



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

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March 22, 2013

Curtis E. Aldendifer
North Carolina Real Estate Commission
1313 Navaho Drive
Raleigh, NC 27609

Re: 21 NCAC 58A .0110 and 1402

Dear Mr. Aldendifer:

At its March 21, 2013 meeting the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to rule 58A .0110 based on ambiguity. It is not clear in (o), page 5 lines 27 and 28, who the rule applies to. Based on discussions at the Commission meeting it appears that the rule would apply to only a NC licensed broker who was not a NC resident and not a broker-in-charge of a NC office. But this may not be clear in all situations.

The Commission objected to rule .1402 on the basis of lack of statutory authority and ambiguity. In both (a) and (b) there are discretionary actions that the Real Estate Commission may take. In neither case are there any standards set for when the discretionary authority shall or shall not be exercised so therefore it is unclear what those standards are. There is no authority cited to set those standards outside the rule.

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Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph J. DeLuca, Jr.", written in a cursive style.

Joseph J. DeLuca, Jr.
Commission Counsel

JJD:jbe

1 21 NCAC 58A .0110 is amended as published in 27:10 NCR 942 as follows:

2
3
4 21 NCAC 58A .0110 **BROKER-IN-CHARGE**

5 (a) When used in this Rule, the term:

6 (1) "Office means any place of business where acts are performed for which a real estate license is required
7 or where monies received by a broker acting in a fiduciary capacity are handled or records for such trust
8 monies are maintained.

9 (2) "Branch Office" means any office in addition to the principal office of a broker which is operated in
10 connection with the broker's real estate business; and

11 ~~(a)~~ (b) Except as provided in this paragraph and paragraph (c) of this Rule, Every every real estate firm firm,
12 including a sole proprietorship, shall designate have a broker designated by the Commission as provided in
13 paragraph (d) of this Rule to serve as the broker-in-charge at its principal office and a broker to serve as broker-in-
14 charge at any branch office. No broker shall be broker-in-charge of more than one office at a time. If a firm shares
15 office space with one or more other firms, one broker may serve as broker-in-charge of each firm at that
16 location; however, all firms at that location shall maintain with the Commission as a delivery address the
17 same delivery address as that of the designated broker-in-charge. No office or branch office of a firm shall have
18 more than one designated broker-in-charge. A licensed real estate firm is not required to designate have a broker-in-
19 charge if it:

20 (1) has been organized for the sole purpose of receiving compensation for brokerage services
21 furnished by its qualifying broker through another firm or broker;

22 (2) is treated for tax purposes as a Subchapter S corporation by the United States Internal Revenue
23 Service;

24 (3) has no principal or branch office; and

25 (4) has no person associated with it other than its qualifying broker.

26 (c) A broker who is a sole proprietor shall designate obtain the Commission's designation of himself or herself as a
27 broker-in-charge if the broker engages in any transaction where the broker is required to deposit and maintain
28 monies belonging to others in a trust account, engages in advertising or promoting his or her services as a broker in
29 any manner, or has one or more other brokers affiliated with him or her in the real estate business. Maintenance of a
30 trust or escrow account by a broker solely for holding residential tenant security deposits received by the broker on
31 properties owned by the broker in compliance with G.S. 42-50 shall not, standing alone, subject the broker to the
32 requirement to designate himself or herself as a broker-in-charge.

33 (d) A broker desiring to be a broker-in-charge shall declare immediately request in writing his or her designation as
34 broker-in-charge of an office to by the Commission on a form prescribed by the Commission. Commission within
35 10 days following the broker's designation as broker in charge of any office. Upon receipt of Notice from the
36 Commission that the broker has been designated as broker-in-charge, the broker shall assume the duties of broker-
37 in-charge.

1 (e) To qualify to become a broker-in-charge, a broker shall:

- 2 (1) have a license on active status but not on provisional status;
 3 (2) possess at least two years of full-time real estate brokerage experience or equivalent part-time real
 4 estate brokerage experience within the previous five years or real estate education or experience in
 5 real estate transactions that the Commission finds equivalent to such experience; and
 6 (3) complete the Commission's 12 classroom hour broker-in-charge course either within three years
 7 prior to designation as a broker-in-charge or within 120 days following designation as a broker-in-
 8 charge.

