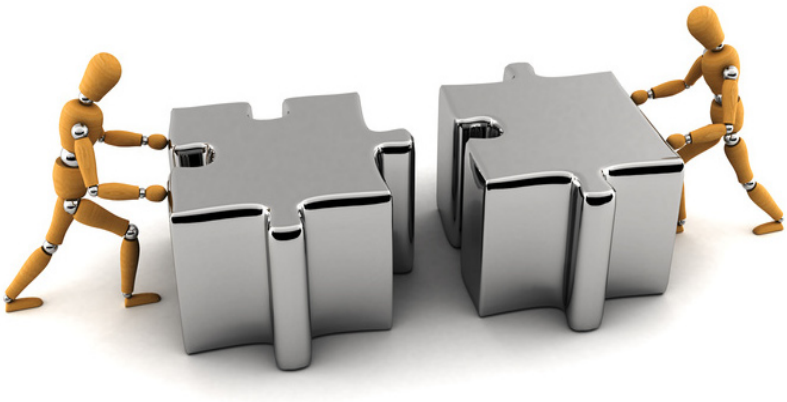
Question #1. Can an appraiser communicate with other professionals involved in a transaction in order to get information about the subject property or a comparable property?

Answer. Generally, the answer is YES, although there are some limitations. In most cases, it would be inappropriate for an appraiser to speak with the commissioned loan officer because the law frowns on it, and also because most lenders (and the lender is the "client" for purposes of this article) specifically prohibit this communication in the assignment conditions. Where the client prohibits this communication—or makes any other specific prohibitions—the appraiser must abide by those instructions.

Tips.

- **Appraisers**: If the AMC prohibits you from speaking with a loan officer, you must work within that limitation. Lenders do occasionally require AMCs to order and pay for new appraisals when unauthorized communication between the loan officer and the appraiser makes it impossible for the AMC to certify appraiser independence. Where you are prohibited from contacting a loan officer, you will have to use the AMC to help you get information from a mortgage professional if you cannot get what you need from the lender or from another source.

  If the AMC prohibits you from speaking with a real estate professional, it is fair to ask whether that communication has been prohibited by the lender as part of the assignment. If not, the AMC is in violation of Utah's rules (see Utah Administrative Code § R162-2e-401(1)(b)). If the AMC insists on insulating the appraiser to a greater extent than that required by law or by the specific assignment conditions, then the AMC has a higher duty to help the appraiser obtain pertinent, relevant information that is necessary to produce a credible report.



- **Agents**: Appraisers need you to provide relevant, factual information. It frequently happens that agents have knowledge about specific sales or neighborhoods not readily discernible from the information contained in the MLS. Sometimes the MLS information is simply inadequate or inaccurate. Where this is the case, the agent should report the facts to the appraiser.

  If an agent feels that an appraiser has missed relevant comparables, it is appropriate for the agent to ask the appraiser to consider specific sales. Note, however, that the appraiser is ultimately responsible for choosing appropriate comparables. Under no circumstances should an agent attempt to usurp that role so as to provide specific sales that will support a predetermined value.

- **AMCs**: Carefully consider before you exceed the client's instructions as to prohibiting communications between an appraiser and another professional. Note that a rule currently in effect allows disciplinary action to be taken against an AMC for unreasonably restricting an appraiser from engaging in legal communications that are necessary to obtain data and information relevant to an assignment (see Utah Administrative Code § R162-2e-401(1)(b)).

  Whenever you prohibit communications, be prepared to act as the intermediary in obtaining information for the appraiser. You put an appraiser in an untenable position when you demand a prompt turn-around time for producing a report, simultaneously prohibit the appraiser from contacting real estate professional(s) for information, but decline to relay questions from the appraiser.

Question #2. If an appraisal comes in lower than the contract sales price, can the real estate agent challenge the appraiser and ask for an explanation?

Answer: YES. The appraisal should contain enough analysis and explanation for you to understand how the final valuation was developed. If it doesn't, then the agent may ask for clarification.

