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WINTER ISSUE • 2024

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OF THE YEAR

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2025
INAUGURAL &
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REALTORS®
BAND TOGETHER
FOR RECOVERY
AFTER
HURRICANE
HELENE**



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{ OUR MISSION }

*Empowering Our Members for Success and
Enhancing the Quality of Life in Our Communities*



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Answers TO Your Questions ABOUT THE **NAR Settlement** AND THE **New GAR Forms** ... AND WHY MORE CHANGES ARE ON THE WAY

The biggest challenge with the NAR settlement is its brevity regarding how REALTORS® can be compensated when working with or representing buyers. Rather than including numerous examples of acceptable and unacceptable practices, the settlement includes exactly one example. Specifically, the settlement says that the buyer's broker's compensation cannot be "open-ended" and must be "readily ascertainable" and gives one example of a non-compliant compensation agreement as follows: "buyer broker compensation shall be whatever amount the seller is offering to the buyer".

Due to the limited examples and vague language in the settlement agreement regarding permissible methods of buyer broker compensation, it's no surprise that lawyers, REALTORS® and consumer advocates have different interpretations of what the settlement allows and disallows regarding broker compensation. As these interpretations evolve, GAR will need to revise some of its forms to stay compliant with NAR's guidance. This article discusses these changes and answers some frequently asked questions regarding the NAR settlement and the new GAR Forms.

1 } Will GAR amend its forms further in light of the NAR settlement?

GAR will continue to amend its forms as NAR offers further guidance on how to comply with the settlement. GAR has identified changes that will be reflected in the 2025 forms package and practice changes that are now required.

NAR's lawyers have recently advised GAR that buyers must be obligated to pay the entire compensation of the buyer's broker to comply with the NAR settlement. Its view is that the buyer cannot give the buyer's broker a right to try to collect a larger amount of compensation from the seller or seller's broker than what the buyer is obligated to pay the buyer's broker. The reasoning is that since it is unclear whether the seller or seller's broker will pay the larger amount, the compensation is not readily ascertainable.

(Previously, it was thought that if the buyer approved the buyer's broker seeking a larger, but defined amount of compensation from the seller or seller's broker, that was compensation in a readily ascertainable amount and was not open-ended. NAR has now indicated that based on guidance from their lawyers, such a compensation approach is unacceptable.)

Therefore, for example, the buyer cannot agree to pay the buyer's broker one lollipop but give permission to the buyer's broker to seek 20 lollipops from the seller or seller's broker. The buyer can continue to seek to have the seller or seller's broker pay all or a portion of the buyer's compensation obligation to the buyer's broker. However, if no contribution is forthcoming, the buyer must, in the opinion of NAR's lawyers, be obligated to pay the buyer's broker's total compensation (unless the buyer's broker waives the buyer's obligation).

Moreover, NAR's lawyers have also taken the position that any contribution by the seller or seller's broker towards the buyer broker's compensation must reduce the obligation of the buyer to pay such compensation. So, for example, let's say that the buyer agrees to pay the buyer's broker 20 lollipops as compensation for the buyer's broker's professional services. The buyer then negotiates to have the seller pay 15 lollipops towards the buyer's broker's compensation. The 15 lollipops must reduce the buyer's broker's compensation obligation, so the buyer would now only be obligated to pay the buyer's broker five lollipops.

The GAR Exclusive Buyer Brokerage Engagement Agreement is being revised for 2025 to reflect that any compensation paid by the seller or seller's broker automatically reduces the compensation paid by the buyer. A disclaimer was also added advising buyers not to make an offer or accept a counteroffer where their compensation obligations are more than they can afford. The new language is as follows:

DATE

{4}

Compensation for Professional Services of Broker (“Compensation”)

A. GENERALLY: Compensation to Broker(s) is negotiable and is not set by state law.

B. COMPENSATION TO BROKER: Buyer agrees to pay Broker the Compensation set forth in the Value of Broker’s Professional Services Section below at the closing of any Contract to Purchase (as that term is hereinafter defined).

