August 25, 2017

VIA U.S. MAIL and EMAIL

Ms. Kerri Lewis
General Counsel
Texas Real Estate Commission
P. O. Box 12188
Austin, TX 78711-2188

RE: Proposed Amendments to Texas Real Estate Commission Rules

Dear Ms. Lewis:

On behalf of the more than 111,000 members of the Texas Association of REALTORS®, I am pleased to provide the following comments regarding the Texas Real Estate Commission's proposed rule changes of the Texas Administrative Code, as published in the Texas Register on August 25, 2017.

I. Use of Standard Contract Forms (§537.11)

In addition to the Commission's standard contract forms, the Association is able to offer our members over 125 additional forms to use in their real estate transactions. Approximately 50 of those forms, like the *Commercial Contract – Improved Property* (TAR 1801) or the *Residential Lease* (TAR 2001), are able to exist because of the current exception provided in 537.11(a)(4)(A), which allows a license holder to use a form in "transactions for which no standard contract form has been promulgated by the Commission" and "the license holder uses a form prepared by an attorney at law licensed by this state and approved by the attorney for the particular kind of transactions involved."

The amendments to 22 TAC §537.11, Use of Standard Contract Forms, propose to add additional requirements that such Association forms must contain: (i) the name of the lawyer or trade association who

prepared the form; (ii) the name of the broker or trade association for whom the form was prepared; (iii) the type of transaction for which the lawyer has approved the use of the form; (iv) any restrictions on the use of the form; (v) a statement that the form has not been approved by the Commission; and (vi) a statement that Commission rules prohibit real estate license holders from giving legal advice. While many of these elements are already contained in the current Association forms, the last two elements (namely, "a statement that the form has not been approved by the Commission" and "a statement that Commission rules prohibit real estate license holders from giving legal advice") would require modifications to most, if not all, of those 50 forms. Unless required by law, the Association attempts to limit the frequency of form updates, which can be burdensome to members as they make efforts to shift to the new versions. By requiring nearly half of the Association's forms to be updated, license holders, and in turn consumers, may ultimately be the ones most detrimentally affected by the proposed changes. Therefore, the Association opposes these changes.

Additionally, the amendments to 22 TAC §537.11, Use of Standard Contract Forms, propose to add a new subsection (b) that would state as follows: "Subsection (a)(4)(A) does not permit a license holder to use a form that changes the rights, remedies or responsibilities of a principal contained in a mandatory contract form or addendum." The Association opposes this language.

New subsection (b) would limit the ability of the Association to be responsive to the needs of license holders and consumers by (i) prohibiting use of existing Association forms, like the *Relocation Addendum* (TAR 1941)*, Release of Earnest Money* (TAR 1904), and depending on the Commission's interpretation, perhaps the *Notices Regarding Contingency Under Addendum for Sale of Other Property by Buyer* (TAR 1912), and *Seller's Notice to Buyer of Removal of Contingency Under Addendum for Back-Up Contract* (TAR 1913); and (ii) prohibiting the Association's creation of future forms. For instance, if this rule is adopted and the Commission ultimately decides not to adopt the proposed *Addendum Concerning Right to Terminate Due to Lender's Appraisal* (TREC 49-0), the Association would be prohibited from creating such a form, despite the demonstrated need.

II. Advertisements (new §535.155)

Although much of new section 22 TAC §535.155, Advertisements, comes from the existing advertising rule, the new section expands the list of items considered an advertisement that "misleads or is likely to deceive the public, tends to create a misleading impression, or implies that a sales agent is responsible for the operation of the broker's real estate brokerage business." Proposed subsections (d)(4) and (7) add that an advertisement is deceptive or misleading if the advertisement:

(i) uses a title, such as owner, president, CEO, COO, or other similar title, email or website address that implies a license holder is responsible for the operations of a brokerage unless the license holder is the designated broker; or

(ii) contains the name of a sales agent whose name is, in whole or in part, the same as the broker's name and does not contain a disclosure that the sales agent is not responsible for the operation of the brokerage."

The Association opposes both proposed additions for the following reasons:

First, proposed subsection (d)(4) will prohibit license holders from using their executive or supervisory titles in advertisements. For example, Mary Frances Burleson is an associated broker for Ebby Halliday Real Estate, Inc. She holds the title of President & CEO and bears that responsibility. The designated broker is Betty Misko. Under the proposal, an advertisement including such title would be considered deceptive or misleading—despite the fact that the associated broker holds that title in the brokerage. This proposed addition also raises concerns as to whether the use of other titles not expressly stated in subsection (d)(4) would be considered deceptive or misleading.

