



REBATES FOR BUYERS: ARE THEY RIGHT FOR YOU?

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Buyers approach you about representing them to find a home in New Jersey and immediately tell you they expect you to pay them a rebate from part of your commission before they will agree to let you represent them. Can you pay a rebate to buyers in New Jersey? What about the sellers? If you can pay any rebate, what conditions must you meet as a real estate licensee before you pay any such rebate?

The questions and answers below will provide you with the information you need to decide whether or not you should offer rebates.

THE PROHIBITION AGAINST REBATES

Q: Aren't rebates to buyers and sellers prohibited in New Jersey?

A: They historically have been prohibited. Section 17(k) of the Licensing Act prohibited licensees from paying any rebate, profit, compensation or commission to anyone who does not have a real estate license. The only exception was for free, discounted or other services or products that are allowed under Section 17(i) of the Act.

Q: Has the law changed?

A: You bet it has! Section 17(k) of the Act recently was amended to allow real estate brokers to pay rebates to buyers under certain conditions. However, the Act still prohibits rebates to sellers.

Q: Why was this amendment passed?

A: A broker who operated in many other states where rebates to buyers are allowed had a model of representing buyers and providing them with a rebate of a portion of its commission on the transaction. They argued that buyers should have the right to negotiate commissions in much the same way as sellers can negotiate the commission in the listing agreement. In these difficult economic times, the Legislature decided that such rebates were pro-consumer and, as a result, passed this legislation, which the Governor signed into law.

Q: So you are saying that only a broker can provide a rebate and that the rebate only can be provided to buyers?

A: That's correct. Only a real estate broker, not a real estate salesperson, broker-salesperson or referral agent, can provide a rebate. In addition, the law is very clear that the rebate only can be paid to buyers, not sellers, lessors or lessees.

Q: If I decide to give rebates to buyers, does it have to be in writing or can I continue to have a verbal relationship with my buyers?

A: Any agreement to provide a rebate to buyers must be in writing and entered into at the onset of the brokerage relationship with the buyers. The writing can be a written document, an electronic document or a buyer agency or other agreement.

Q: Are there any tax implications for the buyers if they receive a rebate?

A: There may very well be. The broker providing the rebate therefore must recommend to the buyers that the buyers contact a tax professional concerning the tax implications of receiving the rebate. It also is recommended that the broker get information from the buyers to provide the buyers with a 1099 tax form.

Q: Do I have to tell the listing agent that I am providing a rebate to the buyers?

A: Yes. Any broker providing a rebate to buyers must disclose the payment of the rebate to all parties involved in the transaction, including but not limited to the listing agent, the sellers and the mortgage lender, if applicable. In addition, the broker must comply with all State and Federal requirements with respect to the disclosure of the payment of the rebate.

Q: Can I condition the payment of a rebate to buyers on the buyers using some other service or product that I offer?

A: Absolutely not. The rebate cannot be contingent upon the use of any other service or product that is offered by the broker who will be providing the rebate or any affiliate of the broker. The rebate also cannot be based upon the use of any lottery, contest or game.

Q: Are there any advertising issues that I should be aware of if I decide to offer rebates to buyers?

A: There are. First, the advertisement must have a disclosure concerning the buyers' obligation to pay any applicable taxes for receiving the rebate. Next, a notice that the purchaser should contact a tax professional concerning the tax implications of the rebate must be included. Finally, the required disclosure and notice must be conspicuously displayed in the advertisement and the size of the text must be equal to or larger than the size of the text used for the advertisement.

Q: Can I provide the buyer with a rebate for undertaking activities that real estate licensees might otherwise do?

A: You're prohibited from paying any unlicensed person, including the buyers, for any act that requires licensure. As a result, you cannot provide them with a credit or a check at the closing for providing any services that would require licensure.

FORM REBATE AGREEMENTS

Q: What agreements are available from NJAR® that will satisfy my obligation to have a writing or agreement concerning the payment of rebates to buyers?

A: NJAR® now has five different forms online that, at your option, you can use if you decide to provide rebates to buyers. The most basic Agreement merely provides the basic terms under which the rebate will be paid to the buyers.

Q: What other forms does NJAR® have concerning rebates to buyers?

A: NJAR® decided to have four other forms for the convenience of its members. These include two Non-Exclusive Buyer Agency Agreements, one that has a provision for rebates to buyers in it and one that does not. NJAR® also has two Exclusive Buyer Agency Agreements, one that has the rebate provision in it and one that does not.

Q: Why would I bother entering into either an Exclusive or Non-Exclusive Buyer Agency Agreement rather than just keeping it simple by entering into an agreement that only deals with my providing a rebate to the buyers?

A: Each broker offering rebates has to make a business decision whether or not to enter into a Buyer Agency Agreement, but it is highly recommended that the decision be for his or her entire office. However, the advantage of a Buyer Agency Agreement, whether it is exclusive or non-exclusive, is that the agreement can protect the broker by providing, for example, how and what amount the buyers' agent will be paid, a protection period for property shown by the buyers' agent to the buyers, and a representation from the buyers that they do not have any Exclusive Buyer Agency Agreement with any other broker.

CONCLUSION

Q: Do you recommend that I start providing rebates to buyers?

A: That is a decision each broker will have to make for him or herself. However, there are already brokers who are providing such rebates in New Jersey as a result of this new law. As with all changes to the law that allow for new business models, competitive sources ultimately will decide how effective a business model offering such rebates to buyers will be. However, if you decide to provide rebates to buyers, you must ensure that you comply with all the requirements for providing such rebates.

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