C. VALUE OF BROKER’S PROFESSIONAL SERVICES: The value of Broker’s Professional Services is as follows:

- _____ percent (____%) of the sales price:
 \$ _____
 (other) _____

D. POSSIBLE PAYMENT OF COMPENSATION BY SELLER OR SELLER’S BROKER: Buyer Directs or does not direct Broker to seek to get Seller or Seller’s Broker to pay all or a portion of Broker’s Compensation above, provided it does not exceed the value of Broker’s Compensation above. If Seller or Seller’s Broker agrees to pay all or a portion of Broker’s Compensation, it shall reduce the Compensation Buyer shall pay to Broker dollar for dollar.

E. DISCLOSURE REGARDING BROKER’S COMPENSATION: Buyer shall be obligated to pay all of Broker’s Compensation not paid by Seller or Seller’s Broker. Before making an offer to buy or accepting a counteroffer in a Contract to Purchase, Buyer should confirm: **1}** any contribution of Seller or Seller’s Broker towards Broker’s Compensation; and **2}** Buyer’s ability to fulfill its Compensation obligation. Buyer should not make any offer to buy or accept any counteroffer in a Contract to Purchase that will result in Buyer paying more of the Broker’s Compensation than Buyer can afford.

While the form revision will be a part of the 2025 GAR Forms, REALTORS® should comply with the new guidance immediately.

2} Can the buyer’s broker receive a bonus?

In theory, the answer to this question is yes, but the buyer must be obligated to pay the bonus in the compensation agreement with the buyer’s broker. This will likely limit the ability of buyer’s brokers to collect bonuses because most buyers may not want to agree to pay their buyer’s broker a bonus prior to seeing any houses and making an offer. Additionally, NAR’s stance is that a buyer’s broker should only be paid a bonus if they have provided extra services to earn a bonus. For example, a builder offering a bonus to entice buyer agents to show a property would not justify paying a bonus to the buyer broker. The same logic should also apply to amendments to increase a broker’s compensation. The broker should be able to justify the increase based on some change in the services or performance of the broker, rather than just additional compensation being available.

3} Can the compensation agreement be amended after a house has been shown to allow the buyer’s broker to receive a bonus?

There is debate on whether a compensation agreement between the buyer and the buyer’s broker can be amended after the buyer sees houses with a buyer’s broker. One law professor has argued that since the compensation agreement must be entered into before homes are toured, no amendments to the compensation agreement can be compliant with the settlement because such amendments are, by definition, entered into after homes are toured. The better argument, in my view, is that so long as the initial compensation agreement between a buyer and the buyer’s broker was entered into prior to the buyer broker showing the buyer houses, it can always be amended later to meet the changing needs and circumstances of the parties. For example, many buyer brokers reduce their compensation to help get transactions to the closing table. If buyers and buyer brokers can amend compensation agreements to reduce a buyer broker’s compensation, it would be illogical to prevent

a compensation agreement from being amended to increase the buyer broker's compensation. If the intent of the NAR settlement was to prohibit compensation agreements from being amended, one would think that the settlement would have expressly provided for this since all agreements can generally be amended.

4} Can I send a buyer pictures and information about a property or properties without having a written compensation agreement?

Yes. Sending pictures or other information about a property to a buyer does not require the buyer's broker to have a compensation agreement with the buyer. The obligation to pay compensation is triggered by "touring" the property with the buyer's broker. While this is normally done in person, it could also be done virtually when a REALTOR® might walk around a property, with his or her camera showing the buyer various rooms in a house. Such a virtual "showing" would trigger the need for a compensation agreement. A buyer broker who is touring a property on behalf of a buyer not physically or virtually present must also have a written compensation agreement with the buyer. However, sending a buyer a video of a property prepared by the seller's broker would be allowed without first entering into a compensation agreement with the buyer.

5} What exactly is decoupling and how will it affect my compensation as a buyer agent?

Decoupling means the seller's broker is compensated by the seller and the buyer's broker is compensated by the buyer. This is a goal of consumer advocates and appears to be where our industry is heading. It presents a challenge for buyers since many of them simply do not have the liquidity to pay their buyer broker's compensation. This problem could be solved if the buyer's broker's compensation could be amortized into the buyer's mortgage. However, the mortgage industry does not yet allow that. Until it is allowed, most buyers and buyer's brokers will continue to seek to have the seller or seller's broker pay all or a portion of the buyer broker's compensation as part of the purchase and sale transaction.

