

DEPARTMENT OF BOATING AND WATERWAYS

2000 Evergreen Street, Suite 100
SACRAMENTO, CA 95815-3896
(916) 263-1331



Information Letter

DATE: *August, 2006*

TO: *Licensed Yacht and Ship Brokers*

FROM: *Gina Ebling, Department of Boating and Waterways*

SUBJECTS: 1) Introduction of new investigator 2) Addition of exam site in San Diego 3) DBW Broker/Salesperson exam revision status 4) Advertising 5) Verification of information 6) Undocumented vessels-use tax 7) Broker supervision of transactions of salespersons 8) Deposit checks held 9) Use of term: Broker of Record

LICENSING ISSUES OF INTEREST

1. New Investigator

The Yacht and Ship Unit is happy to announce the addition of a new investigator to the staff. Silvia Holmquist comes to us from the Department of Justice, Division of Gambling Control with five years investigative experience. Silvia will be performing inspections and investigations throughout the State as well as addressing industry and providing clarification of Departmental laws and regulations. She can be reached at (916) 263-8182 or sholmquist@dbw.ca.gov.

2. Addition of Exam Site in San Diego – Pilot Project

Good news for our applicants in the San Diego area; a new Southern California exam site will be available to accommodate San Diego broker and salesperson applicants beginning on October 25th. The location will be the **San Diego State Building, 1350 Front Street, Room B-102**. The Department will review several factors by the end of 2006 to determine the feasibility of continuing to administer exams in the San Diego area on a permanent basis. The process for submitting application packages will not change; however, unless otherwise stipulated by the applicant, individuals in the San Diego area will be scheduled to test at the San Diego location.

3. DBW Broker/Salesperson Exam Revision Project Status

The Department is continuing its cooperative project with qualified industry subject matter experts to revise the existing broker and salesperson exams. The project is now in the review stage and expected to be completed by the Summer of 2007. Again, we thank industry for their support of this much anticipated project.

4. Advertising

The Department has recently received information concerning possible advertising violations found in print and internet ads. Specifically, brokers are failing to identify themselves as licensed brokers and failing to identify their brokerage in the ads. Please be advised, such violations can result in disciplinary action against your broker license. To be in compliance with law, please refer to the California Code of Regulations, Section 7601(c) and 7602 (a)&(b), which state:

7601(c) "Advertising" is any written or printed communication or oral communication made in accordance with a text or outline that has been reduced to written form which is published for the purpose of inducing persons to sell or purchase a product or use a service.

7602(a) Advertising of any service for which a license is required under the provisions of the Yacht and Ship Brokers Act shall disclose the name of the business as shown on the required license.

7602(b) In addition to the name of the broker on signs or in advertising, the words "licensed yacht broker," "yacht broker," "ship broker," or "boat broker," or "brokerage" in each such context may be used to indicate that the broker is a licensed yacht broker.

5. Verification of Information

In order to avoid misrepresenting a vessel, a broker should validate all verifiable claims made by the seller. The Department considers it essential for brokers to make full and complete disclosures (to the best of their knowledge) about a vessel and its condition.

Licensees who act as brokers for purchasers in a transaction owe a fiduciary duty to the purchaser. A fiduciary duty is the highest standard of duty implied by law. In executing their duty vis-a-vis purchasers they represent, brokers must act for the purchaser's benefit while subordinating their own personal interests (the desire to close the deal and collect a commission). In carrying out this duty, brokers must be proactive in verifying information about the vessel and its condition. Brokers are not fulfilling their fiduciary duty to their purchasers if they merely engage in passive reliance on information provided by the seller. Brokers should verify claims made by the seller and should make full and complete disclosures to the purchaser.

Examples of information that should be verified independently by the broker include that the seller is the actual owner of the vessel, that claims of recent repairs are documented, and that claims of warranties are confirmed by documentation. Information commonly revealed through a marine survey need not be independently verified by a broker.

With general disclosures, common sense and due diligence should apply; a broker or salesperson should always consider the possible side effects of any business practice which may ultimately affect their fiduciary responsibility.

6. *Undocumented Vessels Use Tax*

For your information, according to the California State Board of Equalization (BOE) booklet entitled *Tax Tips for the Watercraft Industry-Sales and Use Taxes*:

When an undocumented vessel is sold through a broker and use tax is due, the purchaser is responsible for paying that tax to the DMV when registering the watercraft.

A licensed yacht and ship broker who has been appointed as an *undocumented vessel registration agent* by the Department of Motor Vehicles (DMV) may collect the use tax from the buyer. The agent can transmit the tax, registration application and applicable fees to the DMV; or, the broker may submit the application and applicable fees to the DMV, which will then collect the use tax from the purchaser. For individual transactions, the boat owner may authorize a broker or their representative to obtain a Power of Attorney which will allow them to process the taxes through the DMV for the owner.

