PAR Standard Forms Update

NAR Settlement Forms Comprehensive Training Guide

July 2024

ASC	CBAC	NRA (no change)
ASMH	*CBC*	SEC
ASNC	CBCR	SRP
ASR	CLC	TAC (new)
ASVL	CTA	TLC
BAC	MOS	XLR
BFA	*NBA*	*XLS*
CAS (discontinued)	*NPC* (new)	XLSC

(** Key forms explained in this Guide; others are referenced but will be explained in the individual Guidelines for Preparation and Use of those forms.)

Pennsylvania Association of Realtors®

TABLE OF CONTENTS

What is this for? And why is it so darn long?

Comprehensive Training Guide

Let's be honest: the changes required by the terms of the NAR settlement agreement will take some getting used to. Even though there aren't a ton of *words* changing in most of the forms that are being updated, it may take some extra effort for some practitioners to fully grasp the concepts and necessary practice changes that will be required. The goal of this document is to pull together a single document with a thorough and complete explanation of the **6 key forms** being updated so members will have a single resource to understand these changes and how they all work together to implement the required terms of the NAR settlement.

Brokers: This is for you!

Individual forms Guidelines will be updated prior to the final release of the revised forms, but those Guidelines will merely reflect the proper use of the forms moving forward, without dwelling on the rationale for the changes or comparing those forms to prior drafts.

THIS document provides a comprehensive explanation of the how and why of the changes, along with additional practice tips on training agents on the form changes and how these new rules may impact day-to-day practice. Including all the key changes in a single document at the start should help brokers and agents better understand how these changes all work together in the transaction. This will provide the information brokers need to understand where they may need to make internal brokerage policies, as well as serving as a single resource for brokers, managers and agents to do the training necessary understand the proper use of the updated forms.

How many forms?

About 25 forms are being updated, along with a new form or two. There are **6 key forms** (starred on the cover) that provide the backbone of the changes. Changes to those forms – along with the reasoning for those changes - will be explained in detail throughout this document. Most of the *other* forms being updated are either variants on the ones explained here (e.g., changes to the residential agreement of sale will show up in the other four agreements of sale), or they are related forms with small changes that naturally flow naturally from the bigger changes in these forms (e.g., a change in the listing agreement that results in adding language to the Change to Listing Contract form).

Format of the Guide

Each of the **6 key forms** will be explained in its own section. Each form will have:

- A general overview of the reasoning behind the change.
- A paragraph-by-paragraph explanation of the changes to that form, potentially including a comparison to prior forms.
  - This explanation will sometimes include items identified as a "Practice Tip" or "Note". These additional explainers provide additional context and often identify areas where brokers and agents may need to consider how they'll address these changes internally (via broker policies and/or individual business decisions) and how they'll address the changes with clients.
- A list of related forms that will also be affected, along with a very brief description of those changes. Those other forms will get updated Guidelines, but not in-depth explanations of the changes.

This document is written from the perspective that the rules have already changed. That is, any references to "prior rules" or "prior forms" refer to the rules/forms that were in place prior to mid-August, 2024. References to "current rules" or "current forms" refer to those that will be in place after mid-August, 2024, depending on the rules rollout schedule of your local MLS.

> **Note:** The revised forms are being released in a 'marked up' version with red & blue text showing the changes that are being made.
>
> - **Red text** signifies text that is totally new or substantially amended from the prior text, often with a change to how the form is used.
> - **Blue text** signifies text that has been moved to a new location from elsewhere in a form without substantive changes. (In one instance, *blue text in italics* indicates a section where text was moved to a new location and rewritten, but with no substantive changes to the concepts).
> - **Black text** has not been changed. The unchanged language is *not* explained here unless it's necessary to understand something that has changed. The full Guidelines for Preparation and Use of each form will have the basic explanation for these provisions. Or to say this bluntly, please double-check these marked-up copies before calling the PAR Legal Hotline about a "change to the forms" that isn't a change at all.

About the terms of the NAR settlement…

In March of 2024, the National Association of Realtors® entered into a comprehensive settlement to address a nationwide series of class action lawsuits challenging certain rules and practices around broker-to-broker compensation and seller assistance for buyer broker fees. The terms of that settlement require brokers, agents, MLSs and associations to make changes to how they approach their roles in real estate transactions. MLSs will have to change certain rules, brokers and agents will have to adjust certain business practices, and associations that produce forms will need to ensure that those forms reflect the new practice rules.

