



**YOUR GUIDE
TO C.A.R.'S
REAL ESTATE
PRACTICE
CHANGE
RESOURCES**

2024 BUSINESS PRACTICE CHANGES **FAQS**

August 17, 2024 marked a sea change in the working lives of all REALTORS *. This was the deadline to implement the practice changes required by NAR's settlement with the U.S. Department of Justice in the Sitzer-Burnett v. NAR class action lawsuit.

Below, C.A.R. answers the top questions it has received about the changes and how they impact your business. You can read the full settlement agreement at www.nar.realtor/the-facts

What are the key ways in which the settlement changes REALTORS" business practices?

- **Compensation offers are no longer allowed on MLSs:** NAR has agreed to put in place a new rule prohibiting offers of compensation on an MLS. Sellers can offer concessions or indicate that they are willing to consider such concessions on an MLS if the particular MLS allows it (for example-concessions for buyer closing costs).
- **Written agreements are required for MLS Participants acting for buyers:** MLS Participants working with buyers must enter into written agreements with their buyers before touring a home.

Why did NAR choose the legal path it did for the settlement?

After much consideration, NAR chose to settle under these terms because it strongly felt they were in the best interests of all members. Other options included:

- **Appealing:** A win on appeal would only have addressed the verdict in the Sitzer-Burnett case (not any of the numerous copycat cases). It may have only resulted in a new jury trial, leaving members and consumers with continued uncertainty.
- **Chapter 11 reorganization:** In theory, Chapter 11 would have enabled NAR to eliminate its own liabilities while pursuing an appeal of the Sitzer-Burnett verdict. But NAR believes that would have left members with continued uncertainty and potential liability risk. Chapter 11 would also have paused the litigation against NAR but not the other defendants in the cooperative compensation cases.

Ultimately, while NAR continues to believe that it is not liable for the home seller claims related to broker commissions and that it has strong arguments challenging the Sitzer-Burnett verdict, it decided to reach this settlement to put claims to rest for over one million NAR members and other parties who would be released under the agreement.

How does a buyer's broker get paid under the new protocols?

There are several ways in which a buyer's broker receives payment. Three examples are discussed below.

- **Method 1:** The first way that the buyer's broker is paid is through a direct payment based on a written buyer-broker agreement signed by the buyer. The buyer contractually commits to paying their own broker and pays their own broker directly.

■ **Method 2:** The second way to get paid begins the same as the first - with the buyer signing a written buyer-broker agreement. But instead of the buyer paying their own broker directly, the buyer asks the seller, through the terms of the purchase agreement, to contribute toward the buyer's obligation. In the second method, subject to agreement between the seller and buyer, the buyer's broker may receive some of their compensation from the seller with the balance paid directly by the buyer, or they may receive all their compensation from the seller. The Residential Purchase Agreement (C.A.R. Form RPA) can be used to negotiate compensation from the seller to the buyer's broker. Check box 3G(3) on the RPA and attach the form Seller Payment to Buyer's Broker (C.A.R. Form SPBB). In December, an update to the RPA will allow you to check box 3G(3) on the RPA to request the seller to pay the obligation to the buyer's broker. The maximum amount that can be requested from the seller is the amount that the buyer agreed to pay the buyer's broker in the buyer representation agreement.

■ **Method 3:** The third way, which arises only occasionally, is when the seller is unrepresented - for example, when the property is for sale by owner (FSBO) without agent representation. In that case, the buyer's agent may approach the seller directly and use the Single Party Compensation Agreement (C.A.R. Form SP) to negotiate for the seller to cover the buyer's obligation. This can and should be done in advance of making an offer to purchase. The SP form allows the seller to compensate the buyer's broker directly while remaining unrepresented. Another option is for the buyer's agent to elect to represent the seller as a dual agent with the consent of both parties; in such cases, the agent should create a separate agreement with the seller to be compensated for representing the seller.

Can an MLS allow MLS listings to link to a listing broker's contact information (e.g., telephone number or the broker's preferred communication method)?

Yes, an MLS may provide links or other information that allows brokers to contact each other. However, this may not be used to circumvent the prohibitions of (a) making offers of compensation on an MLS to cooperating brokers or other buyer representatives (either directly or through buyers) or (b) disclosing on an MLS broker compensation or total brokerage compensation (ie., the combined compensation to both listing brokers and cooperating brokers). For example, an MLS may not allow MLS listings to have an embedded link to a website which, with a single click on the MLS listing, would immediately display an offer of compensation.

Who will be responsible for ensuring all parties follow the new practice changes of requiring written agreements and prohibiting offers of compensation on the MLS?

MLSs will be responsible for enforcing the NAR settlement rules regarding written agreements and prohibiting offers of compensation.

If a BRBC is signed, is any agent within the office permitted to work with the buyer, or is working with the buyer limited to that particular agent?

