

NAVIGATING THE RECENT PRACTICE CHANGES

MATT TROIANI

Senior Counsel, Director Legal Affairs

DEANNE RYMAROWICZ

Senior Counsel



NARdotRealtor



nar.realtor



OVERVIEW

- Settlement Terms
- Practice Changes
- How to Prepare
- Class Notice
- Resources

A close-up, low-angle shot of a pair of brass scales of justice against a light blue background. The scales are slightly out of focus, with the central pillar and the two pans visible. The lighting is soft, highlighting the metallic texture of the scales.

SETTLEMENT TERMS

SITZER-BURNETT

- Sitzer-Burnett is a class-action lawsuit that was filed in Missouri federal court by a group of home sellers in the state against NAR and other defendants, including Anywhere, Berkshire Hathaway HomeServices, Keller Williams, and RE/Max.
- **NAR strongly disagrees with the October 2023 verdict and maintains that compensation has been and continues to be negotiable.**

PROPOSED SETTLEMENT AGREEMENT

- On March 15, 2024, NAR announced a proposed settlement agreement that would end litigation of claims brought on behalf of home sellers related to broker commissions.
- The settlement is subject to final court approval, with a hearing set for November 26, 2024.

KEY SETTLEMENT TERMS

1. Release of liability

- The agreement would resolve claims against NAR, over one million NAR members, all state/territorial and local REALTOR® associations, all association-owned Multiple Listing Services (MLSs), and all brokerage entities with an NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or below.
- The agreement provides a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded \$2 billion to obtain releases efficiently if they choose to use it.

2. Offers of compensation prohibited from the MLS

- NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS.
- This change went into effect on **August 17, 2024**.

KEY SETTLEMENT TERMS

3. Written agreements for MLS participants acting for buyers

- The settlement provides that MLS on August working with buyers must enter into written representation agreements with those buyers.
- This change went into effect on August 17, 2024.

4. Settlement payment

- Under the terms of the agreement, NAR would pay \$418 million over approximately four years.
- NAR's membership dues for 2024 and 2025 will not change because of this payment.

5. NAR continues to deny any wrongdoing

- The settlement, which is subject to court approval, makes clear that NAR continues to deny any wrongdoing in connection with the MLS cooperative compensation model rule (MLS Model Rule) that was introduced in the 1990s in response to calls from consumer protection advocates for buyer representation.

KEY UPDATES

- New FAQs and resources posted at facts.realtor
 - Written Buyer Agreements 101
 - Broker-to-Broker Agreements 101
 - Compensation Disclosure Statement
- Broker slide deck to help understand and communicate the changes
- Fact sheets for homebuyers and sellers

