

ASSEMBLY, No. 2438

STATE OF NEW JERSEY

INTRODUCED OCTOBER 21, 1996

By Assemblyman DiGAETANO

1 AN ACT concerning real estate brokerage practices and supplementing  
2 Title 45 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "Commercial  
8 Real Estate Anti-Kickback and Full Disclosure Act."

9

10 2. The Legislature finds and declares that:

11 a. Several factors have constrained New Jersey's economic  
12 growth, including an underutilization, long-term underinvestment and  
13 de-industrialization of the State's commercial real estate market;

14 b. Commercial real estate is a major industry in New Jersey which  
15 has continued to deteriorate due to the downturn in the State's  
16 economy and inflationary pressures, causing burgeoning expenses and  
17 costs associated with commercial real estate transactions;

18 c. Although the State has targeted efforts towards revitalization  
19 of the State's economy, the realization of this goal has been hindered  
20 by the antiquated practices and abuses in the commercial real estate  
21 industry, inviting a need to redefine the relationship between property  
22 owners, real estate brokers and tenants;

23 d. New Jersey's commercial real estate industry has been unable  
24 to meet the requirements of New Jersey's growing dynamic economy  
25 and the State has been placed at a disadvantage in comparison to other  
26 states because commercial real estate commissions in New Jersey are  
27 among the highest in the nation, despite the State's having one of the  
28 highest commercial real estate volumes;

29 e. Most commercial real estate transactions involve large sums of  
30 money, with contracts containing complex contingencies and  
31 numerous options. Frequently, the parties in these transactions are  
32 unable to negotiate fair and reasonable agreements due to a lack of  
33 understanding of the nature and terms of the brokerage arrangement;

34 f. Commercial real estate brokerage commission practices create  
35 an undue burden on property owners and increase rent for tenants so  
36 that New Jersey commercial real estate is not competitive with similar  
37 real estate in New York and Pennsylvania;

1 g. The potential for conflicts-of-interest in commercial real estate  
2 transactions is too significant to permit even consensual dual  
3 representation of a tenant and owner, except in very limited  
4 circumstances;

5 h. As a matter of business ethics and public policy, and in order  
6 to avoid abuses, there is a need for complete disclosure by all parties  
7 in a commercial real estate transaction as to the nature of the parties'  
8 relationships and their respective compensation arrangements because  
9 these are inexorably linked to the economics of the transaction itself;

10 i. Disclosure in the commercial real estate market is consistent  
11 with developments in the residential real estate market where  
12 consumers have been afforded certain protections through enhanced  
13 disclosure of the types of agency relationships that can occur in a  
14 residential real estate transaction;

15 j. Disclosure in the commercial real estate market will educate the  
16 parties to the loyalties and compensation of the brokers involved and  
17 the effect of such compensation on the cost of the commercial real  
18 estate and will ensure that they are adequately informed of the true  
19 nature of their relationship before entering into an agreement or  
20 transaction, as well as serve to foster the parties course of dealing; and

21 k. Understanding the nature of a broker's relationship with the  
22 party retaining that broker and creating a fiduciary obligation from the  
23 broker to that party will result in a positive economic impact on all  
24 parties involved in such complex real estate transactions.

25

26 3. As used in this act:

27 "Broker" means a person licensed as a real estate broker pursuant  
28 to and all persons employed by or working with that broker as licensed  
29 salespersons.

30 "Buyer" means a person intending to buy or acquire commercial  
31 real estate or any interest therein, including, but not limited to, an  
32 option and who executes a legally binding written agreement with a  
33 broker to represent the buyer in pursuit thereof. The term "buyer"  
34 includes an actual or prospective buyer.

35 "Commercial real estate" means real estate all or any part of which  
36 serves or is intended to serve as a business location for a person,  
37 whether that person owns or leases, or intends to own or lease that  
38 location, as well as any real estate that is offered or is intended to be  
39 offered for sale, exchange or lease as a business location for a person.  
40 For purposes of this act, commercial real estate also includes any part  
41 of or interest in real estate described herein, but does not include any  
42 portion of a residential dwelling that is used for business purposes by  
43 the owner or the tenant of that residential dwelling.

