

PRACTICAL REALITIES OF THE PRELIMINARY NAR SETTLEMENT

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SPOKANE REALTORS® MLS STEERING COMMITTEE CHAIRPERSON, 2024



HOW DID WE GET HERE?

- Industry compensation system deemed antitrust violation: the coupled compensation model we had for generations where listing brokers charged a commission that they shared with the buyer brokers led to:
 - Buyers feeling steered into listings based on offered compensation;
 - This “steering” has compelled sellers to offer a “consistent level” of elevated compensation in order to get buyers in the door (overinflated commissions); and
 - Buyers feeling as though they’ve had no voice in the compensation being paid to their broker who they hired to represent them!

UNCOUPLED COMPENSATION MODEL

- We no longer tie compensation between the brokers.
- Compensation will be uncoupled (has been in WA since January, 2024).
- Compensation to the buyer broker is taken out of the listing agreement and the MLS.

NAR PRELIMINARY SETTLEMENT TOOK EFFECT ON AUGUST 17, 2024 – MAIN POINTS:

- REALTOR® MLS's will not publish seller offer to pay buyer broker (BB) compensation
- Sellers MAY still offer compensation to BB, at seller's option
- Listing broker (LB) may not compel seller's offer or amount of offer (commissions or amount of compensation is negotiable)
- LB MUST publish seller's offer as part of the marketing the property for sale
 - Publish anywhere other than MLS or website fed with MLS data
 - Sellers CAN offer "concessions" to buyer, but cannot be conditioned on buyer using it to pay their BB
 - Don't hide the "seller paid compensation" ball, please!

NAR PRELIMINARY SETTLEMENT TOOK EFFECT ON AUGUST 17, 2024 – MAIN POINTS CONTINUED:

- Buyer brokers must enter buyer agency agreements before touring a home
 - WA Law: before or as soon as reasonable practical after offering brokerage services (so before showing) – if there is a conflict, WA law trumps, but there is no conflict when both can be satisfied
 - BBSA must be for a set amount
 - BB cannot take more than what the BBSA says they will get
 - BB cannot filter or restrict MLS listings based on level of compensation offered to the BB

TOURING A HOUSE WITH A BUYER – ONE HOUSE FUDGE FACTOR IS GONE!

- Broker receives a referral to meet a buyer at a home and show it to them:
 - NAR requires BBSA before showing
 - WA law requires BBSA before showing and if not, then before providing other services
 - Both requirements are satisfied by entering BBSA before showing house so you must sign before opening the door
 - Send to sign electronically before showing appointment (can limit scope to just that house, or just one day or non-exclusive to minimize the “scare factor”)
 - Bring with you and have them sign it on the front porch
 - Give the Real Estate Brokerage in WA pamphlet before they sign anything, of course!

WHAT ABOUT OPEN HOUSES?

- Carved out in the proposed NAR settlement & WA law – no need to have buyers sign BBSA's before letting them in the door!
 - Open house by listing broker – you are not representing buyers, you are showing the house in your capacity as a representative of the seller – you have a services agreement with the seller
 - Open house by broker who is not the listing broker – WA law allows hosts to show open houses and enter BBSA if buyer wants additional services – WA law trumps!

COMPENSATION OUT OF THE MLS

- **Compensation is to be taken out of the MLS – the purpose of the MLS has changed – retain and define cooperation:** obligation to share info on listed property and to make property available to other brokers for showing to buyers and tenants when it is in the best interest of their clients.
 - The Seller Paid BBC field was removed from the Spokane MLS on August 15.
 - MLS cannot create, facilitate or support any non-MLS mechanism for participants or subscribers to make offers of comp to BB's (including providing listing information on an internet aggregator's website for such purpose)
 - Do NOT feed compensation info to third party websites (e.g, Zillow, Realtor.com, etc.).
 - Can the seller still offer BB compensation? YES! It just cannot be published on the MLS.