Full details of the settlement terms, along with comprehensive interpretive and educational information is available from NAR at facts.realtor. Realtors® are strongly encouraged to review the site for its in-depth content – especially a detailed FAQ that covers a host of practice issues.

PAR's primary role in this process is to revise a number of standard forms – about a quarter of our library, in fact – to ensure that users are able to appropriately comply with these new rules and policies. The primary goal of the revision process was to retain and increase the flexibility for all parties to negotiate fees at all stages of a transaction – between a seller and listing broker, between a buyer and a buyer broker, between brokers, and between buyers and sellers; but to do so within the existing forms infrastructure so the forms look and feel like the forms you're already used to.

So what are the rules changes at issue here? All the details are at facts.realtor, but here's the basic outline of the required changes:

1. Listing brokers can no longer make offers of broker-to-broker cooperating compensation in the MLS. Listing brokers can still offer cooperating compensation to buyer brokers and advertise it in other ways (with the consent of their sellers), but they cannot communicate that offer through the MLS.
2. Sellers will not be allowed to make offers of seller concessions for the specific purpose of paying a buyer broker fee owed by a buyer. Sellers can still offer concessions and advertise this general intent in other ways (with the consent of their sellers), with the final agreement between the parties recorded in a signed agreement of sale.
3. Buyer brokers who belong to an MLS that's covered by the NAR settlement are prohibited from retaining any buyer broker fee above what the buyer and buyer broker have negotiated in their agency/fee agreement, regardless of the source of those funds (cooperating compensation, seller-paid or buyer-paid).
4. Brokers "working with" buyers are required to sign a written agreement with that buyer prior to touring any property.

As you work through the forms updates below, they will be easier to understand if you try to view them through the lens of these settlement terms.

Exclusive Listing Contract

(Form XLS)

General Overview

The primary changes relate to how cooperating compensation (broker-to-broker) and seller concessions (buyer to seller) are explained to the seller client, and the ways in which they can be marketed to potential buyers and buyer agents.

Broker & Client ID

Admittedly, this has nothing to do with the settlement, but broker and client blocks are updated to be consistent with all other related employment forms.

Paragraph 2: STARTING & ENDING DATES OF LISTING CONTRACT

Subparagraph (A): Text has been updated to conspicuously state that no law or Realtor® association has predetermined the term of the contract.

Paragraph 5: BROKER'S FEE

Subparagraph (A): Text has been updated to conspicuously state that no law or Realtor® association has predetermined the fees charged in the contract.

Subparagraph (B): Clarifies that if some portion of the Broker's Fee is charged as a percentage commission then the default calculation will be done on the "Purchase Price" of the property, which references the full gross sales price of the property as stated in the Agreement of Sale, without reductions for seller concessions, repairs, etc. This language is added throughout the revised forms to ensure that parties and brokers are all starting from the same default position, though of course it can be modified by the parties as desired.

> **Practice Tip**: If a broker negotiates to charge a percentage commission based on some *other* calculation (which might include the "net price" of the property or some other similar concept), the contract would need to strike and/or modify "Purchase Price" to include additional language describing how that calculation will be done.
>
> But make sure that the basis for the calculation is thoroughly explained and agreed upon by the broker and client; something like the phrase "net price" is unclear without a more detailed explanation of what items would be deducted from the gross purchase price. For example, some might expect that only the listing broker fee should be deducted, but others might expect that expenses

such as seller concessions to the buyer or the cost of any negotiated seller repairs also should be deducted. The time for that discussion is when signing the listing contract…not when reviewing the closing documents and realizing that the broker and seller have different expectations.

NOTE: The remaining content of the fee paragraph has not changed; the flexible options for calculating fees remain the same.

Subparagraph (D): This language has not changed, but was previously in a standalone paragraph.

Paragraph 6: COOPERATING COMPENSATION…

An offer of cooperating compensation is made when a listing broker offers to pay a cooperating broker working with a buyer some portion of their listing fee in consideration of the cooperating broker's work in bringing a buyer to the transaction. Terms of the NAR settlement still allow listing brokers to offer cooperating compensation to buyer brokers if they choose to do so, but with additional restrictions.