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If the listing agreement does not have a field in which the seller commits to paying a certain amount for buyer-broker compensation, how is the issue of the seller agreeing to compensate the buyer's broker raised?

The BRBC itself does not limit representation to the particular agent. Just like a listing, the BRBC is between the principal and the broker. But the expectation of the client is that they will be working with a particular agent, and most brokerages grant agents this right.

The issue may be raised by using the Broker Compensation Advisory (C.A.R. Form BCA), which is an attachment to the listing agreement. By reviewing this advisory with the seller, a discussion can be initiated about the possibility of compensating a buyer's broker. It can be pointed out to the seller that a buyer's broker is likely to request that the seller cover the buyer's obligation to the buyer's broker as a term in the purchase agreement.

If the seller is willing to compensate a buyer's broker, the question then becomes how and when the listing agent communicates this to the buyer's agent. Certainly, there is nothing wrong with a listing broker and buyer's broker having a candid discussion, whether over the phone or through text or email, of the possibility of the seller covering the compensation to the buyer's agent and how the purchase agreement may need to be written to make that happen. There is also the possibility that seller concessions, or the seller's willingness to consider such concessions, can be advertised on the MLS (depending on the MLS), Seller concessions can cover any cost that the buyer might incur such as title and escrow fees and other closing costs, but it is also possible for seller concessions to be applied to pay the buyer's broker as stated above. But to be clear, using the C.A.R. forms, there is no written obligation for the seller to compensate a buyer's broker until it is agreed to in the purchase agreement (or in the case of an unrepresented seller, the seller may agree in advance to compensate a buyer's agent using the SP form).

If the buyer writes into their offer a request for seller concessions, is the amount of the seller concessions limited to the amount of compensation as stated in the buyer representation agreement?

For seller concessions specifically earmarked as payment to the buyer's broker under paragraph 3G(3) of the RPA, that amount is limited to the amount of compensation as stated in the buyer representation agreement. This limitation derives straight from the NAR settlement that caps any payment to the buyer's broker as the amount stated in their representation agreement regardless of source.

If the seller has authorized the listing agent to disclose that the seller is willing to pay compensation to the buyer's broker, or even specified an exact amount of seller credits on an MLS as a seller concession, is the seller then bound to pay that promised amount once the buyer has requested it in the RPA?

No. The advertising of seller concessions on an MLS is only an invitation to offer. It is only expressing the seller's willingness to consider such offers and does not constitute a binding unilateral promise. Accordingly, if the seller does receive an offer in which they are asked to pay the buyer's broker or provide seller credits, the seller is free to accept or counter it. The counter might offer to pay only a portion of the broker's compensation or the credit, or these terms can be countered out entirely.

Since the buyer's agent is not permitted to receive compensation beyond the amount negotiated in their buyer representation agreement, are they required to provide a copy of that buyer representation agreement with the offer to purchase?

The RPA does not require that the buyer representation agreement be provided with the purchase agreement. However, if the seller accepts the offer and agrees to pay the buyer's broker in whole or in part, then the seller has the option to request proof of the buyer's obligation to pay. Specifically, the seller may request to see the part of the buyer's representation agreement that contains the promise to pay (for the BRBC, that would be the last page, under paragraph 16, which has a confirmation of the compensation amount).

Can the buyer refuse to allow their agent to include within the offer a request for compensation?

It depends. If either of the boxes under 2G(2) of the BRBC is checked, then the buyer is bound to include within the offer a request for compensation. Those two boxes state that the buyer either does not have sufficient funds to pay the broker, or that they are obtaining a loan that does not permit compensation to be paid to their own agent. However, if neither box is checked, the buyer is not obligated to make the request as a term in the offer to purchase.

Still have questions? Members can always speak with a C.A.R. Legal Hotline attorney by calling (213) 739-8282. You can also find links to Legal Q&As, Quick Guides, and other resources at car.org and Smartzone.car.org.



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As of August 17, 2024, all MLS participants working with a buyer must enter into a written agreement before the buyer tours any home. C.A.R.'s Buyer Broker Compensation Agreement (C.A.R. Form BRBC) can help you meet this requirement. Keep reading to learn about the BRBC.

1. What requirements must be met for a broker to earn the stated compensation under the BRBC?

The buyer must enter into an agreement to acquire the type of property described in the BRBC during the BRBC's specified representation period, or any extension thereof (and before the effective date of any cancellation, if applicable). If the buyer and buyer's agent have chosen nonexclusive buyer representation, there must also be "broker involvement," which is discussed below in Question #5. If the foregoing requirements are met, compensation will be due even if the transaction closes after the representation period expires or the BRBC is canceled.