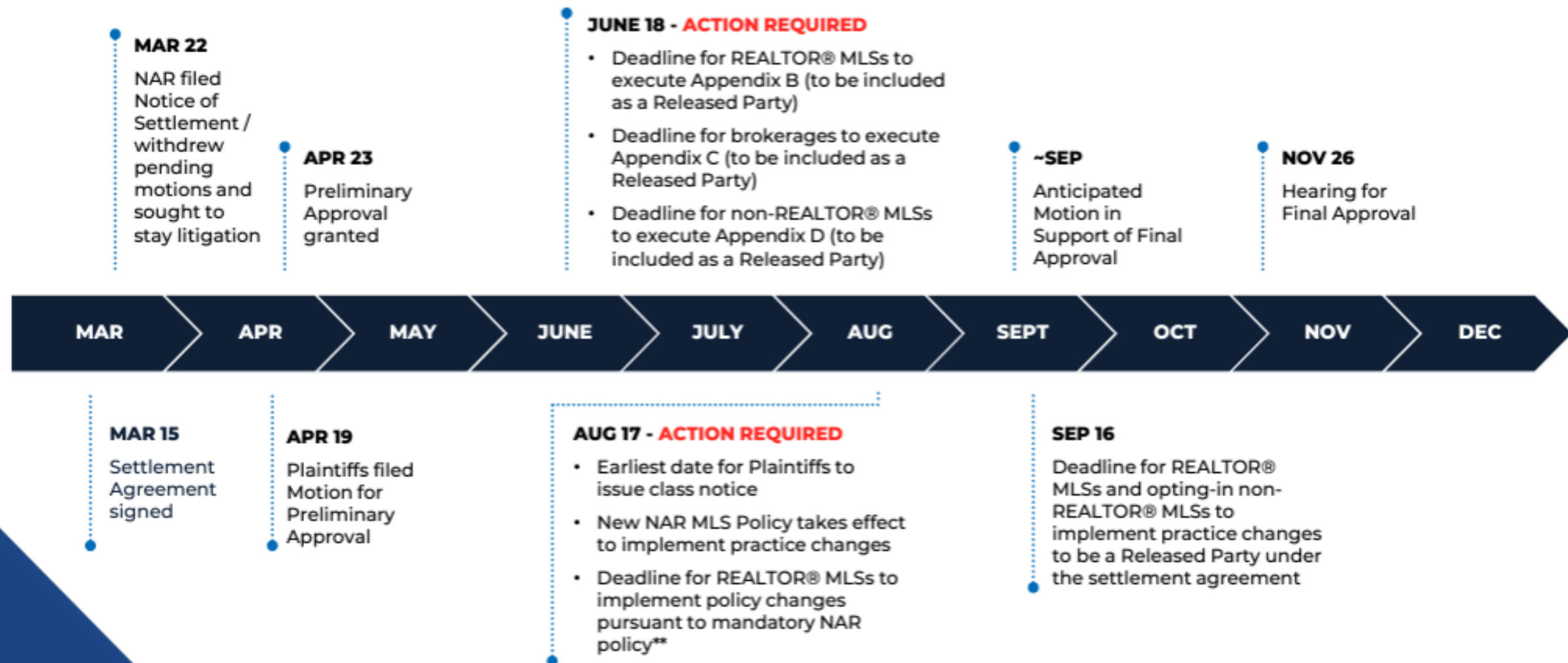
KEY UPDATES

- **Interested Party Contributions:** Fannie Mae, Freddie Mac, and the FHA have limits on seller or broker contributions to the buyer for services paid by the buyer. Compensation is considered a fee that is typically paid by the seller. Fannie Mae, Freddie Mac, and the FHA exclude these fees from their calculation.
- **VA:** On June 11, the Veterans Administration temporarily lifted the ban against veteran buyers paying their buyer broker, effective August 10

NEXT STEPS

- Practice changes went into effect **August 17, 2024**
 - NAR recommends all MLSs implement changes by August 17
 - REALTOR® MLSs must implement the changes by this date to remain in compliance with NAR policy
- Class notice was sent out on or after August 17, 2024
- The settlement is subject to final court approval – hearing set for November 26, 2024

NAR SETTLEMENT TIMELINE*



*As of May 7, 2024. Please refer to the settlement agreement for detailed information on deadlines.

**NAR encourages all MLSs to implement the practice changes by August 17, 2024.

More information on the effective date of practice changes can be found in our FAQ at facts.realtor.



PRACTICE CHANGES

KEY PRACTICE CHANGE AREAS



- Offers of Compensation
- Listing Agreements
- Written Buyer Agreements

OFFERS OF COMPENSATION

- Effective August 17, offers of cooperative compensation are **PROHIBITED** on a REALTOR® association owned MLS, per new MLS policies
 - Includes all listing types (residential, commercial, rental) that appear on the MLS
 - Cannot post a link on MLS directly to a listing on the broker's site which includes an OOC
- Offers of compensation remain an option, **off-MLS**
- Consumers will continue to have choices regarding real estate services

OFFERS OF COMPENSATION

- Listing brokers may advertise an offer of compensation in any way off-MLS, including:
 - On the listing, on their own website
 - Signs and sign riders
 - Flyers
 - Social media posts
 - Text, email, phone calls
- MLS/IDX may not be used to create, facilitate or support a platform for offers compensation from multiple brokers

PRACTICE NOTE

Once agreed to, listing & buyer broker should put compensation agreement in writing

OFFERS OF COMPENSATION

- Seller concessions are allowed on MLSs, at the MLS's discretion
 - Cannot be limited to or conditioned upon the retention of or payment to a cooperating broker
 - Buyer should state in the purchase offer how they want the concessions to be used, including compensating their broker
- Buyers may ask the seller to pay their broker's fee as a term of the purchase agreement
 - Does not violate SOP 16-16

OFFERS OF COMPENSATION

- Code of Ethics **always** applies to REALTORS®, for example:
 - Article 1 – protect/promote interests of client
 - Article 3 – ascertain compensation
 - Article 12 – be honest and truthful in communications
- Mediation and arbitration of commission disputes still applies
- Procuring cause disputes may still arise and be arbitrated

LISTING AGREEMENTS

Required terms:

- 1 State conspicuously that broker commissions are not set by law and are fully negotiable
- 2 Conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that a listing broker will make to another broker or other representative (e.g., real estate attorney) acting for buyers, and specify the amount or rate of such payment

WRITTEN BUYER AGREEMENTS

Two triggers for a written agreement:

- “Working with a buyer”
- “Touring a home”

WHAT DOES THAT MEAN?

