

OFFERING GUARANTEES

Some licensees offer guarantees to consumers. They do so for various reasons, from creating a perception in the marketplace to simply trying to attract more customers and clients.

Guarantees are not prohibited. They can be somewhat risky, however, and this Guideline is presented to help licensees understand how the Commission enforces the license law as it pertains to guarantees.

There are a variety of guarantees being offered by licensees. The Commission has seen complex arrangements where the licensee lists a property for sale and guarantees to personally buy the property if it doesn't sell within a certain period of time. The Commission has also seen guaranteed buyback programs for dissatisfied purchasers and even guarantees for finite sums of money.

No matter what type of guarantee is being offered, the licensee offering it must have cash or immediately-available funds, in an amount sufficient to honor the guarantee, at the time the agreement is entered and throughout the entire contract period. Merely knowing someone who may want to invest in the project, or planning to have the money in hand when the time comes, is not sufficient.

Improper use of a guarantee offer has been interpreted by the Commission to constitute misleading advertising and, under certain circumstances, can even rise to the level of reckless conduct, agency violations, or dishonest and dishonorable dealing.

Further, certain types of advertising are considered misleading under Idaho's Consumer Protection Act, under the jurisdiction of the Attorney General's Office¹. For example, advertising a guarantee with the intent not to sell a guarantee but to lure consumers to contact the licensee, and then switch the consumer to other products or services, could be considered illegal "bait and switch" advertising prohibited under the Idaho Consumer Protection Act. A licensee who violates the Consumer Protection Act could be subject to prosecution by the Attorney General in addition to any discipline imposed by the Commission.

Licensees who enter into guarantee transactions are subject to the disclosure requirements applicable to licensees dealing with their own property (*see* Idaho Code 54-2055).

Here are some additional points to remember about offering guarantees:

1. No licensee should offer or enter into any guarantee unless the licensee has adequate financial resources to meet the commitment. A licensee offering a guarantee should, if requested,

¹ Licensees considering the use of guarantees are advised to review the Consumer Protection Act and Rules of Consumer Protection at www.ag.idaho.gov/consumerProtection/generalTopics/statutesRules.html

provide the consumer proof the licensee has sufficient financial resources to satisfy his/her commitment.

2. Every guarantee must be in writing and contain all conditions and other terms under which the guarantee can be used, including all fees for the service or plan. When the property will be purchased as part of the guarantee, the price for which the property will be sold or purchased and the approximate net proceeds the consumer will receive must be included.
3. A guarantee must include a provision clearly stating the licensee's obligation to purchase property is enforceable **ONLY** at the option of the consumer.
4. A licensee offering or entering into guarantees must comply with the license law's disclosure requirements and run the transaction through his or her brokerage. Licensees must therefore advise their brokers that they are offering guarantees and determine whether such practice complies with the policies of the brokerage.
5. A licensee offering a guarantee should give good market exposure to each property covered by any such plan, and shall present to the consumer all offers received for each property, up to and until the time of closing of the guaranteed transaction.
6. Advertising. A licensee offering a guarantee is free to advertise and promote the plan as a service of the licensee available to those who qualify. However, a licensee may **NOT** advertise the plan in a manner likely to mislead consumers to believe the plan is available without restriction or costs, unless the plan is indeed available without restriction or costs. Any advertisement of a guarantee should include a conspicuous statement advising eligible consumers, costs and restrictions will apply (unless none do), and advising the consumer to inquire of the licensee as to the terms of the guarantee.
7. Disclosures. Prior to issuing a guarantee, a licensee should provide in writing to the consumer all details of the plan. These details should include the precise terms required to use the guarantee. When a property is being purchased, the exact price the licensee will pay for the property, or the precise formula used to determine the price, including an itemization of any and all costs taken into account in determining that price must be included. These details should also include the reason(s) for any difference between the listing or closing price and the price which the licensee agrees to pay.
8. The licensee who advertises a guarantee should, prior to working with a customer or client, advise the consumer whether he/she qualifies for the plan, and if so, explain any restrictions, conditions and costs that apply. The licensee is advised to obtain a signed written confirmation from the consumer that the terms of the guarantee have been explained, and the acknowledgment whether he/she does, or does not, qualify for the plan.
9. Licensees may **NOT** use a guarantee as a misleading advertisement or a false inducement to obtain a customers or clients. A licensee advertising a guarantee, or any other product or service, should be familiar with the state laws protecting consumers from unfair and misleading advertising, namely, section 54-2053(4) of the *Idaho Real Estate License Law*, and

This guideline is not a new law but is an agency interpretation of existing law.

For more information on this guideline, please contact:

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the Attorney General's *Rules of Consumer Protection*.

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