Subparagraph (A): This subparagraph allows the broker and seller to negotiate the amount of cooperating compensation that will be offered by the listing broker, if any (the default is 0 if no numbers are entered). Prior versions of the listing contract allowed the listing broker to offer different amounts to different types of brokers (subagent, buyer agent or transaction licensee). The current language defaults to a single offer of cooperating compensation to a broker working with the buyer in any recognized capacity, so long as that broker is the procuring cause of the successful transaction.

Note: MLS rules *previously* stated that any offer of cooperating compensation was "unconditional" and automatically intended for any broker in the MLS who was deemed to be the procuring cause of a successful transaction. A listing broker couldn't say that an offer of compensation was only available to a cooperating broker who took specific steps or completed certain tasks (e.g., showing the property, writing the offer, etc.).

Terms of the NAR settlement state that MLS rules can no longer mandate any specific terms of cooperating compensation, so it will ultimately be up to the brokers to establish, negotiate and accept offers of cooperating compensation between themselves. This revised form (and others in the PAR Standard Forms library) use procuring cause as the default condition for offering and accepting offers of cooperating compensation. If brokers wish to establish other terms of cooperation they can modify or replace the default language (ideally with assistance of legal counsel).

Subparagraph (B): Terms of the NAR settlement specifically state that offers of broker-to-broker cooperating compensation *cannot be communicated via the MLS or any other system or platform that utilizes MLS data* (although listing brokers can display offers about their own offers of compensation on their own IDX website). Brokers can use pretty much any other method for communicating these offers of compensation, however. This subparagraph reminds brokers and sellers about this new rule, and defaults to allowing the listing broker to advertise or communicate offers of cooperating compensation via any other method they can use to advertise the property (e.g., flyers, signs, broker/agent websites, individual conversations, etc.). If there's a desire to limit the methods of communication, include that information in the blank lines.

> **Note:** Language permitting the listing broker to include cooperating compensation in the MLS has been deleted from Paragraph 25(A)(1) since that is no longer permitted under the new rules.

Paragraph 7: SELLER CONCESSIONS

The prior listing contract included a single line for "seller assist" in paragraph 32. That has been deleted and replaced with this more detailed paragraph on "seller concessions."

There are two main categories of seller concessions. The first is a traditional 'seller assist' in which the seller contributes funds that help cover a buyer's typical closing costs (taxes, title insurance, recording fees, etc.). The second is a payment to help the buyer pay any outstanding buyer brokerage fees they may owe.

Terms of the NAR settlement *do* allow seller concessions to be communicated via the MLS (and any other relevant and appropriate medium), but prohibit advertising any seller concession that is specifically targeted to paying a buyer broker fee. This paragraph therefore explains the multiple purposes for which a seller concession might be used but does not ask the seller to identify how much of a concession might be used for a buyer broker fee and how much towards typical closing costs.

> **Practice Tip:** Lenders often have limits on how seller concessions can be used in a transaction. It may be beneficial/necessary for the buyer and seller to negotiate how a concession would be applied, but that negotiation would take place as part of the agreement of sale.

Subparagraph (A): The listing broker should discuss options for seller concessions and identify whether a seller is willing to consider negotiations where a buyer requests concessions. Subparagraph A includes default language that the seller is willing to consider negotiating concessions; if that is not accurate or if there are specific restrictions on their willingness to negotiate, include that in the blank lines.

> **Practice Tip:** Terms of the NAR settlement state that *buyer brokers* cannot accept/retain any compensation in excess of the fee that they negotiate with their buyer. For example, if the negotiated buyer broker fee is $1000 less than what's being offered the buyer broker would not be able to keep it. The most likely outcomes are that they'd either seek to get that excess credited to their buyer to cover other closing costs or to not have it paid to the buyer side at all. It could be helpful to discuss this with sellers to develop contingency plans for these types of scenarios.

Subparagraph (B): If a seller is willing to consider concessions, the subparagraph also contains an option for sellers to identify a maximum concession they are willing to consider, along with default language allowing the listing broker to communicate that willingness to prospective buyers and buyer brokers via appropriate means (potentially including the MLS). Again, if limitations are negotiated they can be included in the blank lines.

> **Practice Tip:** Some MLSs may allow listing brokers to include information on a seller's willingness to negotiate concessions, which may offer an option to include a maximum concession amount. These rules and fields will vary among MLSs, so brokers and agents will need to know what set(s) of rules apply to a specific listing before negotiating terms.