Tips.

- **Appraisers:** If the contract sales price cannot be supported, you must come in lower. However, you should never come in lower just to "be on the safe side." The current market is difficult, and many appraisers are afraid of potential consequences for overvaluing a property; however, it is just as bad to come in low as it is to come in high. The only way for the market to heal is for you to correctly value the properties you analyze. You must always explain your value conclusions. If you come in lower or higher than the contract price, your explanation should be even more thorough. Similarly, if you require repairs in your appraisal, explain why. And avoid requiring repairs that would be nice, but that are not required by the lender for loan approval.

- **Agents:** Realize that FHA, VA, and RDA loans have minimum property standards that must be met under the appraisal scope of work requirements. Utilities must be on, access to crawl space and attic must be available, and appropriate egress from windows and basement spaces is required. If these conditions are not met when the appraiser arrives, the appraisal cannot be completed, and your closing could be delayed. There are also some health and safety items that might require repairs. Cooperation will speed up the process for everyone.

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THIRD QUARTER LICENSING & DISCIPLINARY ACTIONS

Please note that there are 30 days after the order date for a licensee or an applicant to file a request for agency review of the order, and that there are 30 days after the issuance of an order on review for a licensee or an applicant to file a petition for judicial review. Some of the orders listed may be within those appeal periods.

CE Providers

The Division receives several complaints a month regarding "un-banked" CE courses. This is a critical step for any licensee. In order for your student to complete their renewal on time ALL of their CE courses must be banked within 10 days of attending the course. Failure to bank CE hours will result in possible disciplinary actions. Disciplinary Actions include your company name featured in the newsletter along with a monetary fine. We cannot stress enough how important "banking" your students CE credit.

If you have questions on how to "bank" your students or you are having problems please do not hesitate to call the Division. We are here to assist you and make your student happy and want to return to you for future CE courses.

Staff Spotlight

Kent Nelson
Chief Investigator

The Division of Real Estate welcomes Kent Nelson as its new Chief Investigator. Kent comes from the Division of Consumer Protection where he has worked for sixteen years, most of that time as the Chief Investigator. He previously worked as a police officer in Walnut Creek, California for twenty years before coming to Utah. Kent's expertise is in financial crime investigations. He has developed strong relationships with Utah prosecutors in both state and county agencies. He explained his vision for the DRE as follows: "My goal is to share that expertise with investigators in the Division of Real Estate. Cases involving licensee conduct that may be fraud will now be investigated and prosecuted as criminal actions and not just dealt with through suspension or revocation of a license. I am looking forward to the new challenge of working with an experienced investigative staff".

The Division is pleased to have Kent join our team. He will be assisted by Dee Johnson as his Assistant Chief Investigator.

Expired License Ruins Great Weekend

So things were going pretty well (you thought). You had a great weekend. Played catch with your son. Went to your daughter's soccer game. Took a refreshing five-mile jog. Sold one of your listings. Relaxed on the patio. Then one of your co-workers happened to call to inform you that your license shows as "expired" on the Division's "Look Up A License" website feature (https://secure.utah.gov/rer/relv/search.html).

It can't be true... Clearly there must be a mistake… This can't be happening to you! You are sure that you took care of that last year. You must have! You clearly remember taking your continuing education hours. No way could you have forgotten to renew your real estate license online for only $42! You remember receiving the renewal reminder postcard. Didn't your assistant take care of the rest? Sadly you learn that not only did you forget to renew your license, but--even worse--you have been selling real estate for the past 14 months without a license!

You call the Division to plead your case. "Can't I pay a huge late fee in order to reinstate my license? I will do anything to avoid going back to school and taking the exam again." However, the reality is that since your license has been expired for more than a year, you must reapply as a new applicant. This means that you will take 120 hours of prelicense education, pass the real estate exam, pay an application fee of $152, submit fingerprints, and immediately **stop selling and listing real estate until a new license is issued**.

