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1 ■ Introduction

Contents:

- Course Requirement
- Introduction to *Sam's Brokerage Case Study*
- New Mexico Real Estate Commission Rule Book

INTRODUCTION

Welcome to the New Mexico Real Estate Commission's Qualifying Broker Refresher Course (QBRC).

This course is designed to be interactive to maximize its benefit to you. It is structured around six modules, a fictional case study, and the New Mexico Real Estate Commission Rule book. Your instructor will lead you through each module, relevant portions of the Rule book, and encourage your participation. You will also find extra resources and additional information located in the Resources section at the end of each module.

It is important to note that the Qualifying Broker Refresher Course is just that – a *refresher* course. The QBRC is not a thorough teaching on any one topic but a review of information that Qualifying Brokers should know. While there is a breadth of information provided in this course, brokers are advised to take other specific courses that fully cover topics to increase their knowledge.

Qualifying Brokers are also reminded to stay up to date on emerging issues relevant to a real estate brokerage and new or revised laws and regulations. No course can provide current information in this area. Make note of the websites or other sources of information you regularly can check to find out what's new.

This first module provides an introduction to the Qualifying Broker Refresher Course (QBRC) and describes the New Mexico Real Estate Commission requirement for the course.

MODULE OBJECTIVES

Upon completion of this module, you should be able to:

- Explain the New Mexico Real Estate Commission's requirement for the course.
- Discuss the difference between this course and continuing education courses.
- Describe the instructional use of the *Sam's Brokerage Case Study* throughout the course.
- Participate in class dialogue discussing current issues relevant to Qualifying Brokers.

ACTIVITY: ICE BREAKER INTRODUCTIONS

INSTRUCTIONS: Please follow the instructor's guidance and introduce yourself.

COURSE REQUIREMENTS

REQUIREMENT FOR TAKING THE QUALIFYING BROKER REFRESHER COURSE

This section discusses the educational requirement for taking the Qualifying Broker Refresher Course according to the New Mexico Real Estate Commission rules.

- NMREC Part 16 of the Rule Book states that all Qualifying Brokers must successfully complete as a condition of license renewal or as a condition of reinstatement of qualifying broker status the New Mexico Real Estate Commission approved six (6) hour Qualifying Broker Refresher Course.
- This refresher course requirement is separate from any continuing education requirement set forth in license law and in the New Mexico Real Estate Commission regulations. There is no continuing education credit for taking this course.
- The exemption from continuing education requirements granted Qualifying Brokers 65 or more years of age and continuously licensed 20 years or more does not apply to this course.

USE OF THE *SAM'S BROKERAGE* CASE STUDY AND THE NEW MEXICO REAL ESTATE COMMISSION RULE BOOK AS INSTRUCTIONAL TOOLS IN THE COURSE

This case study will be used throughout this course as an instructional tool to introduce examples of common situations found in brokerages and to consider the responsibilities and role of a Qualifying Broker with regard to each. Key aspects of a brokerage, such as hiring, licensing requirements, education, and transaction supervision will be covered. Selected portions of the case study will be interwoven with the material covered in each module to give you an opportunity to apply what you have learned in the course to situations you will likely encounter in your brokerage.

The New Mexico Real Estate Commission Rule book will be referred to throughout this course so that Qualifying Brokers will become reacquainted with the location of specific portions of license law and Commission rules.

ACTIVITY: CASE STUDY

INTRODUCTION TO *SAM'S BROKERAGE CASE STUDY*

INSTRUCTIONS: Please turn to *Sam's Brokerage Case Study* at the end of this module and take about 5 minutes to read it thoroughly.

Ask your instructor if you have any questions about the case or how it will be used in the course.

MODULE REVIEW

Before moving on to the next module, make sure that you can complete the following tasks presented in this module. If you have any questions, please consult your instructor or refer to information provided in the Resource section of this Participant Guide.

RESOURCES

- Important Terms/Definitions
- *Sam's Brokerage Case Study*
- Current New Mexico Real Estate Commission Rule Book (*New Mexico Real Estate License Law, Real Estate Commission Rules, and Uniform Owner Resident Relations Act* issued by the New Mexico Real Estate Commission)

IMPORTANT TERMS/DEFINITIONS

The following terms and definitions are used within this module and throughout the State of New Mexico Real Estate Commission training. The definitions are important for a solid understanding of the work and processes discussed. For additional definitions, see Part 16.61.1.7 of your New Mexico Real Estate Commission Rule book.

Your instructor will review these terms and definitions with you.

Term	Definition
<i>NMREC</i>	New Mexico Real Estate Commission
<i>Broker</i>	The term “broker” is used throughout this guide, rather than “licensee” or “agent.” A broker is any person holding a valid New Mexico Associate Broker’s or Qualifying Broker’s real estate license.
<i>Qualifying Broker (QB)</i>	A broker who has qualified an individual proprietorship, corporation, partnership or association to do business as a real estate brokerage in the state of New Mexico and who discharges the responsibilities of a qualifying broker.
<i>Associate Broker (AB)</i>	A person holding an Associate Broker’s license who is affiliated with a Qualifying Broker.
<i>Transaction</i>	Any real estate activity subject to the jurisdiction of the commission.

SAM'S BROKERAGE CASE STUDY

CASE: Sam – The Qualifying Broker for Sam's Brokerage

DESCRIPTION:

1. Sam has been a Qualifying Broker in New Mexico for ten years. He is a REALTOR® and participant in the Board's MLS. His brokerage is in a mid-sized city closely linked to several rural communities so about a third of the brokerage business is outside the city limits. Sam's brokerage consists of himself and three Associate Brokers all of whom list and sell real estate. Those Associate Brokers are David, who was licensed in 2000; Paul, just turned 65 with 23 years in the business and a former Qualifying Broker of his own brokerage; and Lucy, licensed in August 2007.
2. Sam's brokerage employs a full-time receptionist and a part-time bookkeeper. Sally, the receptionist, answers the phones, takes and forwards messages, and provides general clerical assistance for Sam and all the brokers. Sally is sometimes asked by the brokers to greet their clients or customers who are picking up or dropping off paperwork at the brokerage. Sally also updates the Remarks section of the MLS when asked to do so.
3. Charles is the part-time bookkeeper. His duties include all financial record keeping for the brokerage. As settlement statements and commission checks are delivered after closing, Charles prepares, signs and disburses the brokers' commission checks according to their commission agreements with the brokerage.
4. All earnest money checks received are delivered to the title company along with the signed purchase agreement. Sam really likes having "hands off" any trust funds so he doesn't have to oversee trust fund record keeping or to deal with earnest money disputes when a deal falls apart!
5. David, Sam's top producer, wants to increase his

CASE: Sam – The Qualifying Broker for Sam’s Brokerage

production but knows he needs help to do it. So, David decides to create his own “team” by hiring a licensed buyer broker to work with buyers, and a transaction coordinator to manage his team’s transaction details. He names his team “David’s Team” and designs a yard sign, business cards and other business related materials for the team. David hires an internet design firm to develop a strong, effective website to attract more prospects – a necessity in today’s business.

6. Sam fully supports David’s business growth plans and likes the catchy name he chose for his website: www.davidscitymls.com. Sam agrees to set up a former conference room for the team’s office with desks, phones, and storage cabinets. Sam is glad that David wants to stay with the brokerage and looks forward to increased profits as he expands.
7. Sam knows the importance of a Qualifying Broker’s supervision of brokerage activities and makes sure he’s available to answer questions about transactions or any problems that arise. He conducts weekly office meetings for all the brokers and training sessions for Lucy. To build her business, Sam advises Lucy to call FSBOs and expired listings, and to hold open houses for the other brokers’ listings. She’s already developed a good contact list and has been calling and mailing those she knows, with several sales and listings as a result of those contacts.
- 7b. Lucy’s former neighbor listed their home with her and now Lucy herself has a buyer interested in making an offer on it. She is concerned about handling the sale herself and consults with Sam for guidance. Sam steps Lucy through the proper way to fill out the purchase agreement and its cover pages, especially cover page 2 with its brokerage relationships disclosures on an in-house transaction. Sam had just completed training Lucy on Broker Duties and what each duty requires of her in a transaction. Lucy understands, but just wants to make sure she makes the disclosures properly so that’s why she reviews things with Sam. Although this isn’t Lucy’s first sale, it is the first time she would sell

CASE: Sam – The Qualifying Broker for Sam’s Brokerage

her own listing.

8. Paul is a retired Air Force colonel with contacts all over the U.S. that generate frequent referrals, the bulk of his business. Paul’s sales and listing packages are always turned in complete, including a Referral Agreement signed by Paul and the referring broker. Sam is pleased with Paul’s always-thorough paper work and consistent production. Paul is also named broker in charge for Sam whenever he is away on vacation or business.
9. Sam considers his increased Qualifying Broker responsibilities as David expands his business and Lucy builds hers. He plans to hire another two or three experienced associates and considers opening another office in a nearby rural market. Because of New Mexico’s multicultural heritage, Sam wants to hire a bilingual Associate Broker to serve the real estate needs of more people. Sam’s 40-acre multi-use subdivision has just been approved where he plans to build a small warehouse, a five space commercial center, and spec homes, so he wants to hire knowledgeable Associate Brokers to sell these properties in-house, if possible.
10. With the prospect of all these changes, Sam decides to review his brokerage responsibilities and policies to be certain he is in compliance with all laws and rules.

2. Qualifying Broker Roles, Responsibilities and Requirements

Contents:

- Roles and Responsibilities of a Qualifying Broker
- Licensing Requirements of a Qualifying Broker

INTRODUCTION

This module will present roles, responsibilities and the licensing requirements of Qualifying Brokers.

MODULE OBJECTIVES

Upon completion of this module, you should be able to:

- Differentiate between the responsibilities of a Qualifying Broker and an Associate Broker as described in a brokerage according to Part 16 and 17 of the New Mexico Real Estate Commission Rules.
- Differentiate the supervisory responsibilities of a Qualifying Broker affiliation and responsibilities of an Associate Broker as described in Part 17 of the New Mexico Real Estate Commission Rules.
- Review the activities for which a real estate license is required and the specific exemptions from licensure.

QUALIFYING BROKER ROLES AND RESPONSIBILITIES

A Qualifying Broker is responsible for all real estate activities within the brokerage. A Qualifying Broker may serve concurrently as a Qualifying Broker for more than one brokerage. A Qualifying Broker may be written agreement engage the services of Associate Brokers and Qualifying Brokers provided that the terms of such agreements are consistent with the responsibilities of the Associate Brokers and Qualifying Brokers as set forth in parts 16.61.16.9 NMAC and 16.61.17.9 NMAC. A Qualifying Broker may serve as Qualifying Broker and Associate Broker for different brokerages simultaneously provided that there are written agreements executed specifying the responsibilities and scope of authority that the broker has for each brokerage.(16.61.16.8)

A Qualifying Broker shall, in addition to all other requirements imposed by law, comply with the following:

- A. Conduct the real estate brokerage business under the trade name and from the brokerage address or addresses registered with the commission.
- B. Prominently display in the brokerage office, the Qualifying Broker's own license and the licenses of all other affiliated Associate Brokers conducting real estate brokerage business from the brokerage office.
- C. Have in the brokerage office and available to all affiliated Associate Brokers and Qualifying Brokers a current copy of the state of New Mexico real estate license law and rules manual.
- D. Notify the commission in writing within ten days of a change of the brokerage office address or telephone number.
- E. Supervise all real estate related activities including advertising of real estate or real estate services conducted on behalf of others by Associate Brokers and Qualifying Brokers affiliated with the brokerage and execute and maintain current written employment or independent contractor agreements with them.
- F. Maintain full and complete records wherein the Qualifying Broker and affiliated Associate Broker(s) are engaged on behalf of others, or on their own behalf, in real estate related matters processed through the brokerage. The required records shall be available to the commission or any duly authorized commission representative at the place of business of the Qualifying Broker or at the commission office. All such records whether in paper or electronic format shall be retained for a period not less than six years. In the case of a property manager, all

records shall be retained for a full term of any agreement and for six years from the termination of the management agreement.

- G. Deposit all money received on behalf of others in the proper trust account as soon after receipt as is practicably possible after securing signatures of all parties on the transaction documents.
- H. Receive and disburse all commissions, referral fees, and other considerations to any broker affiliated with the Qualifying Broker at the time the transaction went under contract. The Qualifying Broker may also disburse or authorize the disbursement of such commissions and fees to any entity entitled by law to receive same, including the estate of a deceased broker, a partnership, corporation, or limited liability company wholly owned by an Associate Broker and their spouse. Such partnership, corporation, or limited liability company shall not be required to have a Qualifying Broker for purposes of this sub-part.
- I. Assure that when the brokerage cooperates with or makes a referral to, or receives a referral from any broker, there be a transaction specific written co-brokerage or referral agreement signed by the Qualifying Broker.
- J. Designate a broker in charge in the event actual supervision by the Qualifying Broker is not possible, and inform the commission of such designation. During this period of time, the broker in charge shall assume all of the responsibilities of the Qualifying Broker for the brokerage.
- K. Upon termination or discharge of an Associate Broker return the Associate Broker's license to the commission within 48 hours.
- L. Ensure that each Qualifying Broker and Associate Broker affiliated with the brokerage obtain and maintain a current errors and omissions insurance policy as provided in NMSA 1978 Section 61-29-4.2 of the real estate license law and 16.61.5.8 NMAC of the commission rules.
- M. Successfully complete as a condition of license renewal or as a condition of reinstatement of Qualifying Broker status the commission-approved six hour Qualifying Broker Refresher course.
- N. Ensure that Associate Broker's affiliated with their brokerage complete the commission-approved New Broker Business Practice course within their first year of licensure.

QUALIFYING BROKER ROLES AND RESPONSIBILITIES

IMPORTANT FORMS FOR QUALIFYING BROKERS

An important brokerage consideration is the legal relationship between Associate Brokers (AB) and Qualifying Brokers (QB). The two choices for consideration are an independent contractor relationship or an employee relationship. Making this brokerage policy choice should take many things into consideration. The two forms referred to below may help a QB in that consideration. For specific legal advice concerning your brokerage, be sure to consult a qualified attorney.

- IRS Form SS-8 (Determination of Worker Status - Independent Contractor or Employee) available at www.irs.gov
- Realtors Association of New Mexico (RANM) Independent Contractor Agreement Form Explanation and Disclaimer

ACTIVITY: CASE STUDY

INSTRUCTIONS: Your instructor will divide you into groups. In your group, follow your instructor's guidelines and use the *Sam's Brokerage Case Study* along with Parts 16 and 17 in the Rule book to find the answers to the questions below. Write the answers in the spaces provided. Be prepared to share your answers with the class.

Must Sam maintain complete records and files for all transactions? What types of "records and files" are included? How long must these be kept?

Contrast Part 16(G) and Part 17(F in your Rule book). Now refer to Sam's Brokerage Case Study to consider whether Sam may authorize David, who is head of his "team," to disburse commissions to Associate Brokers who are members of his team. May Sam authorize anyone to direct the disbursement of commissions besides himself? Write your responses here.

Can Sam compensate an Associate Broker who is incorporated or an LLC?

OPTIONAL QUESTIONS

Is Sam, as a Qualifying Broker, required to supervise transactions of his brokerage? Explain "supervise."

Must Sam deposit money into a proper trust account as soon as possible after securing signatures of all parties to the transaction?

COMMERCIAL BROKERS (OPTIONAL)

Using the information provided in the Sam's Brokerage Case Study, answer the following question in your group:

What if Sam's brokerage is also engaged in commercial real estate? What other laws or Commission Rules would be required for a commercial brokerage?

PROPERTY MANAGEMENT BROKERAGE (OPTIONAL)

Using the information provided in the Sam's Brokerage Case Study, answer the following question in your group:

What if Sam's brokerage is also engaged in property management? What other laws or Commission Rules would be required for a property management brokerage?