44 "Commercial real estate broker" means a broker that, for pecuniary  
45 gain or expectation of pecuniary gain:

46 (1) lists, or offers or attempts to list, for sale or exchange

1 commercial real estate or an interest therein;

2 (2) sells, exchanges, buys or leases commercial real estate or an  
3 interest therein;

4 (3) negotiates, or offers or attempts to negotiate, a sale, exchange,  
5 purchase or lease of commercial real estate or an interest therein;

6 (4) solicits, or offers or attempts to solicit, prospective purchasers  
7 or tenants for commercial real estate or an interest therein;

8 (5) solicits or offers or attempts to solicit owners of commercial  
9 real estate from whom a person retaining or solicited to retain that  
10 broker may purchase, exchange or lease commercial real estate or an  
11 interest therein;

12 (6) assists or participates, or offers or attempts to assist or  
13 participate, in the procuring of one or more person to be a party to an  
14 actual or proposed commercial real estate transaction; or

15 (7) assists or participates, or offers or attempts to assist or  
16 participate in the negotiation or closing of any commercial real estate  
17 transaction.

18 "Commercial real estate transaction" means a sale, exchange,  
19 purchase or lease, or an option to sell, exchange, purchase or lease, or  
20 any proposed transaction involving the sale, exchange, purchase or  
21 lease, and the option to sell, exchange, purchase or lease, of  
22 commercial real estate.

23 "Disclosure" means, in connection with each commercial real estate  
24 transaction, a written notice from a broker to each party other than  
25 that broker describing the identity of those persons paying  
26 compensation or commissions to that broker in connection with the  
27 commercial real estate transaction and the identity of those persons to  
28 whom that broker is paying compensation or commissions in  
29 connection with that commercial real estate transaction.

30 "Family member" means, in the case of a natural person, a person's  
31 spouse, child, parent or sibling.

32 "Fiduciary" means a broker in a relationship of trust and confidence  
33 with the person retaining that broker, and exercising duties of  
34 reasonable care, undivided loyalty, confidentiality, and full disclosure  
35 to the person retaining the broker.

36 "Lease" means any legal right to use commercial real estate granted  
37 by an owner to another person in exchange for the payment of  
38 consideration where that right is intended to continue for more than  
39 one month. The term "lease" also means both the owner's act of  
40 granting that right, or execution of a written document granting that  
41 right, and the tenant's act of agreeing to the consideration for that  
42 right or execution of a written document agreeing to the consideration  
43 for the right.

44 "Owner" means any person with an interest in commercial real  
45 estate that has entered into, is entering into, intends to enter into or  
46 desires to enter into a commercial real estate transaction relating to

1 that commercial real estate as a landlord or seller. The term "owner"  
2 also means an actual or prospective owner and includes any successor-  
3 in-interest to the owner actually entering into a commercial real estate  
4 transaction.

5 "Party" means an owner, tenant, buyer or broker who is a  
6 participant in a commercial real estate transaction.

7 "Prime rate" means the base rate on corporate loans at large United  
8 States money center commercial banks.

9 "Real estate" means land, property, a building or buildings, a  
10 structure or structures, or an establishment or establishments,  
11 regardless of the nature of the owner's interest in same so long as the  
12 owner has the legal right to sell, exchange or lease same.

13 "Tenant" means a person intending to lease commercial real estate  
14 from an owner or who executes a legally binding written document to  
15 lease commercial real estate from an owner and who executes a legally  
16 binding written agreement with a broker to represent the tenant in  
17 pursuit thereof. The term "tenant" also means an actual or prospective  
18 tenant.

19

20 4. a. (1) A broker may be retained by a tenant or buyer to locate  
21 suitable commercial real estate for that tenant or buyer or to perform  
22 related services that the tenant or buyer may desire, including, but not  
23 limited to: the preparation of demographic studies or requests for  
24 proposals; negotiation of leases or contracts for the purchase of  
25 commercial real estate; consultations on legal issues relating to the  
26 proposed commercial real estate transaction; review of leases  
27 submitted by owners desiring to enter into a commercial real estate  
28 transaction with a tenant or review of information about the  
29 commercial real estate being considered by owners desiring to enter  
30 into a commercial real estate transaction with a buyer; consultations  
31 on space plans; and other ancillary services related to a commercial  
32 real estate transaction.

33 (2) Any retention of a broker by a tenant or a buyer shall be  
34 pursuant to a written agreement between the parties and shall clearly  
35 set forth the services to be provided by the broker and the commission  
36 or other compensation to be paid by the tenant or buyer for each  
37 service or, if applicable, each group of services, and the conditions to  
38 any commission or other compensation being earned, due and payable.