Working with a buyer:

MLS Participants who **provide brokerage services** to a buyer

- Identifying potential properties
- Arranging for the buyer to tour a property
- Negotiating on behalf of the buyer
- Writing and presenting offers

As opposed to MLS Participants who simply market their services or just talk to a buyer—like at an open house or providing an unrepresented buyer access to one of their listed homes

WHAT DOES THAT MEAN?

Touring a home:

- When the buyer and/or the MLS Participant (or other agent, at the direction of the MLS Participant working with the buyer) **physically enter the home**
- Includes when the MLS Participant or other agent, at the direction of the MLS Participant, working with the buyer enters the home to provide a **live, virtual tour** to a buyer not physically present

WHEN DOES IT NEED TO BE SIGNED?

“Before touring a home”

UNLESS

State law dictates an earlier time

WHAT ARE THE REQUIRED TERMS?

- 1 A specific and conspicuous disclosure of **the amount or rate of compensation** the Participant will receive or how this amount will be determined, to the extent that the Participant will receive compensation from any source
- 2 The amount of compensation in a manner that is **objectively ascertainable** and not open-ended

WHAT ARE THE REQUIRED TERMS?

3

A term that **prohibits** the Participant from receiving compensation for brokerage services from any source that **exceeds the amount or rate agreed** to in the agreement with the buyer

4

A conspicuous statement that broker fees and commissions **are not set by law** and are fully negotiable.

WHAT TYPES OF AGREEMENTS?

Any type of written agreement can be used*

- Exclusive buyer representation agreement
- Non-exclusive buyer rep agreement
- Non-agency
- Transactional
- Limited service
- Designated agency
- Dual agency
- One property, one weekend ...

**Must comply with state law*

WHAT TYPES OF AGREEMENTS?

NAR policy does not dictate:

- What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).
- The term of the agreement (e.g., one day, one month, one house, one zip code).
- The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).
- The compensation charged (e.g., \$0, X flat fee, X percent, X hourly rate).



BROKER ADAPTATION

HOW CAN BROKERS IMPLEMENT THE CHANGES?

- Understand and be ready to talk to sellers about options for offering compensation
- Have an effective way to post offers of compensation on their listings on their website, and other efforts to communicate offers off MLS

HOW CAN BROKERS ADAPT?

- Ensure all new buyer clients/customers sign a written buyer agreement **before touring a home**, as this is now required.
- Existing buyer rep agreements in effect before August 17 do not need to be amended if they have the required terms 1 – 3; a separate disclosure can satisfy requirement #4.

HOW CAN BROKERS ADAPT?

- Be ready to explain the written buyer agreement requirement.
- Become comfortable with the compensation conversation.
- Understand **their value** and how to communicate that to consumers.
- Use the broker slide deck to help facilitate the conversation.



CLASS NOTICE

WHAT IS CLASS NOTICE?

Following preliminary approval of a proposed class action settlement agreement, the court will direct notice in a **reasonable manner** to **all class members** who would be **bound by the proposed settlement.**

WHEN WILL CLASS NOTICE BE SENT?

Class notice was sent on August 17, 2024.

WHO RECEIVED CLASS NOTICE?

Class notice was directed to members of the nationwide Settlement Class:

“All persons who sold a home that was listed on a multiple listing service anywhere in the United States where a commission was paid to any brokerage in connection with the sale of the home”

LISTING DATES VARY BY STATE OR MLS

WHAT IS CLASS NOTICE?

Class notice typically includes information about:

- The litigation
- The settlement
- The definition of the class
- Opt-out procedures (if any)
- The requested attorneys' fees and incentive awards to the class representatives (if any)
- The objection process
- The scheduled date for the final fairness hearing

CLASS NOTICE – WHAT TO EXPECT

- Expect direct notice to settlement class members, targeted digital efforts, and other means to reach class members
- Expect questions from consumers
- **Always direct these questions to the Claims Administrator website:**

www.realestatecommissionlitigation.com

RESOURCES

ABR DESIGNATION

Topics Covered

- Conveying your value to the buyer-client
- Conducting a seamless, productive buyer counseling session
- Guiding a buyer-client through the search-showing-selection process
- Negotiating buyer-clients' offers



SCAN FOR ACCESS

FACTS.REALTOR

Topics Covered

- FAQs
- Fact sheets for consumers
- Broker resources
- Settlement documents
- Policy changes
- Toolkit with social media assets



SCAN FOR ACCESS

WRITTEN BUYER AGREEMENTS 101



WRITTEN BUYER AGREEMENTS 101

Written buyer agreements benefit consumers because they clearly and transparently outline the services an MLS Participant will provide and how they will be compensated.