REQUIREMENTS FOR QUALIFYING BROKERS

The requirements for obtaining a Qualifying Broker license are that the applicant be:

- Actively engaged in the real estate business for at least two of the last five years preceding application for the QB license.
- Completed a 30-hour Brokerage Office Administration Course, if first licensed as a QB after June 16, 2006.
 - Applicants who can document that they were New Mexico Qualifying Brokers on or before December 31, 2005 are not subject to these requirements, and may regain Qualifying Broker status by filing a trade name registration form, paying the trade name registration fee to the New Mexico Real Estate Commission and completing the commission-approved six hour Qualifying Broker Refresher course. (**New Rule January 2012**)
- Pass the New Mexico Real Estate Broker's Examination.
- Pay the \$270 license fee. (If an associate broker is upgrading their license to a qualifying broker there is no fee to upgrade their license.)

REAL ESTATE LICENSE LAW: PROHIBITION OF UNLICENSED REAL ESTATE ACTIVITY (61-29-1)

Listed below are the activities for which a real estate license is required:

- It is unlawful to engage in the business of real estate or act in any capacity of the business without a license issued by the New Mexico Real Estate Commission.
- Engaging in the business of real estate with or without a license issued by the New Mexico Real Estate Commission brings the individual under the jurisdiction of the New Mexico Real Estate Commission.

The exemptions from licensure are as follows:

- An owner of property acting on behalf of his own property
 - employees of the owner
 - employees of a Qualifying Broker acting on behalf of the owner as a property or investment manager
 - exemption from licensure ends at the 100 subdivision parcel threshold
- Isolated or sporadic transactions not exceeding two annually in which a person acts as an attorney in fact.
- Attorney in fact for an owner granted by a relative.
- An attorney at law in performance of the attorney's duties as an attorney at law.
- A receiver, trustee in bankruptcy, administrator, executor, and court ordered sale, etc.
- A salaried employee of a governmental agency acting in the scope of their employment.
- Persons who deal exclusively in mineral leases or sales of those rights or royalties.

ACTIVITY: QUESTION/ANSWER

INSTRUCTIONS: Using the Sam’s Brokerage Case Study, write the answers to the following questions in the spaces provided. Be prepared to share your answers with the class and explain why.

Can Sam and David “contract out” of the requirement for Sam to supervise David’s transactions and those of his team providing that David maintains his own office and records at a home office?

OPTIONAL QUESTIONS

Sam plans to be away for vacation for more than five days. Must he designate a “Broker in Charge”? Who would he designate? Does the broker in charge have to be a Qualifying Broker?

Is anyone in Sam’s brokerage exempt from licensure?

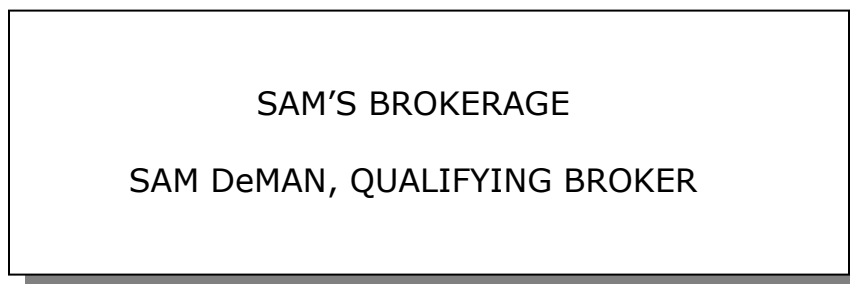
APPROPRIATE AND LEGAL SIGNAGE FOR A BROKERAGE (PART 31 OF THE COMMISSION RULE BOOK)

A REVIEW OF APPROPRIATE AND LEGAL SIGNAGE

An important Qualifying Broker (QB) responsibility is to ensure that the sign for the brokerage complies with Part 31 requirements. These requirements are as follows:

- The sign must be legible and maintained in a conspicuous place near the office entrance.
- The sign must include the name of the brokerage as registered with the New Mexico Real Estate Commission and the name of the QB, and the words “Qualifying Broker.” See the example presented below.
- If the brokerage is located in an office building the Qualifying Broker name may be listed in the office directory and by displaying the brokerage trade name on or near the office entrance.
- Note: In the case of a home office brokerage, the sign must be displayed in a conspicuous place near the office entrance.

Example of correct signage:



ACTIVITY: QUESTION/ANSWER

INSTRUCTIONS: Considering the rules for appropriate brokerage signage, read the scenario below and write the answer to the coinciding question in the space provided:

Realizing she doesn't have a sign for her home office, a Qualifying Broker takes out a sheet of paper and using a magic marker, she enters the name of her brokerage, her own name, and "Qualifying Broker." She tapes her new sign to the wall at the entrance to her home office.

Does this sign comply with Part 31 of the Rule Book requirements?

MODULE REVIEW

Before moving on to the next module, make sure that you understand and can apply to your brokerage the objectives presented in this module. If you have any questions, please consult your instructor or refer to information provided in the Resource section of this Participant Guide.

- Recognize the activities for which a real estate license is required along with the specific exemptions from licensure.
- Explain the supervisory responsibilities of a Qualifying Broker in a brokerage according to Part 16 of the New Mexico Real Estate Commission Rules.
- Differentiate the supervisory responsibilities of a Qualifying Broker with the affiliation and responsibilities of an Associate Broker.

RESOURCES

CASE STUDY AND RULE BOOK

- *Sam's Brokerage Case Study*
- Rule book (New Mexico Real Estate License Law, New Mexico Real Estate Commission Rules, and Uniform Owner Resident Relations Act issued by the New Mexico Real Estate Commission)

3. Qualifying Broker Duties and Rules that Impact Qualifying Brokers

Contents:

- Broker Duties
- Rules Compliance
- Identifying Areas of Non-Compliance in Your Brokerage
- Implementing Policies in Your Brokerage to Ensure Compliance

INTRODUCTION

This module will review the duties and responsibilities of Qualifying Brokers with regard to broker duties, errors and omissions insurance, unlicensed assistants, trust accounts, foreign brokers, and advertising/disclosure in print and other methods of real estate communications. Key forms will also be reviewed and explained.

The purpose of this module is to review certain New Mexico Real Estate Commission Rules as they relate to a Qualifying Broker and a Brokerage.

MODULE OBJECTIVES

Upon completion of this module, you should be able to:

- Implement policies that will ensure compliance with the rules in your brokerage.
- Contrast requirements of the rules with current challenges of operating a brokerage.
- Identify areas of noncompliance within your brokerage.

IMPORTANT TERMS/DEFINITIONS

The following terms and definitions are used in this module and throughout this course. They are found in Part 1 of the New Mexico Real Estate Commission Rules.

Your instructor will review these with you.

Term	Definition
<i>Broker Duties</i>	The duties that brokers owe to their clients and customers in the course of a real estate transaction.
<i>Client</i>	A person who has entered into an express written agreement with a brokerage for real estate services subject to the jurisdiction of the commission.
<i>Customer</i>	A person who uses real estate services without entering into an express written agreement with a brokerage subject to the jurisdiction of the commission.
<i>Foreign Broker</i>	A real estate brokerage licensed by a jurisdiction other than New Mexico engaged in real estate-related activities in New Mexico.
<i>In-house Transactions</i>	A transaction that occurs under the supervision of one qualifying broker in the same brokerage.
<i>Responsible Person</i>	The Qualifying Broker or Associate Broker for whom an unlicensed assistant works. If an unlicensed assistant works for more than one broker, each broker for whom the unlicensed assistant works is a responsible person.
<i>Trust Account</i>	An account at an acceptable financial institution established by the qualifying broker for the purpose of holding money of others received by the qualifying broker in a transaction which includes a brokerage trust account, property management trust account, custodial trust account or special trust account.
<i>Unlicensed Assistant</i>	A person who does not hold a New Mexico real estate broker's license and works under the supervision of a responsible person to perform duties for the brokerage as provided in 16.61.21 NMAC.

PART 19 BROKER DUTIES – A REVIEW

Part 19 of the New Mexico Real Estate Commission Rules establishes ten duties owed by all brokers to all customers and clients. They were established to create specific, measurable duties brokers owe to customers and clients.

Because Commission Rules at Part 16.61.16.8 make the qualifying broker responsible for all real estate-related activities of the brokerage, and because of case law precedent, qualifying brokers are advised that they are responsible for disclosure and performance of broker duties whether they are disclosing and performing them themselves or they are disclosed and performed by an associate broker.

Before the time a broker generates or presents any written document that has the potential to become an express written agreement, the broker shall disclose in writing to their prospective customer or client, and obtain a written acknowledgement from their prospective customer or client, showing the delivery of the disclosure of the following broker duties:

- A. Honesty and reasonable care as set forth in the provisions of this section;
- B. Compliance with local, state, and federal fair housing and anti-discrimination laws, the New Mexico real estate license law and the real estate commission rules, and other applicable local, state, and federal laws and regulations;
- C. Performance of any and all written agreements made with the customer or client;
- D. Assistance to the broker's customer or client in completing the transaction, unless otherwise agreed to in writing by the customer or client, including:
 - (1) Presentation of all offers or counter-offers in a timely manner; and
 - (2) Assistance in complying with the terms and conditions of the contract and with the closing of the transaction; if the broker in the transaction is not providing the service, advice or assistance described in Paragraphs (1) and (2) of Subsection D of 16.61.19.8 NMAC, the customer or client must agree in writing that the broker is not expected to provide such service, advice or assistance, and the broker shall disclose the existence of

such agreement in writing to the other brokers involved in the transaction;

- E. Acknowledgement by the broker that there may be matters related to the transaction that are outside the associate broker's or qualifying broker's knowledge or expertise and that the associate broker or qualifying broker will suggest that the customer or client seek expert advice on these matters;
- F. Prompt accounting for all money or property received by the broker;
- G. Disclosure of any potential conflict of interest that the broker has in the transaction including but not limited to:
 - (1) any written brokerage relationship the broker has with any other parties to the transaction or;
 - (2) any material interest or relationship of a business, personal, or family nature that the broker has in the transaction;
 - (3) other brokerage relationship options available in New Mexico;
- H. Written disclosure of any adverse material facts actually known by the associate broker or qualifying broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction;
- I. Maintenance of any confidential information learned in the course of any prior agency relationship unless the disclosure is with the former client's consent or is required by law;
- J. Unless otherwise authorized in writing, an associate broker or qualifying broker shall not disclose to their customer or client during the transaction that their seller client or customer has previously indicated that they will accept a sales price less than the asking or listed price of a property; that their buyer client or customer has previously indicated that they will pay a price greater than the price submitted in a written offer; the motivation of their client or customer for selling or buying property; that their seller client or customer or their buyer client or customer will agree to financing terms other than those offered; or any other information requested in writing by the associate broker's or the qualifying broker's customer or client to remain confidential, unless disclosure is required by law.

Maintain as confidential the principal's negotiating position regarding the listed or offered price, or the motivation for purchase or sale.

What are some items of importance Qualifying Brokers should be aware of?

- Don't confuse the terms: "customers" and "clients."
- Make certain you use the correct term for the relationship so that no other relationship is implied. EXAMPLE: Do not refer to a person as a "client" unless there is an express written agreement establishing a client relationship.
- Required disclosures must be made in a timely way. The REALTORS® Association of New Mexico (RANM) forms provide the space for disclosures and when they must be given.
- The decision to have a written versus an unwritten relationship is made initially by a Qualifying Broker as a brokerage policy and then by a customer as a matter of choice.
- Important! In-house transactions (in which the buyer and seller are both being provided services by the same brokerage) require scrupulous attention to proper procedures so that no conflict of interest exists or may appear to exist.
- Real Estate Commission Rules no longer require performance of oral agreements.
- Remember the new rule requires written acknowledgement from the customer or client that broker duties have been presented.

ACTIVITY: QUESTION/ANSWER

OPTIONAL QUESTIONS

What if the Qualifying Broker (QB) is the listing broker for the property, and the AB represents the buyer in the purchase? Must the Associate Broker (AB) disclose that fact?

What if you, the QB, have a business, personal, or family relationship in the transaction your AB is involved in, does the QB's interest have to be disclosed? (Example: the QB is the seller or lessor, or the QB is the developer or builder of the property the buyer wants to buy or lease.)

POINTS TO REMEMBER ABOUT ADVERSE MATERIAL FACTS AND CONFIDENTIAL INFORMATION

An adverse material fact refers to something negative or wrong of such a nature that it would impact the negotiations between the buyer and the seller, including price to offer or accept, and their decision whether to buy or to sell.

Adverse material facts may exist about the property itself, about the transaction and whether it can be completed, and about the ability of the buyer to buy or the seller to complete the transaction.

POINTS TO REMEMBER ABOUT ADVERSE MATERIAL FACTS AND CONFIDENTIAL INFORMATION

What does Part 19 of the Commission Rules say about disclosure of an adverse material fact?

- Disclosure of any adverse material fact **actually known by the Associate Broker or the Qualifying Broker** about the property or the transaction, or about the financial ability of the parties to complete the transaction.

What is “confidential information”?

- “Confidential information” refers to personal information, not property information. Confidential information learned in any prior agency relationship must not be disclosed unless required by law or by consent of the former client.

Should property information always be disclosed?

- Property information must always be disclosed if adverse or pertinent **and known** by the broker.

EXAMPLE: Prior unfavorable property inspection, report or appraisal would not be confidential and must be disclosed. The seller’s motivation for selling, the fact that the seller might accept an offer lower than the listed price, or agree to terms other than those offered, are examples of confidential information that may not be disclosed without permission.

Brokers are advised that the courts have and may hold brokers to a higher standard.

A REVIEW OF COMMONLY USED FORMS

The use of current forms is an important risk reduction tool for a brokerage. Make sure you review the forms used in your brokerage to ensure proper usage and to be aware of recent revisions!

The Real Estate Commission does not promulgate or endorse any specific real estate transaction forms.

Brokers who are also REALTORS® have access to the RANM forms as a member benefit at no additional charge. Brokers who are not members may purchase access to the forms. The forms are copyrighted.

The only “standard” forms specifically created for the New Mexico real estate community are produced by the REALTORS® Association of New Mexico (RANM).

Qualifying Brokers are urged to download and print RANM Form 2311 which is a list of general info sheets compiled and edited by RANM’s General Counsel. These forms are an excellent source of information.

GET EXPERT ADVICE!

If you are unsure about any RANM forms, please get advice from RANM or your attorney. Brokers must not advise outside their knowledge and expertise and must recommend that consumers seek advice from the expert of their choosing.

RANM provides a legal hotline for its members only for general information about brokerage issues, but does not give specific legal advice. The hotline is available from 9 a.m. - 1 p.m. Monday – Friday.

PART 5 ERRORS AND OMISSIONS INSURANCE

Effective January 1, 2002, every active broker in New Mexico must have in effect a policy of errors and omissions (E&O) insurance that meets the requirements for E&O insurance spelled out in Part 5 of the Commission Rules. A Qualifying Broker must ensure that every broker licensed with their firm has a current policy in effect.

There is no requirement to purchase coverage from a specific insurance carrier. Brokers may choose to purchase E&O insurance from one of two types of policies:

- A “firm policy” which is one provided by their brokerage firm that covers all brokers performing real estate services on behalf of the firm.
- An “individual policy” purchased from the New Mexico group policy carrier, Rice Insurance, or from another insurance company offering E&O insurance coverage in New Mexico as long as the policy provides coverage and deductibles equivalent to those provided by the commissions group policy carrier.
- Know the limits of your E&O policy coverage.
- Review and choose specific coverage endorsements if needed.

An important point to remember about E&O insurance:

Most professional liability policies (including the Rice insurance group policy) require that there be coverage in place on the day of the transaction, that there be coverage in place on the day that a claim is made, AND that there be an UNBROKEN line of coverage between these two dates.

After you retire or are otherwise no longer licensed, you must have a tail coverage policy in place in order to be covered for those final transactions in your career.