WHAT NOT TO DO:

- No adding text to agent or public remarks about Buyer Broker Compensation (BBC)
- Don't add BBC information inside of uploaded attachments in the MLS (Associated Docs)
- No subliminal remarks in photos of a listing. ----->
- No sneaking “code” into remarks
- No adding BBC info into your showing service (e.g., SentiKey)
- No comments such as “Buyer Broker Friendly” in any remarks
- No use of an AP/RETS/IDX feed to populate BBC website
- **DO NOT POST TO THIRD PARTY VENDOR BBC SITES!**



CREATIVE NO-NO'S

- What about a random number at the end of the remarks? – NO!
- “I give this house 2, 2.5 or 3 smiley faces” – NO!
- “Agents, bring your buyers, we can’t wait to work with you!” – NO!
- Buyer Broker Courtesy – NO!
- Riddle that tells the number without telling the number in the agent remarks. – NO!
- Buyer Agents Welcome! – NO!
- BBC – NO!

MORE CREATIVE NO-NO'S

- An indicator icon or some kind of colored square to be displayed if the commission rate is at least ____%? – NO!
- Buyer Agent Friendly – NO!
- How about the two-finger peace symbol? – NO!
- Reach out with ANY questions! – NO!
- Seller offering ____ in the agent remarks (not public) – NO!
- Can I get a neck tattoo stating all of my listings will offer seller paid buyer broker compensation? – NO!

BOTTOM LINE:

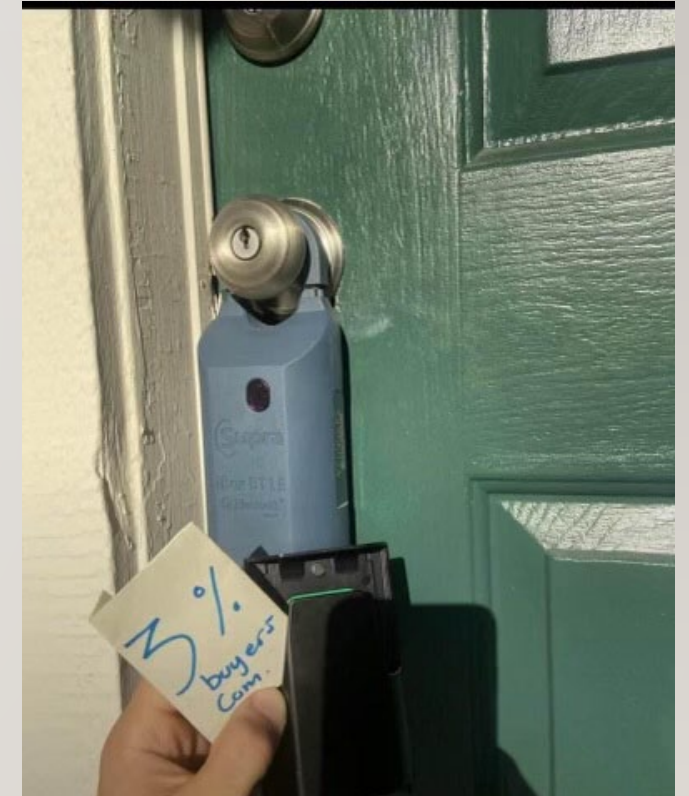
- The BBC field is out of the MLS. Do NOT look for creative ways to get that information back into the MLS!
- **DB/MB NOTE:** Check your office listings to make sure there is nothing about compensation in the public or agent remarks or in associated docs!
 - E.g., Commissions will be paid on sales price less seller paid buyer closing costs, etc.

NEWLY ADOPTED BY YOUR SR BOARD OF DIRECTORS:

- New Tier 4 for violations of this new policy (no compensation in the MLS – ANYWHERE!) - Staff will remove the offending verbiage from public or agent remarks, photo or associated document
 - A warning will be issued to you and your DB that it was removed and this is **your only warning!**
 - Next time staff has to remove something - **\$500 fine!**
 - Next time - **\$5,000 fine!!**
 - Next time - **\$10,000 fine!!!** We know you are a bad actor and just trying to get us all in trouble at this point!