39 (3) A broker employed by a tenant or a buyer may act only for and  
40 in the best interests of that tenant or buyer and shall only receive  
41 commission or other compensation from the tenant or buyer retaining  
42 that broker and then only in the amounts clearly set forth in the written  
43 agreement of retention executed by both the broker and the tenant or  
44 buyer, and only to the extent these amounts are earned, due and  
45 payable pursuant to the retention agreement and applicable law.

46 (4) Other than the tenant or buyer retaining the broker, no party to

1 any commercial real estate transaction that results in a commission or  
2 other compensation being earned, due and payable to that broker shall  
3 have any liability or responsibility for paying any commission or other  
4 compensation due to the broker under the retention agreement, and it  
5 shall be illegal for any broker, tenant, or buyer to request that another  
6 party to that commercial real estate transaction pay, directly or  
7 indirectly, all or any portion of that commission or other  
8 compensation, except to the extent and in the manner specifically  
9 permitted by this act.

10 (5) The broker shall be a fiduciary of the tenant or buyer retaining  
11 that broker and shall carry out all of the broker's fiduciary duties  
12 faithfully and honestly.

13 b. (1) A broker may be retained by an owner to locate a suitable  
14 tenant or buyer for the owner's commercial real estate, or any part  
15 thereof or to perform related services that the owner may desire,  
16 including, but not limited to; the preparation of demographic studies  
17 or requests for proposals; negotiation of leases or contracts for the  
18 sale of commercial real estate; consultations on legal issues relating to  
19 the proposed commercial real estate transaction; review of financial  
20 and other information submitted by tenants or buyers desiring to enter  
21 into a commercial real estate transaction with an owner or review of  
22 information about the tenants or buyers desiring to enter into a  
23 commercial real estate transaction with an owner or the terms of their  
24 proposals; consultations on marketing strategies; and other ancillary  
25 services related to a commercial real estate transaction.

26 (2) Any retention of a broker by an owner shall be pursuant to a  
27 written agreement between the parties and shall clearly set forth the  
28 services to be provided by the broker and the commission or other  
29 compensation to be paid by the owner for each service or, if  
30 applicable, each group of services, and the conditions to any  
31 commission or other compensation being earned, due and payable.

32 (3) A broker employed by an owner may act only for and in the  
33 best interests of that owner and shall only receive a commission or  
34 other compensation earned, due and payable from the owner retaining  
35 that broker and then only in the amounts clearly set forth in the written  
36 agreement of retention executed by both the broker and owner, and  
37 only to the extent that these amounts are earned, due and payable  
38 pursuant to the retention agreement and applicable law.

39 (4) Other than the owner retaining the broker, no party to any  
40 commercial real estate transaction that results in a commission or  
41 other compensation being earned, due and payable to that broker shall  
42 have any liability or responsibility for paying any commission or other  
43 compensation due to the broker under the retention agreement, and it  
44 shall be illegal for any broker or owner to request that another party  
45 to that commercial real estate transaction pay, directly or indirectly, all  
46 or any portion of that commission or other compensation.

1 (5) The broker shall be a fiduciary of the owner retaining that  
2 broker and shall carry out all of the broker's fiduciary duties faithfully  
3 and honestly.

4 c. Every retention agreement executed pursuant to this section  
5 shall specify a definite terminal date, which date shall not be subject to  
6 any qualifying terms or conditions and which shall not be more than  
7 one year after the effective date of the agreement.

8

9 5. a. No commission or other compensation with respect to a  
10 commercial real estate transaction shall be fixed by any governmental  
11 authority, trade association or multiple listing service.

12 b. A broker shall not be prohibited from independently  
13 establishing a policy regarding the amount of commission or other  
14 compensation to be charged in a commercial real estate transaction by  
15 the broker.

16 c. Any commission or other compensation on rental properties  
17 shall be based upon the actual rent to be paid under the lease and not  
18 on other amounts incorporated in the rent, including, but not limited  
19 to, taxes and utilities.

20 d. A broker acting as a commercial real estate broker shall be  
21 entitled to a commission or other compensation as is set forth in that  
22 broker's retention agreement upon the satisfaction of the conditions to  
23 the earning and payment of that commission or other compensation set  
24 forth in the agreement, except that no retention agreement may  
25 provide for any of the following:

26 (1) The payment of any commission to a broker in connection with  
27 a commercial real estate transaction if that broker has not been  
28 retained by a party to the commercial real estate transaction in  
29 connection with that commercial real estate transaction and has not  
30 been actively involved in the commercial real estate transaction for  
31 which the commission is to be paid.

