

INFORMATION LETTER

DATE: June 22, 2000

TO: Licensed Yacht and Ship Brokers

FROM: Leanna Sweha, Staff Counsel
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SUBJECTS: Topics discussed by the Department at the “Yacht Sales and Law III Seminar”: Access to Licensing Information via Internet, Obtaining Original Signatures. **Other Issues:** Exclusive Listing Agreement, Advertising.

To those of you who attended the “Yacht Sales and Law III Seminar” on June 7, 2000 at the Long Beach Yacht Club, thank you for attending. For those of you who did not have the opportunity to attend, this letter summarizes the topics discussed by the Department.

The Internet:

One of many goals the Yacht and Ship Brokers Licensing program wants to achieve this year is to provide consumers convenient access to Yacht and Ship Broker Licensing information. The Department acknowledges that there are times when the staff is not immediately available to answer questions during a brokered transaction.

Therefore, the Department is providing access to additional licensing information via Internet. This will help your client and yourself avoid confusion and conflict during a brokerage transaction, which could result in a complaint filed against you.

You can access the Department’s web-site at www.dbw.ca.gov. Once you have navigated to the Yacht and Ship Brokers Licensing Program, you will find that the Department has publicized the following information:

1. The brochure known as “*How to Buy a Used Boat*” which provides helpful tips to the consumers interested in purchasing a used vessel from a broker. This brochure was created with the helpful assistance of the California Yacht Brokers Association.

2. The 2000 Licensing Directory, with the licensee E-mail address and business fax number. Note: The hard copy will be mailed to the brokers in late July 2000.
3. A direct link from our web page to the Harbors and Navigation Code. Note: the Code sections governing your license are 700-740.
4. The Department's *Information Letters*, which have been issued to brokers in the past addressing various topics under the administration of the Yacht and Ship Brokers Act. The Department recommends that you review all of the letters publicized, as they will make reference to one another.

We are in the process of developing an extensive complaint form that everyone will be able to download. The complaint form will require the complainant to sign his/her statement under penalty of perjury. This was done to deter a complainant from filing a frivolous complaint against a licensee, which wastes both licensee and Department resources.

Obtaining Original Signatures:

The California Yacht Brokers Association has asked the Department to review the following issue:

Whether the Yacht and Ship Brokers Act (Harbors and Navigation Code section 735.1) requires brokers to retain transaction documents containing their principal's original signatures or whether copies of such documents would satisfy the law.

The Department has reviewed this issue and has concluded that:

Although Harbors and Navigation Code section 716 requires brokers to obtain original signatures of their principal on all transaction documents, section 735.1 requires brokers only to retain copies of these documents and provide them to the Department if requested.

Therefore, brokers are in compliance with record retention requirements if they retain copies of all transaction documents. However, brokers may be called upon to prove that they did in fact obtain the principals original signature on a transaction document. For example, in 1999, after the principal filed a complaint with the Department, the Department investigated and fined a broker because he could not prove that he did actually obtain his principal's original signature on certain transaction documents. Retention of originals would be one way to prove compliance, although, as stated above, this is not legally required. You should consult your own legal counsel as to what practice to follow.

The CYBA also has asked whether facsimiles satisfy the requirements of the Yacht and Ship Brokers Act, in light of the new Uniform Electronic Transactions Act

("UETA"). The UETA went into force on January 1, 2000 and is codified at Civil Code section 1633.1 et seq. It applies to "electronic records" and "electronic signatures", as defined in the new law, where the parties agree to conduct business electronically.

The UETA provides that:

- ?? Where a law requires a written record and written signature, an electronic record and an electronic signature satisfy the law.
- ?? If a law requires a record be retained for evidentiary, audit or like purposes, retaining an electronic record of the information in the record satisfies such retention requirement, as long as the record is accurate and accessible.

Clearly then, an electronic record and electronic signature will satisfy the section 716(a) requirement of a "signed written authorization." Similarly, retaining an electronic record of any transaction document will satisfy the record retention requirements of section 735.1.

However, it is not clear whether a signature on a facsimile is an "electronic signature" as defined in the UETA. The Department is researching this issue further, particularly in light of similar pending federal legislation. The Department will provide guidance on this issue as soon as possible.

Exclusive Listing Agreements:

Recently, the Department has found that many brokers have created clauses within their exclusive listing agreements that allows for an automatic renewal of the agreement, without obtaining written authorization once the specified time period has elapsed.

Title 14, Section 7601 (a) of the California Code of Regulations states as follows:

"An "exclusive listing" is a written agreement between the owner of the vessel and a broker which provides that the commission is due the broker named in the contract if the boat is sold, traded, or exchanged within the time limit which must be specified in the contract by the said broker, by any other broker, or by the owner."

The exclusive listing agreement must only contain one specified time limit for which the broker has authorization to sell the vessel. An automatic renewal clause allows the contract to become ongoing, which is not considered a time limit. The Department requests that you either rewrite a new contract with the owner or obtain a verbal authorization to extend the existing contract prior to the expiration of the time limit. However, if you choose the latter, you need to make sure that you make a note of the conversation on the original authorization by providing the content, date and time of the conversation with your signature.

The Department recommends that you secure a new authorization by re-writing the contract. This will protect you against future complaints made by the owner alleging that he/she never gave you authorization to continue to sell the vessel. If a broker is unable to provide evidence to the Department that he/she had authorization to sell the vessel, the broker has committed a violation of section 716 of the Harbors and Navigation Code.

Advertisement:

It has come to our attention that brokers advertising in boating publications are failing to disclose the name of the business as it appears on the broker's license.

Title 14, Section 7602(a) of the California Code of Regulations states:

“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.”

Therefore, advertisements for which a license is required under the Act that fail to disclose the name of the business as it appears on the license will constitute a violation of the Act and be subject to civil penalties.

Please discuss this information with your staff. As always if you have any questions, you may contact either Dave Trillo at (916) 263-8194 or Jana Clarke at (916) 263-8195.