PART 21 UNLICENSED ASSISTANTS

Unlicensed Assistants in a brokerage must be under careful supervision by “responsible persons” to ensure that they only conduct activities permitted by the Unlicensed Assistant Rule, Part 21 of the New Mexico Real Estate Commission Rules.

An unlicensed assistant is permitted to engage in the following activities:

A. obtaining information pursuant to written instructions from the responsible person from public records, a multiple listing service, listing exchange or from third party sources including, but not limited to, surveyors, banks, appraisers and title companies;

B. hosting and/or distributing literature at an open house under the following conditions:

(1) an unlicensed assistant does not discuss, negotiate or solicit offers for the property or provide any information other than printed material prepared and approved by the responsible person; and

(2) the responsible person is present at the open house where the unlicensed assistant is located;

(3) all inquiries are referred to the responsible person or other associate brokers or qualifying brokers;

C. disseminating and distributing information prepared and approved by the responsible person;

D. picking up and delivering paperwork to associate brokers or qualifying brokers other than the responsible person;

E. picking up and delivering paperwork to sellers or purchasers after a contract has been executed if the paperwork has already been reviewed and approved by the responsible person, without answering any questions or providing any opinions or advice to the recipient of the paperwork. All substantive questions must be referred to the responsible person;

F. writing advertisements, flyers, brochures, and other promotional materials for the approval of the responsible person, and placing classified advertisements approved by the responsible person;

G. placing or removing signs on real property as directed by the responsible person;

H. ordering repairs as directed by the responsible person;

I. receiving and depositing funds, maintaining books and records, while under the supervision of the responsible person;

J. typing or word processing documents, including purchase and listing

UNLICENSED ASSISTANT: PROHIBITED ACTIVITIES.

An unlicensed assistant is not permitted to engage in the following activities in connection with the purchase, sale or exchange of real property:

- A. preparing legal documents such as listing and sales contracts;
- B. interpreting documents, offering opinions or advice;
- C. disseminating and distributing information, unless the information is in writing and is prepared and approved by the responsible person;
- D. obtaining personal or property information from a client or customer of the responsible person except when acting as a coordinator directed by the responsible person by gathering and following up on information and the status of matters pertaining to the transaction after a contract has been executed;
- E. picking up from or delivering to customers or clients financial documents prepared by title companies, lenders or other third persons for the purpose of obtaining signatures;
- F. attending a closing without the responsible person present;
- G. representing himself or herself as being an associate broker or a qualifying broker or as being engaged in the business of buying, selling, exchanging, renting, leasing, managing, auctioning or dealing with options on any real estate or the improvements thereon for others;
- H. telephone solicitation of any kind designed to procure transactions requiring licensure under Section 61-29-1 et. Seq. NMSA 1978, including, but not limited to, procuring buyers, sellers, listings or appointments for listing presentations.

Disability

Notwithstanding the foregoing, if an associate broker or qualifying broker is a person with a disability as defined in the Americans with Disabilities Act or regulations promulgated hereunder, an unlicensed assistant may provide such additional services normally requiring a license to or on behalf of the associate broker or qualifying broker as would constitute a reasonable accommodation so long as the unlicensed assistant is under the direct control of the associate broker or qualifying broker, the associate broker or qualifying broker is as close as is practical to the activity, and the unlicensed assistant is not represented as being or having the authority

to act as an associate broker or qualifying broker. The associate broker or qualifying broker shall notify the commission of the identity of all unlicensed assistants who perform services normally requiring a license for the associate broker or qualifying broker pursuant to this rule prior to performance of these services.

ACTIVITY: QUESTION/ANSWER

UNLICENSED ASSISTANTS AND YOUR BROKERAGE

INSTRUCTIONS: Given the Part 21 requirements for “Responsible Persons” and the information presented in the previous table, answer the following questions and write your answers in the space provided:

Does a Qualifying Broker have any liability for an unlicensed assistant employed by an Associate Broker in their brokerage? Explain.

OPTIONAL QUESTIONS

Is it possible that an employee of a brokerage, such as a receptionist, could be considered an unlicensed assistant?

AN IMPORTANT CONSIDERATION FOR QUALIFYING BROKERS

Ensure that your associates execute an Unlicensed Assistant Employment Form when they hire an unlicensed assistant. Review with your associates your unlicensed assistant brokerage policies.

The purpose of this section is to review the importance of carefully managing trust accounts in your brokerage and to review proper records maintenance as established by Part 23 of the Commission Rules.

A Qualifying Broker remains responsible for proper record keeping for earnest money deposits even if deposited with a title company instead of a broker’s own trust account.

PART 23 TRUST ACCOUNTS

CREATING THE PAPER TRAIL: KEY POINTS TO REMEMBER ABOUT TRUST ACCOUNTS (NEW RULE JANUARY 2012)

The Qualifying Broker is responsible for the supervision and control of the trust account and must follow strict record-keeping requirements including:

- use printed, numbered checks and a check register; retain voided checks
- show dates and reasons for receipts and disbursements
- reconcile monthly both the bank statement and records of all funds
- retain records for six years. In the case of a property manager, retain all records for the full term of the agreement and for six years from the close of the transaction.

A complete paper trail must always be maintained including verification of when funds are placed with the title company used by the qualifying broker or the title company that the cooperating broker uses.

- the date received and amount received
- from whom received
- the related property transaction (address, parties)
- the nature of the funds (earnest money, rents, etc.)
- this record must remain in the transaction file and be available for inspection

CREATING THE PAPER TRAIL: KEY POINTS TO REMEMBER ABOUT TRUST ACCOUNTS

Part 23 specifically prohibits “wrongful deposits,” commonly known as commingling funds, such as the following:

- mingling funds of clients with broker’s own funds
- using funds of others for benefit of another
- placing funds of others in any account other than a trust account
- placing non-trust funds into a trust account
- placing broker’s own money into a trust account without specific prior approval of the New Mexico Real Estate Commission except the minimum balance as required in writing by a bank or savings and loan institution.
- failing to remove broker’s funds from the trust account

ACTIVITY: QUESTION/ANSWER

TRUST ACCOUNTS AND *SAM’S BROKERAGE*

INSTRUCTIONS: Using the information provided in the *Sam’s Brokerage* Case Study, write the answer to the following question in the space provided:

By taking all earnest money checks to the title company does Sam really have ‘hands off’?

Explain why or why not.

OPTIONAL ACTIVITY: QUESTION/ANSWER

TRUST ACCOUNTS – RECORD MAINTENANCE

A detailed record of all funds received should clearly indicate the following:

- Date received
- Date deposited (or delivered to title company)
- From whom received
- The related property transaction
- The nature of the funds: earnest money, etc
- Amount of deposit

INSTRUCTIONS: Following are two examples of a trust receipt.

Which of the following examples of earnest money receipts complies with New Mexico Real Estate Commission requirements? Explain why they do or do not comply and write your answer in the space provided.

EXAMPLE #1 – TITLE COMPANY RECEIPT FOR EARNEST MONEY

Date: April 1, 20XX	Received: \$2,000.00 check #123
Received from: Jane Smith, ABC Realty	
For: sale of 3435 Adams Drive, Any City, New Mexico	
Nature of Funds: Earnest Money	
INTERCITY TITLE COMPANY	
BY: _____	

EXAMPLE #2 TITLE COMPANY RECEIPT FOR EARNEST MONEY

Date:
April 1, 20XX

Received:
\$2,000.00

Received from: Jane Smith, ABC Realty

For: sale of 3435 Adams Drive, Any City, New Mexico

Nature of Funds:

INTERCITY TITLE COMPANY

BY: _____

PART 27 FOREIGN BROKERS

A real estate broker currently licensed by another state or licensing jurisdiction other than New Mexico, may engage in real estate activity in New Mexico as a foreign broker provided that he/she enters into a transaction specific written agreement with a New Mexico licensed qualifying broker prior to commencing such real estate activity. The foreign broker shall comply with all New Mexico laws, including but not limited to the real estate license law and real estate commission rules.

Additionally, the qualifying broker must assure that when the brokerage cooperates with or makes a referral to, or receives a referral from any broker; there be a transaction specific written co-brokerage or referral agreement signed by the qualifying broker.

OPTIONAL ACTIVITY: QUESTION/ANSWER

FOREIGN BROKERS AND *SAM'S BROKERAGE*

INSTRUCTIONS: Using the information provided in the *Sam's Brokerage* Case Study, answer the following question and write your answer in the space provided:

What is missing from the Referral Agreement that Paul turned in with his sale?

PARTS 31 AND 32 – SIGNAGE AND REAL ADVERTISING

NEWSPAPERS, YARD SIGNS, AUDIO AND VIDEO, COMPUTER, INTERNET, ETC.

Each Qualifying Broker shall place and maintain a legible sign in a conspicuous place near the office entrance identifying them as the qualifying broker. The trade name of the brokerage as registered with the commission shall be clearly shown.

In the case of a Qualifying Broker whose office is located in an office building, the Qualifying Broker may comply with this regulation by listing their name on the directory of offices provided by the office building and by displaying the trade name on or near the office entrance. Note: The two inch signage requirement has been eliminated.

The Qualifying Broker or Broker in Charge must directly supervise all advertising of real property for others or advertising of real estate services.

Every Qualifying Broker or Associate Broker advertising real property for others for sale, purchase, lease, exchange, or rent, including short-term rentals, or advertising real estate services must include in the advertising at a minimum:

- A. All real estate advertising must be a true and factual representation of the property and/or real estate services being advertised and shall not be presented in such a manner that will confuse or mislead the public.
- B. Every qualifying broker advertising real property for others for sale, purchase, lease, exchange or rent, including short-term or vacation rentals, or advertising real estate services, shall at a minimum, use in such advertising the trade name and current brokerage office number as registered with the commission. Directional signs are exempt from these requirements. Additional telephone numbers may be used in such advertising.
- C. Associate brokers, when advertising real property for others for sale, purchase, lease, exchange or rent, or when advertising real estate services, shall include in the advertisement the trade name and the current telephone number as registered with the commission of the brokerage with which they are affiliated.

- D. A broker advertising to sell, or exchange real property which the broker owns or partially owns shall indicate within such advertising, including signs that the broker owns the real property. Disclosure of such ownership must also be made in the listing contract, purchase agreement, or exchange agreement. If an owner-broker engages a third party broker to list the owner-broker's property, the third party broker is not required to make an owner-broker disclosure in advertising and signs, but such disclosure is required in the listing contract, purchase agreement or exchange agreement. A broker advertising to rent or lease real property which the broker owns or partially owns is not required to disclose such ownership in advertising and signs, but is required to make such disclosure in rental or lease agreements.
- E. When advertising real property owned by a broker and the telephone number of the brokerage is used in the advertisement, the advertisement must also include the trade name of the brokerage as registered with the commission.
- F. All advertising must be in compliance with all local, state and federal laws and regulations.
- G. These requirements apply to all forms of advertising, including but not limited to print, audio and video recordings, computer presentations, online and electronic media.

OPTIONAL ACTIVITY: QUESTION/ANSWER

DISCLOSURE AND ADVERTISING (NEWSPAPERS)

Advertising rules are among the New Mexico Real Estate Commission Rules most widely violated by brokers. The most frequent violations in newspaper and sign advertising include failing to include the trade name and the telephone number of the brokerage as registered with the New Mexico Real Estate Commission.

INSTRUCTIONS: *What's missing from the following newspaper advertisements?* Write your answers in the space provided.

1. Great buy! Large 3 BR, 2 BA, 2CG home on ½ acre lot. Must see!
Call Dave at Sam's Brokerage direct (cell) 505/222-6789.
2. Great buy! Large 3 BR, 2 BA, 2CG home on ½ acre lot. Must see!
Call Dave at Sam's Brokerage, 505/212-0000 or 505/222-6789.

3. Suppose these ads were on Craig's List is your answer any different?

ACTIVITY: IDENTIFICATION

INSTRUCTIONS: Using the information provided by Dave’s Team in the case study along with Part 32 in the Rule Book, look at the signs below. Turn to your neighbor and determine which yard sign is in compliance. Write your answers in the space designated “Notes” below.

Is the identification correct? Which sign is correct? What are the missing elements on some signs?

Example Sign

Notes

A yard sign with an orange header containing the text "FOR SALE" in white. Below the header, the text "Dave's Team" is displayed in a large, bold font. Underneath, it says "The city's best in real estate!" and "Call direct: 505/222-6789". To the right of the text is a photograph of four people (three men and one woman) in business attire, all with their arms raised in a celebratory gesture. At the bottom left, the text "Making your real estate wishes come true!" is written.

A yard sign with an orange header containing the text "FOR SALE" in white. Below the header, the text "Sam's Brokerage" is displayed in a large, bold font, followed by "505/212-0000". To the left of the text is a photograph of four people (three men and one woman) in business attire, all with their arms raised in a celebratory gesture. To the right of the photo, the text "Offered by Dave's Team" is written in a large, bold font, followed by "The city's best in real estate!" and "Cell: 505/222-6789".



NOTE: These same principles apply to all advertising and representations made, including business cards, newspaper ads, websites, flyers, etc.

MODULE REVIEW

Before moving on to the next module, make sure that you understand the following objectives presented in this module. If you have any questions, please consult your instructor.

- Identify areas of noncompliance within your brokerage.
- Contrast requirements of the New Mexico Real Estate Commission Rules with current challenges of operating your brokerage.
- Implement policies within your brokerage that will ensure compliance with the Rules.

INFORMATION FORMS AND REQUIRED NOTICES AND DISCLOSURES



REALTORS® ASSOCIATION OF NEW MEXICO INFORMATION FORMS AND REQUIRED NOTICES AND DISCLOSURES - 2013

- AFIDA Information Sheet (RANM Form 2304A)
- Broker Duties (RANM Form 1401)
- Clandestine Drug Laboratory Remediation Information Sheet (RANM Form 2306)
- Confirmation of Receipt of Lead Based Paint Pamphlet (Renovation) (RANM Form 5117)
- Earnest Money Dispute Information Sheet (RANM Form 2310)
- Estimated Property Tax Levy Disclosure Information Sheet (RANM Form 3775)
- FIRPTA Information Sheet (RANM Form 2304)
- Foreclosure Information Sheet (RANM Form 625)
- HUD Notice: "For Your Protection: Get a Home Inspection" (Form 2564-CN)
- Lead-Based Paint Addendum to Purchase Agreement (RANM Form 5112)
- Lead-Based Paint Disclosure Before Lease (RANM Form 5113)
- Lead-Based Paint (LBP) Renovation Repair and Painting Information Sheet (RANM Form 2315)
- Limited Services Notice, Buyer/Broker to Seller (RANM Form 1207)
- Manufactured Housing Information Sheet (RANM Form 2305)
- Mediation Information for Clients and Customers Information Sheet (RANM Form 5118)
- Mold Information Sheet (RANM Form 2309)
- New Mexico Mortgage Lender Company Act - 2005 Information Sheet (RANM Form 5122)
- Options/Lease Purchase Information Sheet (RANM Form 6200)
- Residential New Construction Information Sheet (RANM Form 2400)
- Septic System Contingency Addendum (RANM Form 5120A)
- Septic Systems Information Sheet (RANM Form 2308)
- Service-Member Civil Relief Act Information Sheet (RANM Form 6104)
- Short Sales Information Sheet (RANM Form 2107)
- Taos Association of REALTORS® Land Grant Disclosure Sheet (RANM Form 2320)
- Tenant's Rights in Event of Foreclosure Information Sheet (RANM Form 6120)
- Water Rights and Domestic Well Information Sheet (RANM Form 2307)

4. Legislative and Regulatory Influences

Contents:

- License Law and the Qualifying Broker – Associate Broker Relationship
- Key Federal and New Mexico Compliance Issues

INTRODUCTION

This module provides a review of the relationship between a Qualifying Broker and an Associate Broker from a hiring standpoint, the Federal issues related to Qualifying Brokers and a brokerage, and other legislative and regulatory influences such as RESPA, the Antitrust Act, and Do Not Call regulations.

