STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 15, 2021

Opinion No. 21-01

Disbursement of Real Estate Commissions

Question 1

Does Tenn. Code Ann. § 62-13-312(b)(11) allow for any person or entity, other than an affiliate real estate broker who is affiliated with a licensed principal real estate broker, to disburse a commission, or any valuable consideration, for the performance of the acts specified in the Tennessee Real Estate Broker License Act?

Opinion 1

Yes. Nothing in Title 62, Chapter 13, prohibits a licensed principal real estate broker from delegating to a title company or other party the authority to disburse commissions.

Question 2

Does an agency relationship created by Tenn. Code Ann. § 62-13-401, or by common contractual or agency law, allow a licensed principal real estate broker to contractually delegate the broker's duty to disburse a commission, or any valuable consideration, for the performance of the acts specified in the Tennessee Real Estate Broker License Act?

Opinion 2

Yes. A licensed principal real estate broker may contractually delegate the broker's duty to disburse a commission or other consideration for a real estate transaction.

ANALYSIS

Taken together, the two questions posed may be restated as asking in essence whether the principal real estate broker must personally disburse the commission(s) associated with a real estate transaction or whether the principal broker may contractually delegate the disbursement of commissions to a third party. The short answer to that question is yes, the principal broker may contractually delegate to a third party, such as a title company, the duty and authority to disburse the commission in a given transaction.

The Tennessee Real Estate Broker License Act creates a licensing category for a "real estate broker" and a separate licensing category for an "affiliate real estate broker." The Tennessee Real Estate Commission (TREC) is the state agency responsible for administering the Act's licensing provisions. See Tenn. Code Ann. § 62-13-203(a).

The Act generally defines a real estate broker as

> any person who, for a fee, commission, finders fee or any other valuable consideration or with the intent or expectation of receiving a fee, commission, finders fee or any other 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 . . . , 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.

Tenn. Code Ann. § 62-13-102(4)(A). The Act defines an "affiliate real estate broker" as "any person engaged under contract by or on behalf of a licensed broker to participate in any activity" described in the above-quoted definition of "real estate broker." Tenn. Code Ann. § 62-13-102(3).

The Act contemplates that both the principal broker and the affiliate broker may negotiate for and receive commissions from a party to a real estate transaction. *See* Tenn. Code Ann. § 62-13-102(3) and (4). The Act also recognizes that both the broker and the affiliate broker may enter written agreements with parties to a real estate transaction establishing the terms and conditions of any agency relationship with a party to the transaction. *See* Tenn. Code Ann. § 62-13-401.

Under the Act, however, an affiliate broker may accept commissions only "from" the affiliate's principal broker. *See* Tenn. Code Ann. § 62-13-312(b)(11) (authorizing TREC to suspend or revoke the license of any affiliate broker who accepts "a commission or any valuable consideration . . . from any person, except the licensed real estate broker with whom the licensee is affiliated"). But the Act does not specifically place responsibility for personally disbursing commissions on the principal broker. *See* Tenn. Code Ann. § 62-13-401. "From" is commonly used to indicate the "source or origin" of something. *Webster's Collegiate Dictionary* 527 (2d rev. ed. 2001). When the common meaning of "from" is applied in this statutory context, it is clear that the principal broker must be the source or origin of the commission; however, there is no statutory requirement that the principal broker personally handle and distribute all commissions related to the sale.

Accordingly, nothing in the Act appears to prohibit, for example, the common practice of real estate brokers contracting with title companies to disburse commissions at real estate closings. And nothing in the Act would prohibit the affiliate broker from receiving a commission disbursed by such a third party, as long as the third party is acting, pursuant to such a contract, at the direction of the principal broker, since the affiliate broker would be, in effect, receiving the commission from the principal broker through the principal broker's delegated agent.

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