

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 6, 2014

Opinion No. 14-27

Exemption from the Real Estate Broker License Act

QUESTIONS

1. Does the exemption from licensure under the Tennessee Real Estate Broker License Act of 1973 provided to a “corporation, foreign or domestic” in Tenn. Code Ann. § 62-13-104(a)(1)(F) apply to a limited liability company?

2. If an individual who is a member or officer of an entity that qualifies for the exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F) has the primary responsibility of performing activities on behalf of such entity for which a license is otherwise required under Tenn. Code Ann. § 62-13-102(4)(A) or (B), does it matter for purposes of the exemption whether the individual’s compensation is dependent upon or directly related to the value of the real estate as to which the actions are performed?

3. If an individual performs activities for which a license is required under Tenn. Code Ann. § 62-13-102(4)(A) or (B) on behalf of an entity that qualifies for the exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F) but does not perform such activities as a vocation, does the exemption apply to that person if his or her compensation is based on a distribution of profits to the owners of the entity, where the amount of the distribution includes the money received by the entity from the sale of the property and is distributed to all owners based on a percentage of ownership in the entity or some other calculation not directly related to the sale or rental of the property?

OPINIONS

1. No. A limited liability company must be licensed under the Act because the exemption provided by Tenn. Code Ann. § 62-13-104(a)(1)(F) is limited to “a corporation, foreign or domestic.” A limited liability company is not a corporation.

2. No, it does not matter; the exemption does not apply. The corporate exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F) expressly does not apply to a person who performs an act described in Tenn. Code Ann. § 62-13-102(4)(A) as a vocation, and a person who performs such acts as his or her primary responsibility does so as a vocation.

3. No. The corporate exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F) expressly does not apply to a person who performs an act described in Tenn. Code Ann. § 62-13-102(4)(A) for compensation if the compensation is dependent upon the value of the real estate with respect to which the act is performed. If the person's compensation is based on a distribution of the corporation's profits that includes money from the sale of property transacted by the person, the amount of the person's compensation is dependent upon the value of the property sold.

ANALYSIS

1. Under the Tennessee Real Estate Broker License Act of 1973 (the "Act"), a "broker" is required to obtain a license from the Tennessee Real Estate Commission. Tenn. Code Ann. §§ 62-13-103 and -301. The term "broker" is broadly defined as follows:

(4)(A) "Broker" means any person who, for a fee, commission . . . or any other valuable consideration or with the intent or expectation of receiving . . . valuable consideration from another, solicits, negotiates or attempts to solicit or negotiate the listing, sale, purchase, exchange, lease or option to buy, sell, rent or exchange for any real estate or of the improvements on the real estate or any time-share interval as defined in the Tennessee Time-Share Act, compiled in title 66, chapter 32, part 1, collects rents or attempts to collect rents, auctions or offers to auction or who advertises or holds out as engaged in any of the foregoing;

(4)(B) "Broker" also includes any person employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a salary, fee, commission, or any other valuable consideration, to sell the real estate or any part of the real estate, in lots or parcels or other disposition of the real estate. It also includes any person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby the person undertakes primarily to promote the sale real estate either through its listing in a publication issued primarily for that purpose or for referral of information concerning the real estate to brokers, or both.

Tenn. Code Ann. § 62-13-102. The Act, however, includes exemptions; one of these exemptions applies to:

A corporation, foreign or domestic, acting through an officer duly authorized to engage in a real estate transaction, where the transaction occurs as an incident to the management, lease, sale or other disposition of real estate owned by the corporation; however, this

exemption does not apply to a person who performs an act described in § 62-13-102(4)(A), either as a vocation or for compensation, if the amount of the compensation is dependent upon, or directly related to, the value of the real estate with respect to which the act is performed.

Tenn. Code Ann. § 62-13-104(a)(1)(F). This exemption is limited to both foreign and domestic corporations, and as this Office has previously opined in other contexts, a limited liability company is not a corporation. *See* Tenn. Att’y Gen. Op. 11-83 (Dec. 29, 2011) (“An examination of the Tennessee Limited Liability Company Act . . . reveals these business entities are intended to be separate and distinct from corporations.”). *See also* Tenn. Atty. Gen. Op. 98-053 (March 2, 1998) (opining that a criminal statute that prohibits the use of funds of a “corporation” for certain political purposes does not apply to a limited liability company). The exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F), therefore, does not apply to limited liability companies.

2. For the exemption to apply, the real estate transaction must “occur[] as an incident to the . . . disposition of real estate owned by the corporation,” and the corporation must be acting through an officer who is “duly authorized” by the corporation to engage in the transaction. Tenn. Code Ann. § 62-13-104(a)(1)(F); *see Bowden Bldg. Corp. v. Tenn. Real Estate Comm’n*, 15 S.W.3d 434, 441 (Tenn. Ct. App. 1999). Furthermore, if the officer “performs an act described in § 62-13-102(4)(A),” the officer is not entitled to the exemption if he or she performs such act as a “vocation” or for “compensation [that] is dependent upon, or directly related to, the value of the real estate.” Tenn. Code Ann. § 62-13-104(a)(1)(F); *see Bowden Bldg.*, 15 S.W.3d at 441.

The term “vocation” is not defined by the Act. “In seeking to determine the ‘natural and ordinary meaning’ of statutory language, the usual and accepted source for such information is a dictionary.” *English Mtn. Spring Water v. Chumley*, 196 S.W.3d 144, 148 (Tenn. Ct. App. 2005). “Vocation” is a “person’s regular calling or business; one’s occupation or profession.” *Black’s Law Dictionary* 1604 (8th ed. 2004). If an officer has the *primary responsibility* of performing activities that constitute acts described in § 62-13-102(4)(A), then the officer is performing such acts as a vocation.¹ Because the officer has not satisfied the exemption’s vocation requirement, the exemption does not apply to the officer regardless of the kind of compensation received. *See Bowden Bldg.*, 15 S.W. 3d at 441 (to satisfy the exemption requirement, corporate officers “must not perform such real estate services as a vocation”).

¹ The acts described in Tenn. Code Ann. § 62-13-102(4)(A) include soliciting, negotiating, or attempting to negotiate the listing, sale, purchase, exchange, or lease of real estate, when those acts are performed for valuable consideration from another. A person who would be required to have a license solely on the basis of the definition of “broker” in Tenn. Code Ann. § 62-13-102(4)(B) but did not perform any act described in § 62-13-102(4)(A) would not be excluded from the exemption.

3. To be exempt, an officer performing activities that constitute acts described in Tenn. Code Ann. § 62-13-102(4)(A) must also not perform such acts for “compensation, if the amount of the compensation is dependent upon, or directly related to, the value of the real estate with respect to which the act is performed.” Tenn. Code Ann. § 62-13-104(a)(1)(F). Salaried officers (not performing the acts as a vocation) would satisfy this requirement because they are paid the same amount regardless of the sales price, while officers paid on commission would not be exempt because their commission would be directly related to the value of the property. *Bowden Bldg. Corp.*, 15 S.W.3d at 441.

The phrase “dependent upon” is broader than “directly related.” If an officer is compensated through a distribution of profits tied to his ownership interest in the corporation and those profits include money from the sale of the property transacted by the officer, the “amount of the compensation is dependent upon . . . the value of the real estate” sold. The sales price would affect the amount of the distribution made to the officer because a higher sales price would result in greater profits to be distributed. Conversely, a lower sales price would result in a smaller distribution. The exemption does not apply to an officer performing acts described in § 62-13-102(4)(A) unless he receives compensation unaffected by sales volume and prices.²

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² See *supra* note 1.

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