To add insult to injury, you are also informed that the real estate activities you have been performing without a current license are *unlicensed activity*! According to the real estate statute, the real estate commission may impose a civil penalty not to exceed the greater of **$5,000 for each violation, or the amount of any gain or economic benefit derived from each violation.**

This unfortunate story happens far too frequently. Everyone who allows a license to expire has a justification or a reason, but no explanation—no matter how impassioned or persuasive—allows the DRE or the Real Estate Commission to reinstate a license more than one year after expiration. To do so would be to violate the statute and break the law. We just can't do it.

Each licensee is personally responsible to ensure that he or she is holding a current, active license when participating in licensed activities. A licensee should regularly check their license status and know when the license expires. Real estate brokers should routinely verify that the brokerage roster of licensees matches the Division records. Remember that paying board dues or renewing your membership in a professional association is **NOT** the same as renewing your license.

By exercising a little care and diligence, you can be sure that this unhappy story never happens to you.

NEW FEDERAL MORTGAGE ADVERTISING RULES INCLUDE REAL ESTATE LICENSEES

After two years of regulatory review, the Federal Trade Commission (FTC) has published final mortgage advertising rules that ban deceptive claims about residential mortgages and impose new record keeping requirements. The new rules apply to all persons and entities under the FTC's jurisdiction that advertise residential mortgages including, but not limited to, mortgage lenders, mortgage brokers and servicers, home builders, etc. Despite exemption requests from the real estate industry, the rules also include real estate agents and brokers.

The new rules prohibit any material misrepresentation, made expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product. "Mortgage credit product" means any form of credit that is secured by real property or a dwelling or extended to a consumer primarily for personal, family or household purposes. "Term" means any of the fees, costs, obligations or characteristics of or associated with the product, and any conditions on or related to the availability of the product. "Commercial communication" is defined to include communications in virtually any form or medium, and in any language that are designed to effect or create interest in purchasing "mortgage credit product" goods or services.

The new advertising rules prohibit "any misrepresentation" but also provide a nonexclusive list of 19 specifically prohibited misrepresentations that reflect common mortgage advertising abuses. The list includes, but is not limited to:

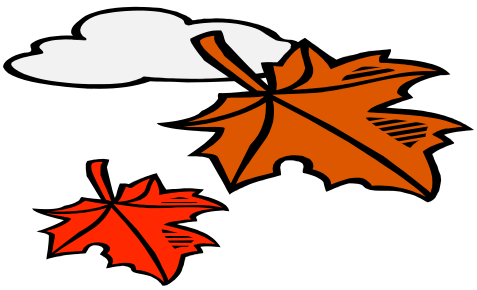
- The existence, nature, or amount of fees or costs to the consumer associated with the mortgage;
- The terms, amounts, payments or other requirements relating to taxes or insurance associated with the mortgage;
- The variability of interest, payments or other terms of the mortgage;
- The type of mortgage offered;
- The source of an advertisement or other commercial communication; and
- The consumer's ability or likelihood of obtaining a refinancing or modification of a mortgage or any of its terms.

The new rules also require specified records to be kept for a period of twenty-four months from the last date the applicable commercial communication was made or disseminated including, among other things, copies of all materially different commercial communications as well as **sales scripts**, training materials, and **marketing materials regarding any term of any mortgage credit product**.

The FTC has determined that real estate brokers and agents are among those from whom consumers commonly receive information about mortgages. Also, like mortgage brokers, lenders and servicers, real estate brokers also advertise and market mortgage products. The FTC said, "These types of individuals and entities, as well as others, can make direct or indirect misrepresentations to consumers about mortgage credit products, causing consumers harm. Accordingly, the final rule must cover misrepresentations by each of these categories of persons to protect consumers from deception."

On July 21st, the FTC's rulemaking authority for the new mortgage advertising rules transferred to the new Consumer Financial Protection Bureau (CFPB). However, the FTC and CFPB both have authority to enforce the rules, which took effect on August 19, 2011.

The text of the rules is available through Federal Register /Vol. 75, No. 45 to the U.S. Federal Register.



