STATE OF WISCONSIN
REAL ESTATE EXAMINING BOARD

IN THE MATTER OF RULE-MAKING	**:**	**REPORT TO THE LEGISLATURE**
PROCEEDINGS BEFORE THE	**:**	**ON CLEARINGHOUSE RULE 10-136**
REAL ESTATE EXAMINING BOARD	**:**	**(s. 227.19 (3), Stats.)**

I. THE PROPOSED RULE:

The proposed rule, including the analysis and text, is attached.

II. REFERENCE TO APPLICABLE FORMS:

Two new brokers' disclosure statements, one for clients, and one for customers.

III. FISCAL ESTIMATES:

The department of safety and professional services estimates that this rule will have costs of $128 to create forms and update the department's website. The real estate examining board finds that this rule will have no significant fiscal impact on the private sector.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

These proposed new rules are for the purposes of clarifying and updating the current version of ch. RL 24, and increasing the number of educational programming hours required for initial licensure in s. RL 25.02 (2). As the rule-making authority, the board sought and received input from the Wisconsin Realtor's Association for these revisions.

Many of the requested changes arose from legislative action in 2005 Wis. Act 87, which became effective on January 13, 2006. Among other things, Act 87 amended various of the definitions related to real estate broker practice in Wis. Stat. § 452.01; modified § 452.133, related to a broker's duties; created § 452.134, related to agency relationships; recreated § 452.135, related to brokers' disclosure requirements; and amended § 452.138, related to brokers serving more than one client simultaneously.

Two significant aspects of Act 87 were first, the new distinction between brokerage services that involve negotiation and those that do not; and second, the two differing disclosure statements, i.e., one that a broker must provide to a client, and the other that must be provided to a customer. Prior to Act 87, under s. 452.135 (1), Stats. 2003-04, licensees were required to enter into agency agreements with all persons to whom they provided any type of brokerage services. With the passage of Act 87, licensees may provide brokerage services, other than those involving negotiation, to any person in a

transaction without an agency agreement, or without having been retained as a subagent. Section 452.134 (1), Stats. 2007-08.

Regarding the new disclosure statements, although the notions of a client, defined as a party to a transaction with whom the broker has an agency agreement, and of a customer, a party to a transaction not a client to whom the broker provides services, were separate and distinct before the passage of Act 87, the same disclosure statement was used for both clients and customers. Act 87 established separate disclosure statements for customers and clients. Ss. 452.135 (1) (a) and (2) (a). This rule-making proposal would render the administrative rules for disclosure statements consistent with the statutory changes. Act 87 also created new s. 452.134, Stats., establishing the concepts of subagency and designated agency, which are reflected in this proposal as necessary.

Several of the other proposed changes to ch. RL 24 are non-substantive, intended simply to make the text of the rules clearer, more accurate, or more succinct, or any combination thereof, and thus, more easily understood. Some changes are substantive, primarily in the nature of either expanding the scope of a licensee's disclosure duties to include more recipients, or expanding the scope of the licensee's duties regarding "offers" to encompass all "written proposals." Finally as to ch. RL 24, the board proposes to eliminate the motor vehicle offense exception from the conviction reporting requirements, and to lessen the amount of time a licensee has for forwarding copies of documents pertinent to a criminal conviction to the department from 30 days to 48 hours.

The proposed increase in the number educational programming hours required for initial licensure under s. RL 25.02 (2) is based on the board's research on the pre-licensure requirements of other jurisdictions. The board found that many other jurisdictions around the country have significantly higher hours requirements than Wisconsin does. To bring Wisconsin into line with other jurisdictions, and to better protect real estate licensees and the consumers of their services, the board requests an increase in Wisconsin's required hours of pre-licensing education from 36 to 72.

V. NOTICE OF PUBLIC HEARING:

A public hearing on this proposed rule-making was held on February 17, 2011. There were no appearances at the public hearing and no written comments were received.

VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:

Comment 5c. "As amended, s. RL 24.05 (2) could be interpreted as allowing self-dealing in some circumstances, provided that a licensee acts in his or her individual interest, rather than for the benefit of a family member, business, or organization. Does that interpretation reflect the department's intention?"

Response: Rejected. The board consulted with department staff members who are involved in enforcement of the real estate rules, and with the Wisconsin Realtors Association on this question. These sources explained that an artificial, yet substantive,

distinction exists between a licensee acting on his or her behalf as an individual, and on his or her behalf as a sole proprietorship or limited liability company. The amendment to s. RL 24.05 (2) will allow a licensee to act on his own behalf as a sole proprietorship or limited liability company, but not as an individual. Thus, the board declines to modify its proposed amendment to s. RL 24.05 (2).

Comment 5.e. "The language added in s. RL 24.07 (8) (a) 3. should be revised for greater clarity. A possible revision might begin with the following language: 'When a change to a licensee's form of representation with a client or customer makes the initial disclosure provided under s. 452.135, Stats., incomplete,…."

Response. Rejected in part, accepted in part. The board agrees that some revision of the language in amended s. RL 24.07 (8) (a) 3. is appropriate for clarification purposes. The board therefore makes minor revisions, but maintains most of the original amendment.

Comment 5.f. "As used throughout s. RL 24.07 (8) (d), the phrase 'to a customer' could create some confusion. A possible alternative might be to insert 'form' after this phrase."

