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RE: Unlicensed Idaho Brokerage Activity

You are receiving this Broker Bulletin letter because you hold an active Idaho designated broker license, and the Commission would like to update you on an important matter.

Over the last year, the Commission has received a multitude of complaints regarding unlicensed brokerage activity in Idaho by licensees from other states. As a result of these investigations, it became apparent there is quite a bit of misunderstanding and confusion about Idaho law and what activities an out-of-state licensee can and can't perform without an Idaho real estate license.

The Commission has carefully reviewed some concerns that were raised in response to the enforcement investigations, and the Commissioners sought additional legal advice to ensure the real estate license law is properly written and correctly interpreted. As a result, the Commission has undertaken two actions:

1. Reviewed and revised Guideline #2 – (formerly titled “Information to Out-of-State Real Estate Brokers” -- to clarify how the Commission interprets and enforces the law; and
2. Requested a law change to clarify the definition of what constitutes “acting in this state”.

At this time, revised Guideline #2 is available on our website at www.irec.idaho.gov, and a copy is attached for your information. The updated version of the guideline will be included in the 2011 License Law & Rules booklet, which will be published in July.

In addition, the legislature has considered the Commission's proposed law change (S 1127, copy attached), which moved the definition of “acting in this state” from the enforcement section of the license law to the defined terms in Idaho Code 54-2004. We believe this change will have a positive effect for those seeking guidance and instruction from the license law.

If you customarily work with out-of-state brokers on Idaho property transactions, please read the Guideline carefully and let us know if you have any questions.

We encourage you to contact our office if you have any questions about compliance with the license law – our Enforcement Department is here to help and would be happy to assist you as best they can.

Sincerely,

A handwritten signature in cursive script that reads "Jeanne Jackson-Heim".

Jeanne Jackson-Heim
Executive Director

Attachment: *Guideline #2 – Information to Out-of-State Real Estate Brokers*
S 1127 – IREC 2011 Legislation

BROKERING IDAHO PROPERTY REQUIRES AN IDAHO REAL ESTATE LICENSE

This Guideline is designed to advise all brokers and salespersons, whether licensed in Idaho or in another state, that, in order to engage in any real estate brokering activities relating to Idaho real property, a broker or salesperson must hold an active Idaho real estate license. This is true even if the broker, salesperson, or their clients do not reside in or personally enter this state. A broker or salesperson who is not licensed in Idaho is not precluded from all participation in the Idaho transaction; however, he may not engage in any act of “real estate broker” without an Idaho license.

1. An Idaho license is required to engage in any brokering activities relating to Idaho real property.

Idaho law flatly prohibits any person from engaging in any act of a “real estate broker” “in this state” without an active Idaho real estate license. Idaho Code 54-2002.

“Real estate broker” is defined in the license law to include “any person who, directly or indirectly, while acting for another for compensation or promise or expectation thereof, sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate”, and also includes “any person who represents to the public” that he is engaging in any of these acts. Idaho Code 54-2004(34).

A person is “acting in this state” if he is “dealing with any interest in real property . . . that is situated in this state. . .” Idaho Code 54-2004(2).

Under Idaho Code, then, any person who “sells, lists, buys or negotiates” the purchase or sale of real property “situated in this state” is, by definition, engaging in acts requiring an Idaho real estate license.

2. A person who does not hold an Idaho license may not “co-broker” Idaho property with an Idaho-licensed broker.

Idaho Code provides no mechanism to allow a person who does not hold an Idaho license to “co-broker” Idaho property with an Idaho-licensed broker. To the contrary, the law states that each person who performs any defined brokering act – whether as salesperson or broker – must hold an active Idaho license. Idaho Code 54-2002. There is no exception for persons who are licensed in another state and/or who privately contract with an Idaho designated broker to “supervise” or “be responsible for” him. A person who engages in any defined act of “real estate broker” – including selling, listing, buying, or negotiating the purchase or sale of Idaho real property – but who does not hold an active *Idaho* license is guilty of unlicensed practice, regardless of any contractual arrangement with an Idaho-licensed brokerage.