RULE DEVELOPMENTS SINCE JUNE 30, 2011

APPRAISAL

The Board and the Division have reorganized the existing rules in order to mirror the organization and numbering of the appraiser statute (§ 61-2g, effective May 10, 2011). The proposed draft was published for comment on July 1, 2011, and a few comments were received. In response, the Board has determined to make some changes prior to making the reorganized rule effective. These changes include the following provisions:

- In Subsection R162-2g-304d(5)(e), (f), and (g), clarify that the rule applies to "assignments" performed by mass appraisers and does not contemplate that these individuals are performing full appraisals.
- In Subsection R162-2g-304d(5)(i), clarify the internal reference to a prior provision.
- In Subsection R162-2g-307c(2)(a)(i), remove the requirement for continuing education providers to have their courses approved by the Appraisal Qualifications Board (AQB).
- In Subsection R162-2g-307c(3)(d), remove language stating that the Division will not award credit for a CE class taught outside of Utah if it was marketed to Utah licensees, but specify that any class actually taught in Utah must be certified with the Division prior to its being taught.
- In Subsection R162-2g-307e(5), specify a six-month reinstatement period with regard to an expired instructor certification.
- In Subsection R162-2g-504, identify the tables as appendices and add a space between two words in Appendix 3(f)(iv).

These corrections will be published for informational purposes in the Utah State Bulletin on October 1, 2011. Comments will not be accepted, and it is anticipated that these changes will be made effective on November 1, 2011 along with R162-2g.

On August 15, 2011 an amendment to R162-2g-304d was published for comment. This amendment requires a mass appraiser who applies for certification as a residential appraiser to submit for review at least one appraisal of each of the following residential property types:

- vacant property
- two- to four-unit dwellings
- non-complex single-family units
- complex single-family units

No comments were received during the public comment period. However, the rule will not be made effective until the date on which the rule reorganization, R162-2g, goes into effect.

MORTGAGE

On August 8, 2011, amendments were made in two sections of the rules, as follows:

- R162-2c-102: Definitions are provided for the terms "safeguard" and "personal information"
- R162-2c-301: A mortgage entity is required to safeguard records that it is required to keep, and must destroy all personal information at the end of the retention period.

On August 22, 2011, amendments were made in two sections of the rules, as follows:

- R162-2c-202: A misdemeanor occurring within the three-year period prior to the date of application automatically disqualifies an individual for licensure only in the Commission and Division consider that the court made a finding of fraud, misrepresentation, theft, or dishonesty. Absent such a finding, the Commission and division will be able to exercise discretion in determining whether a misdemeanor proceeding indicates a lack of good moral character, honesty, integrity, or truthfulness such that a license should be denied.
- R162-2c-401: An applicant or respondent will be given at least 30 days notice of a hearing.

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RULE DEVELOPMENTS SINCE JUNE 30, 2011

Two additional rule amendments are currently open for public comment, as follows:

- R162-2c-102: Definitions are provided for the following terms: "expired license", "lending manager" and "lending manager license", "NMLS", "reapplication" or "reapply", "reinstatement" or "reinstate", and "terminated license".
- R162-2c-204: The deadlines for license renewal and reinstatement are clarified. An exemption is provided under which a person who obtains a new license after November 1 of the calendar year is not required to renew it within the same calendar year. The educational requirement for license renewal, reinstatement, and reapplication are delineated. The procedures for license renewal, reinstatement, and reapplication are amended to comport with recent decisions and policies from NMLS.

Comments will be accepted through October 3, 2011.