6} As a buyer's broker, do I have to use any specific agreement to try to help my buyer negotiate for the seller or seller's broker to pay the buyer's broker's compensation as part of the purchase and sale transaction?

No specific form is required although GAR has created Form F259 for this purpose. As of January 1, 2025, Form 259 will

be revised so that it only addresses the compensation of the buyer's broker. This change is being made because many seller's brokers objected to revealing their compensation at the time of the offer. Therefore, the name of the form is being revised to "Buyer Broker Compensation Agreement".

REALTORS® may also use a special stipulation instead of attaching a compensation exhibit to the contract. A special stipulation is sufficient provided it addresses the following three issues:

- a. It needs to say that once the compensation is agreed to, it can only be modified with the consent of the buyer's broker;
- b. It needs to make the buyer's broker a third-party beneficiary to the contract so it can be enforced by the buyer's broker; and
- c. It needs to state that the special stipulation survives the closing, so that the buyer's broker can enforce the stipulation if the commission is not paid at the closing.

The GAR Purchase and Sale Agreement already addresses these three issues.

An example of such a special stipulation is set forth below.



STIPULATION TO PROTECT BUYER'S BROKER'S COMPENSATION WHEN PAID BY SELLER

For and in consideration of Buyer's Broker having procured the Buyer to purchase the Property, Seller agrees to pay Buyer's Broker at the Closing the following Compensation:

This special stipulation can only be modified with the prior written consent of Seller and Buyer's Broker and any attempt to modify the same shall be null and void. Buyer's Broker shall be an express third-party beneficiary of this Agreement to enforce its rights to the Compensation above. This special stipulation shall survive the Closing if the Compensation is not paid in full at Closing.

Is it better for the seller or the seller's broker to pay the buyer broker's compensation?



7} Where can I, as a seller's broker, provide information to a buyer's broker regarding the compensation the seller or seller's broker is offering to the buyer's broker?

No information about the amount of compensation a seller is offering to a buyer's broker can be included in any section of a REALTOR® owned MLS — including the private and public remarks. This includes codes or coded language in the listing remarks that are intended to convey the amount of compensation offered is also prohibited. However, it is permissible to include a statement in the MLS regarding concessions, if any, that the seller is willing to provide to buyers. For example, REALTORS® can state: "Seller will pay \$10,000 in closing costs with a full price offer", so long as these concessions are not limited or otherwise tied to the buyer broker's compensation.

NAR's lawyers have advised that any information about buyer broker compensation should be two computer clicks away from the MLS. So, for example, a seller broker could state in the MLS remarks that more information about the listing is available on the seller broker's website and include a link to the website. The broker's website would be one computer click away from the MLS. The broker's website that is linked in the MLS remarks could not include information about the specific compensation offered on the

listing. Instead, the broker's website should direct visitors to click on another link that would provide the compensation offered by the seller on that specific listing. That would be two clicks away from the MLS.

The bottom line is that broker's websites may contain compensation information if the website is two clicks away from a REALTOR® MLS. In addition, information about compensation being offered by sellers or seller's brokers to buyer's brokers can continue to be included on brokerage company websites, agent websites, social media and even as riders on "for sale" signs.

8} Is it better for the seller or the seller's broker to pay the buyer broker's compensation?

In the several months since the settlement was announced, NAR, consumer advocates, and attorneys involved in negotiating the settlements have expressed a preference for a system where the seller's broker is paid by the seller pursuant to the listing agreement and the buyer's broker is paid by the buyer pursuant to the buyer compensation agreement. If buyers cannot afford to pay the buyer's broker, they may request that the seller pay the buyer's broker as part of the real estate transaction. Currently the GAR Forms allow the buyer broker's compensation to be paid by either the seller or the seller's broker. While REALTORS® will not be able to arbitrate disputes regarding commission if the buyer broker is paid by the seller, the seller's broker's exposure to claims involving how the buyer's broker is compensated is reduced if the seller pays the buyer broker directly. Many industry experts predict an end to seller's brokers sharing compensation with buyer's brokers.