For more information or for licensed brokers who wish to be appointed as an *undocumented vessel registration agent* by the DMV, contact:

Vessel Registration Unit
California Department of Motor Vehicles
P.O. Box 942869
Sacramento, CA 94269-0001
(916) 657-7669

7. *Broker Supervision of Salespersons' Transactions*

The Department has recently had reports of salespeople working without direct supervision of their qualifying broker. The code provides that "salesman" refers to a natural person who is employed by a licensed broker to do one or more of the acts that may be performed by a licensed broker. By definition, an employer has the power or right to control and direct the employee in the material details of how the work is to be performed, and because a broker owes a fiduciary duty to his or her customers, the broker also has a duty to do so. This supervisory relationship should be spelled out in the broker-salesman relationship agreement required by Title 14 CCR Section 7619 and should be strictly adhered to at all times. Among other things, brokers should supervise the sales transactions of their salespersons and require salespersons to maintain files at the broker's principle place of business.

Salespersons should be precluded from signing any documents which require the express signature of the broker, and may only make withdrawals from trust accounts in accordance with Title 14 CCR section 7604, in the broker's absence and when authorized by the broker in writing to do so. Proper broker supervision assures consumer protection and also insures that licensed salespersons correctly learn the skills and apply the professional standards required of all licensees. Licensed salespersons, as agents of the broker, have the same fiduciary responsibility to the broker's principles as do brokers; however, when a licensed salesperson commits a violation, not only the salesperson, but also his or her supervising broker may be disciplined for the violation. Brokers who fail to properly supervise their salespersons are putting their own licenses at risk.

8. Deposit Checks Held

Random inspections have revealed that some brokers are still holding deposit checks, sometimes until the transaction has been completed. Harbors and Navigation Code section 714 gives the broker the choice of placing these funds into a neutral escrow depository as soon as possible, or to place those funds into a trust fund account. Although the language of the statute does not define when the funds should be deposited into the trust fund, the Department interprets the law to require the broker who elects to deposit those funds into a trust fund account to do so as soon as possible, e.g., within 36-48 hours.

The only exception to this requirement is found in Title 14 CCR section 7604(e) and (f), which provide:

(e) A check received from the offeror may be held un-cashed by the broker until acceptance of the offer if:

(1) the check by its terms is not negotiable by the broker or if the offeror has written instructions that the check shall not be deposited nor cashed until acceptance of the offer and;

(2) the offeree is informed that the check is being so held before or at the time the offer is presented for acceptance.

(f) In these circumstances if the offeror's check was held by the broker in accordance with subdivision (e) until acceptance of the offer, the check shall be placed into a neutral escrow depository or the trust fund account or into the hands of the offeree if offeror and offeree expressly so provide in writing not later than the next business day following acceptance of the offer unless the broker receives written authorization from the offeree to continue to hold the check.

9. Use of Term: Broker of Record

Section 701 does not distinguish between a "broker" and a "broker of record." However, the Department recognizes that a "broker of record" is a term commonly understood in the industry to mean a designated broker or supervising broker.

An individually owned brokerage, corporation or partnership may employ several brokers; however, in each case, only one individual is designated as the "broker of record." That individual has the responsibility to supervise the transactions of all other salespersons and brokers employed by the brokerage. The Department recognizes the term "broker of record" to identify that broker who is so designated by the brokerage.

Harbors & Navigation Code Section 701(a) defines a "broker" as follows:

701(a) "Broker" means a person who, except as otherwise excluded by Section 710, for compensation or in expectation of compensation, does, or negotiates to do, one or more of the following acts for another or others.....

LICENSING ISSUES OF INTEREST

Downloading Renewal/Reinstatement/Transfer Documents

For your convenience, broker and salespersons renewal/reinstatement/transfer documents are available by internet. These forms can be downloaded via our department website. The link is www.dbw.ca.gov. To retrieve these documents click on DBW Programs ~ (located on the left side of the screen), then click on Yacht and Ship Licensing Program.

Returning Licenses to the Department

Pursuant to Department of Boating and Waterways Regulations, licenses must be returned to the department for the following reasons:

- Upon termination or transfer of salesperson
- Upon closure of main brokerage or branch office
- Upon change of Broker of Record
- Upon change of Broker of Record's address or business entity

A salesperson may only transfer to another brokerage after their current license has been received by the Department.

Courtesy Notices

Courtesy notices are sent out one month prior to a license expiration date. If a notice is not received, it is the responsibility of the broker/salesperson to renew their license in a timely manner.

Requesting Applications and Receiving a Salesperson License

Only a licensed broker of record may request a salesperson application package from the Department. The package, which includes study materials, will be mailed to the broker's address of record and should be immediately forwarded to the applicant to complete and submit with appropriate fees. The Department then has ten days to process the application and schedule the exam ~ please do not call requesting the status within this time period.

Once the salesperson has successfully completed his/her exam, a license will be issued and mailed to the broker's address. Once received, the salesperson's license should immediately be displayed at the brokerage and the pocket license presented to the salesperson.

2006 Directories

The 2006 Directory of Licensed Yacht and Ship Brokers and Salespersons is now available by request from the Department. However, due to frequent revisions, it is strongly recommended that you rely on the licensing directory posted on the Department website which is updated weekly. A current internet directory can be accessed through our website at www.dbw.ca.gov/yacht.htm.

If there are any items of interest to the industry which you would like to see addressed in a future edition of this Information Letter, please contact Gina Ebling at gebbling@dbw.ca.gov.