REAL ESTATE

On August 10, 2011, four rule amendments were made effective, as follows:

- R162-2f-102: The term "residential property" is defined.
- R162-2f-205: The Division may not register an entity if it proposes to use a business name that closely resembles the name of another registered entity, or that the Division determines might otherwise be confusing or misleading to the public.
- R162-2f-401a: In order to offer a property for sale or lease, a licensee must make reasonable efforts to verify the accuracy and content of the information and data to be used in the marketing of the property. In order to offer a residential property for sale, a licensee must disclose the source on which the license relies for any square footage data that will be used in the marketing of the property. This disclosure must be made in the listing agreement executed between the licensee and the seller and also in a written disclosure to the buyer on or before the contract deadline for seller disclosures.
- R162-2f-403: Unless otherwise agreed in writing by the parties who have an interest in funds held by a principal broker, the principal broker may not pay a commission from the real estate trust account without first depositing the withdrawn funds into the brokerage operating account.

On August 22, 2011, R162-2f-407 was amended to provide that an applicant or respondent will be given at least 30 days notice of a hearing.

An amendment to R162-2f-202b will be published for comment on October 15, 2011 in the Utah State Bulletin. This amendment provides that an individual who applies for licensure within two years after allowing a principal broker license to expire must demonstrate having acquired three years of full-time professional real estate experience within the seven-year period preceding the date of application. Comments will be accepted through November 14, 2011.

Mortgage License Renewal Information

(Portions of this article are repeated from the Second Quarter 2011 Division of Real Estate Newsletter)

This article serves as a final reminder of several important mortgage license renewal issues prior to the NMLS renewal period, which extends from November 1 – December 31, 2011.

All renewing Utah mortgage licensees are required to complete 8 hours of **NMLS approved** continuing education including:

* 3 hours of federal law and regulations;
* 2 hours of ethics that shall include instruction on fraud, consumer protection and fair lending issues;
* 2 hours of training related to lending standards for nontraditional mortgage products; and
* 1 hour of undefined instruction on mortgage origination.

The SAFE Act states that MLOs may receive credit for CE **in the year in which the course is taken**, and may not take the same approved course in the same or successive year to meet the annual requirements for CE.

Mortgage loan originators who completed the 20-hour NMLS prelicense education **in 2011** and who (**also in 2011)** licensed in Utah as an MLO, are <u>not</u> required to complete <u>any</u> CE in order to renew the MLO license in the upcoming 2011 license renewal period. MLOs who completed the 20-hour NMLS prelicense education **this year** (2011) will need to complete the NMLS CE hours described above **in 2012** in order to renew. Remember, except for "late" CE, which applies only in a very specific circumstance, all CE must be taken in the renewal year.

Additional note: Utah mortgage licensees who reinstated a mortgage license between January 1, 2011 and February 28, 2011 and who completed "late" or "reinstatement" CE in order to reinstate the license will be required to complete an additional 8 hours of NMLS CE in 2011 in order to request license renewal for 2012. The reason these individuals need to complete two sets of CE in 2011 is because the "late" or "reinstatement" CE they took between January 1, 2011 and February 28, 2011 was retroactively applied to the NMLS record for the previous year (2010).

To reiterate, the NMLS requires that CE be completed in the calendar year immediately following the date in which an MLO completes the NMLS 20-hour prelicense education (PE), regardless of the date in which an initial license is granted. However, MLOs are not required to complete CE in the same year in which they complete the 20-hour NMLS PE.

This means, for example, that an MLO who completed the 20-hour NMLS PE in October of 2010 would be required to complete CE by the end of the renewal period in 2011 even if the MLO did not receive the initial license until June of 2011.

Case 1: Individual completed 20-hour NMLS Prelicense Education (PE) in March 2011 and was granted the license in April 2011.

Q: Is CE Required in 2011?
A: No, MLO's are not required to complete CE in the same year PE is completed.

Q: When is CE Required?
A: The MLO is expected to complete CE in calendar year 2012 to maintain licensure for 2013.

Case 2: Individual completed PE in November 2010 and was granted the license in February 2011.

Q: Is CE required in 2011?
A: Yes, the NMLS requires CE in the year immediately following the PE compliance date.

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Mortgage License Renewal Information

Case 3: Individual completed PE in 2009 and obtained the license, but let the license expire/terminate in 2010. This individual reapplied and was granted a mortgage license in 2011.