3. **An Idaho designated broker may not “co-broker” Idaho property with a person who does not hold an Idaho license.**

Similarly, an Idaho designated broker violates the license law if he “co-brokers” Idaho property with a person who does not hold an active Idaho license. The license law specifically prohibits a designated broker from allowing any person not licensed by the Commission to represent him, as a salesperson, associate broker, or otherwise, in any real estate business activities requiring a real estate license. Idaho Code 54-2038(3). In order for a salesperson or associate broker to perform broker activities in Idaho, the salesperson or associate broker must hold an active Idaho license and be licensed by the Commission with that broker (as an associate broker or salesperson). Idaho Code 54-2004(35), (36) and Idaho Code 54-2018(4). This state licensing requirement cannot be circumvented by private contract.

Idaho designated brokers should also be aware of the license law’s prohibition against “lending” or “permitting” a license to be used to carry on a business for which an Idaho broker’s license is required. Under the license law, the Idaho designated broker must “actively manage and have full control” of the transaction. Idaho Code 54-2040(5). Thus, an Idaho designated broker may not contract away his statutory management responsibilities; the Idaho designated broker, and not any other person, must be the active manager in control of the Idaho transactions.

4. **Communication and cooperation that do not involve specific acts of brokering are not prohibited.**

There are situations in which a broker or salesperson licensed in another state but not in Idaho, (“non-Idaho licensee”) has an existing client who wishes to buy or sell Idaho property. Although the non-Idaho licensee is prohibited from engaging in any act specified as “brokering,” he is not barred from all participation in the transaction.

a. Communication with the client.

A non-Idaho licensee may communicate with, consult, or advise his or her client about the Idaho transaction. Advising or consulting with the client – even after the client has hired an Idaho broker – do not constitute acts of brokering and do not require a real estate license.

b. Cooperation with the Idaho broker.

Although a non-Idaho licensee may not “co-broker” Idaho property with an Idaho broker, such person is not prohibited from cooperating with an Idaho broker. For example, he may consult and advise the Idaho broker concerning the objectives and concerns of the client. Or, he may coordinate information between the Idaho transaction and other non-Idaho transactions.

c. Non-Idaho licensee participating in an Idaho transaction may NOT engage in brokering.

Although a non-Idaho licensee may advise his client and may collaborate with the Idaho broker with respect to Idaho property, he is prohibited from engaging in any act constituting “brokering.” For example, a salesperson or broker who is not licensed in Idaho may not:

- Transmit offers or counteroffers to sell the client’s property directly to potential buyers;
- Receive offers to buy the property directly from potential sellers; or
- Engage in any communication, written or oral, that may be construed as “negotiation.”

5. Advertising Idaho property.

Advertising and marketing Idaho property are not acts specifically defined as “brokering,” and do not, in themselves*, require an Idaho real estate license. However, Idaho Code does impose certain requirements relating to the advertisement of Idaho property. Idaho Code 54-2053. A person, including an individual or entity that is not licensed in Idaho, *may* market and advertise Idaho real property, *provided* the statute’s advertising requirements are met, including:

- Every broker or salesperson named in the advertising holds an Idaho license;
- The licensed business name of the Idaho broker is included in the advertisement; and
- The advertisement is not otherwise misleading.

* (Only persons licensed in Idaho or another state may seek any type of referral fee or finder’s fee. Idaho Code 54-2054(3).

6. Fee-sharing arrangements between licensed brokers.

The license law prohibits Idaho brokers from “fee-splitting,” i.e., sharing brokerage fees with, or paying any portion to, any person *except* persons who are licensed “in Idaho or another state or jurisdiction.” Idaho Code 54-2054(2).

This “fee-splitting prohibition” does not apply to fee arrangements made between Idaho-licensed brokers and brokerages licensed in other states. The fee sharing arrangements made between an Idaho-licensed broker and a broker or salesperson not licensed in Idaho are beyond the regulatory interest of the Commission. A broker not licensed in Idaho may, consistent with the Idaho license law, earn, in addition to a referral fee, a fee for performing other, non-broker services related to an Idaho property transaction.

7. Sanctions for unlicensed activity.

Unlicensed brokering activity is a misdemeanor crime in Idaho punishable by imprisonment and a fine of \$5,000 for individuals, and \$10,000 for a business entity. In addition, the Idaho Real Estate Commission is authorized to take administrative action against anyone engaged in unlicensed brokering activity, and to assess a civil penalty up to \$5,000, plus costs and attorney fees.