Keep in mind that laws and rules change frequently so a Qualifying Broker should make every effort to stay informed about these changes. Make note of the resources provided in this Module and throughout this course. Attend relevant continuing education courses to stay current.

As a result of the review provided in this Module, Qualifying Brokers will be able to assess their brokerage policies and adopt new policies or revise those already in place to ensure compliance.

MODULE OBJECTIVES

Upon completion of this module, you should be able to:

- Contrast the relationship of the Qualifying Broker to the Associate Broker according to the license law and a 2004 New Mexico Appeals Court decision.
- Identify key compliance issues for a brokerage as required by various Federal and New Mexico legislative and regulatory requirements.

LIABILITY OF THE QUALIFYING BROKER FOR ACTIONS OF THE ASSOCIATE BROKER (LICENSE LAW 61-29-12B)

The real estate license law states that, unless a Qualifying Broker (QB) had guilty knowledge of an unlawful act by an associate, there would not be cause for the revocation of the QB license.

However, a 2004 New Mexico Court of Appeals decision states that a QB is responsible for the acts of their Associate Brokers and can be held responsible. In *Robertson and McGregor v. Carmel Builders*, an associate fraudulently held herself out to have a valid listing agreement with a seller, and then tried to get the seller to accept an offer from a buyer. She negotiated verbally without reaching any written acceptance, and finally, the associate continued to negotiate with the buyer against the explicit orders of the seller to stop.

In the meantime, the buyer thought they had an accepted offer and spent money on preparing the property for development. The associate fled the state when the lawsuit was filed and the QB claimed that he was not responsible for her actions because she was an independent contractor.

The Court of Appeals disagreed, stating that the Qualifying Broker is responsible for the acts of the Associate Broker. The decision stated “an agent is a person who ... represents the principal in dealings with third persons ...” The court also held, “Liability of a principal for an agent is grounded on the maxim of respondeat superior and is determined by considering whether a tortious act was committed while the agent or employee was acting within the scope of that relationship.”

ACTIVITY: QUESTION/ANSWER

INSTRUCTIONS: Please refer to *Sam's Brokerage* Case Study and consider the working arrangement of Sam with the three Associate Brokers in his brokerage. Review the case study to determine whether Sam is responsible for the actions of his Associate Brokers. Read the following question and write your answer in the space provided.

Will Sam still be responsible for Dave's actions and those of his buyer's broker once Dave has formed a team?

WRITTEN AGREEMENTS, HIRING PRACTICES AND DIVERSITY ISSUES

Written agreements between a Qualifying Broker (QB) and Associate Broker (AB) are required by Part 16 of the New Mexico Real Estate Commission Rules. These agreements should specify the relationship and mutual responsibilities of the AB to the QB and the brokerage, and the scope of authority of the AB to act on behalf of the brokerage.

A QB is wise to establish sound employment practices to avoid charges of discrimination. The Federal Fair Housing Act forbids discrimination based on race, color, religion, sex, age, or handicap. The New Mexico Human Rights Act adds ancestry as a protected class. And, in New Mexico, if a brokerage has fifty or more employees, spousal affiliation is a protected class. If a brokerage has fifteen or more employees, an employee's sexual orientation or gender identity is a protected class.

Under the work sharing agreement with the Equal Employment Opportunity Commission (EEOC), the New Mexico Human Rights Division may also investigate complaints of discrimination on the basis of race, color, national origin, religion and sex under Title VII of the Civil Rights Act of 1964; age under the Age Discrimination in Employment Act (ADEA) of 1967; and disability under the Americans with Disabilities Act (ADA) of 1990.

Recognition of diversity issues is an emerging issue in the workplace. A QB who establishes employment practices that reach out to the whole community builds a brokerage that reflects the diversity of the population. Such a practice helps establish a brokerage that can meet the diverse needs of every consumer seeking real estate services and is a sound risk management practice against claims of discrimination.

1099 STATEMENTS AND TIMING:

- Remember to provide a 1099 annually to each Associate Broker listing the total amount paid to the associate during the previous year.
- Due dates are January 31st for the 1099 to the Associate Broker, and February 28th to the IRS (form 1096).
- Remember to issue a 1099-MISC to any “non-employee” to whom the taxpayer pays \$600 or more in a year; this requirement **does not apply** to compensation paid to corporations. Qualifying Brokers are advised to obtain a W-9 form from any cooperating broker to whom they pay \$600 or more in a calendar year.
- For more information go to **<http://www.irs.gov/pub/irs-pdf/fw9.pdf>**.
- For Form 1099-MISC and instructions for completing it go to: **<http://www.irs.gov/pub/irs-pdf/i1099misc.pdf>**.

ACTIVITY: QUESTION/ANSWER

HIRING QUESTIONS

Instructions: In your groups, consider the issues regarding hiring practices and diversity considerations. Write the answers to the following questions in the space provided below. Be prepared to share your responses with the class.

List some of the important questions a Qualifying Broker might ask when interviewing an Associate Broker for hire.

OPTIONAL QUESTION

How would those same concerns you identified above affect how a Qualifying Broker will prospect for new Associate Brokers? How would consideration of diversity issues affect interview questions a QB might have for an AB?"

FEDERAL ISSUES RELATED TO QUALIFYING BROKERS AND A BROKERAGE

REAL ESTATE SETTLEMENT AND PROCEDURES ACT (RESPA)

PURPOSE OF THE ACT

The Real Estate Settlement and Procedures Act (RESPA) was originally designed to protect the consumer by requiring disclosure about closing fees, preventing industry kick-backs and mandating certain forms (the HUD-1 Settlement Statement). RESPA covers “settlement services” on federally related mortgage loans on residential property, including home purchase loans, equity lines of credit, and reverse mortgages.

RESPA does not cover cash sales, a rental property transaction or another business purpose transaction. Prohibited are “paying or receiving a fee or thing of value for referring business related to settlement unless there is an actual service rendered.”

RESPA revisions effective January 1, 2010 include significant changes to the Good Faith Estimate (GFE) intended to simplify the comparison of loans from multiple lenders. Additionally, the changes dictated charges that can and cannot change between the issuance of the GFE and settlement. The HUD-1 settlement statement was modified to provide side-by-side comparison of the charges from the GFE with actual closing costs. RESPA, now administered by the Consumer Finance Protection Bureau (“CFPB”), now heavily regulates lender charges on loans for consumer disclosure and protection. Further changes to the HUD-1 are anticipated in 2013.

In 2009, an Alabama case found that a brokerage firm violated RESPA when charging a home buyer a \$149 “administrative brokerage fee” in addition to the commission. The Federal District Court held that the fee was not related to any specific settlement service, rendering it an “unearned fee” in violation of RESPA. (*Bugsby v. JRHBW Realty, Inc.*). The case remains under review by various Appellate Courts across the country.

RESOURCES:

- NAR quiz www.realtor.org
- RESPA Information Guide for REALTORS[®],
[www.realtor.org/government affairs/respa](http://www.realtor.org/government_affairs/respa)
- www.realtor.org/lettlw.nsf/pages/0305respaQ&A?OpenDocument&Login
- HUD FAQs About RESPA
www.hud.gov/offices/hsg/sfh/res/resindus.cfm

FAIR HOUSING AND THE NEW MEXICO HUMAN RIGHTS ACT

Federal Fair Housing laws protect the right of all citizens to freely buy and sell residential real estate. The law prohibits discrimination against seven protected classes of individuals. The New Mexico Human Rights Act covers residential and commercial real estate transactions. It includes the seven Fair Housing protected classes and adds national origin, ancestry, spousal affiliation, gender identify and sexual orientation. Brokerages must ensure compliance with these laws through policies and supervision of associates. See the Section *Written Agreements, Hiring Practices and Diversity Issues* for details on how the Act applies to employees of a brokerage.

ACTIVITY: TABLE FILL-IN

INSTRUCTIONS: Consider each law below as it relates to your brokerage policies. Write “what you need to do” in the space provided.

✓	What is required?	What I need to do:
	A Fair Housing poster on display in every office. Available at: www.hud.gov/fairhousing	
	NM Human Rights Act notices on display in every office. Available at: http://www.dws.state.nm.us/dws-posters.html	
	All advertising of the brokerage must conform with anti-discrimination laws (including print, electronic, internet, MLS, etc.)	
	Associates must be aware of and abide by federal and state anti-discrimination laws.	

RESOURCES:

- NAR’s “Equal Opportunity in Housing” brochure
- Fair Housing Quiz: **www.realtor.org**

LEAD-BASED PAINT REGULATIONS (RESIDENTIAL PROPERTY) AND LEAD RENOVATION, REPAIR AND PAINT RULE FOR PROPERTY MANAGERS AND OTHERS

The 1992 Residential Lead-Based Paint Hazard Reduction Act requires mandatory lead-based paint disclosure in housing built prior to 1978, called “target housing.” The Act includes single family homes and apartments. Brokers must ensure their policies comply with the requirements of the law and are scrupulously followed.

Effective April 2010, contractors performing renovation, repair, and painting projects that disturb lead-based paint in homes, child care facilities, and schools built before 1978 must be EPA-certified and follow specific work practices to prevent lead contamination.

The new rule applies to contractors, **property managers**, owners, and others including maintenance workers performing work for compensation. The new rule requires distribution of a new lead pamphlet prior to the start of work, EPA certification and training of workers in use of lead-safe work practices and minimization of occupants’ exposure to lead hazards.

OPTIONAL ACTIVITY: TABLE FILL-IN

INSTRUCTIONS: Fill in the tables below (continued on next page) as you consider how these federal requirements apply to your brokerage.

1992 Residential Lead-Based Paint (LBP) Hazard Reduction Act

✓	What is required?	What I need to do:
	Is every associate knowledgeable about LBP disclosure requirements and how to complete the disclosures?	
	Does each associate have the seller complete and sign the Lead Based Paint Addendum along with the listing agreement? RANM #5112	
	Does each associate make sure the buyer/tenant signs, dates and times the LBP Addendum BEFORE signing, dating and timing the purchase agreement or lease? RANM #5113	

RESOURCES:

- Lead-Based Paint Quiz: www.realtor.org
- EPA website: www.epa.gov for more resources and information

OPTIONAL ACTIVITY: TABLE FILL-IN

CONTINUED

Lead; Renovation, Repair and Painting (RRP) Rule as it applies to Property Managers and Brokers in certain circumstances

✓	What is required?	What I need to do:
	Understand this Rule applies to residential homes, child care facilities, and schools built pre-1978?	
	Hire/recommend only EPA-certified contractors for renovation, repairs and painting?	
	Knowledgeable about procedures to contain work area, minimize dust, thorough clean up by contractors?	
	Ensure that contractors, workers, provide new EPA pamphlet to occupants?	

RESOURCES:

- FAQs about the RRP Rule, www.epa.gov
- Lead; Renovation, Repair and Paint Rule: Federal Register
- Contact www.epa.gov/lead or (202) 512-1800 for more resources
- National Lead Information Center: 1-800-424-LEAD for a list of local contractors

ANTITRUST ISSUES (SHERMAN ACT)

The Sherman Act prohibits anti-competitive business practices and identifies two basic elements for antitrust violation:

1. Is there a contract, combination, or conspiracy among two or more competitors?
2. Was there an unreasonable restraint of trade as a result?

The Federal Trade Commission supports the Sherman Act and prohibits:

- Unfair methods of competition
- Unreasonable restraints of trade

The U.S. Department of Justice has also filed complaints against REALTOR organizations and real estate licensing jurisdictions that attempt to dictate real estate brokerage business models i.e. requiring full service as opposed to limited service brokers. (See Part 16.16.19.8d Broker Duties p.63)

OPTIONAL ACTIVITY: TABLE FILL-IN

INSTRUCTIONS: Fill in the table below as you consider how these federal requirements apply to your brokerage.

✓	What is required?	What I need to do:
	Do associates understand which actions could constitute a “restraint of trade”? ... price-fixing between competitors ... group boycotts of competitors who offer different business services than we do. ... dictating brokerage business models.	
	Do associates know that commissions are negotiable in the marketplace between competitors?	
	Do associates know that our brokerage may establish its own commissions and listing policies as long as they are set independently of other brokerages?	

RESOURCES, OTHER POLICIES TO CONSIDER:

- NAR’s “Antitrust in Real Estate” booklet
- Establish an Office Compliance Program and Antitrust Compliance policies for our brokerage
- Review our brokerage practices to see whether any potential for antitrust exists; set policy, educate associates
- Identify any current business practices in the marketplace that might result in antitrust activities
- Antitrust Quiz www.realtor.org

DO-NOT-CALL, FAX, AND EMAIL REGULATIONS

In an attempt to stop unwanted solicitations of various natures, the federal government and many states have passed “Do-Not-...” laws. Every brokerage should have policies in place and must educate their Associate Brokers to ensure compliance. These laws prohibit solicitations via telephone, fax and email among others.

Please note that this is an issue covered more thoroughly in the New Mexico Real Estate Commission’s Mandatory Course.

ACTIVITY: TRUE/FALSE AND TABLE FILL-IN

INSTRUCTIONS: As a review of the Do-Not-Call laws, complete the True/False quick quiz below by circling either “T” for “True” or “F” for “False.”

1. The Federal Trade Commission and the Federal Communications Commission work together jointly to enforce the Do-Not-Call and Do-Not-Fax laws and have created the Federal Do-Not-Call Registry.

T F

2. There are three exceptions to the Act: the broker has a personal relationship with the consumer ("family member, friend, or acquaintance" of the caller); second, the broker has expressed written permission or invitation to call the consumer; or third, the brokerage has an "established business relationship" with the consumer.

T F

3. A brokerage is required to scrub its No-Call list against the National Do-Not-Call Registry every 31 days.

T F

4. A broker can continue to call her own expired listings for up to eighteen months following expiration without checking the federal registry.

T F

5. After a consumer calls a broker with a question about a property, the broker may continue to call the consumer with information about other properties for three months following the inquiry.

T F

6. There is a 5-point “safe harbor” provision in the Act that protects against a lawsuit when a broker inadvertently calls a consumer registered on the list.

T F

DO-NOT-CALL, FAX, AND EMAIL POLICY CHECKLIST

INSTRUCTIONS: Look at the tables below with a view toward compliance in your brokerage. In the space provided, write down any action you should take in your brokerage.

In addition to the resources listed in each table, the RANM Legal Hotline can provide general compliance information.

DO-NOT-CALL ACT (FTC, FCC RULES, 2003):

✓	What is required?	What I need to do:
	Does my brokerage have a Do-Not-Call Compliance Policy? Do I know the five points to include in the policy?	
	Does each associate understand and comply with the Act? How can I determine that they do?	

RESOURCES:

- NAR Field Guide to Do-Not-Call, Fax, Email Laws, www.realtor.org (includes a Compliance Policy outline)
- “Do Not Call” Quiz, www.realtor.org
- Free Do-Not-Call Law poster for your brokerage: NAR Field Guide www.realtor.org
- www.fcc.gov / www.ftc.gov for more resources

Do-Not-Fax Act (Junk Fax Prevention Act, 2005)

The Do-Not-Fax Act prohibits sending unauthorized faxes.

It mandates that an unauthorized commercial fax must contain an opt-out provision on the first page of the fax, plus a cost-free, 24/7 means to opt-out.

It reaffirms an “established business relationship” exception with no time limit on the EBR and the Act grandfathers in all fax numbers now in the possession of the sender.

Do-Not-Email Act (CAN-SPAM ACT, 2005)

✓	What is required?	What I need to do:
	<p>Does your brokerage have an electronic message policy to ensure compliance with the Act?</p> <ol style="list-style-type: none">1. Accurate headers: To, From fields, originating domain name and email address.2. No deceptive subject lines, and clear indication that email is a solicitation or advertisement.3. Easy opt-out method available for 30 days after sending.4. A valid physical mailing address of emailer. <p><i>Note: The Act also applies to cell phone email.</i></p>	

RESOURCES:

- NAR “Can-Spam” Quiz, www.realtor.org
- FTC website, www.ftc.gov

ACTIVITY: CASE STUDY

INSTRUCTIONS: In your group, and using the *Sam's Brokerage Case Study* together the Do-Not-Call rules, answer the following question. Write your answer in the space provided and be prepared to share your answer with the class.