Beginning August 17, 2024, an MLS Participant "working with" a buyer will be required to enter into a written agreement with the buyer prior to touring a home, including both in-person and live virtual tours. This resource provides information about what provisions must be included in the written agreement pursuant to the NAR settlement as well as other provisions that, while not required by the settlement, MLS Participants may consider addressing with their clients.

As you develop or refresh your agreement forms, keep in mind:

- Agreement forms should account for the choice and optionality consumers and real estate professionals have when negotiating the terms of their relationship permissible under state law.
- Agreement forms should give the real estate professional and consumer the ability to efficiently memorialize the relationship based on the transparent and clear conversation they have when deciding to work together.

MANDATORY PROVISIONS

Pursuant to paragraph 58(vi) of the NAR proposed settlement agreement, written buyer agreements must:

- Specify and conspicuously disclose the amount or rate of any compensation the MLS Participant will receive from any source, or how this amount will be determined;
- The amount of compensation must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer");
- Include a statement that MLS Participants may not receive compensation from any source that exceeds the amount or rate agreed to with the buyer;
- Disclose in conspicuous language that broker commissions are not set by law and are fully negotiable; and
- Include any provisions required by law.

OTHER CONSIDERATIONS WHEN ENTERING INTO A BUYER AGREEMENT:



SCAN FOR ACCESS

BROKER TO BROKER AGREEMENTS 101



BROKER-TO-BROKER AGREEMENTS 101

Effective August 17, 2024, MLS Participants are prohibited from communicating any offer of compensation via an MLS. All broker compensation fields will be eliminated on MLSs opting into the settlement practice changes.

The settlement empowers consumers with choice when it comes to services, compensation, and marketing strategies that meet their needs. Real estate professionals should work with sellers to ensure they fully understand their options, including the ability to make offers of compensation off-MLS to brokers working with buyers.

The settlement expressly preserves offers of compensation as an option when agreed upon by the consumer and the broker. Offers of compensation are good for buyers and sellers and help make the path to homeownership accessible for all buyers, especially first-time, low income, and other underrepresented homebuyers.

OFFERS OF COMPENSATION CAN BE MADE OFF-MLS

NAR Policy does not dictate whether an offer of compensation is made. The amount—and existence—of any offer of compensation is an option solely determined by the real estate professional and the consumer.

In cases where a seller believes it is in their best interest and makes the informed decision to instruct their listing broker to offer compensation to buyer brokers, the listing broker may communicate the offer of compensation off-MLS. For example, the offer of compensation for the broker's listing could be communicated through common marketing methods such as on the broker's website, signs, flyers, social media posts, or by communicating directly with the buyer broker.

SELLER CONSENT IS REQUIRED

As of August 17, 2024, before a REALTOR® or MLS Participant makes an offer of compensation or a payment to another broker, agent, or other representative (e.g., a real estate attorney) acting for a buyer:

- The REALTOR® or MLS Participant must conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that a listing broker will make to another broker acting for buyers; and
- This disclosure must be made to the seller in writing in advance of any payment or agreement to pay another broker acting for buyers and must specify the amount of such payment.




SCAN FOR ACCESS



WINDOW TO THE LAW


“Settlement Facts” Videos



How Will Existing Offers of Compensation Change

VIDEO | JULY 30, 2024


Can a broker rely on an offer of compensation made in the MLS, once the practice changes in the NAR settlement agreement take effect?



How Listing Agreements Are Changing

VIDEO | JULY 30, 2024


Find out what provisions must be included in a listing agreement when the practice changes in the NAR settlement agreement take effect.



What Does the Class Action Notice Mean for REALTORS®


VIDEO | JULY 30, 2024

What is “class notice” of the NAR settlement agreement, and what can members expect to see in their markets when class notice is sent?



How the Settlement Affects Broker-to-Broker Agreements

VIDEO | JULY 30, 2024



How Are Seller Concessions Impacted by the Settlement

VIDEO | JULY 30, 2024



SCAN FOR ACCESS

For the latest information, please visit:
Facts.Realtor