IN THE SENATE

SENATE BILL NO. 1127

BY STATE AFFAIRS COMMITTEE

AN ACT

1 RELATING TO IDAHO REAL ESTATE LICENSE LAW; AMENDING SECTION 54-2004, IDAHO
2 CODE, TO DEFINE TERMS; AMENDING SECTION 54-2038, IDAHO CODE, TO PROVIDE
3 THAT CERTAIN LICENSEES MAY GIVE AN OPINION OF THE PRICE OF REAL ESTATE
4 FOR THE PURPOSE OF A PROSPECTIVE LISTING OR SALE, TO PROVIDE THAT ONLY
5 AN ACTIVELY LICENSED BROKER OR ASSOCIATE BROKER MAY PREPARE AND RENDER
6 A BROKER PRICE OPINION, TO PROVIDE REQUIREMENTS RELATING TO A BROKER
7 PRICE OPINION PREPARED OR RENDERED BY AN ASSOCIATE BROKER AND TO PROVIDE
8 FOR DISCIPLINE; AND AMENDING SECTION 54-2058, IDAHO CODE, TO REMOVE
9 LANGUAGE RELATING TO A PERSON ACTING WITHIN THE STATE OF IDAHO AND TO
10 MAKE A TECHNICAL CORRECTION.
11

12 Be It Enacted by the Legislature of the State of Idaho:

13 SECTION 1. That Section 54-2004, Idaho Code, be, and the same is hereby
14 amended to read as follows:

15 54-2004. DEFINITIONS. As used in this chapter:

16 (1) "Accredited college or university" means an institution accredited
17 by the regional accrediting associations, as reported in the most current
18 publication of the accredited institutions of postsecondary education.

19 (2) "Acting in this state" means and includes dealing with any inter-
20 est in real property, or a business opportunity involving an interest in real
21 property, that is situated in the state of Idaho, or conducting or attempt-
22 ing to conduct or solicit real estate business with residents of the state of
23 Idaho.

24 (3) "Active license" means the status of a real estate license that has
25 not been inactivated, expired, terminated, suspended or revoked.

26 (34) "Associate broker" means an individual who has qualified person-
27 ally as a real estate broker in Idaho under this chapter, but is licensed un-
28 der, associated with and represents a designated broker in the performance
29 of any act described in subsection (335) of this section.

30 (45) "Branch office" means an office operated by a licensed real estate
31 broker or licensed legal business entity, separate and apart from the main
32 office. A branch office may be licensed or unlicensed, in accordance with
33 this chapter.

34 (6) "Broker price opinion" means a written price opinion of the esti-
35 mated price for identified real property prepared or rendered by an actively
36 licensed broker or associate broker, for a purpose other than a prospective
37 listing or sale, and that complies or purports to comply with the require-
38 ments and content provision of section 54-4105, Idaho Code.

39 (57) "Brokerage company" means a real estate business, whether a sole
40 proprietorship, a legal entity, or any other licensed person engaged in acts
41 requiring a real estate license in Idaho, and which is conducting or hold-

1 ing itself out as conducting the business of real estate through a designated
2 broker.

3 (~~68~~) "Brokerage representation agreement" means a written contract be-
4 tween a buyer, seller, or both, and a real estate brokerage for agency repre-
5 sentation in a regulated real estate transaction.

6 (~~79~~) "Business conduct and office operations course" means, in refer-
7 ence to a real estate course offering, the component of the advanced real
8 estate course that is required in order to obtain a broker license and that
9 teaches business practices and office operations of the brokerage, includ-
10 ing recordkeeping, trust account procedures and the laws governing those
11 practices.

12 (~~810~~) "Business day" means and includes each day of the week except Sat-
13 urday, Sunday or any other legal holiday enumerated in section 73-108, Idaho
14 Code.

15 (~~911~~) "Business name" means the name in which the brokerage company is
16 licensed by the commission.