Q: Is CE required in 2011?
A: Yes. Since PE was completed in 2009, "late" CE (8 NMLS "late" CE hours) is required for 2010 AND current CE is required for 2011.

Initially the Division believed that new principal lending managers would be exempt from the NMLS CE requirement if they completed the associated prelicensing education and obtained the license within a calendar year. The Division has since been informed that the NMLS perceives the PLM, BLM and ALM licenses to be variations of MLO licenses, for which CE is required. In addition, the NMLS does **not** recognize the Utah-specific PLM prelicensing education as being equivalent to PE. In other words, the NMLS does not view a licensee who elects to upgrade the Utah MLO license to a PLM license as being a new license who has completed prelicensing education. Therefore the NMLS 8-hour CE requirement described earlier in this article is required in the initial licensing year for new PLM, BLM, and ALM mortgage licensees.

License Renewal Procedural Change Notification: Unlike the 2010 license renewal period, during the upcoming 2011 renewal window, the NMLS will not allow a mortgage licensee to submit an application for license renewal without all required CE hours being banked in the licensee's NMLS account. Please remember that CE banking with the NMLS can take up to ten business days, so allow sufficient time in order for your completed NMLS CE courses to be banked into your individual account.

Utah! NEWS **DIVISION of REAL ESTATE**

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Kagie's Korner

Multiple Offer Situations

Every month the Division receives calls that pertain to multiple offer scenarios. Most of those scenarios start something like this: The buyer's agent submits an offer to the listing agent and is told that multiple offers have come in. The listing agent then requests, "Please give me your client's highest and best offer." That is when the frustrated buyer's agent calls the DRE and declares, "I feel that the listing agent is simply trying to run an auction, and run the purchase price up. How do I stop this type of thing from happening? The listing agent should present my offer, right?" Because every situation is unique, it is difficult to offer general advice that will be uniform for all multiple offer situations however, let's review some basic guidelines to hopefully assist licensees in avoiding the potential problems that could occur.

First, the listing agent represents the seller and, as such, has the job of procuring the best price possible with the most favorable terms for their client. Although the listing agent needs to deal fairly with any potential buyer, the primary duty is to find the best buyer for the seller. The listing agent's duties do not include making decisions for the seller. It is the seller's sole decision whether to accept, reject, or counter an offer; this decision should not be made by the agent. This is true regardless of whether a licensee personally believes that the offer is too low, or has unacceptable terms, etc.

Unless the **sellers** specifically instruct their listing agents not to present any offers that include certain terms or conditions that fall below a specified "bottom dollar" price, or has given other instructions such as specifying that they only want to review one offer at a time, **the listing agent must present all offers to the seller**. It is then up to the seller to decide how to respond to the offer(s). The general rule of thumb is that all offers should be presented as quickly as possible to the seller. However, there are times when the listing agent learns that subsequent offer(s) might be forthcoming before the first offer is presented to the seller. In this situation, the listing agent is confronted with a dilemma: should I present the offer in hand or wait until subsequent offer(s) are received? In analyzing this situation, the listing agent must keep these core principles in mind:

1) The primary obligation is to represent their client and find the best offer for the seller,
2) The agent must deal honestly and fairly with all potential buyers, and
3) The decision to wait for additional offer(s) is ultimately up to the seller.

> The listing agent's duties do not include making decisions for the seller.

Acting with these fundamentals in mind, the best course of action for the licensee is to present the offer that is in hand and advise the seller that subsequent offer(s) might be forthcoming. Again, it is up to the seller at this point to decide whether to proceed (i.e. respond to the first offer), or wait for potential additional offer(s) to come in.

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Kagie's Korner
Multiple Offer Situations

Another common multiple offer dilemma occurs when the listing agent actually receives subsequent offer(s) before having had the opportunity to present the first offer to the seller. In this situation the listing agent must present all offers to the seller. As above, it is up to the seller to make the decision regarding how to proceed and to determine whether to accept, reject, or counter any individual offer.

