

# Broker

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# Supervision

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## Selling Incentives

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With the market shifting decidedly in favor of buyers, brokers and sellers are offering various types of incentives to buyers and cooperating agents. Incentives such as bonuses are useful marketing tools, but there are some fundamental rules and guidelines that REALTORS® and their clients must follow when offering incentives.

### **Listing Broker Incentives to Buyers**

Listing brokers may offer buyer incentives in any amount as cash or as an item of personal property such as a home warranty plan, a savings bond, a gift certificate, an appliance or a charitable donation in the buyer's name.

The two main issues all brokers must consider when offering incentives to parties are 1) ensuring the incentive does not constitute an illegal referral to a non-licensuree (fee-splitting); and 2) proper adherence to the advertising rules found in the Code of Ethics and Wisconsin law.

Section 452.19 of the Wisconsin Statutes limits the payment of referral fees, finders fees and commission splits to persons licensed or registered in Wisconsin to practice real estate, or persons regularly and lawfully engaged in real estate brokerage in another state. However, incentives may be offered to sellers or buyers to induce them to sell or purchase real estate. Such incentives must be clearly documented in advance – prior to closing. This advance documentation is necessary to establish that the incentive is not a fee-splitting arrangement with a non-licensuree.

Standard of Practice 12-3 of the REALTOR® Code of Ethics states, “The offering of premiums, prizes, merchandise, discounts or other inducements to list, sell, purchase, or lease is not, in itself, unethical even if receipt of the benefit is contingent on listing, selling, purchasing, or leasing through the REALTOR® making the offer. However, REALTORS® must exercise care and candor in any such advertising or other public or private representations so that any party interested in receiving or otherwise benefiting from the offer will have clear, thorough, advance understanding of all the terms and conditions of the offer. ...”

### **BROKER Pointer**

*Sellers have great latitude in offering creative incentives to make their properties more marketable. REALTORS® must ensure that they abide by the applicable license law and ethics rules when offering or advertising any incentives.*

This standard assumes the omission of even one detail will cause the advertisement to present less than a true picture. This may be disputable should someone bring an ethics complaint concerning an ad for party incentives that does not contain every detail – the issue will be whether there is a true picture of the offered incentive in the ad. An ad that states, “see broker for details,” however, is like a red flag waving in the face of a competitor who lives by the Standards of Practice – it may be seen as an admission that less than a true picture has been disclosed in the ad.

Similarly, Wis. Admin. Code § RL 24.04 prohibits Wisconsin licensees from advertising in a manner that is false, deceptive or misleading. The law simply does not tolerate any advertising that dupes consumers into engaging a broker based upon false representations. One reality-check brokers may consider is to present the advertisement of their incentive program to someone with little exposure to the real estate business and ask whether he or she fully understands what is being offered and what must be done to earn the incentive.

## Seller Incentives to Buyers

While sellers are not bound to the same advertising standards as REALTOR®-licensees, it is wise for sellers to follow the spirit of the rules to prevent future misunderstandings between the parties. The offer to purchase is the binding contract that represents the details of the bargain between the seller and buyer. Thus, when a seller is offering an incentive to a buyer, the terms of the incentive should be precisely stated in the offer to purchase as well as in whatever media the seller uses to advertise the incentive.

When listing brokers advertise the seller's incentive, such as in the remarks section of the MLS or other promotional materials, they should specify that the seller is offering the incentive. This may help avoid liability in the event the seller reneges and help shield the broker from improper advertising claims.

## Listing Broker Incentives to Cooperating Agents (Bonuses)

A listing broker may offer a bonus to cooperating brokers (subagents or buyer's brokers) in addition to commission. The listing broker may *offer* the bonus in the remarks section of the MLS by providing a general description of the bonus. However, cooperating brokers interested in receiving the bonus should enter into a *separate compensation agreement* with the listing broker that addresses the terms of the bonus. There is no magic formula for drafting the compensation agreement to make the bonus enforceable. However a properly drafted agreement, at a minimum, should:

- Fully describe the property for which the incentive is being offered.

- State who is paying the incentive, generally the listing agent or company.
- State exactly who is to be paid – the cooperating broker.
- Clearly state the terms of the bonus such as amount, type and duration.
- Set clear performance standards, such as procuring cause, successful closing, as well as any limitations.

REALTORS® must be mindful of Wis. Stat. § 452.14 (3)(f), which prohibits a salesperson from accepting payment for services in a real estate transaction from anyone but the salesperson's broker. Accepting a bonus directly from another broker could place the salesperson's license in jeopardy. Therefore, the payment must be through the salesperson's broker and may be subject to any commission arrangements between them.

Similarly, Standard of Practice 16-15 states that in cooperative transactions, a REALTOR® shall compensate the principal broker and shall not compensate or offer to compensate (directly or indirectly, including bonuses), any licensee employed by/affiliated with another REALTOR®, without the prior express knowledge and consent of the cooperating REALTOR® broker. Accordingly, the cooperating broker and not the agent should sign the bonus compensation agreement.

## Seller Incentives to Cooperating Agents (Bonuses)

Sellers may also offer bonuses to cooperating brokers. A seller may advertise the bonus personally or may rely upon the listing broker to do so, i.e., in the remarks section of the MLS.

These bonuses may be difficult for cooperating brokers to enforce. For example, a buyer could include the terms of the bonus to the selling agent in the offer to purchase, but the cooperating broker would need to rely on the buyer to enforce that provision. Once the deal closed, the buyer may not be too eager to pursue a court action solely for the benefit of the selling agent. If the cooperating broker is a buyer's broker, the prior written consent of all parties is required pursuant to § RL 24.05(1), so the bonus may need to be included in the offer. The best way for a cooperating broker to ensure the enforceability is through a separate written agreement with the seller, although this may be somewhat cumbersome for the seller given the number of cooperating brokers that may be involved during the course of the listing.

Sellers have great latitude in offering creative incentives to make their properties more marketable. REALTORS® must ensure that they abide by the applicable license law and ethics rules when offering or advertising any incentives.

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