17 (~~102~~) "Business opportunity" means and includes an established busi-
18 ness, good will of an established business, or any interest therein, or any
19 one (1) or combination thereof, where a sale or transfer of an interest in
20 land including, but not limited to, an assignment of a lease, is involved in
21 the transaction.

22 (~~113~~) "Commission" means the Idaho real estate commission, unless the
23 context clearly indicates a different meaning.

24 (~~124~~) "Commission core course" means, in reference to a real estate
25 course offering, the course containing curriculum, identified by the com-
26 mission, that stresses current trends in real estate practices and changes
27 in laws in real estate related industries. A core course must contain no more
28 than four (4) classroom hours of instruction.

29 (~~135~~) "Continuing education elective course" means a real estate course
30 offering, other than the commission core course for which continuing educa-
31 tion credit hours may be obtained as provided in section 54-2023, Idaho Code.

32 (~~146~~) "Convicted" means a plea of nolo contendere or guilty, a jury ver-
33 dict of guilty or a court decision of guilt whether or not a judgment or sen-
34 tence has been imposed, withheld or suspended.

35 (~~157~~) "Cooperative sale" means a transaction involving two (2) or more
36 brokers.

37 (~~168~~) "Council" means the Idaho real estate education council.

38 (~~179~~) "Dealer in options" means any person, firm, partnership, associ-
39 ation or corporation who shall directly or indirectly take, obtain or use
40 options to purchase, exchange, lease option or lease purchase real property
41 or any interest therein for another or others whether or not the options
42 shall be in his or its name and whether or not title to the property shall pass
43 through the name of the person, firm, partnership, association or corpora-
44 tion in connection with the purchase, sale, exchange, lease option or lease
45 purchase of the real property, or interest therein.

46 (~~1820~~) "Designated broker" means an individual who is licensed as a real
47 estate broker in Idaho and who is designated by the brokerage company to be
48 responsible for the supervision of the brokerage company and the activities
49 of any associated licensees in accordance with this chapter.

1 (1921) "Distance learning course" means, in relation to a real es-
2 tate course offering, a real estate course that is delivered, not as a live
3 course, but through a medium in which the instructor and student are sepa-
4 rated by both distance and time.

5 (202) "Double contract" means two (2) or more written or unwritten
6 contracts of sale, purchase and sale agreements, loan applications, or any
7 other agreements, one (1) of which is not made known to the prospective loan
8 underwriter or the loan guarantor, to enable the buyer to obtain a larger
9 loan than the true sales price would allow, or to enable the buyer to qual-
10 ify for a loan which he or she otherwise could not obtain. An agreement or
11 loan application is not made known unless it is disclosed in writing to the
12 prospective loan underwriter or loan guarantor.

13 (213) "Executive director" means the executive director of the Idaho
14 real estate commission.

15 (224) "Expired license" means the status of a license when the license
16 period has expired and the license is not renewed or provisional license
17 granted, and before the license is terminated.

18 (235) "Fee or commission" means a payment, actual, promised or ex-
19 pected, as compensation for the performance of any act requiring a real
20 estate license.

21 (246) "Inactive license" means the status of a license that is not ex-
22 pired, terminated, suspended or revoked, and during which inactive period
23 the license holder is not authorized to act as or associate with a designated
24 broker.

25 (257) "Legal business entity" means and includes any type of corpora-
26 tion, partnership, limited liability company or limited liability partner-
27 ship, a governmental entity, trust or other entity capable of conducting
28 business.

29 (268) "Licensee" means any person who is licensed in accordance with
30 this chapter to engage in the business or act in the capacity of real estate
31 broker, associate broker or real estate salesperson.

32 (279) "Limited broker" means a broker individually qualified to do
33 business in Idaho, but who may not have associate brokers or salespersons
34 licensed with that broker.

35 (2830) "Live presentation" means, in reference to a real estate course
36 offering, a real estate course that is personally presented by the instruc-
37 tor and personally attended by the student at the same facility, or, if sepa-
38 rated by distance, the instructor and student are connected by contemporane-
39 ous, two-way audio and visual communication.

40 (2931) "Main office" means the principal location where the real estate
41 broker is licensed to transact business.

42 (302) "Person" means and includes an individual, or any legal business
43 entity.

