

LICENSEE'S PERSONAL TRANSACTIONS TO BE CONDUCTED THROUGH THE BROKER WITH WHOM HE IS LICENSED

Under Idaho law, all active licensees are required to conduct their personal real estate transactions through the broker with whom they are licensed, regardless whether the property is listed. See section 54-2055, Idaho Code. The law states:

54-2055. LICENSEES DEALING WITH THEIR OWN PROPERTY.

(1) Any actively licensed Idaho broker, sales associate, or legal business entity shall comply with this entire chapter when that licensee is buying, selling or otherwise acquiring or disposing of the licensee's own interest in real property in a regulated real estate transaction.

(2) A licensee shall disclose in writing to any buyer or seller that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal use or any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.

(3) Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed.

[Emphasis added].

This Guideline attempts to answer several questions that have arisen as to the requirements of the licensee who conducts his personal transactions through his brokerage.

Question: Must the licensee's broker always be the "responsible broker" for the transaction? If not, how can the transaction "be conducted through" the licensee's broker?

Answer: The Commission recognizes there are transactions for which it is impractical to have the licensee's broker act as the "responsible broker." The purpose and intent of subsection (3) is to ensure that the licensee's broker is made aware of and able to supervise transactions for which he might be held liable. The Commission finds that this purpose is satisfied if the licensee timely provides a copy of each transaction document to his broker, even if the original document is provided to a different broker who is the "responsible broker for the transaction."

Guideline #24

Question: Must the licensee enter an Agency Representation Agreement with his Brokerage?

Answer: No. Although the licensee is required to conduct his personal transactions through his brokerage, he and the brokerage are NOT required to enter a written agreement for agency representation. An individual licensee buying or selling property is necessarily acting on his own behalf. However, whether the *brokerage* agrees to represent the licensee and act as his agent is a decision left to the brokerage and its licensee, and is not required by the law.

The law permits the brokerage and the licensee to enter into a written agreement for agency representation, in which case the brokerage will owe its licensee, for that transaction, those duties owed a client under section 54-2087, Idaho Code. Absent a written agreement for agency representation, the relationship of the brokerage to the licensee in the transaction is that of a “non-agent” to a “customer.” Whatever brokerage relationship is chosen, it must be indicated accurately in the Representation Confirmation (check the box) section of the Purchase and Sale Agreement. And, of course, the licensee always is required to make written disclosure of the fact that he is actively licensed.

Question: Must the licensee give himself the Agency Disclosure Brochure?

Answer: No. Complying with the License Law does NOT require that the licensee give himself a copy of the Agency Disclosure Brochure. This requirement, contained in section 54-2085, Idaho Code, does not apply where the “prospective buyer or seller” is an active Idaho licensee.

Question: Will my errors and omissions insurance policy provide coverage for my personal transactions?

Answer: Not likely. Insurance contracts vary. However, errors and omissions policies typically exclude from coverage the licensee’s personal transactions. Coverage may exist for the brokerage under the brokerage’s separate policy. All licensees should pay careful attention to the exclusion and exemption provisions of any policy of insurance he or she maintains.

Question: Which transactions have to be conducted through the licensee’s broker?

Answer: Questions have also arisen as to which transactions fall within the scope of subsection (3), requiring that the transaction be run through the broker with whom the licensee is licensed. The answers will depend on the identity of the “person” buying or selling the property, and whether that person is “actively licensed”. A “person” is either an individual or a legal business entity. Unless the “person” buying or selling is actively licensed, the requirement does not apply.

Example #1

Mary Smith is an active licensee. She is married to John, who is not licensed. John and Mary are the sole shareholders in ABC, Inc., an unlicensed business that owns real property and constructs new homes.

Question: Does the law require that ABC, Inc.'s sales of its new homes by ABC, Inc. be conducted through a responsible broker?

Answer: No. In this case, ABC, Inc. is the "person" selling property. Because ABC, Inc. is not an "actively licensed person", the requirement of subsection (3) does not apply. *However*, under the broad language of subsection (2), 54-2055, Idaho Code, Mary Smith is required to disclose, in writing, that she is an active licensee.

Example #2

Same facts as in #1. Mary and John have agreed to buy their neighbor's ranch, and to make the purchase in their own names, "Mary and John Smith". The ranch property is not on the market.

Question: Must the transaction be conducted through Mary's broker?

Answer: Yes. Because Mary is one of the persons buying the property, and because she is "actively licensed", the transaction must be conducted through Mary's broker, "whether or not the property is listed". Mary will also have to make written disclosure of her status as an active licensee.

Example #3

Same facts as in #1. John wants to buy a small lot and building for use in connection with his own personal hobbies. John will handle the transaction and Mary will not be involved at all. (The funds used are not John's sole and separate property.)

Question: Must the transaction be conducted through Mary's broker?

Answer: Yes. Even if the property is purchased for exclusive use by John, the property will still belong to the marital community, and Mary will acquire a community "interest therein." Therefore, the transaction must be conducted through Mary's broker. Again, Mary is also required to disclose her status as an active licensee.