

Joel Grayson, an attorney licensed since 1971 and EMAR's legal counsel, is a recognized authority in real estate law, litigation, a published author, and has been a frequent lecturer and continuing education instructor and mediator to the real estate industry, as well as a contributor to newspapers, television and radio. Mr. Grayson practices in Oregon and Washington.

Janet L. Grayson is a member of the firm's real estate and litigation group, participates in continuing education instruction to brokers, and is a published author.

Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, Realtor® associations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters throughout Oregon and Washington.

Advertising of "Investments" by Brokers

Over the years, our law practice has seen different types of claims resulting from both strong and weak real estate markets. Although the nature and number of claims may vary depending on the health of the real estate market, we continue to see one type of claim regardless of the market conditions. Such a claim relates to a real estate broker's involvement in promoting investments to potential buyers. This can occasionally lead to an unhappy buyer claiming a broker was selling securities, which would involve securities licensing and registration requirements. This article will address brokers' advertising of and participation in investment programs, and how brokers can protect themselves from securities law claims resulting from these activities.

In both strong and weak real estate markets, we see many real estate industry professionals teaming together to promote the benefits of investing in real estate. In a strong market, they are typically talking to individuals about gains that have been achieved by others through investing in real estate. And in a weak market, they may be talking to individuals about investing in short sale and foreclosure properties. In some circumstances, real estate brokers may hold seminars on investing in real estate or advertise their expertise in working with investors. They may advertise their connection to mortgage brokers or lenders who will assist individuals in financing their investments. And they may offer other "package" services, such as preferred home appraisers or inspectors that will help individuals move smoothly through a transaction.

There is nothing inherently wrong in legitimately promoting one's expertise as a broker, or referring business to trusted real estate industry colleagues. However, certain aspects of promotion may trigger securities law issues, namely requirements that the investments be registered and the broker be licensed as a securities broker. Real estate brokers are in the business of real estate, not securities, and therefore need to be careful about crossing the line between the two.

In order to discuss how to avoid selling real estate as securities, it is important to first understand what constitutes a security. Oregon law defines a security as

...a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a pension plan or profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract ... or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificates for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

In our experience, plaintiffs have argued that real estate transactions constitute securities under the “investment contract” definition. An investment contract was defined in the case *Pratt v. Koss*, 276 Or. 483, 497 (1976), to include “an investment of money, in a common enterprise, with an expectation of profit, through the management and control of others.”

What this essentially means is that a real estate broker could be selling securities if the broker advertised on a broad scale to attract potential investors, who would rely on the broker and his or her real estate industry partners to find investments, qualify the investors, and successfully close the transactions on behalf of the investors, all with an expectation by the investors that they would ultimately sell the investments at a profit.

The best advice we can give to brokers regarding this topic is for brokers to act as brokers, and allow their buyers and sellers to act as buyers and sellers. Brokers should not advertise or promise profits to their clients, and should not assist their clients in “managing” their investments by retaining keys to the properties or helping their clients rent out the properties. In addition, brokers should be careful when teaming with mortgage brokers and other service providers in order to more easily assist investors in closing their transactions. More often than not, brokers are better off leaving those choices to their clients, and not offering a “package” service to investors. In addition, brokers would be well advised to be very clear in their advertising to potential investors. Brokers are licensed individuals in the business of listing and selling real estate – they should not advertise themselves as anything but that. Brokers should also be careful about implying to potential clients that they have an “inside” connection that will ensure successful investments.

Following these few tips will help reduce the risk that brokers are blamed for securities law violations. Brokers who are uncertain about whether their practices may constitute securities violations should first speak with their principal brokers, and after consulting with them, may wish to seek legal counsel. Considering the implications of these business practices prior to implementation will go a long way towards avoiding potential liability.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.