WHAT CAN YOU DO?

- OK to publish on the following:
 - Yard sign / sign riders
 - On the keyring or on a card in the lockbox
 - Flyer (in the house, flyer box, etc.)
 - Advertisements including broadcast flyers to MLS subscribers as long it does not reference recipient is receiving the email because they are member of the Spokane REALTORS® MLS (avoid any implication that the Association is involved with such offers)
 - Listing broker's social media channels
 - Text, phone call or email between listing broker and buyer broker
 - Broker's or firm's website (for broker's and firm's listings only!)
- **DB/MB NOTE: Make sure your brokers know how important communicating with their colleagues is!**



HERE'S WHAT I AM DOING:

- Adding a banner with the seller's offer on the flyer in the house.
- Adding the seller's offer to flyers I am sending out to the MLS subscribers when I do this for new listings or broker open houses.
- Texting the seller's offer when a buyer broker schedules a showing through SentiKey.
- Answering my phone when it rings or when someone texts me!

IMPROVED COOPERATION AND COMMUNICATION IS NECESSARY

- Listing brokers must improve their responsiveness
 - When BB communicates – respond!
 - If you need back-up because you are super busy, get it!
 - It is a power trip to hold information needed by others and your power trip does not benefit your seller!
 - Be prepared to send written evidence of the seller's offer to the Buyer/BB (e.g., listing addendum or stand alone agreement to pay).

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- Buyer brokers must do more homework
 - When buyer wants to know what the seller offer of compensation is, research!
 - Seek info from the listing broker's social media, website, etc.

WHAT ABOUT APPRAISERS?

- Questions are coming up about how appraisers will take compensation into account when conducting valuations.
 - Cooperate with appraisers when they call and ask.
 - **DB/MB NOTE: Make sure your brokers know they should have an open line of communication with appraisers.**

FORMS CHANGES – SEE NWMLS LEGAL BULLETIN 226 FOR DETAILS

- Updated forms were available on TransactionDesk on Thursday, August 15
- Major changes to the following forms:
 - Form IA-SWF – Exclusive Sale & Listing Agreement
 - Form 4I – Buyer Broker Services Agreement
 - Form 2I – Purchase and Sale Agreement (and all other PSA's)
 - Form 4IC – Addendum for Buyer Credit

FORM IA – SWF – EXCLUSIVE SALE AND LISTING AGREEMENT

- NAR policy changes prohibit REALTOR® MLS's from creating, facilitating or supporting any non-MLS mechanism for listing brokers or seller to make offers of compensation to buyer brokers. Accordingly, the revised IA-SWF will remove seller's offer of compensation to buyer brokers.
- Compensation to listing firm in paragraph 7(a):
 - i. compensation owing if buyer is represented
 - ii. compensation owing if buyer is unrepresented
 - DO NOT ADD SUBSECTIONS i & ii.

UNREPRESENTED BUYERS VS. LIMITED DUAL AGENCY

- Know the difference!
- Make sure you treat the unrepresented buyer correctly:
 - Give them the Real Estate Brokerage in WA pamphlet.
 - Give all the proper disclosures including suggesting they should get representation, that you represent the seller exclusively and cannot counsel or advise the unrepresented buyer, etc.
 - Follow-up with an email with these same disclosures.
- See Annie's Friday Video on this – good stuff!

WHAT IF THE SELLER WANTS TO OFFER COMPENSATION/CONCESSION?