> **Practice Tip:** It can't be stressed enough that *broker-to-broker cooperating compensation is NOT a "seller concession"* as the term is used here and in the NAR settlement. If the listing contract says cooperating compensation will be offered, do ***NOT*** advertise that amount as a seller concession. Period.

Paragraph 25: MARKETING OF PROPERTY

Subparagraph (A)(1): This section had previously given permission of the listing agent to advertise cooperating compensation via the MLS. Since that is no longer permitted, the language has been removed.

Subparagraph (C): The language in (C)(4) regarding open houses was moved from the prior subparagraph (D) for consistency.

Subparagraph (D): Additional lines have been added to accommodate various marketing options that might be employed by the broker after discussion with sellers

For Contracts Signed Before Rules Changes

NAR recommends that brokers consider amending or replacing any listing or buyer agency contract signed prior to the implementation of these new rules to ensure that the terms of those older contracts still comply with the new rules and the terms of the NAR settlement agreement.

PAR has created a new, limited-time form called the Notice of 2024 Policy Changes (Form NPC – see below) to partially address this issue. Form NPC should be used to facilitate any necessary conversations about how these changes may affect the listing contract and the seller's overall approach to the transaction - especially as it relates to cooperating compensation and seller concessions.

> **Note:** Form NPC **<u>is a notice and does not actually amend the listing contract</u>**. Brokers who need to amend specific terms in the contract can do that with the Change to Listing Contract (Form CLC) or a broker-drafted form. Brokers who decide to sign a new listing contract with updated terms should carefully review the form to ensure that it accurately reflects all the other terms of the contract that are not being changed.

Other Related Forms

- **XLR – Listing for Rent Contract**
  - Similar changes to fee provisions
- **XLSC – Exclusive Right to Sell and/or Lease Commercial Property**
  - Similar changes to fee provisions
- **CLC – Change to Listing Contract**
  - Include two rows for seller concessions (buyer broker fee and closing costs)
- **SEC – Seller's Estimated Closing Costs**
  - Include two lines for seller concessions (buyer broker fee and closing costs)
- **MOS – Multiple Offer Worksheet**
  - Include two rows for seller concessions (buyer broker fee and closing costs)
- **CBC – Cooperating Broker Compensation Agreement**
  - See form description below
- **TLC – Transaction Licensee Contract**
  - Similar changes to fee provisions

- **NRA – Non-representation Acknowledgment (used by listing agent to confirm that they have no relationship with unrepresented buyer)**
    - No changes…but listing brokers should familiarize themselves with the form as it may be advisable to present/sign the form with unrepresented buyers to ensure that they understand that the listing broker does not represent them.

Exclusive Buyer Agency Contract

(Form BAC)

General Overview

Terms of the NAR Settlement require that MLS participants and subscribers who are "working with a buyer" sign a "written agreement" outlining their services and fees at some point prior to "touring a home." Since 1999, Pennsylvania law has required brokers to have fee agreements with buyers (and sellers) in order to be entitled to payment from the consumer. While the general usage of buyer agency forms is similar to what brokers should already be familiar with, it's likely that many agents will be using the forms differently than they have in the past.

In that light, there is some concern that prospective buyers may be unclear about the meaning and value of buyer agency, and that there may be concerns when they're presented with the need to sign a buyer agency form earlier in the relationship than they may have in the past. This form (and other related forms) have been revised in an attempt to better explain buyer agency to consumers and help agents allay some of those concerns.

Form Name/Purpose

This form has traditionally been styled as a "Buyer (Tenant) Agency Contract", with notes that all references to purchase transaction also should be considered as references to rental transactions (e.g., seller = landlord; buy = rent).

With this latest revision, Form BAC will strictly be an exclusive buyer agency form, and a new Tenant Agency Contract (Form TAC) will be introduced just for rental transactions.

Introduction

A new explanatory section has been added above the broker blocks. This language is intended to help brokers and agents ease into the explanation of buyer agency and why it may be beneficial to a buyer. It also incorporates existing language reminding buyers that signing an exclusive agreement and then using the service of another broker could cause the buyer to owe multiple fees. Buyers are reminded to discuss questions prior to signing the contract, and repeats existing language letting buyers know they can consult with an attorney if they have questions that the broker or agent cannot control.

