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November 6, 2009

VIA E-MAIL RGOLDEN@COLORADOREALTORS.COM

Robert E. Golden, CEO
Colorado Association of REALTORS
309 Inverness Way South
Englewood, CO 80112-5818

Dear Bob:

Pursuant to your request, this letter forwards our formal opinion on the following issue which has become a hot topic in Colorado and several other states:

May a real estate broker in Colorado produce a Broker Price Opinion in Colorado for a third party and charge a fee for this service?

I. Background

During these challenging economic times, REALTORS® may be asked to provide a valuation of real property for a third party such as a lender. Where the third party is a lender, the estimate may be used to decide whether to foreclose on a property or may be used to determine the amount the lender may bid at a foreclosure sale. In the industry, such an estimate of value is called a "Broker Price Opinion" (hereinafter "BPO").

Sometimes, a REALTOR® provides an oral BPO while others are written. Some REALTORS® charge a fee for the BPO, others do not.

As the number of BPO's has increased, questions have arisen from lenders, appraisers and brokers about the legality of BPO's and whether the broker may be paid for the BPO. This opinion addresses the legality of BPO's in Colorado from the standpoint of the broker who provides them. This opinion does not address legal issues affecting a lender's purchase or use of a BPO.

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II. Disclaimers

This opinion is provided to our client, the Colorado Association of REALTORS®, with the understanding that it may be used by REALTORS® for general information purposes only. This letter does not constitute legal advice and no broker or brokerage company may rely on this opinion.

Although there are federal laws which may be applicable to a BPO, the legality of a BPO is determined under state law. This opinion is predicated upon Colorado law and is not applicable to any other state.

Brokers should consult a lawyer for legal advice as to whether a particular BPO should be provided and under what circumstances.

III. Discussion

In Colorado, the definition of "real estate broker" contained in real estate licensing statutes does not expressly list offering an opinion of value as a task which a real estate broker may perform under a Colorado real estate license. § 12-61-701(2)(a), C.R.S. However, under Colorado case law the term "real estate broker" includes all activities related to the sale of real estate and offering opinions on value is certainly one of those activities. When a broker has a listing or buyer brokerage agreement the broker often offers opinions on value.

One question is whether a broker may offer an opinion on value where the broker is not performing services under a listing or buyer brokerage agreement. That question is directly addressed in Colorado's statutory scheme for regulation of real estate appraisers which was enacted in response to amendment to the Federal Institutions Reform, Recovery and Enforcement Act ("FIRREA").

In Colorado, a person who provides for a fee an opinion of the value real estate including one who estimates value, must comply with statutory requirements for real estate appraisers such as registration, license or certification. § 12-61-701 et seq., C.R.S. However, for several years, this statutory scheme has excluded a person who is licensed as a real estate broker in Colorado who provides an opinion of value so long as it is not represented as an appraisal and is not used for purposes of obtaining financing. § 12-61-702(5)(b)(II). That exclusion does not require that the broker have a listing in order to provide the opinion of value. Neither FIRREA nor any other Federal law or Colorado law precludes a real estate broker from providing a BPO for a fee.

Thus, a real estate broker licensed in Colorado may provide a BPO for a fee without being licensed, certified or registered as an appraiser. However, each BPO should contain a disclaimer which mirrors the Colorado statute:

"This is not an appraisal and may not be used to obtain financing."

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While we recognize that REALTORS® often provide an oral BPO, that is not the best practice. REALTORS® in Colorado must comply with Standard of Practice 11-1 of the Code of Ethics, which provides:

"When REALTORS® prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following:

- (1) Identification of the subject property;
- (2) Date prepared;
- (3) Defined value or price;
- (4) Limiting conditions, including statements of purpose(s) and intended user(s);
- (5) Any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants;
- (6) Basis for the opinion, including applicable market data; and
- (7) If the opinion is not an appraisal, a statement to that effect."

To comply with the above Standard of Practice, the BPO should be in writing. Also, the disclaimer contemplated by Colorado law is more effective if given in writing. If the third party imposes a time constraint on the provision of the BPO, a REALTOR® could provide an oral BPO and later confirming it in writing so as to include the disclaimer under Colorado law and the items enumerated in Standard of Practice 11-1.

The next consideration is whether the engagement of the broker to provide a BPO needs to be in writing. Through adoption and promulgation of Real Estate Commission Rule F, it is compulsorily for all real estate brokers licensed in Colorado to use Commission approved forms in their contracting. This includes listing contracts. However, the listing contracts promulgated by the Commission do not address BPO's and the Commission has not promulgated an approved form for a licensee to provide a BPO for a third party. In instances where the Commission has not developed an approved form, licensees may use other forms which are not governed by Rule F.

In our opinion, neither Colorado statutes nor Commission rules require a broker to have a written contract in order to provide a BPO. However, it is advisable for the broker to have a written contract where the written disclaimer can be reflected. Also, the written contract should clearly document the scope of the BPO, the extent of the property to be valued, the compensation to be paid, and the use to be made of the BPO. A broker should consult legal counsel to prepare such a written contract.

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In order to simplify the process, we suggest that the written contract contain not only the disclaimer under Colorado law but also the elements required by Standard of Practice 11-1. Thus, a REALTOR® need create only one document, not both a written contract and a written BPO.

Very truly yours,

ROTHGERBER JOHNSON & LYONS LLP

A handwritten signature in black ink, appearing to read "R. Clark", written in a cursive style.

Richard K. Clark

RKC