9 Upon the request of the Commission, a broker shall provide to the Commission evidence that he or she possesses the
 10 requisite experience. A broker-in-charge designation shall be immediately terminated if a broker-in-charge fails to
 11 complete the broker-in-charge course during the required time period or if the Commission finds the broker-in-
 12 charge does not possess the required experience. A broker who is removed as broker-in-charge for failure to timely
 13 complete the Commission's 12 hour broker-in-charge course must first complete the 12 hour broker-in-charge course
 14 before he or she may again be designated as broker-in-charge.

15 (f) By submission of a broker-in-charge designation request to the Commission, a broker certifies that he or she
 16 possesses the experience required to become a broker-in-charge and upon designation by the Commission, the
 17 broker shall be authorized to act as a broker-in-charge. Upon his or her designation as broker-in-charge and
 18 completion of the broker-in-charge course within the time period prescribed in Subparagraph (e)(3) of this Rule, the
 19 designated broker-in-charge acquires the eligibility to be re-designated as a broker-in-charge at any time in the
 20 future after a period of not actively serving as a broker-in-charge without having to again satisfy the qualification
 21 requirements for initial designation stated in this Paragraph so long as the broker continuously satisfies the
 22 requirements to retain such eligibility described in Paragraph (i) of this Rule.

23 (g) The broker-in-charge shall, in accordance with the requirements of G.S. 93A and the rules adopted by the
 24 Commission, assume the responsibility at his or her office for:

- 25 (1) the retention of current license renewal pocket cards by all brokers employed at the office for
 26 which he or she is broker-in-charge; the proper display of licenses at such office in accordance
 27 with Rule .0101 of this Section; and assuring that each licensee broker employed at the office has
 28 complied with Rules .0503, .0504, and .0506 of this Subchapter;
 29 (2) the proper notification to the Commission of any change of business address or trade name of the
 30 firm and the registration of any assumed business name adopted by the firm for its use;
 31 (3) the proper conduct of advertising by or in the name of the firm at such office;
 32 (4) the proper maintenance at such office of the trust or escrow account of the firm and the records
 33 pertaining thereto;
 34 (5) the proper retention and maintenance of records relating to transactions conducted by or on behalf
 35 of the firm at such office, including those required to be retained pursuant to Rule .0108 of this
 36 Section;

- 1 (6) the proper supervision of provisional brokers associated with or engaged on behalf of the firm at
 2 such office in accordance with the requirements of Rule .0506 of this Subchapter;
- 3 (7) the proper supervision of all licensees brokers employed at the office for which he or she is
 4 broker-in-charge with respect to adherence to agency agreement and disclosure requirements.

5 (b) When used in this Rule, the term:

- 6 (1) ~~"Branch Office" means any office in addition to the principal office of a broker which is operated
 7 in connection with the broker's real estate business; and~~
- 8 (2) ~~"Office" means any place of business where acts are performed for which a real estate license is
 9 required or where monies received by a licensee acting in a fiduciary capacity are handled or
 10 records for such trust monies are maintained.~~

11 (c) To qualify to become a broker in charge, a broker shall:

- 12 (1) ~~have a license on active status but not on provisional status;~~
- 13 (2) ~~possess at least two years of full-time real estate brokerage experience or equivalent part-time real
 14 estate brokerage experience within the previous five years or real estate education or experience in
 15 real estate transactions that the Commission finds equivalent to such experience; and~~
- 16 (3) ~~complete the Commission's 12 classroom hour broker in charge course either within three years
 17 prior to designation as a broker in charge or within 120 days following designation as a broker in
 18 charge.~~