2. Where do I enter the amount of compensation that the buyer is to pay the buyer's broker?

The compensation amount to the buyer's broker is stated under paragraph 2E(1) of the BRBC. This amount is also restated in paragraph 16 of the BRBC, entitled "Confirmation of Compensation." ZipForms will auto-populate the same commission amount stated in paragraph 2E(1) in this Confirmation of Compensation paragraph. When using other platforms, the agent should check that the same amount of compensation is indicated to avoid conflicting terms regarding their right to compensation.

3. Under the BRBC, a buyer and broker can enter into an exclusive or non-exclusive relationship. What is the difference?

There are two main differences. First, under a non-exclusive agreement (which the BRBC defaults to), a prerequisite to the broker earning compensation is that there must be "broker involvement" (discussed in Question #5) with the property. On the other hand, under an exclusive agreement, the broker has the right to compensation even if the buyer acts alone or with a different broker in buying a property during the representation period.

Second, unilateral cancellation under a non-exclusive agreement is effective immediately upon receipt of the cancellation notice (unless otherwise agreed in the BRBC), while unilateral cancellation under an exclusive agreement is not effective until 30 days after receipt of the notice.

4. How do I make the BRBC an exclusive agreement?

The box in paragraph 2A(2) must be checked, but additionally, the buyer must initial the Exclusive Representation box (paragraph 15 of the BRBC).

5. What does "broker involvement" mean under the BRBC?

"**Broker involvement**" means any of the following:

- The buyer physically entered and was shown the property by the broker;
- The broker showed the property to the buyer virtually (e.g, via a videoconference or walk through);
- The broker submitted to the seller a signed, written offer from the buyer to acquire, lease, exchange, or obtain an option on the property;
- The broker performed a market analysis related to the property or reviewed property-specific documents or disclosures with the buyer; or
- The property was introduced to the buyer by the broker, or the property was one for which the broker acted on the buyer's behalf.

Note that merely sending the buyer a list of properties is not deemed "broker involvement" without documented action on the part of the broker, for example: analyzing the property for the buyer specifically, assisting the buyer in the potential acquisition of the property, or communicating with the seller or seller's agent about the buyer's potential acquisition of the property.

6. My buyer is refusing to sign the BRBC. Is there a simpler version of the BRBC?

Yes. There is the Property Showing and Representation Agreement (C.A.R. Form PSRA). It has many of the features of the BRBC but is much shorter and simpler. The main differences between the PSRA and the BRBC are:

- The PSRA cannot last longer than 30 days
- It can only be non-exclusive
- It has space for identifying only three properties
- It may be cancelled at any time

7. Does the BRBC need to be approved by an agent's broker or office manager to be binding on the broker?

No, but much like a listing agreement, the broker or manager has five days to cancel the BRBC if they do not approve of the terms. Individual agents or broker-associates should provide their brokerage with a copy of the BRBC as soon as possible once obtaining the buyer's signature.

8. Are there any limits to how long a representation period can be under the BRBC?

Yes. The maximum representation period allowed under the BRBC is 3 months, unless the buyer is a corporation, limited liability company, or partnership. However, the representation period may be extended for an additional 3-month period (or less) by using a modification agreement, such as C.A.R.'s Modification of Terms - Buyer Representation Agreement (C.A.R. Form MT-BR). Subsequent extensions are also permitted.

SMART ZONE IS YOUR SOURCE FOR PRACTICE CHANGE TOOLS

Smart Zone is your one-stop shop for business practice change tools. From forms to fact sheets and one sheets for your clients, we've provided the latest information and tools to smooth the transition to the latest practices. Below is a sample of the tools on Smart Zone.

Forms

Find all the latest forms for your business, along with FAQs and town halls.

Forms

- Top Questions from C.A.R.
- Special Townhalls on C.A.R. Forms
- Broker Compensation
- Compliance

Legal Fact Sheets

- What Should a Listing Broker or Buyer's Broker Do?
- 5 Things to Know About the New Broker Compensation Advisory Form
- BRBC – Exclusive or Non-Exclusive

Videos

- Member to Member
– Erin Stumpf
- Member to Member
– Barb Betts
- Member to Member
– Ivan Estrada

For Your Clients

- How REALTORS* Are Compensated
- What the NAR Settlement Means for You
- What Is a Buyer Representation Agreement?
- 9 Reasons You Need a Buyer's Agent

Infographics

- 5 Ways REALTORS' Can Help Consumers
- 7 Reasons To Work With a Buyers' Agent
- What the NAR Settlement Means for You
- Homebuying: Getting Started
- Homebuying: Steps to Closing

Let's Talk Scripts

- Conversations with Your Buyer
– Without a Buyer's Broker
- Conversations with Your Buyer
– With a Buyer's Broker
- Conversations with Your Buyer
– New Business Practices
- Conversations with Your Seller
– New Business Practices
- Conversations with Your Buyer
– REALTOR* Value