

STATE OF NEW HAMPSHIRE
REAL ESTATE COMMISSION

**DECLARATORY RULING ON WHETHER NON-LICENSED PRINCIPALS CAN
SHARE TRANSACTION COMMISSIONS**

Pursuant to Rea 201.08(a), James Hochman, petitioned the New Hampshire Real Estate Commission (“Commission”) for a declaratory ruling that clarifies whether transaction commissions can be shared with a principal to the transaction. The Commission finds that such a sharing is not allowed.

Unless otherwise exempt, Real Estate brokers are required to be licensed pursuant to RSA 331-A:3. Further, it is unlawful for any person to act as a broker without a license. RSA 331-A:3. The definition of “broker” includes “any person acting for another on commission” while performing specific functions. RSA 331-A:2, III. The activities include assisting with or directing in “the procuring of prospects” or “the negotiation of any transaction.” RSA 331-A:2, III (h)-(i). A principal is “the party or parties to a real estate transaction who contract the services of a real estate brokerage firm.” RSA 331-A:2, VII-a.

Real Estate brokers are limited to paying commissions to licensees. RSA 331-A:26, XXIV (outlining the duty to not share commissions, “[n]o licensee shall knowingly pay a commission or other valuable consideration to a licensed person knowing that the licensee will in turn pay a portion or all of that which is received to a person who does not hold a valid real estate license”). Additionally, brokers have a certain set of obligations under the statute. These obligations bind licensees to the duties of “loyalty, obedience, confidentiality, reasonable care, diligence, and accounting.” RSA 331-A:25-a, I. The statutory framework allows for certain exemptions from these licensing requirements. These exemptions include, for example, an “owner who is not a licensee.” RSA 331-A:4, I. An exempted person does not diminish or effect the duties and obligations of other licensees. The New Hampshire Supreme Court, in *Robinson v. N.H. Real Estate Comm’n*, indicated that the plain language of the exemption statute is not ambiguous. 157 N.H. 729, 732 (2008). When construing the statute as a whole, however, removing duties of those not exempted is outside the scope of the exemptions clause. Therefore, while exempted individuals are not barred from earning a commission, licensees are still barred from “paying or offering to pay valuable consideration” to non-licensees. *See* RSA 331-A:26, XXIV.

Further, the New Hampshire Supreme Court has found, partially under the theory of unjust enrichment, that non-brokers should not be able to accept a commission. In *Kowalski v. Cedars of Portsmouth Condominium*, the Court noted that one who is not licensed as a broker “is ordinarily not entitled to collect a commission” as such, agreements to pay commissions to non-licensed individuals is not enforceable—thus “void at its inception.” 146 N.H. 130, 132 (2001)

(quoting 12 AM. JUR. 20 *Brokers* § 217 (1997)). This general principle is codified at RSA 331-A:32, stating that actions for compensation are restricted to those “duly licensed under this chapter as a broker or salesperson at the time of offering.”

Conclusion:

A licensee cannot share commissions with an unlicensed individual—even if that individual is exempt from licensure. RSA 331-A:4 exemptions do extend to property owners, however the exemption does not impact the obligations of those who are licensed. Further, the Supreme Court of New Hampshire has held that commissions paid to non-brokers are unenforceable, and therefore void.

There is nothing, however, that prohibits a broker from lowering the commission to be charged to a principal to the transaction.

BY ORDER OF THE COMMISSION

Dated: June 19, 2018



Rick A. Wisler, Administrator III
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Authorized Representative of the NH Real Estate
Commission