19 By submission of a broker in charge declaration to the Commission, a broker certifies that he or she possesses the
 20 experience required to become a broker in charge and upon acknowledgement by the Commission of a completed
 21 declaration, the broker shall receive his or her broker in charge designation and be authorized to act as a broker in
 22 charge. Upon his or her designation as broker in charge and completion of the broker in charge course within the
 23 time period prescribed in Subparagraph (c)(3) of this Rule, the designated broker in charge acquires the eligibility to
 24 be re-designated as a broker in charge at any time in the future after a period of not actively serving as a broker in
 25 charge without having to again satisfy the qualification requirements for initial designation stated in this Paragraph
 26 so long as the broker continuously satisfies the requirements to retain such eligibility described in Paragraph (e) of
 27 this Rule. A broker in charge designation shall be immediately terminated if a broker in charge fails to complete
 28 the broker in charge course during the required time period or if the Commission finds the broker in charge does
 29 not possess the required experience. Upon the request of the Commission, a broker shall provide to the Commission
 30 evidence that he or she possesses the required experience. A broker who is removed as broker in charge for failure
 31 to timely complete the Commission's 12 hour broker in charge course must first complete the 12 hour broker in
 32 charge course before he or she may again be designated as broker in charge. A broker in charge, upon written
 33 request of the Commission or a broker who has been affiliated with the broker in charge within the previous five
 34 years, shall provide the Commission or broker an accurate written statement regarding the broker's work at the office
 35 of the broker in charge, including the dates of affiliation, average number of hours worked per week, and the
 36 number and type of properties listed, sold, bought, leased, or rented for others by the licensee during his or her
 37 affiliation with the broker in charge.

1 ~~(d)~~(h) A broker who was the broker-in-charge of a real estate office on April 1, 2006, whose broker-in-charge
 2 declaration was received by the Commission prior to that date, and who completed the Commission's broker-in-
 3 charge course prior to April 1, 2006 or within 120 days following designation as a broker-in-charge, may continue to
 4 serve as a broker-in-charge thereafter until his or her eligibility to serve as a broker-in-charge is terminated as
 5 provided in Paragraph ~~(f)~~ (j) of this Rule.

6 ~~(e)~~(i) Once a broker has been designated as a broker-in-charge and completed the 12 hour broker-in-charge course
 7 as prescribed by Paragraph ~~(e)~~ (e) of this Rule, the broker may maintain broker-in-charge eligibility by timely
 8 annual renewal of his or her broker license, completion each license year of the four hour mandatory continuing
 9 education update course prescribed for all licensees brokers and known as the "Real Estate Update Course," and
 10 completion each license year of the four hour special continuing education course prescribed by the Commission
 11 only for brokers-in-charge and known as the "Broker-In-Charge Annual Review Course." The Broker-In-Charge
 12 Annual Review Course must be taken initially by a broker-in-charge during the first full license year following the
 13 license year in which the broker was designated as a broker-in-charge and must be taken each license year thereafter
 14 in order for the broker to maintain broker-in-charge eligibility. The Broker-In-Charge Annual Review Course shall
 15 satisfy the broker's general continuing education elective course requirement, but the broker must also take the
 16 mandatory continuing education Real Estate Update Course each license year. The Broker-In-Charge Annual
 17 Review Course is reserved exclusively for current brokers-in-charge, and brokers who are not currently acting as a
 18 broker-in-charge but who desire to retain their broker-in-charge eligibility. Only these brokers shall receive
 19 continuing education elective credit for taking the course.

20 ~~(f)~~(j) A broker's broker-in-charge eligibility and, if currently designated as a broker-in-charge, his or her broker-in-
 21 charge designation shall be terminated upon the occurrence of any of the following events:

- 22 (1) The broker's license expires or the broker's license is suspended, revoked or surrendered;
- 23 (2) the broker's license is made inactive for any reason, including failure to satisfy the continuing
 24 education requirements described in Rule .1702 of this Subchapter;
- 25 (3) the broker fails to complete the Broker-In-Charge Annual Review Course described in Paragraph
 26 ~~(e)~~ (i) of this Rule; or
- 27 (4) the broker is found by the Commission to have not possessed the experience required in Paragraph
 28 ~~(e)~~ (e) of this Rule at the time of either initial designation as a broker-in-charge or re-designation
 29 as a broker-in-charge.