Other contracts

The Code of Ethics requires Realtors® to inquire as to whether a prospective client already has an existing exclusive relationship with another broker. This question has been altered to ask if the buyer has a "written agreement, such as a buyer agency contract" with another broker. This is designed to identify *any* agreement, including an exclusive buyer agency, a non-exclusive buyer agency, transaction licensee, or any other contract in which the buyer may potentially have agreed to pay a fee to a different broker.

Paragraph 1: STARTING & ENDING DATES OF LISTING CONTRACT

Subparagraph (A): Text has been updated to conspicuously state that no law or Realtor® association has predetermined the term of the contract.

Paragraph 2: BROKER'S FEE

Subparagraph (A): Text has been updated to conspicuously state that no law or Realtor® association has predetermined the fees charged in the contract.

Subparagraph 2(B)(1)(a): Clarification that this buyer broker fee is due for all transactions in which a seller is represented by a broker, even if the same broker represents both sides of the transaction.

> **Note:** Terms of the NAR settlement say a buyer broker cannot retain any amount greater than what was agreed to in the written agreement between the broker and buyer. Since there is no guarantee that a listing broker's fee is sufficient to pay the fees on both sides of the transaction, this should ensure that the broker can collect/retain the stated amount on behalf of the buyer when there's dual agency.
>
> **Practice Tip:** Some brokers or practitioners may have had a prior practice of leaving the fee provision blank or filling in zeroes, "no fee" or similar language, to reflect that they were willing to represent the buyer for whatever amount the listing broker was offering as cooperating compensation.
>
> DO. NOT. DO. THAT.
>
> PERIOD.

Remember that the terms of the NAR settlement state that a buyer broker cannot keep more than the amount of the negotiated brokerage fee, so leaving that provision blank or filling in a zero **means that the buyer broker will not be allowed to collect any fee at all, from any source**. There is no default fee (because PAR does not set or recommend what fee would be charged), so every buyer agency dicussion will require a specific fee negotiation with every buyer, just like you have with every seller before signing a listing contract.

Subparagraph 2(B)(2): The option for some or all of the broker's fee to be paid in advance has been in the form for years. The new language makes it clear that advance payments would be credited against the total broker's fee *unless* the parties agree to some other option.

Subparagraph 2(B)(4): This new section is required by the terms of the NAR settlement, which says that a buyer broker cannot retain any amount greater than what was agreed to in the written agreement between the broker and buyer.

> **Practice Tip:** Terms of the NAR settlement state that buyer brokers cannot accept/retain any compensation in excess of the fee that they negotiate with their buyer. For example, if the negotiated buyer broker fee is $1000 less than what's being offered the buyer broker would not be able to keep it. The most likely outcomes are that they'd either seek to get that excess credited to their buyer to cover other closing costs or to not have it paid to the buyer side at all. It could be helpful to discuss this with buyers to develop contingency plans for these types of scenarios.

Subparagraph 2(C): Although this is no longer to be used as a tenant agency contract, this subparagraph is maintained in an effort to highlight that a buyer client who decides to pursue a rental during the term of the contract may still owe a fee.

> **Practice Tip:** This provision is optional. If a client clearly is unsure if they're going to rent or buy the best legal approach is to sign *both* a buyer agency contract (Form BAC) *and* a Tenant Agency Contract (TAC).

Subparagraph 2(D): The first line is language required by law, but moved from a different location.

The two subparagraphs are conceptually the same as the prior contract, but the specific words are very different and explain a buyer's options in much greater detail.

In 2(D)(1), a buyer is made aware that cooperating broker compensation be used to pay some portion of a buyer broker fee and that this can be negotiated between the brokers to reduce a buyer's out-of-pocket expenses.

In 2(D)(2), a buyer is made aware that seller concessions can sometimes be used to pay some portion of a buyer broker fee and that this can be negotiated between the parties in an agreement of sale to reduce a buyer's out-of-pocket expenses.

