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November 14, 2024

## Advisory Opinion on Exceptions to Wholesaling Under Real Estate Practice Act SC Code §40-57-10 et seq.

In May 2024 Governor Henry McMaster signed into law the revised *Real Estate Practice Act, SC Code § 40-57-5 et seq.* which includes a prohibition on the practice known as “wholesaling.” Since the statute’s passage, the Real Estate Commission (REC) has received numerous inquiries regarding possible statutory exceptions to this law. This advisory opinion aims to provide guidance about those exceptions, focusing on the following issues:

1. Distinction between Wholesaling and Assigning a Contractual Interest.
2. Limitations on “Marketing a Contract” under the statute.

### Is there a distinction between wholesaling and assigning a contract?

To address this question, we must first examine how the statute defines wholesaling. According to *South Carolina Code Ann. § 40-57-30(44)* wholesaling is defined as:

“Having a contractual interest in purchasing residential real estate from a property owner, then marketing the property for sale to a different buyer prior to taking legal ownership of the property. Advertising or marketing real estate owned by another individual or entity with the expectation of compensation falls under the definition of “broker” and requires licensure. ‘Wholesaling’ does not refer to the assigning or offering to assign a contractual right to purchase residential real estate.”

Thus, the elements of wholesaling are:

1. **Contractual interest.** Having a contractual interest in purchasing residential real estate from a property owner.
2. **Marketing or Advertising:** Marketing or advertising the property for sale prior to taking ownership.
3. **Compensation.** Expecting compensation in the transaction.
4. **Legal Instrument.** Using a legal instrument, such as an assignment, to transfer the interest to a third party for the compensation.

The REC emphasizes that the entirety of the definition of wholesaling is controlling. The provision concerning assigning or offering to assign a contractual interest cannot be read in isolation but must be considered as part of the overall definition. The REC thus holds that assigning a contractual interest is not

automatically considered wholesaling. Instead, it is one element in the definition of wholesaling. Conversely, wholesaling inherently involves an assignment of a contractual interest. Thus, a transaction involving the assignment of a contractual right can still be considered wholesaling if other elements are present.

#### **Clarification Through Examples:**

##### **1. Non-Wholesaling Assignments:**

- If a spouse assigns their contractual interest to their spouse, or if a person assigns their contractual interest to their corporate entity, or another person. This is not considered wholesaling under the statute. *There is no marketing, advertising, or expectation of compensation in such transactions.*

##### **2. Wholesaling Assignments:**

- If an individual contracts to purchase a property, markets and advertises that property, or uses the facts of the property (example: the property address) and assigns the contract to a third party with the expectation of compensation, this is considered wholesaling. The involvement of an assignment does not exempt the transaction from being classified as wholesaling.

#### **Conclusion**

The statute cannot be interpreted to mean that all assignments of contractual interests are deemed wholesaling, nor can it be read to exclude all transactions involving assignments from the definition of wholesaling. If the assignment involves marketing and advertising the property for sale before taking ownership with the expectation of compensation, it qualifies as wholesaling and is prohibited by the statute.

#### **What are the limitations of “marketing a contract” under the statute?**

*South Carolina Code §40-57-135 states: “An advertisement that markets a contractual position to acquire real property from a person with either equitable or legal title and does not imply, suggest, or purport to sell, advertise, or market the underlying real property is permissible under this section.”*

Simply put, you may market a contractual position as long as you do not imply, suggest, or purport to sell, advertise, or market the underlying real property.

The conjunction "and" indicates that compliance with both parts of the provision is required. The REC notes that advertising or marketing a contractual position without implying, suggesting, or purporting to sell, advertise, or market the underlying real property is practically impossible. Consumers typically do not purchase contracts without knowing the nature of the underlying property. The REC finds it unlikely that someone would buy a contract without knowing its contents. In short, there is no market for purchasing random contracts for unknown items.

The REC has repeatedly held that marketing and advertising include MLS, social media, print media, Facebook groups, private email groups, verbal communication, etc.

Therefore, if an unlicensed person includes any of the following items in marketing or advertising a "contractual position" for sale, it would likely violate the provision of implying, suggesting, or purporting to sell, advertise, or market the underlying real property. These items include, but are not limited to:

1. A picture of the real property, land, or house
2. A plat or survey of the property
3. Any description of the property, including the number of rooms/bedrooms/bathrooms or square footage of the house
4. The year the house was built or rehabilitated
5. The condition of the property and its improvements
6. The address, tax map number, or whole or partial legal description of the property
7. Rental income history
8. The neighborhood or subdivision where the property is located
9. Any details related to the real property or its improvements

This list is not exhaustive but serves as an illustration.

Marketing and advertising are broadly construed to include any effort to make the offering of the property known to others. The REC believes that compliance with this statute is very limited. For example, one may comply with this statute if the person holding the contractual position is approached about contracts they hold on properties in a particular area, without making any effort to market or advertise the property for sale.

However, if someone could simply state through a disclaimer or header that they are only selling a contract and not real property, then there would have been no need to define wholesaling because nothing would be considered wholesaling.

### **Final Thoughts**

The revised Real Estate Practice Act SC Code §40-57-5 et seq. seeks to regulate the practice of wholesaling by distinguishing it from legitimate assignments of contractual interests and by setting clear limitations on the marketing of contracts. Real estate professionals and unlicensed individuals must ensure compliance with these provisions to avoid legal repercussions and maintain the integrity of real estate transactions within South Carolina. For specific situations and further guidance, individuals are encouraged to consult legal professionals or reach out directly to the Real Estate Commission.