Response. Rejected. The board adds the word "statement" after "disclosure" instead of "form," to clarify the reference to the written disclosure statement. The board otherwise finds that the citations to s. 452.135 (1), Stats., provide sufficient clarity as to the use of the phrase "to a customer" in the proposed amendments to s. RL 24.07 (8) (d).

Comment 5.g. "For consistency, in s. RL 24.07 (8) (e), consider replacing the phrases 'disclosure to clients required in' and 'disclosure to customer form required in' with 'disclosure statement required under.'"

Response. Rejected. Again, the board believes that the citations to either s. 452.135 (1) or (2), Stats., following the term "broker disclosure statements" in s. RL 24.07 (8) (e) provide sufficient clarity as to the meaning of that term.

The remaining recommendations in the Clearinghouse Report are accepted in whole.

VI. CHANGES IN THE CLEARINGHOUSE DRAFT RECOMMENDED BY THE RULE-MAKING AUTHORITY:

The board has made minor modifications to the draft of this proposal that was submitted to the clearinghouse, such as renumbering some of the original proposal's sections after inserting a new one for the definition of "principal broker," as recommended by the clearinghouse; changing certain prepositions as appropriate; and correcting typographical errors. In addition, where appropriate, references in the clearinghouse draft to "the department" have been changed to "the board," i.e., the real estate examining board, pursuant to ss. 150 and 3217, 2011 Wisconsin Act 32, codified at ss. 15.405 (11m) and 452.01 (1s), Stats., respectively.

The board also makes some revisions that simply more accurately reflect the board's original intent for the proposal. As noted above, the board adds a definition of "principal broker" using the statutory definition of the same that is found in s. 452.01 (5w).

In amended s. RL 24.05 (1) (a), the board adds the term "broker-employer" to the entities from which a licensee may accept a fee or compensation related to a transaction without the prior written consent of all parties. Amending the existing rule to include both a principal and an employing broker makes clear first, that licensees acting as subagents may receive compensation from the principal broker for their services to a client whose agency agreement is with the principal broker without the client's or any other party's written consent; and second, that a licensee who works for a brokerage firm may receive compensation from the firm for his or her services to a client, where the firm requires all clients of its employee-brokers to pay the firm directly. The addition of a principal broker reflects Act 87's introduction of sub-agency. The addition of a broker-employer accounts for licensees who practice in a firm and receive their pay from the firm rather than the client directly.

Next, the board replaces the word "may" with "shall" in the last sentence of amended s. RL 24.05 (2). Section RL 24.05 (2) requires a licensee acting as an agent in a real estate or business opportunity transaction to disclose any interest he or she may have in the transaction to all the parties involved, and to obtain their written consent. The board concludes that incorporating such consents into a transaction document should be mandatory, rather than permissive. The purpose of the mandatory disclosure rule is to ensure that all parties to a transaction are aware of the licensee/agent's interest *before* entering into any type of agreement related to the transaction. Requiring the written consents to be incorporated into the first-executed transaction-related document will accomplish that objective.

In addition, the board eliminates its proposed Note to s. RL 24.05 (2), concluding that it is not necessary.

In recreated s. RL 24.05 (4), the board takes out the qualification of "principal" respecting "buyer," and uses only "buyer" instead. The rule should logically encompass all buyers, because it is intended to prohibit listing brokers from providing incentive to another licensee to act as a buyer in a transaction, principal or otherwise, without first obtaining the seller's written consent. Eliminating the "principal" qualification will also avoid any confusion over who is the "principal" buyer.

In the amendment to s. RL 24.07 (8) (c) (title), the board replaces the word "documents" with "proposals," because these proposed new rules define the term "written proposal" in s. RL 24.02 (19). The term encompasses "any written document…." Thus, it is logical and more consistent to use the term "written proposals" in amended s. RL 24.07 (8) (c).

In the proposed recreation of s. RL 24.07 (8) (d) 3., the board adds the phrase "as required in s. 452.135 (1), Stats.," for clarity, and for consistency with the other three subdivisions of s. RL 24.07 (8) (d).

In the proposed amendments to s. RL 24.07 (8) (e) (title) and subd. 1., the board replaces the term "listings" with "agency agreements." This change is consistent with the generally more-encompassing nature of the rest of the new rules.

In amended s. RL 24.13 (4), regarding notifications of a party's action on a written proposal, the board adds the requirement that if requested, licensees must also notify the other party's broker of the date and time a written proposal was presented to the licensee's client or customer. Current law requires notification of when an offer is rejected or expired, but not of when an offer was presented. The board and department often receive complaints questioning whether presentation of a buyer's offer was withheld temporarily or altogether. This modification to the original amendments proposed for this rule addresses such complaints. The board finds that the addition of this requirement better reflects the intent of both the existing notification-of-action rule and the same, as amended.

Finally, as recommended by the legislative clearinghouse, the board creates a separate, effective date section at the end of the rule-making proposal. However, rather than having these new rules take effect the first of the month following publication, the board concludes that the effective date of the new rules should be delayed until January 1, 2012. This will allow the department preparation time to account for the increased licensure requirement.

VII. FINAL REGULATORY FLEXIBILITY ANALYSIS:

The board determines that these proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1), Stats.