

# Promotions in New Jersey: Be Careful What You Offer!

By Barry S. Goodman, Esq., NJAR General Counsel

The expectations of buyers and sellers are changing. Of course, you have to provide personal and professional services to help buyers locate their dream homes and to market homes for sellers. However, many of them now also expect you to provide free or discounted promotions from other businesses that will make their move easier and less expensive. In New Jersey, what can you offer? To whom do you have to offer such promotions? Can you offer promotions that are being marketed around the rest of the country by other REALTORS®? It is important to understand laws that are unique to New Jersey to avoid any pitfalls when you offer such promotions.

## Background

The New Jersey Real Estate Licensing Act (the Act) historically prohibited any real estate licensee from “[u]sing any plan, scheme or method for the sale or promotion of the sale of real estate which involves a lottery, a contest, a game, a prize, a drawing, or the offering of a lot or parcel or lots or parcels for advertising purposes.”<sup>1</sup> Similarly, the Act prohibited licensees from “[p]laying any rebate, profit, compensation or commission to anyone not possessed of a real estate license.”<sup>2</sup> The Real Estate Commission (the Commission) broadly interpreted these provisions in the Act to prohibit a broker from offering any free or discounted services or products, including coupons, from any other business.

In the mid-1980s, Coldwell Banker, which then was owned by Sears Roebuck, initiated a promotion under which it offered Sears merchandise coupons providing discounts for buyers and sellers. The Commission concluded that the coupon program was prohibited as a “prize” and as a “rebate, profit, compensation or commission” in violation of the Act.

Coldwell Banker appealed this decision. However, the Appellate Division issued an opinion in 1990 affirming the Commission's decision.<sup>3</sup> Such promotions therefore were prohibited in New Jersey.

## Amendments to the Licensing Act

After a significant majority of other states began to allow such promotions, in April 2001 the Legislature amended the relevant sections of the Act to permit real estate brokers to offer “free, discounted or other services or products” under certain conditions.<sup>4</sup>

First, the promotion cannot be tied to the consumer entering into “a sale, listing or other real estate contract as a condition of the promotion or offer.” As a result, receipt of the offer can be conditioned, for example, on the person attending a sales presentation. However, it should be available to all consumers and not limited to actual buyers or sellers entering into a buyer

agency, listing or other real estate agreement.<sup>5</sup>

Next, the promotion still cannot involve a lottery, contest, game, prize, drawing or offering of lots or parcels. Finally, if the broker is receiving “any compensation” for such a promotion or offer, the broker must disclose the compensation in writing to the consumer in the form and substance required by the federal Real Estate Settlement Procedures Act (RESPA) no later than when the promotion or offer is extended to the consumer.<sup>6</sup>

The Commission then promulgated regulations providing additional conditions and clarifications. First, the Commission explained that the amendment to the Act covers all “offerings which confer monetary benefit upon consumers.” Examples of covered promotions provided in the regulation include the following: free or subsidized homeowner's warranties; property, radon and pest inspections; surveys; mortgage fees; offers to pay other costs typically incurred by parties to real estate transactions; and coupons offering discounts on commissions charged by brokerage firms.<sup>7</sup>

The Commission also provided that, whenever the promotion has a value of more than \$5.00 retail, the licensee must provide a written disclosure to the recipient stating in a clear and conspicuous manner that (1) the consumer is not required to enter into any sale, listing or other real estate contract as a condition of receiving the promotion, (2) whether the consumer has to perform any action to qualify for the promotion, and (3) if the offered services or products are not delivered when the disclosure is provided to the consumer, the date they will be delivered.<sup>8</sup>

In addition, the Commission specified that this disclosure must be provided to the consumer no later than when the promotion or offer is extended to the consumer. Finally, the broker is prohibited from requiring the consumer to take any action prior to delivery of the disclosure “other than an action necessary to accomplish the delivery of the disclosure to the consumer.”<sup>9</sup>

## Permitted Promotions

Real estate licensees, therefore, now are permitted to provide certain promotions and offers for free or discounted services or products as long as they comply with these requirements. For example, licensees can provide free or discounted services or products from other companies that could be for home improvement services, warranty programs, landscaping, furniture and appliance coupon books, interior decorating consulting and American flags, as well as products and services unrelated to the home.

A recently announced promotion that is a joint offering of the NATIONAL ASSOCIATION OF REALTORS® (NAR) and

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Lowe's provides a good example of the parameters for offering promotions in New Jersey. Under this program, Lowe's will provide customized mailings for REALTORS® that Lowe's will send to a REALTOR's sellers, buyers and prospective buyers with discount coupons and rebates. These marketing services will be free for REALTORS®. In addition, REALTORS® will be entitled to five percent discount gift cards and rebates from Lowe's.

Any REALTOR® in New Jersey offering the Lowe's program will have to ensure its compliance with the Act and the Commission's regulations. For example, when a REALTOR® provides Lowe's with names, addresses, etc., for consumers who should be sent the marketing material, the REALTOR® should not limit the names to consumers who entered a sale, listing or other real estate contract. In addition, written disclosures will have to be provided to consumers since REALTORS® will be receiving compensation in the form of free marketing, discount gift cards and rebates.<sup>10</sup>

## Conclusion

The amendments to the Act have provided real estate brokers with a tremendous opportunity to offer promotions that they previously could not offer. However, brokers must carefully analyze any promotion that they decide to offer to consumers to ensure that it fully complies with the Act and the Commission's regulations. As long as the promotion complies, there is no reason that brokers cannot offer, and consumers cannot receive, the benefits of such promotions. ▲



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1 N.J.S.A. 45:15-17(g). 2 N.J.S.A. 45:15-17(k). 3 *Coldwell Banker v. Real Estate Commission*, 242 N.J. Super. 354 (App. Div. 1990). 4 See N.J.S.A. 45:15-17(g) and (k). 5 N.J.S.A. 45:15-17(g). It should be noted that NAR Standard of Practice 12-3, which provides that promotions are not "unethical even if receipt of the benefit is contingent on listing, selling, purchasing or leasing through the REALTOR® making the offer," is subject to the limitations and restrictions of New Jersey law. 6 N.J.A.C. 45:15-7(g). 7 N.J.A.C. 11:5-6.1(m)2. 8 N.J.A.C. 11:5-6.1(m)4. 9 N.J.A.C. 11:5-6.1(m)7. 10 If the Lowe's (or any other) rebate is a payment to a salesperson, it must be made through the broker pursuant to N.J.S.A. 45:15-16. In addition, brokers and salespersons should consider including a provision in the salesperson's independent contractor agreement permitting the salesperson to receive the other "compensation" from Lowe's.

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