- Individual listing firms must provide the contract provision for the seller to make the offer:
 - Add language to the “other” paragraph of IA-SWF
 - Addendum to the listing agreement
 - Stand alone agreement containing the seller’s offer
 - Make sure you have the mandatory language that compensation is **not set by law and is fully negotiable!**
- **DB/MB NOTE: You must create your own office policy, forms or contract language (model off old IA-SWF?). SEEK LEGAL COUNSEL!**

ADDITIONAL CHANGES TO IA-SWF

- Removes seller's advance consent to any compensation sharing between firms as this may not be facilitated by a REALTOR® MLS any longer.
- Retains seller consent to listing firm receiving compensation from more than one party because in the event of limited dual agency, the broker will be receiving compensation from both buyer and seller - this consent is required under RCW 18.86.080.

LISTING IN NWMLS AND A REALTORS MLS?

- Broker must enter into two different listing agreements: IA and IA-SWF
- Listing firm should then also create an over-arching agreement/document ensuring seller that they will not be charged two listing firm commissions
- If seller signs IA & IA-SWF, the check box on the IA that offer of compensation to BB is extended to non-NWMLS BB's would eliminate the need to add a separate provision to IA-SWF for seller offer of compensation to a BB
- NWMLS **will** publish the compensation, REALTOR® MLS **will NOT** publish the compensation

FORM 41 - BUYER BROKERAGE SERVICES AGREEMENT (BBSA)

- Compensation provision is revised to clarify BB firm may not receive compensation that is greater than the amount agreed to in Form 41 or any subsequent amendment to Form 41 (e.g., Form 41A – Amendment to BBSA).
- Buyer and BB must agree to specific compensation (cannot be “whatever the seller offers” or a range such as “X-Y%”)
 - Compensation CAN, however, be tailored (e.g., X% for land and Y% for house) – use the “other” paragraph
- Adds a provision for a different compensation amount if the seller is unrepresented (e.g., a FSBO) and for dual agency.

FORM 41 - BBSA REVISIONS CONTINUED

- “Seller Compensation Offer” paragraph is simplified:
 - Seller may offer compensation, but is not required to do so.
 - Any seller offer of compensation to the BB firm will be stated in the PSA as required per Agency Law.
 - Buyer may request the seller pay the BB compensation as part of the buyer’s offer.
 - Buyer will pay any amount not paid by seller.
 - If seller offers more than buyer owes, buyer may ask seller to credit overage to buyer as part of the PSA if allowed by lender (41C or 22A).

FORM 41 - BBSA REVISIONS CONTINUED

- “Compensation Terms” provision will delete the buyer’s advance consent to compensation sharing between firms which is no longer allowed
- VA regs **may** require (rather than **do** require) compensation to be paid by seller
- Removes the “exceptions” line – BB must bring all listings to the buyer’s attention regardless of seller’s offer of compensation - BB may not filter any search results based on seller’s offer (Buyer may choose which listings to view, of course!).
- **DB/MB NOTE: Talk to your brokers about this conversation with buyers who cannot pay the BB fee – what will happen if the seller won’t pay?**

FORM 21 – RESIDENTIAL PURCHASE & SALE AGREEMENT (AND THE OTHER PSA’S)

- Revised to simplify BB compensation disclosure and negotiation
- Page 1 – specific term 17 on the Form 21 - Buyer Brokerage Compensation
 - 17(a) “Seller’s Offer”
 - 17(b) “Amount to be Paid by Seller”

17. Buyer Brokerage Compensation: _____ ; _____ Addendum for Buyer Credit
(a) Seller's Offer (if any) (b) Amount to be Paid by Seller

BUYER BROKERAGE COMPENSATION PROVISION ON THE PSA

- A buyer's offer must have both fields completed:
 - **17(a) – seller's offer** must be completed per the agency law (RCW 18.86.030 (1)(g)(ii) – duty to disclose any offer of compensation from the other party to the transaction prior to mutual acceptance)
 - **17(b) – amount that the seller will pay the BB firm** – if 17(b) is left blank, the seller has no obligation to pay – THIS IS A HUGE CHANGE! You will now negotiate the compensation the seller will actually pay the BB on the face of the PSA (no longer just a disclosure).
- **DB/MB NOTE: Train, train, train your brokers on this! Buyer brokers – fill in 17(b) or you might not get paid! Listing brokers, check what is filled in on 17(b) and make sure it is what your seller intends to pay or counter. These mistakes will only be made once!**

TO REITERATE ... 'CAUSE THIS IS SOOO IMPORTANT!