In reviewing multiple offers with the seller, the licensee must exercise great caution to avoid placing the seller in a position of accepting more than one offer.

For example, if a seller wishes to simultaneously "counter" multiple offers; all but one of the counter offers should be designated as a back-up or contingent on the other (primary) offer. Specific language should be included in the REPC to address how a back-up offer would become an accepted offer. Failure to include this type of language could place the seller in the unfortunate position of being legally obligated to sell the property "twice", to two different buyers if both accept the counter offer from the seller.

One of the best ways to stay out of trouble with the Division on a multiple offer situation is to involve your principle broker in the transaction by getting advice on how to handle these complex and delicate situations.

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Appraisers, Agents, and AMCs
Can we work together?

Question #3. Can distressed sales and short sales be used as comparables by appraisers?

Answer: As to distressed sales, the answer is YES, but only if those distressed sales represent the market. As to short sales, the answer is generally NO. Short sales are difficult for appraisers to rely on because the seller in a short sale is not experiencing typical motivation (i.e., the need to sell the property for enough to pay off the mortgage).

Tips.

- **Appraisers:** Whenever you use a Fannie Mae report form, you must develop an opinion of "market value." Not all sales that occur represent the market, so you must select your comparables carefully and reject any distressed sales that are outside the market norm. In addition, you should never perform a "liquidation value," which tends to be lower than "market value," but represent is as a market value conclusion. When this happens it results in a misleading appraisal and constitutes a violation of USPAP.

  Find out if your possible comparables were short sales. Best practice is not to use a short sale. If you can't avoid it without committing other USPAP violations (by going too far outside the subject neighborhood, for example), then you should consider making an adjustment and providing detailed explanation about how you accounted for the lack of seller motivation in your analysis.

- **Agents**: Provide as much information as you can about the properties appraisers are considering as comparables. If an appraiser calls and leaves a message asking for information about a property,

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Instructor Development Workshop
Park City

Dear Instructors:

The Utah Division of Real Estate is pleased to announce the 2011 Instructor Development Workshop (IDW) will be held at the Park City Marriott on October 24th & 25th, 2011. This year's two day workshop will feature Mark Barker from Missouri. Mark is best known as the primary author of GAPE (Generally Accepted Principles of Education) and is also a Distinguished Real Estate Instructor. Mark started Career Education Systems in 1980. For over 30 years his application of modern adult education theory to real estate has led the real estate education field in a new direction. Most real estate educators utilize the techniques he pioneered. He was also the National President of the Real Estate Educators Association in 1993-1994. Mark has spoken in 49 states teaching instructor workshops, continuing education, GRI programs and high level sales programs for over 20 years.

The second day the Division will introduce our new Division Director Jonathan Stewart and new Chief Investigator Kent Nelson. Also speaking will be Dee Johnson, Assistant Chief Investigator, Mark Fagergren, Education and Licensing Director. The Division will present current information on our industries and Division changes. Day two will also include discussion and question/answers with Real Estate Commission Chair Stefanie Tugaw-Madsen, Mortgage Commission Chair, Lance Miller, and Appraiser Board Chair Craig Morley. Along with Director Stewart, Chief Nelson, Assistant Chief Johnson and Director Fagergren. They will be discussing past hearings and what they are seeing month to month. Informing the educators of what the licensee should know before they come before the commission.

Please refer to the enclosed information and registration form. For all pre-license instructors, it is required by Administrative Rule to attend a Utah IDW once every two years. Attendance for both days is necessary to satisfy this requirement. This year, we are also offering credit to real estate and appraiser licensees for continuing education. Attendees will receive 14 hours of continuing education credit. Credit will be given in full day segments. Mortgage instructors are welcome to attend however we are unable to give NMLS CE credit.

The registration fee for the two day IDW is $75, or $50 if you wish to attend only one day (light breakfast and lunch are included). The registration deadline is October 7th, 2011. A $20 late fee will be applied to all registrations received after October 7th, 2011. To reserve your seat, log on to http://realestate.utah.gov/idw.html or mail your registration form to Utah Division of Real Estate, PO BOX 146711 Salt Lake City, UT 84114-6711 or fax to 801-526-4387. For hotel directions and/or room reservations please refer to http://www.parkcitymarriott.com/.