32 (2) The payment of any compensation other than a commission to  
33 a broker for services related to an actual or proposed commercial real  
34 estate transaction or related to commercial real estate transactions in  
35 general, if that broker's retention agreement does not clearly set forth  
36 the compensation other than commission to be paid and the terms and  
37 conditions to its being earned, due and payable.

38 (3) The payment of any commission or other compensation to the  
39 broker in connection with any commercial real estate transaction or  
40 transactions not clearly contemplated by the retention agreement, or  
41 clearly contemplated by the retention agreement but consummated  
42 after a date certain set forth in the retention agreement, which date  
43 shall not be more than one year after the date that the retention  
44 agreement is executed by the person agreeing to retain that broker,  
45 except that it shall be permissible for an owner or tenant to agree in a  
46 retention agreement that if a lease of commercial real estate entered

1 into during the actual retention period is renewed by a tenant in  
2 accordance with an express option to renew provided in a written lease  
3 of commercial real estate on which the broker was paid a commission  
4 by the retaining party, the broker may also be paid a commission by  
5 the retaining party upon the exercise of such express renewal option  
6 by the tenant to the extent and only to the extent that:

7 (a) the option is required to be irrevocably exercised and is in fact  
8 irrevocably exercised within the time period, whichever is less, of the  
9 initial term of the lease, or the initial 10 year period of the lease;

10 (b) the retaining party has not retained another broker to assist that  
11 party in connection with the renewal option; and

12 (c) no commission or other compensation is payable in connection  
13 with any portion of any such renewal option extending the lease past  
14 the time period, whichever is less, of: the initial term of the lease plus  
15 the first renewal option; the initial term of the lease plus five years; or  
16 15 years after the commencement of the initial term of the lease.

17 (4) The payment of any commission or other compensation to the  
18 extent that commission or other compensation is based upon the rents  
19 to be paid under the lease and not on an hourly rate, fixed task rate or  
20 other rate not based on the rents to be paid under the lease, before the  
21 rents upon which the commission or other compensation is based are  
22 paid from the tenant to the owner, except that if both the broker and  
23 the party retaining the broker agree, a retention agreement may  
24 provide for an accelerated payment of the commission or other  
25 compensation based upon the rents to be paid if:

26 (a) These rents are discounted to the present value of the stream  
27 of rents over the time period they are to be paid at the then current  
28 prime rate, and

29 (b) The broker agrees, in the retention agreement providing for an  
30 accelerated payment, that if the lease is terminated before its  
31 expiration date, as a result of any cause, including the default of any  
32 party affecting the economic value of the commercial real estate, a  
33 casualty, condemnation or other cause, any unearned portion of the  
34 commission or other compensation shall be repaid by the broker to the  
35 party paying the commission or other compensation to the broker  
36 except to the extent that the party paying the commission or  
37 compensation to the broker caused the termination of the lease by its  
38 default. No party shall be deemed to have caused the termination of  
39 a lease by its default for purposes of this section as a result of a  
40 casualty or similar event even if caused by the negligence or gross  
41 negligence of that party.

42

43 6. Any broker acting as a commercial real estate broker for any  
44 party to a commercial real estate transaction shall disclose in writing  
45 to all parties to that commercial real estate transaction, before any  
46 binding agreement related to the commercial real estate transaction is

1 entered into by any party, in a disclosure, the form and substance of  
2 which shall be written in a simple, clear, understandable and easily  
3 readable way, all financial arrangements between the broker and any  
4 other person or persons with respect to commissions or other  
5 compensation payable to the broker by the party retaining that broker,  
6 including, but not limited to, any commission or other compensation  
7 to be paid by the broker to any other broker or other person who is  
8 not a broker in connection with the commercial real estate transaction.  
9 Nothing in this section shall require a broker to disclose the particulars  
10 of the sharing of a commission or other compensation between or  
11 among the broker and any other brokers or salespersons retained or  
12 employed by that broker.