9} When representing a buyer who wants to request that the seller pay all or part of the compensation buyer owes to the buyer's broker and the details of the seller's offer of compensation, if any, are unknown, should the offer ask the seller or seller's broker to pay the buyer's broker's compensation?

If it is unknown whether the seller is offering to pay the buyer broker's compensation or whether the seller or seller's broker is responsible for that payment, it is safer for the buyer's broker to advise the buyer to ask the seller to pay the buyer's broker's compensation. Structuring an offer in that way will protect the buyer's brokers from being accused of violating license law or the NAR Code of Ethics, Article 16, Standard of Practice 16-16. Georgia license law prohibits

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a buyer's broker from inducing the seller to change the seller's broker's compensation without the seller's broker's prior permission. (See O.C.G. A. § 43-40-25(b)(35)). If the buyer broker advises the buyer to request that the seller pay compensation directly to the buyer's broker, there is a stronger argument that there is no intent to change the seller's broker's compensation but is instead a request to ask the seller to pay additional compensation to the buyer's broker.

10} Will REALTORS® continue to be able to arbitrate disputed commissions?

Arbitration will still be required to resolve disputes between REALTORS®. However, if sellers are paying the compensation of buyer's brokers directly, there will be fewer commission disputes between REALTORS® to be arbitrated by GAR. Instead, disputes will likely be litigated between sellers and buyer's brokers. In anticipation of such litigation, REALTORS® will need to be more prepared than ever before to document their claims for entitlement to compensation.

11} Why not include broker compensation in the Purchase and Sale Agreement (F201)?

While this sounds like it would be convenient, there are a couple of reasons why this may not be such a great idea. In most cases the seller's broker's compensation is already addressed in the listing agreement. Including it in the purchase and sale agreement could open the door to renegotiation between the seller and seller's broker, which is not in the seller's broker's best interest. If the buyer has agreed to pay the buyer's broker's full compensation and does not intend to ask the seller to pay the buyer's broker, it would also not be in the buyer broker's best interest to create an opportunity for that obligation to be renegotiated.

The primary reason to include the buyer's broker's compensation in the purchase and sale agreement is when it is being paid by the seller or seller's broker and has not previously been negotiated. However, if the only section on compensation included in the purchase and sale agreement is when it is being paid by the seller or seller's broker, it could appear that GAR is creating a presumption that the seller or seller's broker is expected to pay the buyer's broker's compensation. This is clearly not GAR's position and not a presumption GAR would want to perpetuate.

If a goal of the settlement is to have the compensation of the buyer's broker be paid by the seller or the seller's broker

as part of a true negotiation in each transaction, addressing the buyer's broker's compensation in an exhibit to the purchase and sale agreement better achieves this goal.

12} Does the NAR settlement apply to commercial and leasing transactions?

The rules adopted by all REALTOR® owned MLSs state that compensation information regarding a commercial or leasing transaction cannot be included in any REALTOR® owned MLS. However, the other practice changes in the NAR settlement do not apply to commercial or leasing transactions.

13} What do I do if a buyer refuses to sign a compensation agreement?

This is an easy answer! If the buyer doesn't sign a compensation agreement, you cannot work with the buyer. As one friend put it, "No agreement on money, I can't show you the house, honey!"

14} Do I need, as a seller's broker, to get visitors to an open house to sign compensation agreements?

No. The seller's broker already has a client relationship with the seller in the transaction along with a compensation agreement. Therefore, no agreement with visitors is needed. Of course, if one of the visitors then wants to work with the seller's broker to see other properties, a compensation agreement would be needed. The same answer should be applicable when a buyer calls after obtaining your contact information from your sign and wants to see your listing. No compensation agreement is needed at that time. But, if the buyer then asks you to show them property you do not personally have listed, you need to get a compensation agreement signed prior to taking them to tour any such property.

15} What kind of compensation agreement would I need if I am acting in a dual agency or designated agency capacity?

If the broker is acting in a dual agency or designated agency capacity, the broker needs a compensation agreement with each client.

As REALTORS®, we are navigating changing and uncertain times. There will likely continue to be adjustments to real estate brokerage practices in Georgia. However, with time, hopefully, the industry will gain greater clarity on how to stay compliant with the NAR settlement.