

## GUIDELINES FOR COMPLETING CONFIRMATION OF COMPENSATION FORM

(Form No. 770)

NC Real Estate Commission rule 58A.0109(c) requires real estate agents to disclose the receipt of (or the expectation of receiving) any compensation, incentive, bonus, rebate, or other valuable consideration ("Compensation") from a third-party under certain circumstances. A summary of the rule's requirements is as follows:

- The rule applies to real estate *sales* transactions
- The rule applies to receipts from any party or person other than the agent's client (other party to transaction, other party's agent, vendor or supplier of goods or services, etc.)
- Disclosure must be made to the agent's client
- The disclosure must describe the Compensation including:
  - o Its value
  - o The identity of the person or party by whom it will or may be paid
- The disclosure must be "timely"
  - o According to the new rule, "[a] disclosure is timely when it is made in sufficient time to aid a reasonable person's decision-making"
- The disclosure may be made orally, but it must be confirmed in writing before the client makes or accepts an offer to buy or sell

The rule does NOT require disclosure:

- To a person who is not the agent's client the compensation the agent expects to receive from his/her client

**EXAMPLE #1:** Listing agent offers cooperative compensation of Y% of the sales price of the property to subagents and buyer agents who participate in the MLS. An agent working as a subagent with a prospective buyer would not be required under the rule to disclose the compensation the subagent expects to receive if the buyer purchases the property because the buyer is not the subagent's client.

- To the agent's client the compensation the agent expects to receive from his/her real estate firm

**EXAMPLE #2:** Firm and agent enter into independent contractor agreement pursuant to which firm agrees to pay agent in accordance with an attached compensation schedule. The schedule provides that the brokerage fees on closed transactions in which the agent is involved will be split between firm and agent in differing percentages depending on how many closed transactions agent is involved in during a specified period of time. Agent works with a buyer client who is interested in a property listed in MLS. Although agent would be required to disclose to the buyer client before the buyer makes an offer on the property the amount of cooperative compensation being offered by the listing agent, the agent would not be required by the rule to disclose to the buyer client the manner in which the cooperative compensation will be divided between the agent and the agent's firm.

If the written agency agreement between the agent and the client describes all the compensation to be received, including its value and the identity of the person paying it, no further disclosure is required.

- EXAMPLE #3:** Buyer agency agreement indicates that if buyer buys property during term of agreement, agent will be entitled to a commission of X% of purchase price of property, and that agent will seek payment of commission from listing agent or seller. Buyer becomes interested in listed property and buyer agent determines that listing firm is offering cooperative compensation through the multiple listing service of X% of the sales price. Buyer agent would not be required to make further disclosure regarding the commission he/she would receive if buyer purchases the property.



Examples of when Rule 58A.0109(c) DOES require disclosure of compensation, incentive, bonus, rebate, or other valuable consideration:

- Compensation in addition to that described in the agency agreement

**EXAMPLE #4:** Same facts as EXAMPLE #3 above, except listing agent is offering cooperating agents a commission of X% plus 1. Buyer agent would be required to disclose to buyer client any compensation above X% that he/she expects to receive if buyer purchases property and confirm such disclosure in writing.

- The existence of an incentive or “step” program that would result in the payment to the agent working with buyer of additional compensation, whether the compensation would be paid in connection with the transaction in question or in a future transaction

**EXAMPLE #5:** Builder has an incentive program in which agents who sell three of the builder’s homes in a specified period of time will receive a free trip to a Caribbean island upon the closing of the third sale. Agent, who is aware of the program, shows one of the builder’s properties to a buyer client. If buyer client is interested in making an offer on the property, agent must disclose the existence of the program to the buyer in writing prior to the making of the offer, even though the agent will not receive the trip unless he sells two more of builder’s properties during the specified time frame. Note that agent would also be required to disclose the *value* of the trip.

- Fees from third-party vendors or suppliers of services

**EXAMPLE #6:** In connection with listing property, seller agrees to obtain and pay for a home warranty for the property. Listing agent applies for home warranty and is aware that if listing agent assists the seller in applying for the home warranty, the home warranty company will pay Firm a fee for its assistance in obtaining the home warranty. Agent must disclose the potential fee to the seller, and should do so prior to submitting the home warranty application in order for the disclosure to be considered “timely.” Agent must also confirm disclosure of the fee in writing to the seller before the seller makes or accepts an offer to buy or sell the property. (NOTE: Disclosing such fee in the relevant section of the listing agreement or buyer agency agreement, as the case may be, satisfies the required disclosure/confirmation.)

Rule 58A.0109(c) also requires disclosure to the Seller and the Buyer of the total compensation a firm will receive when the firm is acting as a dual agent.

**EXAMPLE #7:** Listing agreement provides that the seller will pay ABC Firm a fee of X% of the sales price of the property and that ABC will offer cooperating subagents and buyer agents compensation equal to Y% of the sales price of the property. ABC practices dual agency. An agent with ABC represents a buyer who is interested in seeing the property listed with ABC. Paragraph 4 of the Exclusive Buyer Agency Agreement between ABC and the buyer indicates that if the buyer buys property during term of agreement, ABC will be entitled to a commission of Y% of purchase price of property, and the “Dual Agency Compensation” section in paragraph 14 of the Buyer Agency Agreement indicates that if ABC acts as a dual agent, the total fee ABC expects to receive for its services in representing the buyer and the seller will be X% of the purchase price of the property. The buyer agent would not be required to make further disclosure regarding the total compensation ABC will receive if the buyer purchases the property. However, if the total fee the firm will receive is different from that described in the “Dual Agency Compensation” section, the buyer agent should timely disclose the actual fee to the buyer client and confirm the disclosure in writing. )

**EXAMPLE #8:** Same facts as EXAMPLE #7 above, except that the Exclusive Buyer Agency Agreement between ABC and the buyer indicates that if the buyer buys property during term of agreement, ABC will be entitled to a commission of Y + 1% of purchase price of property. Since ABC’s fee from the buyer is 1% more than the amount offered to cooperating agents under the listing agreement with the seller, ABC is in a position to make a total fee that is 1% more than the total fee set forth in the listing agreement. Therefore, the listing agent should disclose the actual fee that ABC is in a position to make to the seller client and confirm the disclosure in writing.

**Acknowledgment by client.** Although the client’s signature on the form is NOT required by the Rule, it is strongly suggested that the client sign the form to clearly evidence that the Firm has complied with the disclosure obligation. If a client refuses to acknowledge receipt of the form, the agent should note on the agent’s copy of the form the date and time that the agent gave the form to the client and that the client refused to sign it and the agent should send it to the client in a manner that provides proof it was sent.