44 (313) "Primary Idaho license" means an Idaho real estate license that is
45 not contingent upon continuance of a license in another state or jurisdic-
46 tion.

47 (324) "Provisional license" means an extension of the period of active
48 licensure, beyond the licensee's expiration date, granted by the commission
49 for the purpose of allowing the licensee to complete the continuing educa-

1 tion requirements set forth in section 54-2023, Idaho Code, or for any other
2 purpose allowed by this chapter.

3 (335) "Real estate broker" means and includes:

4 (a) Any person other than a real estate salesperson, who, directly or
5 indirectly, while acting for another, for compensation or a promise or
6 an expectation thereof, engages in any of the following: sells, lists,
7 buys, or negotiates, or offers to sell, list, buy or negotiate the pur-
8 chase, sale, option or exchange of real estate or any interest therein
9 or business opportunity or interest therein for others;

10 (b) Any actively licensed broker while, directly or indirectly, acting
11 on the broker's own behalf;

12 (c) Any person who represents to the public that the person is engaged
13 in any of the above activities;

14 (d) Any person who directly or indirectly engages in, directs, or takes
15 any part in the procuring of prospects, or in the negotiating or closing
16 of any transaction which does or is calculated to result in any of the
17 acts above set forth;

18 (e) A dealer in options as defined in this section.

19 (346) "Real estate salesperson" or "salesperson" means any person who
20 has qualified and is licensed as a real estate salesperson in Idaho under
21 this chapter, and is licensed under, associated with, and represents a des-
22 ignated broker in the performance of any act described in subsection (335) of
23 this section.

24 (357) "Real estate settlement procedures act" means the real estate
25 settlement procedures act of 1974, as amended, 12 U.S.C. section 2601 et
26 seq., and as in effect on January 1, 2008.

27 (368) "Regulated real estate transaction" means those real estate
28 transactions for which a real estate license is required under chapter 20,
29 title 54, Idaho Code.

30 (379) "Responsible broker" means the designated broker in the regulated
31 real estate transaction who is responsible for the accounting and transac-
32 tion files for the transaction, in the manner described in section 54-2048,
33 Idaho Code.

34 (3840) "Revoked license" means a license that has been permanently re-
35 voked by the issuing authority.

36 (3941) "Sales associate" means a salesperson or an associate broker li-
37 censed under and associated with a designated broker.

38 (402) "State or jurisdiction" means and includes any of the fifty (50)
39 states and any foreign jurisdiction that issue real estate licenses substan-
40 tially similar to those provided for in this chapter.

41 (413) "Successfully completed" means, in reference to a real estate
42 course offering, completing all required course hours and, except where the
43 licensee seeks continuing education credit for having regularly attended
44 the live presentation of a course, passing a commission-approved final exam-
45 ination.

46 (424) "Surrendered license" means a license that has been voluntarily
47 terminated or surrendered by a licensee who, at the time of the voluntary
48 termination or surrender, was under investigation or named in a formal ad-
49 ministrative complaint.

1 (435) "Suspended license" means a license that has been temporarily
2 suspended by the issuing authority.

3 SECTION 2. That Section 54-2038, Idaho Code, be, and the same is hereby
4 amended to read as follows:

5 54-2038. DESIGNATED BROKER -- GENERAL RESPONSIBILITIES -- BROKER
6 PRICE OPINIONS. The requirement that each brokerage company be maintained
7 and conducted in compliance with the Idaho real estate license law and the
8 Idaho real estate brokerage representation act is the responsibility of its
9 designated broker. The designated broker is responsible for the actions of
10 its licensees and associated unlicensed persons performed within the course
11 and scope of their employment or agency, regardless of the location of the
12 company's business or where representation is conducted.

13 (1) A designated broker is required to:

14 (a) Supervise and control, in the manner required by law and rule, all
15 office locations, and the activities of all licensees and unlicensed
16 persons associated with that brokerage company or for whom that design-
17 ated broker is responsible;

18 (b) Review and approve all real estate agreements including, but not
19 limited to, those related to listing, selling or purchasing property
20 and brokerage representation agreements;

21 (c) Be reasonably available to manage and supervise the brokerage
22 company during regular business hours. When a broker is a regular
23 full-time employee or is engaged in a full-time activity at a location
24 other than where the broker is licensed to do business, a presumption
25 will be made that the broker is unable to manage and supervise the bro-
26 kerage company in accordance with these requirements, and no sales
27 associate shall be licensed under the broker until such presumption is
28 overcome by evidence to the contrary, satisfactory to the commission.