In addition, the requirements to provide the IABS and make it available through a business website alleviate the consumer-confusion issue of identifying the designated broker for a brokerage.

Second, new subsection (d)(7) leads to further confusion. The plain meaning of the new subsection may prohibit certain sales agents from advertising under their licensed name if their name, in whole or in part, is the same as the broker's name unless an additional disclosure is included. For example, Jane Smith is a sales agent sponsored by Smith Realty. John Smith is the designated broker for Smith Realty. If Jane places an advertisement with her name and her brokerage's name, her advertisement may be considered deceptive or misleading unless she adds a disclosure stating she is not the broker responsible for the brokerage. Further, the proposal does not specify the language for the disclosure that would meet the requirements of this subsection.

It is important to note that new subsection (d)(7) replaces the language provided in 535.154(c) of the current rule. This language is as follows: "If the broker's name or its assumed name includes a salesperson's name, the advertisement must include another assumed name of the broker that does not include a salesperson's name, or the designated broker's name." Since the language in the current rule is unambiguous, the Association opposes this proposal.

III. Consumer Information (§531.18) and Information About Brokerage Services (§531.20)

Current rules require that a link to both the Consumer Protection Notice (CPN) and the Information About Brokerage Services form (IABS) be posted in at least 10-point type in a readily noticeable place on the business website's homepage. The amendments to 22 TAC §531.18, Consumer Information, and §531.20, Information About Brokerage Services, propose changes that would, in part (i) prohibit placing the link to the Consumer Protection Notice (CPN) and Information About Brokerage Services form (IABS) in the footer of a business website's homepage; and (ii) increase the required size of the link from 10-point type to 12-point type. The Association opposes both of these changes.

First, the footer of a website is a readily noticeable location. The bottom of a website is frequently the site of important information, like contact information, a sitemap, and policies, meaning this is already a common place a consumer would look if he or she needs to

contact the brokerage. Furthermore, placement of the link in the footer allows the information to be included on every page of a website, going beyond the current rules' requirements and ensuring that consumers can more easily obtain the required information. To prohibit this type of placement will make this information more difficult to find, not less.

Second, the change in the link's required font size unnecessarily burdens those license holders who currently comply with the rules governing the CPN and the IABS. While the Association recognizes that many license holders are still not in compliance, to change the link's font size requirement now requires *all* license holders to make the change, regardless whether they are currently in compliance.

IV. Paragraph 5 of the TREC Contracts

The Commission's standard contracts, like the *One to Four Family Residential Contract (Resale)* (TREC 20-13, TAR 1601), contain proposed revisions to Paragraph 5:

> **5. EARNEST MONEY:** Within 3 days after the Effective Date [~~Upon execution of this contract by all parties~~], Buyer shall deposit $______________ as earnest money with , as escrow agent, at ____ (address). Buyer shall deposit additional earnest money of $____________ with escrow agent within _____ days after the Effective Date [~~effective date~~] of this contract. If Buyer fails to deposit the earnest money within the time [~~as~~] required [~~by this contract~~], Seller may terminate this contract or exercise Seller's remedies under Paragraph 15, or both, by providing notice to Buyer before Buyer deposits earnest money [~~Buyer will be in default~~]. **Time is of the essence for this paragraph.**

First, the Association echoes the concerns expressed by several of the Commissioners at the August 7th meeting, chiefly that the three-day time period may be problematic in some transactions. For instance, if the contract is executed on the Friday evening before Labor Day and the title company is closed, despite the buyer's intention to perform, the seller may be able to terminate because of a mere oversight.

This language is nearly identical to the Association's commercial contracts, with one notable difference: the Seller may either terminate *or* exercise the Seller's remedies under Paragraph 15, but not both ("If Buyer fails to timely deposit the earnest money, Seller may terminate this contract or exercise any of Seller's other remedies under Paragraph 15 by providing written notice to Buyer before Buyer deposits the earnest money."). In the commercial context, most sellers just want to be able to terminate in this situation and place the property back on the market. Residential transactions are no different in this regard, and allowing both termination and Paragraph 15 remedies to be exercised concurrently may lead to confusion as to how these remedies are applied.

The Texas Association of REALTORS® appreciates this opportunity to comment. If we can provide any further information, please do not hesitate to contact Lori Levy, General Counsel, at (512) 480-8200 or llevy@texasrealtors.com.

Sincerely,

Vicki Fullerton
2017 Chairman
Texas Association of REALTORS®