What issues does Lucy face as a new broker prospecting?

HOME VALUATION CODE OF CONDUCT (HVCC)

REAL ESTATE APPRAISAL REFORM

The Real Estate Appraisal Reform section of the Dodd-Frank Wall Street Reform and Consumer Protection Act passed by Congress in 2011 requires that appraisals used in connection with federally-regulated real estate transactions are performed

- In writing in accordance with uniform standards;
- By licensed appraisers with demonstrated competency and subject to effective supervision.

State appraiser licensing agencies, including the New Mexico Real Estate Appraisers Board, are monitored by the federal Appraisal Subcommittee to ensure that state agencies have enacted legislation and implemented policies and procedures that maintain appraiser independence.

With certain exceptions, appraisal assignments and performance are managed by Appraisal Management Companies (AMC's) licensed by state appraiser licensing agencies to ensure that appraisals are conducted free from inappropriate influence and coercion and according to appraisal independence standards established by the Truth in Lending Act.

Resources: Title XI of FIRREA, Real Estate Appraisal Reform (12 U.S.C. 3331-3351) as amended by the Dodd-Frank Reform Act.

NEW MEXICO ISSUES RELATED TO QUALIFYING BROKERS AND A BROKERAGE

SEPTIC TANK REGULATIONS (LIQUID WASTE AND GROUND WATER)

Inspection requirements:

- New Mexico Environment Department (NMED) regulations require an inspection of the on-site liquid waste system by a NMED-certified inspector prior to sale of the property on which the system resides.
- The septic system must be brought up to code before the sale of the property can be consummated.
- If the property has an advanced treatment system, the buyer must enter into a maintenance agreement with a NMED-approved provider and file a notice of change of system ownership on the NMED form.
- The inspection must be conducted no earlier than 180 days prior to recording the deed.
- Neither the seller nor the buyer may opt out of the inspection.

RESOURCES:

- RANM Form #2308 “Septic Systems, Wells and Water Information”
- RANM Form #5120(a) “Septic System Contingency Addendum”

ESTIMATED PROPERTY TAX LEVY DISCLOSURE

Beginning July 1, 2009, the State of New Mexico requires that prospective buyers of residential property (four units or less) be provided an Estimated Property Tax Levy Disclosure before a purchase offer can be accepted. Vacant land and commercial property are exempt from this law.

ESTIMATED PROPERTY TAX LEVY DISCLOSURE

✓	What Is Required	What I Need to Do
	Listing brokers know to request from the county assessor an estimate of property tax based on list price of the property	
	Buyer brokers know to provide the tax estimate from the assessor immediately upon receipt from the seller or listing broker RANM Form #3223 for written acknowledgement of receipt.	
	All associates understand requirements of this law and brokerage policies ensuring compliance	

RESOURCES:

- RANM Form #3225 County Assessor’s Property Tax Levy Request and Certificate
- RANM Form #3250 Certification of Delivery and Acknowledgement of Receipt of Estimated Property Tax Levy
- RANM Form #3275 Estimated Property Tax Levy Disclosure Information Sheet

NEW MEXICO MORTGAGE LOAN COMPANY ACT OF 2005

The purpose of this Act is to eliminate delays in getting sellers their sale proceeds at closing.

See RANM Form #5122 NM Mortgage Loan Company Act 2005, Information for Clients and Customers – 2008

NOTE: Brokers should be advised not to tell sellers that they will receive their sale proceeds at closing because there can be delays. Check with the buyer’s lender for more information.

FUNDING REQUIREMENTS ACCORDING TO THE ACT

- A New Mexico-licensed mortgage loan company is required to deliver funds to the title company at the same time they provide the mortgage and closing documents.
- The mortgage loan company has up to two days to review the signed documents once they are returned to them. They must either authorize the recording of the documents and release of the funds, or advise the title company of any unsatisfied funding conditions.
- Recording and distribution of funds to seller and others only takes place upon release of the funds by the mortgage loan company.

COVERAGE AND EXCLUSIONS TO THE ACT

- The Act applies only to mortgage loan companies licensed under the New Mexico Mortgage Loan Company Act.
- Excluded are state or national banks, savings and loans, and credit unions.
- Mortgage loan brokers are not covered under the Act.

NEW MEXICO MORTGAGE LOAN ORIGINATOR LICENSING ACT (MLOL)

Effective July 31, 2009, the MLOL Act requires licensing of mortgage loan originators. The New Mexico Regulation and Licensing Department clarified that a broker would **not be** required to be licensed under this act when assisting a seller and a buyer to negotiate the terms of seller financing and including those terms in the purchase agreement.

Qualifying Brokers should understand the details of this Act and create clear brokerage policies to avoid triggering the requirements of this Act.

RESOURCES:

- To read the final version of the law go to: <http://www.legis.gov>

IRC SECTION 1031 TAX-DEFERRED EXCHANGES

This provision in the tax code allows the exchange of like-kind investment property and the deferral of taxes, as long as requirements of the Section are met.

PROPERTY MANAGEMENT

Property Management is possibly the most exacting brokerage practice in New Mexico and a source of regular complaints and disciplinary action by the New Mexico Real Estate Commission. Qualifying Brokers managing property for others must understand the law and New Mexico Real Estate Commission rules and are advised to complete property management courses.

UNIFORM OWNER-RESIDENT RELATIONS ACT (UORRA)

This is the law that establishes the responsibilities and duties of landlords and tenants in New Mexico. This law details procedures for such things as deposits, payment of rent, service of notice, obligations of owners and residents, as well as the eviction process and what constitutes a substantial violation.

NEW MEXICO REAL ESTATE COMMISSION RULES PART 24 PROPERTY MANAGEMENT

This rule applies to all brokers engaged in residential as well as commercial property management. Strict record keeping requirements are described as well as trust account reconciliation, reports to owners, and agreements between the owner and the property manager and between the property manager and tenants.

ACTIVITY: CHECKLIST

INSTRUCTIONS: Take a minute to review the information covered in this module and create a checklist of items you need to implement or update in your brokerage .

✓	Policy items needed to implement or update	Action required

RESOURCES:

- www.realtor.org
- www.epa.gov
- www.hud.gov
- www.rld.state.nm.us/boards/Real_Estate_Commission.aspx

MODULE REVIEW

Before moving on to the next module, make sure that you can apply the following objectives that were discussed in this module. If you have any questions, please consult your instructor.

- Contrast the Qualifying Broker – Associate Broker relationship according to the license law and recent judicial decisions.
- Identify key compliance issues for a brokerage as required by various federal and state legislative and regulatory requirements.

RESOURCES

IMPORTANT TERMS/DEFINITIONS

The following terms and definitions are used within this module and throughout the State of New Mexico Real Estate Commission training. The definitions are vital for a solid understanding of the work and processes discussed.

Term	Definition
<i>Respondeat Superior</i>	Latin: “Let the master answer.” A legal doctrine that holds a superior responsible for the actions of their subordinate.
<i>EEOC</i>	Equal Employment Opportunity Commission in New Mexico.
<i>Lead; RRP Rule</i>	Lead; Renovation, Repair and Paint (RRP) Rule. A federal regulation affecting residential property owners and managers, construction contractors, and others who perform renovations for compensation.
<i>RESPA</i>	Real Estate Settlement and Procedures Act.

5. Impact of Judicial Decisions on a Brokerage

Contents:

- Key New Mexico Court Cases
- Implications for Brokerages
- *Sam's Brokerage* Case Study Activity

INTRODUCTION

This module will cover selected court cases, in particular *Robertson and McGregor v. Carmel Builders Real Estate* (2004 NMCA). You will consider these cases from the standpoint of the operation of your brokerage. Discussion will include how the judicial decisions might apply to your associates, employees, and your company policies.

The court cases presented here were compiled from summaries prepared by the REALTORS® Association of New Mexico and posted at www.nmrealtor.com. These court cases and summaries are presented for information only and are not meant to provide legal advice. Brokers are advised to seek specific legal advice from a competent attorney.

The purpose of this module is to understand how judicial decisions impact a real estate brokerage.

MODULE OBJECTIVES

Upon completion of this module, you should be able to:

- Analyze selected court cases to determine the implications that each judicial decision has on a Qualifying Broker and his or her brokerage.
- Differentiate between standards of care established by law and regulation and those created by judicial decisions.

KEY COURT CASES AND IMPLICATIONS FOR YOUR BROKERAGE

Key court cases will be considered concerning their implications for a brokerage, with the focus on *Robertson and McGregor v. Carmel Builders*. Also discussed, although briefly, will be *McIlhannon*. The cases of *Azar and DeArmond* are presented in the Resources section. As a final activity, understandings gained in this module will be applied to the *Sam's Brokerage Case Study*, the fictitious brokerage example used throughout the course.

The court cases are as follows:

1. *Robertson and McGregor v. Carmel Builders Real Estate* (2004 NMCA)
 - a. Fiduciary Relationship, Standards of Care
2. *McIlhannon v. Ford* (2003 NMCA)
 - a. Contract Disclaimers
3. *Azar, Solimon, and ReMax Advantage, Ltd., v. The Prudential Insurance Company of America* (2003 NMCA)
 - a. Material Facts
4. *DeArmond v. Halliburton* (2003 NMCA)
 - a. Amendment of Contract Terms

STANDARDS OF CARE

In Module 4, *Robertson and McGregor* was discussed from the perspective of the doctrine of “*respondent superior*” and the fiduciary relationship. In this module, the case of *Robertson and McGregor* will be presented from the perspective of “*standards of care*.”

Remember that a standard of care does not become a new law nor does it automatically make an existing law obsolete. Standards of care recognized by a judicial decision are very important for a Qualifying Broker to understand and relate to their brokerage practices.

Throughout this module, be prepared to answer the question: “*What are some key implications of this decision for your brokerage?*”

COURT CASE 1

CASE 1: Robertson and McGregor v. Carmel Builders Real Estate et al., (2004 NMCA-056, No. 22,176)

DESCRIPTION: A buyer's agent approached an Associate Broker whose listing had expired, but whose sign was still on a lot. The broker represented that she had a listing and solicited an offer from the buyer's agent. She then called the sellers to ask if the land was still for sale. The sellers said that they would sell for \$100,000. The broker delivered an old disclosure statement, incorrectly locating utilities at the property line. The buyer offered \$62,500 and the sellers eventually told the broker they would not sell for less than \$100,000. The buyer made an offer for \$100,000, assuming the accuracy of the disclosure statement and contingent on financing and some dirt work. After the sellers heard that the buyer was consulting an attorney with respect to the disclosures, the sellers refused to sell. The buyer's agent testified, however, that the broker gave him a "verbal counteroffer" from the seller, which the buyer accepted.

The buyer, believing that he had a binding contract in January, proceeded with backhoe work, an appraisal, and blueprints. The Qualifying Broker (QB) of the Associate Broker authorized the work on the land. At the same time, the two brokers were attempting "to coerce the sellers into selling" the land, in the words of the Court of Appeals.

In April, the QB told the buyer there were contingencies that had to be removed and that the sellers did not believe there was a contract. The buyers removed the contingencies and thought that solved the problem. The buyers discovered at closing in May that the sellers believed that no contract had ever been formed, when the sellers refused to close.

ACTIVITY: QUESTION/ANSWER

INSTRUCTIONS: Using the information provided in the *Sam's Brokerage* Case Study, answer the following question in your group and write your answer in the space below:

“How does Robertson and McGregor apply to Sam’s brokerage and what are the implications for your own brokerage as well?”

Be prepared to share your answers with the class.

ACTIVITY: QUESTION/ANSWER

ISSUES CONSIDERED BY THE COURTS IN *ROBERTSON*

INSTRUCTIONS: Fill in the answers to the following questions as they are discussed in class.

Issues Considered	Questions/Rulings
1. Relationship between Qualifying Broker and Associate Broker.	<i>Is a Qualifying Broker liable for the acts of his Associate Broker who is employed as an independent contractor?</i>
2. Fraudulent misrepresentation.	<i>Was the statement of a broker that he had a listing on a property false when the seller testified that he has given a "pocket listing" to the broker, but no express listing agreement existed?</i>
3. Duty to disclose.	<i>Since there was no listing agreement, was the broker under any duty to disclose the unauthorized negotiations with the buyer to the seller?</i>
4. Fiduciary relationship.	<i>Can a fiduciary relationship exist between the brokers and the sellers if there is no written agency relationship?</i>

THE MCLHANNON CASE AND ITS IMPACT ON YOUR BROKERAGE

Listed in the Resources section you will see three other cases.

The first case, *McIlhannon v. Ford*, involves a licensed building contractor, not a real estate broker. The main issues considered by the court concern contract clauses in a purchase agreement and under what circumstances they might not be enforceable.

The second case, *Azar*, addresses the question of “material facts” and provides a definition consistent with one generally adopted by real estate professionals.

The last case presented, *DeArmond*, deals with employee issues in your brokerage and relates to amendment of employment contract terms. All three of these cases have impact on your brokerage and should be considered seriously.

We will briefly consider *McIlhannon* for its implications on contract disclaimers. Please study the remaining two cases, *Azar* and *DeArmond*, on your own.

CASE 2: Contract Disclaimers: McIlhannon v. Ford (2003 NMCA)

Description: In this case, a licensed contractor built a home without a building permit because he did not get approval of a mechanical engineer (a requirement for metal-framed buildings), and no certificate of occupancy was issued. The buyers purchased the property using a purchase agreement that included a disclaimer similar to the RANM disclaimer, which stated that they were buying "upon [their] own examination and judgment and not by reason of any representation made to purchasers by sellers or agents... and purchasers accept property in present condition."

After noting defects in the home, the buyers investigated and discovered that there was no record of a building permit or a certificate of occupancy. They filed suit against the sellers, the electrical contractor, and PNM, alleging fraud, negligent misrepresentation, breach of warranty, rescission, and unfair trade practices. All counts were dismissed by the trial court after a motion for summary judgment except breach of warranty against the sellers. The buyers appealed to the Court of Appeals.

McILHANNON: KEY IMPLICATIONS FOR YOUR BROKERAGE

- Be aware that contract disclaimers will not protect a seller or a broker in cases of fraud. A contract disclaimer presumes good faith and honesty on the part of the parties.
- A brokerage could be held liable to a buyer where the brokerage failed to use a contract that protected their buyer-client's interests in the purchase of a property.
- Make certain that new-construction contracts used by your brokerage contain language that expressly requires a building permit or certificate of occupancy. (The RANM New Construction Agreement requires the latter.)

ACTIVITY: QUESTION/ANSWER

INSTRUCTIONS: Now that we have discussed *McIlhannon*, answer the question: “*How does McIlhannon relate to Sam’s brokerage and what are the implications for your own brokerage as well?*”

Write your answer in the space provided below. Be prepared to share your answer with the class.

MODULE REVIEW

Before moving on to the next module, make sure that you can complete the following tasks presented in this module. If you have any questions, please consult your instructor or refer to information provided in the Resources section of this Participant Guide.

- Describe the key issues in the *Robertson* and *McIlhannon* cases from the standpoint of a Qualifying Broker.
- Differentiate between standards of care established by law and regulation and those created by judicial decision.
- Analyze selected court cases to determine the implications that each judicial decision has on a Qualifying Broker of a brokerage.

RESOURCES

IMPORTANT TERMS/DEFINITIONS

The following terms and definitions are used within this module and throughout the State of New Mexico Real Estate Commission training. The definitions are vital for a solid understanding of the work and processes discussed.