30 (k) When a broker who is a former broker-in-charge desires to be re-designated as a broker-in-charge following
 31 termination of his or her broker-in-charge designation or eligibility, he or she must first have a license on active
 32 status. The broker then must satisfy the experience requirements for initial designation set forth in Paragraph ~~(e)~~ (e)
 33 of this Rule, and the broker must complete the 12 hour broker-in-charge course ~~within 120 days following re-~~
 34 ~~designation, except that if the broker has taken the 12 hour broker in charge course within the preceding three years,~~
 35 ~~he or she has the option to complete the Broker In Charge Annual Review Course for the current license year within~~
 36 ~~120 days following re-designation as a broker in charge in lieu of repeating the 12 hour broker in charge~~
 37 ~~course prior to re-designation as broker in charge. If a broker who has been re-designated as a broker in charge and~~

1 then removed as broker in charge due to failure to satisfy his education requirement within 120 days following re-
 2 designation subsequently seeks another re-designation as broker in charge, the broker must first complete the 12
 3 hour broker in charge course before he or she may again be designated as a broker in charge, even if the broker has
 4 completed the 12 hour broker in charge course within the preceding three years.

5 ~~(g)~~ (l) A broker-in-charge shall notify the Commission in writing that he or she no longer is serving as broker-in-
 6 charge of a particular office within 10 days following any such change.

7 ~~(h)~~ A licensed real estate firm is not required to designate a broker in charge if it:

8 (1) ~~has been organized for the sole purpose of receiving compensation for brokerage services~~
 9 ~~furnished by its qualifying broker through another firm or broker;~~

10 (2) ~~is treated for tax purposes as a Subchapter S corporation by the United States Internal Revenue~~
 11 ~~Service;~~

12 (3) ~~has no principal or branch office; and~~

13 (4) ~~has no person associated with it other than its qualifying broker.~~

14 ~~(i)(m)~~ A broker-in-charge residing outside of North Carolina who is the broker-in-charge of a principal or branch
 15 office not located in North Carolina is not required to complete the broker-in-charge course or the special continuing
 16 education course prescribed for brokers-in-charge under Paragraph ~~(e)~~ (i) of this Rule. However, if such broker-in-
 17 charge either becomes a resident of North Carolina or becomes broker-in-charge of an office located within North
 18 Carolina, then he or she must take the 12 hour broker-in-charge course within 120 days of such change, unless he or
 19 she has taken the 12 hour course within the preceding three years. Such broker-in-charge shall take the special
 20 broker-in-charge continuing education course prescribed in Paragraph ~~(e)~~ (i) of this Rule during the first full license
 21 year following the change and each license year thereafter so long as the broker-in-charge remains a resident of
 22 North Carolina or continues to manage an office located in North Carolina.

23 ~~(j)(n)~~ A nonresident commercial real estate broker licensed under the provisions of Section .1800 of this Subchapter
 24 shall not act as or serve in the capacity of a broker-in-charge of a firm or office in North Carolina.

25
 26 *History Note: Authority G.S. 93A-2; 93A-3(c); 93A-4; 93A-4.1; 93A-4.2; 93A-9;*

27 *Eff. September 1, 1983;*

28 *Amended Eff. April 1, 2013; July 1, 2010; July 1, 2009; January 1, 2008; April 1, 2006; July 1,*
 29 *2005; July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1,*
 30 *1998; April 1, 1997; July 1, 1995; July 1, 1994.*

1 21 NCAC 58A .1402 is amended as published in 27:10 NCR 951 as follows:

2

3 21 NCAC 58A .1402 MULTIPLE CLAIMS

4 (a) If at any time the Commission has notice of more than one application or potential claim for payment from the
5 Real Estate Education and Recovery Fund arising out of the conduct of a single licensee, broker, the Commission
6 may, in its discretion, direct that all applications filed before a date determined by the Commission be consolidated
7 for hearing and payment.

8 (b) When consolidation is appropriate, the Commission shall issue to the licensee broker and the applicants and
9 potential claimants an Order of Consolidation setting forth the deadline for filing all applications to be consolidated.
10 Upon the passing of the deadline, the Commission may, in its discretion, either extend the deadline or issue to the
11 licensee broker and all applicants a notice of the time, date and place set for the hearing on the consolidated
12 applications.

13

14 *History Note:* Authority G.S. 93A-16(d); 93A-17; 93A-20;
15 Eff. February 1, 1988;
16 Amended Eff. April 1, 2013; July 1, 2000; February 1, 1989.