13

14 7. If a commercial real estate transaction is a lease renewal,  
15 extension of the term of a lease or agreement for additional space in  
16 connection with a lease, whether set forth as an amendment,  
17 modification or otherwise, except in the situation described in  
18 paragraph (4) of subsection d. of section 5 of this act and otherwise  
19 satisfying all conditions of this act, a broker shall only be entitled to a  
20 commission or other compensation from the party retaining that broker  
21 if:

22 a. The broker is retained by the retaining party expressly for the  
23 negotiation of that lease renewal, extension of the term of the lease or  
24 agreement for additional space in connection with the lease, whether  
25 denominated as an amendment, modification or otherwise, and the  
26 other party is informed of that retention in writing by the retaining  
27 party or the retained broker no less than 30 days before negotiations  
28 commence and no more than 10 days after negotiations commence;  
29 and

30 b. The broker is substantially involved in the negotiations on  
31 behalf of the retaining party.

32

33 8. A broker no longer actively engaged in a commercial real estate  
34 brokerage business shall not be entitled to the payment of any  
35 commission or other compensation that is not earned, due and payable  
36 before the broker ceases to be actively engaged in the commercial real  
37 estate brokerage business, except that nothing shall prevent a broker  
38 no longer actively engaged in a commercial real estate brokerage  
39 business from being entitled to a payment of a commission paid as rent  
40 under the lease in connection with which that broker was retained if  
41 the commission is not fully earned, due and payable solely as a result  
42 of the fact that all rents on which that commission is to be earned, due  
43 and payable have not yet become due to the owner from the tenant,  
44 but receipt of that commission shall not extend beyond the payment of  
45 a commission to include any renewal, expansion or other term not  
46 unconditionally binding on both owner and tenant at the time of the

1 execution of the lease for which the broker was retained.

2

3 9. Nothing in this act shall be construed to apply to residential  
4 real estate transactions.

5

6 10. a. No person shall engage either directly or indirectly in the  
7 business of a broker in connection with an actual or prospective  
8 commercial real estate transaction, and no person shall advertise or  
9 represent himself as being authorized to act as a broker in connection  
10 with an actual or prospective commercial real estate transaction,  
11 without having entered into a retention agreement with an owner,  
12 tenant or buyer in connection with that commercial real estate  
13 transaction and without disclosing whether the broker represents an  
14 owner, tenant or buyer in connection with the transaction.

15 b. If, a broker fails to apprise a person retaining that broker,  
16 before the retention occurs, that any other actual or prospective party  
17 to a proposed transaction is a person with whom that broker, any  
18 family member of that broker or any entity in which that broker or any  
19 family member has a direct or indirect interest, had or has a business  
20 or personal relationship, and where the full disclosure of the actual  
21 circumstances would reasonably be expected to generate fair suspicion  
22 in a reasonable person as to whether the broker would exercise his  
23 very best efforts on behalf of the retaining party due to that business  
24 or personal relationship, the broker shall not be entitled to any  
25 commission or other compensation whatsoever in connection with that  
26 retention and shall promptly repay to the retaining party any  
27 commission or other compensation previously paid to the broker in  
28 connection with the retention, with interest at the prime rate from the  
29 date of payment to the date of repayment, and that nondisclosure shall  
30 constitute an absolute defense in an action for any commission or other  
31 compensation, whether or not the person retaining the broker was in  
32 fact prejudiced by the nondisclosure.

33

34 11. Notwithstanding any other provision of this act, a broker may  
35 be permitted to represent both an owner and tenant or an owner and  
36 buyer in a commercial real estate transaction only when the following  
37 conditions are satisfied:

38 a. The broker has, for a period of at least 30 days before the  
39 tenant or buyer first expresses an interest in entering into the  
40 commercial real estate transaction, been the exclusive leasing or sales  
41 agent, as the case may be, for the commercial real estate involved in  
42 the commercial real estate transaction pursuant to a retention  
43 agreement between the owner and broker.

44 b. The tenant or buyer receives full disclosure of the broker's  
45 representation of the owner and the commission or other  
46 compensation to be paid to the broker by the owner before retaining

1 that broker in connection with the commercial real estate transaction  
2 and consents in writing to the dual representation.

3 c. The owner receives full disclosure of the broker's  
4 representation of the tenant or buyer and the commission or other  
5 compensation to be paid to the broker by the tenant or buyer before  
6 the tenant's or buyer's general interest in entering into a commercial  
7 real estate transaction with the owner is revealed and consents in  
8 writing to the dual representation.