Term	Definition
<i>Standard of Care</i>	In real estate, the standard of care is determined by the standard expected of a prudent real estate professional in a particular circumstance. May be established by law or rule or by a judicial decision.
<i>Fiduciary Relationship</i>	Not defined in New Mexico Real Estate Commission Rules. Defined in judicial decisions as a relationship based on great trust and confidence of the consumer in the broker. Usually associated with agency relationships.
<i>Adverse Material Facts</i>	A fact about the property or the transaction or the ability of the parties to perform in the transaction which, if actually known by the broker, must be disclosed to the customer.
<i>Respondent Superior</i>	Latin: "Let the master answer." Refers to the responsibility of Qualifying Brokers for the acts of their Associate Brokers.

CASE STUDY AND RULE BOOK

- *Sam's Scenario* Case Study
- Rule Book (*New Mexico Real Estate License Law, Real Estate Commission Rules, and Time Share Act* issued by the New Mexico Real Estate Commission)

COURT CASES

CASE 1: *Robertson and McGregor v. Carmel Builders Real Estate et al.* (2004 NMCA-056, No. 22,176)

DECISIONS OF THE NEW MEXICO COURT OF APPEALS (2004)

- “An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation.”
- “A Qualifying Broker has a duty to supervise activities of Associate Brokers ...”
- When a principal engages a real estate salesperson, “the principal also engages the salesperson’s Qualifying Broker ...”
- “Liability of a principal for an agent is grounded on the maxim of *respondent superior* and is determined by considering whether a tortuous act was done while the agent or employee was acting within the scope of that relationship.”
- “... the manner in which the parties designate a relationship is not controlling.”

CASE 2: Contract Disclaimers: *McIlhannon v. Ford* (2003 NMCA)

SUMMARY/DESCRIPTION: After noting defects in their home, the buyers investigated and discovered that the licensed contractor from whom they had bought the home had built it without a building permit. The purchase agreement the contractor used included a disclaimer similar to the RANM disclaimer that they were buying "on their own examination and judgment and not be reason of any representation made to purchasers by sellers or agents ... and purchasers accept property in present condition" All counts were dismissed by the trial court after a motion for summary judgment except breach of warranty against the sellers. The buyers appealed to the Court of Appeals.

CASE 3: Material Facts: *Azar, Solimon, and ReMax Advantage, Ltd., v. The Prudential Insurance Company of America*, 2003 NMCA

DESCRIPTION: In a lawsuit alleging that an insurance company failed to disclose material facts about differences in premiums for different payment schemes, the Court of Appeals discussed the meaning of "material facts."

AZAR: KEY IMPLICATIONS FOR YOUR BROKERAGE

- The Court confirmed that an "adverse material fact" is a fact that could affect the buyer's willingness to buy or pay. Although this case is based on different terms offered in an insurance policy, the principles and the Court's recognition of "material facts" have direct implication for a brokerage.
- Brokers need to disclose any fact about the property or the transaction that fits this definition of adverse material fact.

AZAR: KEY IMPLICATIONS FOR YOUR BROKERAGE

- New Mexico Real Estate Commission Part 19 Broker Duties require a broker to disclose any “adverse material fact” actually known about the property or the transaction or the parties’ financial ability to complete the transaction.

CASE 4: Amendment of Contract Terms: DeArmond v. Halliburton, 2003 NMCA-148, No. 22,802

DESCRIPTION: An employer decided to implement a binding arbitration program in the coming year and mailed a notice to employees at their addresses of record. The notice stated that as of January 1st of the following year, all employee disputes would be referred through the company Dispute Resolution Program; employees would then have no right to sue the employer. The employees' continued employment after that date was taken as their acceptance of the terms of the program. Later, an employee sued the employer for discrimination, breach of employment contract, and abusive discharge, and the company filed a motion to compel arbitration. The trial court determined as a matter of law that a duty to arbitrate existed and ordered arbitration, and the employee appealed this decision to the Court of Appeals.

DEARMOND: KEY IMPLICATIONS FOR YOUR BROKERAGE

- A brokerage with at-will employees must follow proper procedures if they decide to make changes to their policies. “Actual knowledge” of the changes is required.
- When making any change to employment policies, make certain that employees have actual knowledge of the change. Do not simply mail the notice to their correct address and think that acceptance of the changes has been given because the employee continues to show up at work.
- Brokers are advised to contact an employment law attorney for specific advice on this and all other employment issues.

6. Risk Reduction in the 21st Century

Contents:

- Brokerage Challenges
- Risk Management Strategies

INTRODUCTION

This module will review current challenges facing brokerages today including complaints and lawsuits, the Seller Property Condition Disclosure Statement, disclosure issues in electronic communications, and loan fraud.

The purpose of this module is to develop an awareness of current concerns in a brokerage in order to minimize legal risk.

MODULE OBJECTIVES

Upon completion of this module, you should be able to:

- Identify challenges for a brokerage in developing and using advertising and marketing given computer-mediated communication in today's world.
- List the three main reasons for lawsuits against a brokerage.
- Develop risk reduction policies for the brokerage.

COMPLAINTS AND LAWSUITS – TWO ISSUES OF GREAT CONCERN

2007 RICE E&O INCIDENCE AND PAYMENT REPORT – NEW MEXICO (FIRST THREE YEARS OF THE PROGRAM)

Total number of claims filed 1/1/04 – 12/31/07:	473
Closed with no payment	159
Closed with payment (legal, damage, or both)	250
No coverage	94
Number of claims still open at year end	95
Total claims paid (damage, legal, recovery):	\$1,883,848.50
Total reserve for open claims	\$1,883,140.78
Total claims paid and reserve for open claims	\$3,766,989.28

Rice Insurance Services Company (RICE), the New Mexico errors and omissions insurance administrator, reports that of the 31 New Mexico claims paid since 2004 that involved amounts over \$50,000, one clear finding is the need to verify information prior to including it in a multiple listing service (MLS).

NAR LEGAL SCANS

Conducted every two years, the National Association of REALTORS® (NAR) Legal Scan researches court cases and statutes and regulations to determine key legal issues and trends and information on broker liability.

Key issues identified in recent Scans, listed by importance:

1. Agency issues including breach of fiduciary duty and dual agency.
2. Property condition disclosure disputes, especially mold and structural defects.
3. Technology issues including privacy, spam, and other forms of electronic solicitation.

Broker liability continues to increase.

Three areas identified as of growing future concern are: 1) technology challenges including advertising and the internet, 2) representation responsibilities in brokerage relationships with consumers, and 3) property condition claims. Today as never before, a Qualifying Broker must diligently supervise the brokerage, establish and enforce policies to ensure compliance with the various laws and regulations, and pay close attention to employment law issues.

ADVERTISING AND THE INTERNET: WEBSITES, EMAIL, VIRTUAL OFFICES

“Advertising” no longer means an ad in the newspaper or a homes magazine, or a neighborhood flyer or newsletter. Today’s advertising has been vastly expanded to include any and all representations made to the public, including electronic advertisement.

WHAT THE NEW MEXICO REAL ESTATE COMMISSION AND THE NATIONAL ASSOCIATION OF REALTORS® SAY:

- **New Mexico Real Estate Commission Rules, Part 32-Advertising/Disclosure:** Advertising/disclosure requirements apply to all forms of advertising, including but not limited to print, audio and video (including audio and video recordings), computer presentations, and electronic media, such as the internet, email, virtual office websites, and all broker websites.
- **National Association of REALTORS® (NAR) Article 12:** REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations.

EXAMPLE: Misleading website and domain names are not allowed!

QUALIFYING BROKER SUPERVISION CHALLENGES

A Qualifying Broker must clearly understand the various disclosure requirements in any advertising of the brokerage and its associates. Associates must understand brokerage policies concerning advertising to ensure compliance and consistency.

- The increasing incidence of internet advertising by Associate Brokers requires vigilance by Qualifying Brokers to ensure that all Associate Broker advertising includes the brokerage name and telephone number with which the Associate Broker is affiliated.
- Qualifying Brokers must use care and caution their Associate Brokers to use care in choosing trade names under which to conduct brokerage business. Although the New Mexico Real Estate Commission no longer grants permission to use a particular trade name, some trade names and web sites are copyrighted and use of these names can result in legal action.

ACTIVITY: QUESTION/ANSWER

ACTIVITY PART 1

INSTRUCTIONS: As a Qualifying Broker, please write the answers to the following questions in the space provided below and be prepared to share your answers with the group.

Are Multiple Listing Service (MLS) remarks considered advertising?

How can a Qualifying Broker ensure that electronic transmission of data, whether on the brokerage website or the website of an Associate Broker, whether sent by email or “texting” to a cell phone, is true and factual, accurate and timely, and contains the required disclosures?

Give an example of a misleading website or domain name.

ACTIVITY PART 2

INSTRUCTIONS: Please answer the following question using the *Sam's Brokerage Case Study*. Be prepared to share your answer with the group.

Question for Sam: "Does the name of David's new website comply with advertising requirements? Is it false or misleading in any way?"

BROKERAGE POLICIES AND PRACTICES: DISCLOSURE OF PROPERTY CONDITION

The purpose of a Seller Property Condition Disclosure Statement is for the seller to provide information about their property to the prospective purchaser. The statement gives the buyer information they need before making an offer such as what inspections to request, and what repairs might need to be made. A disclosure statement is a good risk management tool for a brokerage, because it places responsibility for conveying information about a property with the seller rather than the broker.

ISSUE: SELLER PROPERTY CONDITION DISCLOSURE STATEMENT

- Not required by law, nor regulation, nor by an MLS rule.
- Most MLSs provide a space to electronically attach a disclosure statement to the listing so a cooperating broker can provide it to their buyer to consider prior to making an offer.

RESOURCES:

- RANM Form #2306 Seller Property Condition Disclosure Statement

ACTIVITY: BROKERAGE POLICIES--QUESTION/ANSWER

INSTRUCTIONS: Please answer the following policy questions when working with buyers and write your answers in the space provided:

What are the pros and cons for a buyer who conditions their offer on a seller's disclosure statement as a condition of the purchase agreement?

OPTIONAL QUESTION

What should a buyer consider when the seller has either not provided a seller's disclosure statement or will not provide one?

INSTRUCTIONS: Please answer the following policy questions when working with sellers and write your answers in the space provided:

What are the pros and cons for a brokerage that requires a property condition statement from the seller when taking a listing? What about third party relocation companies? What about foreclosures? What about sellers acting on the advice of their attorney?

OPTIONAL QUESTIONS

What should brokers consider regarding the seller's property condition disclosure statement?

That the associate give the form to the seller to complete but they must not complete any portion of the statement themselves?

Should associates look over the statement, or should they turn a blind-eye to it and just put it in the file?

What should associates do if they review the statement once it is completed by the seller and they notice some "red flags" on the statement? What would those red flags be?

ISSUE: MEGAN'S LAW

Megan's Law requires registration of convicted sex offenders in New Mexico. However, information from a sex offender registry is specifically excluded from the definition of "adverse material facts" in Part 19 Broker Duties.

ISSUE: NEW MEXICO REAL PROPERTY DISCLOSURE ACT (AKA PSYCHOLOGICALLY IMPACTED PROPERTIES, OR STIGMATIZED PROPERTIES)

This 1981 statute protects sellers and brokers from liability for failing to disclose certain occurrences that took place on or about the property: (natural death, homicide, suicide, assault, sexual assault, any other crime punishable as a felony, or that the property is or has been owned/occupied by a person with AIDS or any other disease determined not likely to be transmitted to others by occupancy of the real property).

Important to remember: New Mexico Real Property Disclosure Act does not prohibit the disclosure of these occurrences; it protects the seller and the broker against any cause of action for failure to disclose them.

OPTIONAL ACTIVITY: QUESTION/ANSWER

BROKERAGE POLICIES

INSTRUCTIONS: Please answer the following policy question concerning your brokerage and write the answer in the space provided below.

What is a prudent brokerage policy about providing information from the New Mexico Sex Offender registry to a prospective buyer?

CLANDESTINE DRUG LABS

Clandestine drug labs (CDL) were not even thought of in 1981 when the New Mexico Real Property Disclosure Act was passed. Today we know that the labs are highly toxic and the long-term effects of exposure are still unknown. Because the rules require brokers to disclose adverse material facts **actually known** about a property, any broker with such knowledge must disclose it to the buyer. This is one of the most important issues a brokerage faces today and the liability is increasing. The New Mexico Environment Department's Clandestine Drug Laboratory Remediation Regulations became effective January 1, 2008. The US Department of Justice Drug Enforcement Agency also tracks CDL information by state.

How do I find out if a home was a clandestine drug lab? Find the regulation, a remediation flow chart and a list of contaminated properties and their cleanup status at the Clandestine Drug Lab Cleanup Program website: <http://cdli.nmenv.state.nm.us.rule.php>.

ALBUQUERQUE CITY ORDINANCE

The ordinance was created to hold owners responsible for clean-up and remediation of contaminated property and to require disclosures of the contamination. The process requires that a “public nuisance notice” be posted on property so identified, the notification of various municipal agencies of the “notice of removal,” and the filing with the county assessor of a certificate of substandard property. The ordinance further requires disclosure by owners to all brokers selling, leasing or renting the property. Brokers are required to notify in writing all prospective buyers, tenants or other occupants about the notice of removal.

SUMMARY

All brokers should be familiar with state and local initiatives to identify and clean up contaminated property and ensure that the public is informed. In addition, brokers should be aware of any “red flags” observed on a property and bring it to the attention of their Qualifying Broker or appropriate legal entity immediately.

RESOURCES:

- New Mexico rule remediation flow chart:
<http://cdli.nmenv.state.nm.us>
- www.usdoj.gov/dea/seizures/newmexico.html

OPTIONAL ACTIVITY: QUESTION/ANSWER

INSTRUCTIONS: Please answer the following question and write your answer in the space provided. Be prepared to share your answer with the group.

How does a broker know whether a property is or has been the site for manufacture, storage, or distribution of clandestine drugs?

MORTGAGES, LOANS, AND SELLER FINANCING

LOAN FRAUD - WHAT IS IT?

One of the fastest growing areas of financial crimes in the United States is mortgage loan fraud.

Fraud involves two parties: one makes a false statement of a fact material to the business involved, and the other party relies on that statement to their detriment. In mortgage loan fraud, false or inaccurate information is given on a mortgage application and the loan is made based on that false or inaccurate information.

Two categories of mortgage fraud have been identified by mortgage industry professionals and law enforcement groups: **fraud for housing**, and **fraud for profit**.

LOAN FRAUD - WHAT IS IT?

The FBI cites the following as examples of mortgage loan fraud:

- Property flipping
- Silent second
- Nominee loans/straw buyers
- Fictitious/stolen identity
- Inflated appraisals
- Equity skimming

NAR's 2006 Risk Management Committee developed an informative brochure for the use of all members and member boards, detailing the various schemes used in mortgage fraud and some warning signs to watch for in any transaction. The brochure is available at **www.realtor.org**.

Funds that don't show up on the closing statement may also be considered fraud. The HUD-1 settlement statement lists all the financial information concerning the closing of the transaction, concluding with a statement which, when signed by the parties, states that there are no "side deals" to the transaction that did not show up on the HUD-1 settlement statement. It is fraud to sign that statement unless it is true. Seller concessions must be shown on the HUD 1 settlement statement.

RESOURCES:

- HUD Loan Fraud Information – web address:
<http://www.hud.gov/offices/hsg/sfh/buying/loanfraud.cfm>
- NAR Mortgage Fraud Information (See form at the end of this Module)

WORKING WITH FOREIGN INVESTORS

Investment in U.S. property by foreign investors has increased and is under scrutiny by our government to ensure payment of income taxes, and to spot possible criminal activity. There is one law that has increased in importance over the last several years.

Foreign Investment in Real Property Tax Act (FIRPTA) of 1980. Under this law, nonresident sellers are taxed similarly to U.S. real estate owners when selling their properties by **placing the tax-remittance responsibility on the U.S. resident buyer.**

FIRPTA Checklist	
Requirements of the Act	Buyer must submit 10% of the net contract price to the IRS within 20 days of closing. The buyer must determine if the seller is a foreign person. If the seller is foreign, but an exemption applies, the buyer must obtain proof of qualification to avoid IRS sanctions.
Exemptions to the Act	Purchase price is \$300,000 or less and property will be a primary residence. Seller is exempt from IRS withholding. Seller provides buyer with a non-foreign affidavit. Seller is participating in a simultaneous 1031 exchange.

