

The Top NAR Settlement Townhall

Questions and Answers

1. Can you explain how the buyer's broker is to get paid under the new protocols?

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

The first way in which the buyer's broker will be paid is by a direct payment based on a written buyer broker agreement signed by the buyer. The buyer contractually commits to paying their own broker and in fact pays their own broker directly.

The second way to get paid begins the same as the first way -- 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 towards the buyer's obligation.

In the second way, 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 of their compensation from the seller.

The residential purchase agreement can be used to negotiate compensation from the seller to the buyer's broker. Check box 3G(3) on the Residential Purchase Agreement (C.A.R. Form RPA) and attach the form Seller Payment to Buyer's Broker (C.A.R. Form SPBB). The maximum amount that can be requested from the seller is the amount that buyer agreed to pay the buyer's broker in the Buyer Representation and Broker Compensation Agreement (C.A.R. Form BRBC).

The third way, which will arise only occasionally, is when the seller is unrepresented. For example, the property is for sale by owner (FSBO) without agent representation. In that case, the buyer's agent may approach the seller directly and using 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. Or the agent may elect to represent the seller as a dual agent (which right is granted to the broker under the terms of the BRBC (Buyer Representation and Broker Compensation Agreement (C.A.R. Form BRBC))).

2. If a listing broker is currently in a listing but not using the Residential Listing Agreement as revised in July 2024 (C.A.R. Form RLA), is it necessary to amend the listing to make it compliant with the NAR settlement terms?

Yes, any pre-July listing agreement should be revised. The Disclosure and Modification to Listing Agreement (C.A.R. Form DM-LA) can be used for this purpose.

Pre-July listing agreements typically offer cooperating broker compensation through the MLS. The seller is agreeing to pay the listing broker a commission, part of which, is intended to be offered to the cooperating broker via the MLS. But when the NAR settlement terms become effective (on August 17th or possibly sooner depending upon the MLS) the listing broker will no longer be able to offer compensation through the MLS. Hence the listing agreement must be modified.

The DM-LA introduces two critical modifications. First, the seller will be apprised that such offers of compensation will no longer be made through the MLS. Second, the parties can use this form to reduce the amount of compensation by the amount of compensation that was intended to be offered to the cooperating broker. The DM-LA states, "Seller and Broker agree that the total compensation shall (___shall not) be reduced by the amount authorized to be offered in the MLS." To be clear this term comes into effect only at the time the MLS no longer permits offers of compensation to be made to the buyer's broker.

Note: Before the July 2024 update, there was an earlier version of the DM-LA which did not reduce compensation in the way discussed above but does apprise the seller that offers of compensation will be prohibited through the MLS.

3. If a buyer's broker is currently in a buyer representation agreement but not using the July version of the Buyer Representation and Broker Compensation Agreement (C.A.R. Form BRBC), is it necessary to amend the agreement to make it compliant with the NAR settlement terms?

Yes, and for two critical reasons: First, in all prior versions of the BRBC, the buyer's broker is permitted to receive compensation from an outside source (such as the listing agent or seller) above what the BRBC states the buyer will pay. However, this will be a prohibited practice under the NAR settlement terms once the settlement takes effect. All buyer representation agreements need to be amended for this reason alone. Agents can use the Disclosure and Modification to Buyer Representation Agreement (C.A.R. Form DM-BR) for this purpose.

The second reason is related to the first reason. Because the agent will no longer be able to obtain compensation above what is stated in the buyer representation agreement, they will be stuck with whatever amount has already been negotiated, even if that was a small or nominal amount. Up until very recently it was a common practice to negotiate buyer representation agreements with nominal amounts of commissions owed. But if that's what the agreement says, the agent will be prohibited from receiving more than that nominal amount once the settlement terms take effect. If an increased commission needs to be negotiated in this case, then the addition of the DM-BR alone

will not suffice. The agent will need to negotiate a modification agreement to the BRBC for a higher amount of compensation. The Modification of Terms – Buyer Representation Agreement (C.A.R. Form MT-BR) can be used for this purpose.