9 d. The broker agrees in writing with both the owner and tenant or  
10 buyer that for purposes of calculating any commission or other  
11 compensation due to the broker as a result of the commercial real  
12 estate transaction for which the tenant or buyer has retained the  
13 broker, the broker will receive no more than the sum of the amounts  
14 to be paid by the owner and the tenant or buyer, to be limited as  
15 follows:

16 (1) The commission or other compensation to be paid by the owner  
17 to the broker, as due and payable in accordance with the retention  
18 agreement and the provisions of this act, shall be limited to the  
19 commission or other compensation that would be paid by the owner  
20 to the broker if the tenant or buyer had retained a third party broker  
21 to represent him in connection with the commercial real estate  
22 transaction; and

23 (2) The commission or other compensation to be paid by the tenant  
24 or buyer to the broker, as due in accordance with the retention  
25 agreement and the provisions of this act, shall be limited to the amount  
26 specified under the retention agreement with the tenant or buyer  
27 before any credit for amounts paid or payable by the owner pursuant  
28 to the owner's retention agreement with the broker, less the amount to  
29 be paid to the broker by the owner in accordance with the owner's  
30 retention agreement.

31 e. In those circumstances satisfying all of the requirements of this  
32 section, the broker shall advise each party that, in addition to working  
33 on their behalf, the broker will also represent the other party. The  
34 broker shall also advise what effect the broker's representation will  
35 have on the fiduciary duties the broker owes to the owner and the  
36 tenant or the buyer. The broker shall be required to treat both parties  
37 to the commercial real estate transaction honestly and act in a  
38 competent manner. When working as a broker for both the owner and  
39 tenant or buyer, a broker shall also obtain the express written consent  
40 of a party prior to disclosing confidential information to the other  
41 party. This information includes the highest price a tenant or buyer  
42 can afford to pay and the lowest price an owner will accept and the  
43 parties' motivation to sell, lease or buy. A broker acting in this  
44 capacity shall not place one party's interests ahead of those of the  
45 other party and shall not advise or counsel either party on how to gain  
46 an advantage at the expense of the other party on the basis of

1 confidential information obtained from or about the other party.

2

3 12. Upon the written request of any tenant submitted before final  
4 leases are submitted for execution, that tenant may request that the  
5 owner provide to the tenant, at the sole cost and expense of the tenant,  
6 the payment of all or a portion of a commission or other compensation  
7 to a broker retained by the tenant in connection with a commercial real  
8 estate transaction. The owner shall have discretion whether or not to  
9 agree to provide these payments.

10 If the owner agrees, in writing, to provide these payments, the  
11 obligation of the owner to provide the payments shall be limited as  
12 follows:

13 a. The lease shall specifically and separately set forth:

14 (1) The total amount of the commission or other compensation to  
15 be paid by the tenant to the broker and, assuming the tenant has paid  
16 all amounts due under the lease, all amounts to be paid to the broker  
17 on behalf of the tenant by the owner, including the dates and exact  
18 amounts that are to be paid to the broker on behalf of the tenant by the  
19 owner and an agreement by the tenant to pay all such amounts to the  
20 owner no less than 10 days before each payment is scheduled to come  
21 due.

22 (2) An agreement that the owner shall forward the payment  
23 required on any date as set forth in the lease to the broker provided:

24 (a) all amounts payable by the tenant to the owner pursuant to the  
25 lease, including but not limited to, rent, additional rent, other charges  
26 and amounts to be paid on behalf of the tenant to the broker, through  
27 and including that date have been paid in full and no amounts remain  
28 outstanding;

29 (b) all payments by the tenant to the owner have actually been  
30 received at least 10 days prior to the date on which the payment to the  
31 broker is due and payable, and are fully available to the owner without  
32 risk of reversal; and

33 (c) any other terms related to the broker payments, to the extent  
34 they are not inconsistent with this act, have been met.

35 b. A separate agreement between the owner, tenant and broker,  
36 in writing, shall set forth that:

37 (1) the broker has been retained by the tenant and that the tenant  
38 is solely responsible for compensating the broker;

39 (2) the tenant, with the broker's consent, has agreed to request the  
40 owner to handle the payment to the broker in accordance with the  
41 provisions of this act and that the owner has agreed to do so;

42 (3) the owner agrees to pay to the broker the amounts set forth in  
43 the lease as being payable to the broker on the dates these amounts are  
44 payable, provided that all conditions to that payment set forth in the  
45 applicable retention agreement and this act have been satisfied;

46 (4) the tenant shall be responsible to the broker for each payment

1 due to the broker until such time as the owner has received such  
2 payment and all other conditions to the payment from the owner to the  
3 broker are satisfied, at which point only the owner shall be responsible  
4 for the payment; and

5 (5) any other terms, not inconsistent with the terms of this act, as  
6 the parties shall desire.