RESOURCES:

- RANM Form #2304 FIRPTA Information Sheet
- RANM Form #2303A Qualified Substitute Statement
- RANM Form #2303 Affidavit Non-Foreign Seller
- www.irs.gov

ACTIVITY: DISCUSSION QUESTIONS

INSTRUCTIONS: Please answer the following questions. Write your answers in the space provided and be prepared to share your answers with the group.

How can brokers avoid being involved in loan fraud activities?

OPTIONAL QUESTIONS

How does a broker know whether a seller is a foreign individual?

How does a U.S. resident buyer collect and submit the withholding required by the Act for a non-resident seller?

What is a broker's liability to a buyer?

MODULE REVIEW

Before moving on to the next module, make sure that you can apply the following objectives presented in this module. If you have any questions, please consult your instructor.

- Identify challenges for your brokerage in developing and using advertising and marketing given computer-mediated communication in today's world.
- List the three main reasons for lawsuits against a brokerage.
- Develop risk reduction policies for your brokerage.

RESOURCES

- Important Terms/Definitions
- FIRPTA Forms: FIRPTA INFORMATION SHEET – 2008, RANM Form 2304 (2008); IRS: www.irs.gov, go to FIRPTA Withholding
- Loan Fraud (HUD) Information
- NAR “Mortgage Fraud – Recognizing the Signs”
www.realtor.org
- Clandestine Drug Labs Forms and Information


IMPORTANT TERMS/DEFINITIONS

The following terms and definitions are used within this module and throughout this course.

Term	Definition
<i>FIRPTA</i>	Foreign Investment in Real Property Tax Act
<i>ARELLO</i>	Association of Real Estate License Law Officials
<i>MLS</i>	Multiple Listing Service

IRS FIRPTA WITHHOLDING WEB PAGE

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 **Internal Revenue Service**
United States Department of the Treasury

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Small Business/Self-Employed

- [Farmers](#)
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International Taxpayers Topics

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- [Employer ID Numbers \(EIN\)](#)
- [Forms and Publications](#)
- [Self-Employed Individuals](#)
- [Business With Employees](#)
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IRS Resources

- [Compliance & Enforcement](#)
- [Contact My Local Office](#)
- [e-file](#)
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- [News](#)
- [Taxpayer Advocacy](#)
- [Where To File](#)

FIRPTA Withholding

Withholding of Tax on Dispositions of United States Real Property Interests

The disposition of a U.S. real property interest by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. FIRPTA authorized the United States to tax foreign persons on dispositions of U.S. real property interests. A U.S. real property interest includes sales of interests in parcels of real property as well as sales of shares in certain U.S. corporations that are considered U.S. real property holding corporations. Persons purchasing U.S. real property interests (transferee) from foreign persons, certain purchasers' agents, and settlement officers are required to withhold 10 percent of the amount realized (special rules for foreign corporations) Withholding is intended to ensure U.S. taxation of gains realized on disposition of such interests. The transferee/buyer is the withholding agent. If you are the transferee/buyer you must find out if the transferor is a foreign person. If the transferor is a foreign person and you fail to withhold, you may be held liable for the tax.

The amount that must be withheld from the disposition of a U.S. real property interest can be adjusted pursuant to a withholding certificate issued by the IRS.

- A disposition includes the sale/purchase of any U.S. real property interests.
- Generally speaking, in reference to the sale/purchase of real estate, the person selling the real estate, the seller, is commonly referred to as the transferor.
- The purchaser/buyer of the real estate is commonly referred to as the transferee.
- Generally speaking the amount realized is the purchase/sales price of the real estate.
- Generally speaking the buyer must find out if the seller is a foreign person. If so, the purchaser/buyer must withhold income taxes.
- The purchaser/buyer may be held liable for the tax that should have been withheld on the purchase.

One of the most common exceptions to FIRPTA withholding is that the transferee (purchaser/buyer) is not required to withhold tax in a situation in which the purchaser/buyer purchases real estate for use as his home and the purchase price is not more than \$300,000.

- [Exceptions from FIRPTA withholding](#)
- [Reporting and Paying Tax on U.S. Real Property Interests](#)
- [Withholding Certificates](#)
- [Format for Applications](#)
- [Road Map to Regulations](#)
- [Definitions of terms and procedures unique to FIRPTA](#)
- [Foreign Persons Involved in U.S. Real Estate Transactions](#)

For additional information on the withholding rules that apply to corporations, trusts, estates, and REITs, refer to section 1445 of the Internal Revenue Code and the related regulations. For additional information on the withholding rules that apply to partnerships, refer to discussion under [partnership withholding](#). Also consult IRS [Publication 515](#), Withholding of Tax on Nonresident Aliens and Foreign Entities, section U.S. Real Property Interest.

Additional information may be obtained from:

Internal Revenue Service Center
P.O. Box 409101
Ogden, UT 84409.

Note: This page contains one or more references to the Internal Revenue Code (IRC), Treasury Regulations, court cases, or other official tax guidance. References to these legal authorities are included for the convenience of those who would like to read the technical reference material. To access the applicable IRC sections, Treasury Regulations, or other official tax guidance, visit the [Tax Code, Regulations, and Official Guidance](#) page. To access any Tax Court case opinions issued after September 24, 1995, visit the [Opinions Search](#) page of the United States Tax Court.

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NAR MORTGAGE FRAUD INFORMATION

Mortgage Fraud

Recognizing the Signs

Financial crimes are one of the fastest growing areas of criminal activity in the United States and one of the fastest growing areas of financial crimes is mortgage fraud. Fraud involves two parties: one makes a false statement of fact material to the business involved and the other party relies on that statement to their detriment. In mortgage fraud false or inaccurate information in connection with a mortgage application is provided and that information causes a lender or another in the chain of approving and funding that loan to make the loan or to make the loan on terms and conditions different than if the true facts were known.

Mortgage fraud includes a whole category of illegal business dealings. The different schemes that may be used include, but are certainly not limited to, property flipping, equity skimming, application fraud, credit or income misrepresentation or asset and down payment misrepresentation. Mortgage industry professionals and law enforcement break these different schemes into two groups.

There is “*Fraud for Housing*” in which a borrower will knowingly provide false or at least inaccurate information regarding his or her qualification for the loan. This might be something as innocent sounding as fudging a little on their income levels or employment in order to qualify for the loan or for better terms on a loan.

Although we would like to see everyone be able to obtain the American Dream of homeownership, real estate agents must be careful when counseling purchasers to avoid any suggestion that enhancing certain facts may assist a buyer in qualifying for the necessary mortgage. The desire to be helpful can not override good sense and honesty. The REALTORS® Code of Ethics requires members to treat all parties to the transaction honestly, including those providing the financing for the purchase.

There is also “*Fraud for Profit*” which is sometimes referred to as “industry insider fraud”.

The consequences for the housing market differ only as to degree. The latter group causes far more in losses to the mortgage industry and ultimately the public because the people involved are not trying to stay in the property and never intended to make the payments required by the mortgage. Often their schemes will involve multiple properties and parties. They are motivated to commit mortgage fraud solely by the money that can be taken from a property. When they have done that or the threat of being caught increases they will often disappear. Individuals who provide false information to the lender to help secure their own housing lack the same kind of bad motivation and usually intend to make the payments to stay in the housing. But if they default on the loan because they really were not qualified, the community is still left with foreclosed housing and the individuals with damaged credit and credibility.

Mortgage fraud is accomplished through the use of false documents, identity theft, straw buyers, and sometimes the witting or unwitting assistance of real estate professionals. To protect themselves and their clients, real estate agents must be able to distinguish between legal and illegal mortgage practices. There are a number of different ways in which the real estate agent may inadvertently become involved in these schemes or involve their seller clients. Agents may be asked to interfere in the appraisal process, alter or not include parts of the purchase agreement that is provided to the lender or title company, intercept verifications of income or employment history or help out by hand carrying verifications provided by the buyers or others working with the buyer. Any of these activities could be a part of a mortgage fraud scheme.

Some common examples of mortgage fraud as described by the FBI include:

Property Flipping - Property is purchased, falsely appraised at a higher value, and then quickly sold. What makes property flipping illegal is that the appraisal information is fraudulent. The schemes typically involve one or more of the following: fraudulent appraisals, doctored loan documentation, inflating buyer income, etc. Kickbacks to buyers, investors, property/loan brokers, appraisers, title company employees are common in this scheme. A home worth \$200,000 may be appraised for \$400,000 or higher in this type of scheme.

Silent Second - The buyer of a property borrows the down payment from the seller through the issuance of a non-disclosed second mortgage. The primary lender believes the borrower has invested his own money in the down payment, when in fact, it is borrowed. The second mortgage is usually not recorded to further conceal its status from the primary lender.

Nominee Loans/Straw Buyers - The identity of the borrower is concealed through the use of a nominee who allows the borrower to use the nominee's name and credit history to apply for a loan.

Fictitious/Stolen Identity - A fictitious/stolen identity may be used on the loan application. The applicant may be involved in an identity theft scheme: the applicant's name, personal identifying information and credit history are used without the true person's knowledge.

Inflated Appraisals - An appraiser acts in collusion with a borrower and provides a misleading appraisal report to the lender. The report inaccurately states an inflated property value.

Equity Skimming - An investor may use a straw buyer, false income documents, and false credit reports, to obtain a mortgage loan in the straw buyer's name. Subsequent to closing, the straw buyer signs the property over to the investor in a quit claim deed which relinquishes all rights to the property and provides no guaranty to title. The investor does not make any mortgage payments and rents the property until foreclosure takes place several months later.

As is demonstrated in each of the foregoing descriptions, a key element of the problem is the imbalance of information. One side, normally the borrower or someone working with the buyer, conceals information from or affirmatively misleads the lender. Anytime an agent suspects this may be the case, further investigation is warranted to rule out any involvement by the agent or their unwitting client in a fraudulent transaction. There are several clues which may alert the agent that there may be a problem.

One of the most important documents in detecting fraud is the *original sales agreement and any addenda to that agreement*. It is the document which the real estate agent is most likely to be involved in preparing. Thus, care must be exercised in preserving its accuracy. Things to be sure of:

- The property is clearly identified
- All parties to the transaction are identified and have executed the agreement
- The signatures are legible or properly identified
- All riders and addendums are attached
- There are no blanks or inconsistent information in the purchase and sales agreement
- It accurately reflects the consideration to be paid by the buyer for the property

Other possible red flags:

- Significant sales price adjustments that are not supported by comparable market data possibly accompanied by request that list price in MLS be altered to reflect appraised value.
- Required use of a particular appraiser
- Down payment assistance programs that charge excessive fees or that attempt to place restrictions on how their participation is reported in contract documentation, including the HUD 1
- Large seller contributions, possibly in the form of provisions for large decorator or improvement allowances
- Mortgage brokers who refer pre-qualified buyers to agents
- Statement that the buyer will occupy the property is questionable. For example, the buyer is retaining old property or there is unrealistic commute to the buyer employment
- Buyer has very limited credit history and existing history is with high rate consumer finance companies
- Credit history indicates the repayment of a prior obligation did not include any interest payments
- Unrealistic income for occupation
- Recent drastic increase in income due to a raise or a new job
- Sales contract, appraisal and title work disagree with respect to seller's name and appraisal shows property or comps previously sold in past year.

If these warning signs are present in your transaction, bring the situation to the attention of your broker. While fraud isn't involved every time one of these warning signs appear, the few minutes it will take to decide between innocent and fraudulent can save you and your broker time, money and maybe even your license, and reporting fraud will protect the communities in which you do business.

Mortgage fraud is more than a just a possibility for real estate professionals. Read the following fraud profile which describes one broker's experience and lesson.

An agent was asked by a friend to help in the acquisition of a distressed property. This friend was in the mortgage brokerage business with her husband. The agent successfully assisted her friend in the purchase. Unbeknownst to the agent, the buyers arranged a simultaneous closing for the same property to another buyer for double the original purchase price. The issues of fraud were as follows:

1. The second buyer was a straw buyer whose loan qualifications were "enhanced".
2. A fraudulent appraisal was obtained to substantiate the inflated second sale price to the lender funding the loan.
3. The simultaneous closing was doctored to allow the high LTV loan on the second transaction to close first in order to fund and close the first transaction.
4. Participation of the escrow closer is not documented but the closing sequence certainly should have raised questions.
5. Not surprisingly, the straw buyer did not perform on the loan and the lender took a large loss.

Outcome: The mortgage broker served Federal prison time. Unfortunately, his name has come up again following his release from prison. The agent was not prosecuted only because there was no evidence that she had any knowledge of the fraudulent second sale to the straw buyer.

Lesson learned: If the agent becomes aware of a short-term flip of a property for a lot more money, without justification for a higher value, the agent should be alerted that he or she could be implicated in a loan fraud investigation and take appropriate steps of self-defense.

Have your own story you would like to share or want to learn more about mortgage fraud? Go to <http://www.realtor.org/letterlw.nsf/1006mortgagefraud>

Prepared by the Risk Management Committee of the National Association of REALTORS®

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NATIONAL ASSOCIATION OF REALTORS®

The Voice for Real Estate®

NEW MEXICO CLANDESTINE DRUG LAB WEB PAGE LINK

NOTE: New web address: <http://cdli.nmenv.state.nm.us/>



For Immediate Release
December 31, 2007

Contact: Marissa Stone, NMED
(505) 827-0314 or (505) 231-0475

Clandestine Drug Lab Regulations Go into Effect Jan. 1 *Environment Department Launches New Web Page for Cleanup Program*

(Santa Fe, NM) –New state regulations governing the cleanup and public notice of former clandestine drug laboratories in New Mexico become effective Jan. 1. The Environmental Improvement Board passed those regulations in October.

The Environment Department also launched a new Web page containing information about implementing that rule.

"The regulations that go into effect on the first of the year will protect children, the elderly and families from harmful contaminants present in homes and other properties formerly used as meth labs or in the manufacturing of other illegal drugs," Governor Richardson said. "The rules will provide safeguards to ensure New Mexico citizens will not be harmed by exposure to toxic chemicals. The Environment Department will continue to work with law enforcement agencies to ensure the State addresses the problem of clandestine laboratories from the time the sites are discovered until they are cleaned up."

"The Environment Department worked hard to develop a Web site that provides guidance and is easy to use," said New Mexico Environment Department Secretary Ron Curry. "The Environment Department met with officials and residents around the state to inform citizens of their rights and responsibilities regarding the cleanup of clandestine drug laboratories. We developed regulations that protect New Mexicans from risks related to contaminated properties."

Drug laboratory sites can be contaminated with dangerous chemicals including drug residues, volatile organic compounds, lead and mercury.

The Web page, which can be found at <http://www.nmenv.state.nm.us/hwb/>, contains lists of contaminated properties. That list includes addresses of locations where law enforcement agencies found chemicals or other items indicating the presence of clandestine drug laboratories or dump sites. Once a site has been cleaned up, the Web site will note that status.

The site also contains a copy of the rule, information about the cleanup process and background studies used to develop the rule and public outreach materials. Those materials include a list of cleanup companies. The department's Information Technology Division and Hazardous Waste Bureau worked on the Web page. The Hazardous Waste Bureau developed the regulations governing clandestine drug laboratories.

SELLER PROPERTY CONDITION DISCLOSURE STATEMENT, PAGE 1



REALTORS® ASSOCIATION OF NEW MEXICO PROPERTY DISCLOSURE STATEMENT - RESIDENTIAL - 2010

INSTRUCTIONS AND ACKNOWLEDGMENT REGARDING THIS FORM

This Statement discloses Seller's current, actual knowledge of the condition of the Property as of the date signed by Seller, and is not a substitute for any inspections or warranties that Buyer may wish to obtain. This Statement is designed to assist Seller to provide information about the Property and to assist Buyer in evaluating the Property being considered. Conditions may exist which are unknown to Seller. Buyer is encouraged to address concerns about the Property whether or not included in this Statement. This Statement does not relieve Seller of the obligation to disclose a condition of the Property that may not be addressed on this form or a change in any condition after the date of this Statement, and is not a substitute for inspection by the Buyer. Neither the Broker, nor the board or association of REALTORS® nor the REALTORS® Association of New Mexico warrant or guarantee the information in this disclosure.