4. When do the NAR settlement terms go into effect?

August 17th is the final deadline for REALTOR®-owned MLSs to implement the settlement terms. However, many MLSs may implement the settlement terms prior to August 17th. It is important that you check with your MLS to know the effective date of the settlement terms as they apply to you.

5. 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 only?

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 for the most part.

6. Under the BRBC, the buyer is required to provide relevant personal and financial information using the Buyer Financial and Personal Information form (C.A.R. Form BFPI)). When does the BFPI apply?

As background to this question, the BFPI is a form that requires the buyer to provide relevant financial information including proof of funds needed to complete the purchase of the property and satisfy the obligation to pay the broker, and provide a pre-approval/ pre-qualification letter.

This question is really driving at the issue of fair housing. Is the brokerage treating all buyers equally? In answering this question, we first point out that providing the BFPI is a requirement of the BRBC. It's not an option. Under the strict terms of the BRBC every buyer, no matter who they are, must provide this form.

Only the *timing of delivery* of the form is optional within the BRBC. The default is that the buyer will provide the form within 5 days from signing the BRBC. The agent can write in a longer or shorter period or even check the box stating that the BFPI is attached.

Going to the heart of the question as it pertains to fair housing, the issue is whether a broker can demand that certain buyers deliver the form immediately, but other buyers will have five days, or perhaps some buyers might be told they do not need to provide it at all?

The answer is that it is important that brokers have consistent policies that are applied equally to all buyers no matter who they are. However, if a brokerage were to ask different buyers for this information to be given at different times, this is not in and of itself discriminatory. But it may appear discriminatory and can expose a brokerage to claims of discrimination unless there is a clear non-discriminatory basis for the different procedure.

7. Does the RLA (as revised in July) have a field for cooperating broker compensation?

No. The compensation set forth in the RLA is for services rendered by the listing broker and is for the seller-side only. There is no field in the listing for cooperating broker compensation. Neither is there a field in which the seller commits to paying the cooperating broker directly. Cooperating broker compensation has been removed from all C.A.R. forms including the listing agreements.

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

The issue may be raised by using the Broker Compensation Advisory (C.A.R. Form BCA) which is a pre-checked attachment to the listing. By reviewing this advisory with the seller, a discussion can be opened up 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 does the listing agent communicate 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 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 that seller concessions can apply to pay to the buyer's broker.

But to be clear, using the CAR 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).

9. Where on the listing agreement does the seller commit to paying a certain amount as "seller concessions?"

There is no place on the listing agreement in which the seller commits to any amount of "seller concessions." The RLA contains no field in which the seller commits in advance to pay either a seller concession or buyer broker compensation.

However, there is an attachment to the listing agreement. Under paragraph 2E of the RLA, the Multiple Listing Service Addendum form (C.A.R. Form MLSA) is referenced. On that form the seller may authorize the broker to advertise on the MLS that the seller is willing to consider offers in which

seller concessions are requested. Mind you, not all MLSs will have a field for advertising seller concessions.

But not even that creates a binding obligation on the seller. Seller concessions within the offer are still fully negotiable. The seller may accept them or reject them.

Keep in mind that seller concessions are defined broadly as any monetary payment to cover any buyer expense including, but not limited to, such things as costs of escrow or title, lender fees, repairs, inspections, rate buy-downs, and payments toward insurance.

10. Does the form MLS specify the amount of seller concessions the listing agent is authorized to advertise on the MLS?

No. the MLSA form only has a box, under paragraph 5B, that states the agent is authorized to advertise seller concessions on the MLS but does not specify any specific amount. If the seller would like to advertise a specific amount, then the seller must separately notify the listing broker in writing of the amount.

11. How does a buyer, who has committed to paying their own agent, request that the seller compensate their agent?

The buyer can use the terms of the offer to purchase. In the RPA, the box under paragraph 3G(3) can be checked indicating that Seller Payment to Buyer's Broker (C.A.R. Form SBPP) is attached.

On the other hand, if the buyer is requesting a seller concession for closing costs or credits other than for compensation paid to their own broker, then this request should be included under paragraph 3G(1) of the RPA.

12. 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 which caps any payment to the buyer's broker as the amount stated in their representation agreement regardless of source.