7

8 13. This is a remedial act and the protections provided herein are  
9 not waivable by any party to a commercial real estate transaction. Any  
10 waiver or purported waiver shall be null and void and any broker  
11 requesting a waiver of the provisions of this act from any party shall  
12 be in violation of this act and subject to discipline as set forth in this  
13 act or in any other laws governing the conduct of brokers.

14

15 14. A broker engaging in a commercial real estate transaction  
16 violates this act if the broker:

17 a. Makes any false promises or any substantial misrepresentation;

18 b. Acts for more than one party in a transaction without the  
19 knowledge of all parties thereto or in any way not permitted by this  
20 act;

21 c. Fails to disclose any of the information required under this act;

22 d. Pursues a flagrant and continued course of misrepresentation  
23 or making of false promises through agents, advertisements or  
24 otherwise;

25 e. Fails to account for or to pay over any moneys belonging to  
26 others, coming into the possession of the broker;

27 f. Acts in a manner which demonstrates unworthiness,  
28 incompetency, bad faith or dishonesty, including, but not limited to,  
29 requesting any person to waive any of the rights, protections or  
30 remedies provided to that person under this act;

31 g. Fails to provide the broker's client with a fully executed copy  
32 of a retention agreement at the time of its execution, or fails to specify  
33 in the agreement a definite terminal date, as provided in section 4 of  
34 this act;

35 h. Uses any plan, scheme or method for the sale or promotion of  
36 the sale of commercial real estate which involves a lottery, a contest,  
37 a game, a prize, a drawing, or the offering of a lot or parcel for  
38 advertising purposes;

39 i. Is convicted of a crime, knowledge of which the New Jersey  
40 Real Estate Commission did not have at the time of last issuing a real  
41 estate license to the broker;

42 j. Except as expressly permitted by this act, collects or attempts  
43 to collect a commission or other compensation as a broker in a  
44 transaction, when at the same time representing another party in that  
45 transaction in a different capacity for a consideration;

46 k. Uses any trade name or insignia of membership in any real

- 1 estate organization of which the broker is not a member;
- 2 l. Pays any rebate, profit, compensation or commission to anyone  
3 not possessed of a valid New Jersey real estate broker or salesperson  
4 license;
- 5 m. Any other conduct, whether of the same or a different character  
6 than specified in this section, which constitutes fraud or dishonest  
7 dealing;
- 8 n. Accepts a commission or valuable consideration as a broker for  
9 the performance of any of the acts specified in this act, from any  
10 person, except his employing broker;
- 11 o. Procures a real estate broker or salesperson license, for himself  
12 or anyone else, by fraud, misrepresentation or deceit; or
- 13 p. Commingles the money or other property of the broker's  
14 principals with his own or fails to maintain and deposit in a special  
15 account, separate and apart from personal or other business accounts,  
16 all moneys received by a real estate broker, acting in that capacity, or  
17 as escrow agent, or the temporary custodian of the funds of others, in  
18 a real estate transaction;
- 19 q. Engages or attempts to engage in a commercial real estate  
20 transaction involving commercial real estate in the ownership of which  
21 the broker is interested in any manner whatsoever, unless the broker  
22 first discloses to the other parties to the commercial real estate  
23 transaction the broker's interest therein and the broker's status as a real  
24 estate broker;
- 25 r. Engages or attempts to engage in a commercial real estate  
26 transaction in which the broker desires to or will acquire an interest of  
27 any nature whatsoever in the commercial real estate unless the broker  
28 first discloses to the other parties to the commercial real estate  
29 transaction the broker's status as a real estate broker;
- 30 s. Fails to notify the New Jersey Real Estate Commission within  
31 30 days of having been convicted of any crime, misdemeanor or  
32 disorderly persons offense, or of having been indicted, or of the filing  
33 of any formal criminal charges, or of the suspension or revocation of  
34 any real estate license issued by another state, or of the initiation of  
35 formal disciplinary proceedings in another state, or of the initiation of  
36 formal disciplinary proceedings in another state affecting any real  
37 estate license held, or failing to supply any documentation available to  
38 the broker that the New Jersey Real Estate Commission may request  
39 in connection with such matter; or
- 40 t. Violates any of the provisions of this act or of the  
41 administrative rules adopted by the New Jersey Real Estate  
42 Commission.
- 43
- 44 15. Any person or party damaged as the result of a violation of any  
45 provision of this act may sue therefor in any court of competent  
46 jurisdiction to recover compensatory damages, which may include