Address _____ City _____ Zip Code _____

Legal Description _____
or see metes & bounds description attached as Exhibit _____ County, New Mexico.

OCCUPANCY: Does seller currently occupy the Property? Yes. If yes, _____ years/months seller occupied.
 No. If no, _____ years/months since seller occupied. Never occupied property.

TITLE, ZONING, LEGAL INFORMATION

Is the Seller aware of:

1. Any title problems (for example, unrecorded or disputed easements, lot line disputes, liens, encroachments, access issues, third party claims)? Yes No
2. Any property taxes that are not current? Yes No
3. Any existing or proposed bonds, assessments, liens, mortgages, judgments, deeds of trust, real estate contracts, etc. against the property? Yes No If yes, explain: _____
4. Any violations of applicable subdivision laws at the time the property was subdivided? Yes No
If yes, explain: _____
5. Any alleged violations of applicable laws, regulations, ordinances or zoning laws? Yes No
6. Any zoning variances/exceptions or non-conforming use of the property? Yes No If yes, explain: _____
7. Any legal issues, proposed buildings, bridges, roadways or real estate developments, etc. in the immediate area?
 Yes No If yes, explain: _____
8. Any restrictive covenants or other limitations on use? Yes No If yes, explain: _____
9. Any violation thereof? Yes No If yes, explain: _____
10. Any building code or environmental regulation violations? Yes No If yes, explain: _____
11. Any necessary permits, approvals or inspections for all construction, repairs and improvements that have not been obtained? Yes No If yes, explain: _____

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RANM Form 2301 (2010) Page 1 of 9

©2008 REALTORS® Association of New Mexico Initials: Buyer _____ Seller _____

Phone:

Fax:

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CLANDESTINE DRUG LABS, PAGE 1



REALTORS® ASSOCIATION OF NEW MEXICO INFORMATION SHEET CLANDESTINE DRUG LABORATORY REMEDIATION – 2010

The following is a summary of the New Mexico Environmental Department's (NMED) regulations regarding clandestine drug laboratory (CDL) remediation (Regulations). (20.4.5.1-20.4.5.602 NMAC). This information sheet does NOT include all provisions of the Regulations. Additionally, other applicable federal, state and local laws and regulations may apply to properties identified as CDLs. Compliance with the following Regulations does not relieve a person from the obligation to comply with other applicable laws and regulations. Persons found to have violated these Regulations face the possibility of civil and criminal penalties and therefore, should consult with an attorney.

DECLARATION OF CDL PROPERTY AND NOTICE TO OWNER

Upon identification of a CDL by a law enforcement agency (Agency), the Agency shall take the following actions: deliver a notice of contamination (Notice) to the property owner in accordance with 20.4.5.200(A)(4), document proof of posting the Notice; and deliver a copy of the Notice to NMED's Hazardous Waste Bureau chief within seven days after posting of the Notice. Upon receiving a copy of the Notice from an Agency, NMED shall send a copy of the Notice to the property owner as required by 20.4.5.200(B). The contents of the Notice are set forth in 20.4.5.201 NMAC. Posting of the Notice at the CDL shall be considered notice if the property owner cannot be identified through county records.

USE AND TRANSFER OF CDL PROPERTY

An owner shall not sell, lease, rent, loan, assign, exchange or otherwise transfer the CDL property unless the owner does the following: provides written notice to the purchaser, lessee, renter, borrower, assignee, exchange partner or other transferee, with a copy to NMED's Hazardous Waste Bureau, of the existence of the CDL and the Notice; and receives a written acknowledgment, and provides a copy to NMED's Hazardous Waste Bureau, that the notice was received by the purchaser, lessee, renter, borrower, assignee, exchange partner or other transferee. A person other than the owner or the owner's agent, may not enter, occupy, or use the CDL or otherwise knowingly and intentionally violate the provisions of the Notice until remediation of the residually contaminated portion of the property has taken place in accordance with Section 20.4.5.6000 NMAC and the Notice is vacated pursuant to 20.4.5.202 NMAC. This provision does not apply to persons performing work for a law enforcement agency, NMED, or a remediation firm.

INITIALS: Buyer _____ Seller _____

Tenant _____ Landlord _____

RANM Form 2306 (2010) Page 1 of 3

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CLANDESTINE DRUG LABS, PAGE 2

REALTORS® ASSOCIATION OF NEW MEXICO INFORMATION SHEET CLANDESTINE DRUG LABORATORY REMEDIATION – 2010

OWNER RESPONSIBILITIES FOR REMEDIATION OF CDL PROPERTY

The owner of the property shall retain a remediation firm to perform a preliminary assessment (PA) of the residually contaminated portion of the property to determine the extent of the contamination and the nature of the required remediation within seven days of the day of delivery of the Notice to the owner. If the PA determines that remediation is not required, the owner shall send a copy of the PA to the NMED's Hazardous Waste Bureau chief within seven days of receipt of the results of the PA. The owner may choose to forego a PA and conduct the remediation in accordance with the Regulations. The owner shall complete remediation in accordance with the Regulations within 60 days of the day of delivery of service of the Notice to the owner or in such other period of time that is approved in writing by the NMED. The owner shall retain a remediation firm to perform a post-remediation assessment of the residually contaminated portion of the property to determine that the requirements for remediation of residual contamination as set forth in the Regulations have been met within seven days of receiving notice from the remediation firm that the residually contaminated portion of the property has been remediated. After NMED has approved the remediation and vacated the notice of contamination, the owner or owner's agent is no longer required to comply with 20.4.5.300 NMAC (Section above entitled "Use and Transfer of CDL Property) and may remove the Notice and allow any person to enter, use, occupy, rent, or sell the property.

CDL LIST

A list of CDL properties can be viewed at NMED's web site, www.cdli.nmenv.state.nm.us/registry.php and the United States Department of Justice's site www.usdoj.gov/dea/seizures/new_mexico.html. The list is based on information received from law enforcement agencies.

REQUIREMENTS FOR REMEDIATION AND CLEARANCE LEVELS

The evaluation and cleanup of residual contamination found at CDLs after chemicals and equipment have been removed shall meet the standards as set forth in 20.4.5.600. At the minimum, a remediation firm shall conduct sampling and testing for all the constituents set forth in 20.4.5.601 unless clear evidence indicates that such constituents were not used in the operation of the CDL. All interior areas of the residually contaminated portion of a property that will be occupied by people for any length of time for any purpose and all furnishings and materials intended for reuse shall meet the required post-remediation clearance levels as set forth in 20.4.5.601.

APPROVAL OF REMEDIATION

Upon receipt of the remediation report, NMED shall review the report within 30 days to determine if the remediation of the property was completed pursuant to the Regulations. NMED shall notify the owner or the owner's agent within 7 days of NMED completing its review as to whether or not NMED approves the remediation report and agrees that the remediation is complete. If NMED does not approve the remediation report, it shall inform the owner or the owner's agent and state the reasons for disapproval. The owner shall take the appropriate corrective action within a time period allowed by NMED.

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INITIALS: Buyer _____ Seller _____
Tenant _____ Landlord _____

Phone:

Fax:

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CLANDESTINE DRUG LABS, PAGE 3

REALTORS® ASSOCIATION OF NEW MEXICO INFORMATION SHEET CLANDESTINE DRUG LABORATORY REMEDIATION – 2010

VACATING NOTICE OF CONTAMINATION

The owner of a CDL is responsible for providing proof to NMED that the property has been remediated in compliance with 20.4.5.600 NMAC. Upon NMED determining that a CDL has been remediated in accordance with the Regulations, or that no remediation is required, NMED shall notify the owner of the property that the Notice is vacated and can be removed from the property.

FAILURE TO COMPLY

Failure to comply with the remediation standards required by this part may result in enforcement proceedings which may include, but not be limited to the following actions: issuing a compliance order requiring compliance immediately or within a specified time period or assessing a civil penalty up to \$10,000 per day of noncompliance for each violation or both; and/or commencing a civil action in district court for appropriate relief, including a temporary or permanent injunction. A person who fails to comply with the remediation standards required the Regulations is guilty of a petty misdemeanor under Section 74-1-10 NMSA 1978 of the Criminal Code.

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FIRPTA INFORMATION SHEET, PAGE 1



REALTORS® ASSOCIATION OF NEW MEXICO INFORMATION SHEET - FIRPTA – 2010

FIRPTA EXPLAINED. FIRPTA is the Foreign Investment in Real Property Tax Act of 1980 (26 USC §1445 et. Sec.) ("FIRPTA"). Under FIRPTA, nonresident Sellers are taxed similarly to U.S. real estate owners when selling their properties by placing the tax-remittance onus on the resident Buyer.

BUYER'S OBLIGATIONS UNDER FIRPTA. In transactions with foreign persons, the Buyer MUST submit ten percent (10%) of the amount realized from the sale of the property to the Internal Revenue Service ("IRS") within 20 days of closing. Generally speaking, the "amount realized" is the sales/purchase price of the Real Estate. The Buyer must determine the Seller's status as a foreign or non-foreign person. If the Seller is foreign, but an exemption applies, then the Buyer must obtain proof of qualification to avoid IRS sanctions. If a Seller asserts that he/she is a non-foreign person, the Buyer should obtain an Affidavit of Non-Foreign Seller (RANM Form 2303) or a Qualified Substitute Statement (RANM Form 2303A).

A "FOREIGN PERSON" UNDER FIRPTA. A foreign person includes: a nonresident alien individual; a foreign corporation, partnership, trust, or estate; and any other person that is not a U.S. person. A nonresident alien is defined as an individual who is neither a U.S. citizen nor a resident of the U.S. within the meaning of section 7701(b) of the Internal Revenue Code. Two tests apply. Under the "green-card" test, an alien individual is a resident of the U.S. if he/she has been admitted for U.S. permanent residence (i.e., has a green card) at any time during the calendar year. Under the substantial-presence test, an alien individual is a resident for U.S. federal tax purposes if the alien is physically present in the U.S. for 183 days or more during the current calendar year. Alternatively, if the alien is physically present for at least 31 days during the current year, the alien may be treated as a U.S. tax resident in the current year under a three-year look-back test which requires an analysis of the alien's presence over the preceding three years. If the alien is from a country that has an income tax treaty with the United States, the treaty may act to change these results.

EXCEPTIONS TO WITHHOLDING UNDER FIRPTA. The following are the most common: 1) the property is purchased for less than \$300,000 AND the Buyer is using the property as a primary residence; 2) the Seller has an IRS statement that specifies the Seller is exempt from withholding, is entitled to a reduced withholding amount, has provided adequate security for payment or has made arrangements with the IRS for payment; 3) **the Seller provides the Buyer with a Non-Foreign Seller Affidavit (RANM Form 2303); 4) a Qualified Substitute provides the Buyer with a Qualified Substitute Statement (RANM Form 2303A);** or 5) the Seller is participating in a **SIMULTANEOUS** Section 1031 Exchange. In order for the home to be considered the Buyer's "primary residence" for purposes of the exception, the Buyer or a member of the Buyer's family must have definite plans to reside at the property for at least 50% of the number of days the property is used by any person during each of the first two 12-month periods following the date of transfer. When counting the number of days the property is used, do not count the days the property will be vacant.

AFFIDAVIT OF NON-FOREIGN SELLER (FORM 2303) AND QUALIFIED SUBSTITUTE STATEMENT (FORM 2303A). The Affidavit of Non-Foreign Seller (Seller's Affidavit) is a sworn statement completed and signed by the Seller which includes the Seller's tax identification number (most often a Social Security number) and in which the Seller states under Penalty of Perjury that the Seller is not a foreign person as defined under FIRPTA, and thus, is not subject to tax withholding under FIRPTA. The Seller can provide a completed and signed Seller's Affidavit directly to the Buyer or to a Qualified Substitute. A Qualified Substitute is a person or entity as defined under FIRPTA that

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FIRPTA INFORMATION SHEET, PAGE 2

REALTORS® ASSOCIATION OF NEW MEXICO INFORMATION SHEET - FIRPTA – 2010

accepts a Seller's completed and signed Seller's Affidavit in the Buyer's stead. The Qualified Substitute retains the Seller's Affidavit and must provide the Buyer with a Qualified Substitute Statement. The Qualified Substitute Statement is a sworn statement made under Penalty of Perjury in which the Qualified Substitute states that the Qualified Substitute has a completed and signed Seller's Affidavit from the Seller. The Buyer must retain the Qualified Substitute Statement in his/her records. If the Buyer receives a Qualified Substitute Statement, the Buyer never receives the Seller's Affidavit, nor the Seller's tax identification number.

QUALIFICATIONS OF A "QUALIFIED SUBSTITUTE" UNDER FIRPTA. Under FIRPTA, the Buyer's Broker or any person (including an attorney or Title Company) responsible for closing the transaction may be a "Qualified Substitute". **The Seller's Broker may NOT be a "Qualified Substitute"**.

EXCEPTION FOR NON-FOREIGN SELLERS DOES NOT APPLY IF THERE IS KNOWLEDGE OR NOTICE THAT THE SELLER'S AFFIDAVIT OR QUALIFIED SUBSTITUTE STATEMENT IS FALSE. In the case of any of the following, the Buyer must retain and remit ten percent (10%) of the amount realized from the sale of the property to the IRS within 20 days of closing (Generally speaking, the "amount realized" is the sales/purchase price of the Real Estate):

- 1) The Buyer or Qualified Substitute has actual knowledge that either the Seller's Affidavit or the Qualified Substitute Statement is false;
- 2) The Buyer **receives notice** from the Seller's Broker, Buyer's Broker or the Qualified Substitute that the Seller's Affidavit or the Qualified Substitute Statement is false;
- 3) The Qualified Substitute **receives notice** from the Seller's Broker or Buyer's Broker that the Seller's Affidavit is false;
- 4) The United States Secretary of Treasury, by regulations, requires the Buyer or the Qualified Substitute to furnish a copy of the Seller's Affidavit or the Qualified Substitute Statement to the Secretary of Treasury and the Buyer or Qualified Substitute fails to furnish a copy of the Affidavit or Statement at the time and in the manner as required by the regulations.

AGENT TO THE TRANSACTION OR A QUALIFIED SUBSTITUTE LEARNS THE SELLER'S AFFIDAVIT OR QUALIFIED SUBSTITUTE STATEMENT, AS MAY BE THE CASE, IS FALSE. Such agent or Qualified Substitute **MUST** notify the Buyer at such time and in such manner as required by the regulations. If the Seller's Broker, Buyer's Broker or Qualified Substitute fails to provide notice of a false affidavit as required by the regulations, such agent or Qualified Substitute shall have the same duty to deduct and withhold that the Buyer would have had if the agent or Qualified Substitute had complied with the notice requirements. (See below for limitation on liability for agents, Brokers and Qualified Substitutes).

IRS PENALTIES FOR VIOLATIONS UNDER FIRPTA. Buyers who fail to withhold and fail to obtain proof of an approved exemption may be held liable for the Seller's tax that should have been withheld on the sale. In the event an agent or Qualified Substitute fails to notify a Buyer of a false Seller's Affidavit or false Qualified Substitute Statement as may be the case, the agent and/or Qualified Substitute may be liable for an amount up to the amount of compensation the agent or Qualified Substitute derived from the transaction. In addition to the above, criminal penalties and other civil penalties and interest may apply.

PARTIES SHOULD CONSULT WITH QUALIFIED PROFESSIONALS. Foreign Sellers and Buyers dealing with transactions involving Foreign Sellers should consult with the appropriate professional, i.e. an accountant and/or attorney.