Please feel free to contact Tiffeni Wall @ 801-530-6751 if you have questions. We look forward to a successful IDW.

Sincerely,

Mark Fagergren
Licensing/Education Director

INSTRUCTOR DEVELOPMENT WORKSHOP

OCTOBER 24th & 25th, 2011

PARK CITY MARRIOTT
1895 Sidewinder Dr.

NAME _____

LICENSE # _____

EMAIL ADDRESS _____

PHONE # _____

REGISTRATION DEADLINE
October 7th, 2011
*Registration late fee $20
applied to all
registrations received after
October 7th, 2011

~Registration Fee Includes~
light breakfast & lunch
8:00 to 8:45
Registration/Sign-In
Workshop Hours
9:00 AM to 5:00 PM

Please indicate the dates
you will be attending:
(Please circle)

Monday & Tuesday,
October 24th & 25th $75

Monday, October 24th $50

Tuesday, October 25th $50

( ) Check ( ) Visa ( ) MasterCard ( ) American Express
Make checks payable to: Utah Division of Real Estate

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Appraisers, Agents, and AMCs Can we work together?

call back promptly and personally (your assistant will never have the same understanding of a property that you do). You could well be the only source of reliable information in our nondisclosure state. Let the appraiser know if the listing being used as a comp is a cream puff or a distressed property, an arm's length transaction, a short sale, or a transfer resulting from divorce or death. Sometimes your assistance will be needed for a transaction in which you have no commission coming; you should help anyway—promptly and willingly. What goes around comes around, after all.

Question #4. Is an appraisers allowed to accept assignments that are beyond his or her geographic competence, or otherwise outside of the appraiser's area of expertise?

Answer: NO. An appraiser may not accept an assignment for which the appraiser is not licensed or certified, or for which the appraiser is not able to demonstrate the necessary competency.

Tips.

- **Appraisers:** Do not accept an assignment for which you personally do not have appropriate data sources. You need to be a member of the local MLS for each property you appraise. Do not ask a real estate agent to pull comps for you so as to avoid the expense of subscribing to the MLS. Having the ability to access comparable sales is only the fist step in understanding a market. You also need access to timely and accurate statistical data (local builders' cost data, paired sales analysis data, etc.) to support value conclusions. If you have done little or no work in a specific geographic area, and if the assignment deadlines do not allow enough time for you to develop a thorough understanding of the local marketplace so as to demonstrate competency according to USPAP standards, do not accept the assignment.

- **Agents:** An agent has a duty to provide appraisers with complete and accurate information. Fair and impartial information regarding property improvements, conditions, and seller concessions is essential. Competency and expertise is a two-way street.

- **AMCs:** Know the appraisers on your panel. Although every appraiser licensed in Utah is deemed qualified to appraise across the state, no individual appraiser is able to appraise statewide with equal competency in every geographic area. Pairing each assignment with an appraiser who has demonstrated knowledge of the area and assignment type will go a long way in helping the market to recover. In addition, you should allow the appraiser enough time to do a credible job. Remember that you have a role in ensuring compliance with USPAP standards and assignment conditions. If you are allowing a single appraiser to turn in a high volume of assignments across the state and under a short time frame, the question inevitably arises as to whether the appraiser is really measuring the property, inspecting it, taking photos, and driving past the comparables. In these circumstances, if USPAP violations occur and if you knew or should have known that they were occurring, you can be disciplined right along with the appraiser.

Much of what has been addressed in this article is just common sense. It involves treating others fairly and putting the client and the profession first. If you are in a situation where another professional fails or refuses to abide by the law, the rules, or the professional standards, you should file a complaint with the Division. Note that complaints can be filed anonymously. The Division needs the help of all its ethical, conscientious licensees to weed out the bad actors. Let's do business!

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