1 costs of suit and attorney fees. If a broker is found by a court of  
2 competent jurisdiction to have violated any provision of this act, the  
3 broker shall be subject to a civil penalty not to exceed \$5,000 for the  
4 first violation, and a penalty of not more than \$10,000 for any  
5 subsequent violation. Each offense shall be construed as a separate  
6 violation.

7

8 16. Nothing in this act shall prevent a person from negotiating or  
9 entering into a written retention agreement with any broker in  
10 connection with a commercial real estate transaction which contains  
11 duties, obligations or responsibilities which are in addition to, but not  
12 inconsistent with, those specified in this act.

13

14 17. This act shall take effect immediately.

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#### STATEMENT

18

19 The State's commercial real estate market has been plagued by a  
20 lagging economy and an overall underutilization of commercial space,  
21 intensified by antiquated practices and abuses in the commercial real  
22 estate industry. These practices have placed New Jersey at a  
23 competitive disadvantage with other states, not only on a regional, but  
24 a national basis as well, demonstrating a need to redefine the  
25 relationship between the parties in commercial real estate transactions.

26 This bill, the "Commercial Real Estate Anti-Kickback and Full  
27 Disclosure Act," codifies certain prevailing commercial real estate  
28 practices by requiring disclosure of the nature and terms of the  
29 brokerage relationship. Such disclosure is consistent with  
30 developments in the residential real estate market where consumers  
31 have been provided enhanced disclosure of the types of agency  
32 relationships that could occur in a residential real estate transaction.  
33 Commercial real estate transactions frequently involve large sums of  
34 money, with contracts containing complex contingencies and  
35 numerous options, illustrating a need to educate the parties to ensure  
36 that they are adequately informed of the true nature of their  
37 relationship before entering into a brokerage agreement.

38 Under the bill, a broker is permitted to be retained by a tenant or  
39 buyer to locate commercial real estate or such other related services  
40 pursuant to the terms of a written retention agreement setting forth the  
41 amount of commission or other compensation to be paid to the broker.  
42 Once the agreement is executed, the broker, as a fiduciary of the  
43 tenant or buyer, is obligated to act in the best interests of the tenant or  
44 buyer. A broker is also permitted to be retained by an owner to locate  
45 a tenant or buyer or perform related services under a written retention  
46 agreement creating the same fiduciary obligations of a broker retained

1 by a tenant or buyer.

2 The bill prohibits the fixing of any commission or other  
3 compensation for a commercial real estate transaction by any  
4 governmental authority, trade association or multiple listing service.  
5 Also, a broker is not entitled to any commission or other compensation  
6 the broker has not earned while actively engaged in the commercial  
7 real estate brokerage business.

8 The bill's provisions also govern lease renewals, extensions of the  
9 term of a lease or agreements for additional space in connection with  
10 a lease. It contains additional requirements which must be met before  
11 a broker will be entitled to a commission in such situations, including  
12 a requirement that the retention agreement must be executed not more  
13 than 30 days before and 20 days after negotiations commence and the  
14 broker is substantially involved in the negotiations on behalf of the  
15 retaining party.

16 The bill allows a broker to represent both an owner and tenant or  
17 an owner and buyer in a commercial real estate transaction when the  
18 broker has been the exclusive leasing or sales agent under a retention  
19 agreement for at least 30 days before the expression of interest by the  
20 tenant or buyer; the broker's representation, including commission or  
21 other compensation, has been fully disclosed to the parties and the  
22 parties give their written consent to the broker's dual representation;  
23 and the broker agrees that his or her commission could be limited.

24 Under the bill, the tenant has the right to request that the owner pay  
25 the broker's commission at the expense of the tenant. Finally, the bill  
26 sets forth what conduct constitutes violations of its provisions and  
27 allows a person to institute a civil action seeking damages, costs and  
28 attorneys fees.

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33 "Commercial Real Estate Anti-Kickback and Full Disclosure Act."