- 17(a) states what the seller is offering.
- 17(b) is what the seller WILL BE PAYING!
- What if you don't know what the seller is offering?
 - Write “unknown” on 17(a)
 - Document in the firm transaction folder your efforts to find out!

WHAT IF SELLERS OFFER IS GREATER THAN WHAT IS TO BE PAID TO THE BB FIRM?

- Two options:
 - Check the box at the end of line 17 – Addendum for Buyer Credit and add Form 41C

17. **Buyer Brokerage Compensation:** _____ ; _____ Addendum for Buyer Credit
(a) Seller's Offer (if any) (b) Amount to be Paid by Seller

- OR ask for the credit on the top of page 2 on the Form 22A – Financing Addendum

BUYER BROKERS HAVE TO KNOW WHAT THE SELLER IS OFFERING

- Because the agency law requires the BB to disclose what, if anything, the seller is offering, the BB must do everything in their power to find out what the seller is offering.
 - Listing brokers – don't make this difficult information to discover – publish on the flyer in the house, answer your phone/text, email your company's addendum, etc.

PSA BOILERPLATE RE: BB COMPENSATION

- If there is any inconsistency between the BB firm's compensation offered and the description of the offered compensation stated in I7(a), the terms shall be as set forth in the “published offer”.
 - Why does this matter if all that REALLY matters is what is filled in on I7(b) - what the seller will pay?
 - It matters because the state law requires the broker disclose what is being offered – so get it right!
 - And it matters if there is a difference between the two and the buyer wants the credit!

GET IT IN WRITING!

- Because 17(a) will be so important, get this in writing from the listing broker (also important to show your compliance with the law):
 - Screenshot of the website
 - Copy of the flyer
 - Journal entry of phone call
 - Text or email communication

IF USING 41C – MUST CONFIRM SELLER’S OFFER!

- Buyer brokers - make sure if you are using 41C for the buyer’s credit that you have the seller’s offer in writing from the listing broker so you have no inconsistency between what you write on 17(a) and what was “published”.

<input type="checkbox"/> Credit to Buyer.	5
The difference between the amount of Seller’s Offer for Buyer Brokerage Firm’s compensation and the amount to be paid by Seller shall be credited to Buyer’s obligations at Closing.	6 7
If Buyer is obtaining a loan or loans to purchase the Property, Seller’s credit to Buyer is subject to Buyer’s lender(s) approval. Any amount not approved by Buyer’s lender shall be <input type="checkbox"/> applied as a reduction in the purchase price; or <input type="checkbox"/> credited to Seller (credited to Seller if neither box is selected).	8 9 10
<input type="checkbox"/> Other:	11 12 13

EXISTING AGENCY RELATIONSHIPS AND PENDING TRANSACTIONS

- Pending transactions with sellers and buyers – no need to update/replace representation agreements unless sale flubs, then replace. You do, however still need to remove compensation language from pending listings in the MLS!
- Active Listings and BBSA's – need to update/replace with new representation agreements:
 - Listing agreements should have been updated/replaced **by August 15** (when compensation came out of the MLS) – replacement is necessary to eliminate the contract language obligating the listing firm to publish offer of compensation to the BB in the MLS.
 - BBSA's should be updated ASAP after August 15 – replacement is necessary because old BBSA allowed filtering of listings and overage to be credited to firm.

FOR MORE INFORMATION ...

- Facts.REALTOR
- Nar-settlement-estimated-timeline-2024-07-31.pdf

• Thank you so much!