13. Why are there two places in the RPA for seller credits, one in which the seller agrees to credit the buyer for “closing costs” as a default (under paragraph 3G(1)) and the other for the seller agreeing to pay the buyer’s broker (under paragraph 3G(3))?

The main reason is that it allows broker compensation to be negotiated separately from all other costs.

However, drawing a line between the two types of seller credit is important for a second reason. Fannie Mae, Freddie Mac and the FHA specify caps on how much a seller can contribute to the buyer to pay for services traditionally paid for by the buyer, referred to generally as “closing costs.” However, these entities have indicated that they will exclude from the caps, compensation paid to the buyer’s broker by the seller. Having separate fields makes it clear that these are different types of seller credits. (See NAR Settlement FAQs questions 92 and 93 for further information).

14. 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, and for two reasons: First if a seller authorized the advertising of seller concessions through the MLS, then the language of the MLS will be explicit that advertising the concession on the MLS is only an invitation to offer. It is only expressing the seller’s willingness to entertain such offers. But will not result in a binding obligation.

Second, any obligation of a principal to compensate a broker must be in a written document signed by the seller. Under the statute of frauds, if there is no written document in which the seller’s signature appears, then there will not be a binding obligation to compensate a broker from a principal.

Accordingly, if the seller *does receive* an offer in which they are asked to pay the buyer’s broker, 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 obligation can be countered out entirely.

Even though the seller will not be bound to pay a commission until they have agreed to it in writing, it is still important for a listing agent to communicate using precise language. Whether talking, texting or emailing, the listing agent should stick to the idea that the seller *may consider* such offers, as opposed to expressing an absolute promise to pay a buyer’s broker.

15. Since the buyer's agent is not permitted to receive compensation beyond the amount negotiated in their buyer representation agreement (Question #13 above), are they required to provide a copy of that buyer representation agreement with the offer to purchase?

The RPA does not require that the BRBC 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, and that would be the last page of the BRBC, under paragraph 16, which has a confirmation of the compensation amount.

16. If the seller were to counter the buyer's broker compensation, do they counter just the SPBB or do they counter the purchase price?

They seller may choose to do either. The seller may counter the purchase price, or the seller may counter back to reduce the compensation. It's perhaps simpler to counter the purchase price.

However, if the seller chooses to counter the compensation to the buyer's broker, then the term in the counter should be specific by referencing the amount stated in the SPBB. But there is no specific C.A.R. form for this.

17. Assuming that the seller counters out a portion of the buyer's broker's compensation, who would be responsible for the balance of the compensation and how would it be paid?

The buyer would be responsible based on the buyer representation agreement. The BRBC has a provision that states that the buyer will submit funds into escrow at closing to cover their obligation. Therefore, the buyer would be obligated to submit into escrow the remaining amount not agreed to be paid by the seller.

Although not typically done in the past, the buyer's agent will have to provide their buyer representation agreement to the escrow so that the escrow will be aware of the total amount of commission that is due.

As in all of the C.A.R. compensation agreements, there is a provision which makes payment of commission an irrevocable assignment of funds through escrow. At the same time, all C.A.R. purchase agreements state that brokers are parties to the escrow for the sole purpose of compensation.

18. 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.

19. Where in the BRBC does it state that the agent has no obligation to proceed with the transaction unless the seller (or others) agree to compensate the buyer's broker in full?

The right of the broker to *not* proceed in a transaction depends on how the BRBC is filled out. If either box under 2G(2) is checked, then the broker has the right to *not* proceed in the transaction if the seller (or others) do not agree to compensate the broker in full. That right is provided under paragraph 9B(2).

As stated in the previous question, the two boxes in 2G(2) of the BRBC indicate either that the buyer 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 broker. By checking either box, the buyer is obligated to allow the broker to include with the offer to purchase a request that the seller compensate them.

Checking either box under 2G(2) comes with a second right. If the seller refuses payment, even if only partially, the broker can withdraw from the transaction. The broker's election to withdraw from the transaction does not terminate the BRBC. This is not a cancellation right. The broker may continue to represent the buyer as their agent on other properties if within the property description in the BRBC.