29 (2) A broker who is otherwise qualified to do business in Idaho, but is
30 not able to manage and supervise according to this section, may be licensed
31 as a "limited broker" in Idaho and shall not have any sales associates li-
32 censed under that broker.

33 (3) An actively licensed salesperson or broker may, in the ordinary
34 course of business, give an opinion of the price of real estate for the pur-
35 pose of a prospective listing or sale. Only an actively licensed broker or
36 associate broker may prepare and render a broker price opinion, as defined
37 in this chapter. An associate broker who prepares and renders a broker price
38 opinion shall notify the designated broker and the associate broker may not
39 accept any fee except through the designated broker. Any licensee who ren-
40 ders a price opinion that does not comply with this subsection or with the
41 requirements of section 54-4105, Idaho Code, is subject to discipline by the
42 commission.

43 (4) A designated broker shall not allow any person who is not properly
44 licensed to represent that broker as a sales associate or otherwise, in any
45 real estate business activities requiring a real estate license. "Properly
46 licensed" means a license or a change in license that has been made effective
47 by the commission.

1 SECTION 3. That Section 54-2058, Idaho Code, be, and the same is hereby
2 amended to read as follows:

3 54-2058. AUTHORITY TO INVESTIGATE AND DISCIPLINE. (1) General author-
4 ity to investigate. The commission may investigate the action of any per-
5 son engaged in the business or acting in the capacity of real estate broker
6 or salesperson ~~within the this state of Idaho~~, or any person believed to have
7 acted as a real estate broker or salesperson without a license in violation
8 of section 54-2002, Idaho Code. Upon receipt of a written complaint from
9 anyone who claims to have been injured or defrauded as a result of such ac-
10 tion, or upon information received by the executive director, the executive
11 director shall perform an investigation of the facts alleged against such
12 real estate broker or salesperson or such unlicensed person. Prior to the
13 initiation of any proceedings for the revocation or suspension of a license,
14 or for such other disciplinary actions as set forth in section 54-2059, Idaho
15 Code, the executive director shall transmit to the commission a report, in
16 writing, signed by the executive director, setting forth the facts alleged
17 against such real estate broker or salesperson or unlicensed person. Upon
18 receiving such report, the commission shall make an examination of all the
19 facts and circumstances connected with such report. If the facts set forth
20 in the report are deemed insufficient by the commission, no further action
21 shall be taken, unless the executive director resubmits the report with ad-
22 ditional facts supporting the filing of an administrative complaint. Should
23 the commission deem that the facts set forth in the report are sufficient to
24 proceed with a formal action, the commission shall authorize the filing of an
25 administrative complaint against such person.

26 ~~A person is acting "within the state of Idaho" if that person is dealing~~
27 ~~with any interest in real property or a business opportunity involving an in-~~
28 ~~terest in real property, which is situated in this state, or is conducting or~~
29 ~~attempting to conduct or solicit real estate business with residents of the~~
30 ~~state of Idaho.~~

31 (2) Audits. The commission or its duly authorized representative is
32 vested with the authority to conduct periodic inspections, surveys and au-
33 dits of the transaction records and real estate trust accounts of all Idaho
34 licensed designated brokers. Any transaction records or real estate trust
35 account records located outside the state of Idaho shall promptly be made
36 available to the commission upon request at the licensee's own cost and at
37 the location or in the manner requested by the commission. If the analysis
38 of a broker's real estate trust account indicates a deficiency or any ir-
39 regularity which cannot be resolved between the commission and the broker,
40 the commission may order a complete audit of the trust account by a certified
41 public accountant at the broker's expense.

42 (3) The commission also has the authority to investigate the action of
43 any Idaho licensee as provided in this section. The licensee or broker shall
44 answer all reasonable investigative questions of the commission, and must
45 make available, promptly upon request, any and all records to the commission
46 at the licensee's own cost and at the location or in the manner requested by
47 the commission.