> **Note:** Prior language merely said that "if the amount received from the listing broker is less than [the buyer broker fee], Buyer will pay Broker the difference, unless seller agrees to pay the difference as a term in the agreement of sale." The new language should be more transparent for buyers and may help agents better explain the available options.
>
> **Practice Tip: Get it in writing!** Offers of cooperating compensation can no longer be made through the MLS, which means you cannot rely on MLS rules to define when such an offer has been accepted. If a listing agent puts an offer of cooperating compensation on their website, or in an email or text, it's still just an offer until the brokers negotiate and accept the final amount of compensation. Similarly, if a seller indicates a willingness to negotiate seller concessions, those are not actually part of the contract terms unless and until they are included in the agreement of sale and accepted by both parties.
>
> Best practice will always be to get any and all financial terms in writing and signed by the relevant parties, depending on who is paying whom. Cooperating compensation can be negotiated on the PAR Cooperating Broker Compensation Agreement (or a similar broker form). Seller concessions can be negotiated as part of the Agreement of Sale.

Subparagraph 2(E): As above, the concept here is the same as the prior contract, but the language is clearer. The prior contract said "Buyer will pay Broker the difference" between the negotiated buyer broker fee and whatever is paid by the listing broker or seller. This new language makes the buyer's obligation clearer and more conspicuous.

For Contracts Signed Before MLS Policy Changes

NAR recommends that brokers consider amending or replacing any listing or buyer agency contract signed prior to the implementation of these new rules to ensure that the terms of those older contracts still comply with the new rules and the terms of the NAR settlement agreement.

PAR has created a new, limited-time form called the Notice of 2024 Policy Changes (Form NPC – see below) to partially address this issue. Form NPC should be used to facilitate any necessary conversations about how these changes may affect the buyer agency contract and the buyer's overall approach to the transaction (especially as it relates to cooperating compensation and seller concessions).

Note: Form NPC **is a notice and does not actually amend the buyer agency contract**. Brokers who need to amend specific terms in the contract can do that with the Change to Listing Contract (Form CLC) or a broker-drafted form. Brokers who decide to sign a new buyer agency contract with updated terms should carefully review the form to ensure that it accurately reflects all the other terms of the contract that are not being changed.

Other Related Forms

- **TAC – Exclusive Tenant Agency Contract**
  - New form. Separate form for residential tenant agency relationship so Form BAC no longer does do double duty as buyer/tenant contract.
- **CBAC – Commercial Buyer/Tenant Agency Contract**
  - Similar changes to fee provisions
  - Note that there is no current plan to have a separate commercial tenant agency agreement. This form is drafted to more effectively address both types of transactions in the commercial setting
- **BFA – Broker's Fee Agreement (used where a buyer broker is asking an unrepresented seller pay some portion of the buyer broker fee directly)**
  - Minor changes to fee language consistent with all other forms
  - Add language that buyer broker cannot retain compensation from any source that is greater than the negotiated buyer broker fee

<u>Non-Exclusive Buyer Agency Contract</u>

<u>(Form NBA)</u>

General Overview

The *Exclusive* Buyer Agency Contract (Form BAC) is used when the broker and buyer are entering into an agency relationship for a certain period of time. The *Non-exclusive* Buyer Agency Contract, however, trades a time-based commitment for a property-based commitment. The broker and buyer agree that the broker would earn a fee for any properties introduced or shown by the broker, but the buyer has the choice to work with a different broker (or no broker at all) for other properties. Similarly, the broker can choose whether to maintain an active relationship with the buyer by continuing to introduce/show properties, or could simply allow the buyer to work with other brokers instead.

The bulk of this contract is the exact same as the newly revised Form BAC now that it includes the same fee options as Form BAC. The primary difference between the two revised forms is in the first paragraph that defines the term of the contract. This and the other minor differences will be noted with asterisks below, but most of this description is the same as the description of Form BAC – no sense coming up with different descriptions of the same words!

> **Practice Tip:** There could be many reasons why a broker and buyer might decide on a non-exclusive agreement, but the most common is likely because one or both want to take a ‘test run’ on the agency relationship before determining if it makes sense to enter into an exclusive agency agreement.
>
> Regardless of the intent, it’s important to be sure that the buyer client (and the agent) both understand that the mechanics and obligations of buyer agency still apply. The broker’s obligations as a buyer agent are exactly the same regardless of whether the relationship is exclusive or non-exclusive – there is no lesser obligation to the client. Similarly, for properties where the contract applies, the buyer’s obligations (including the payment of a fee) is just as binding regardless of whether the relationship is exclusive or non-exclusive.

Introduction

A new explanatory section has been added above the broker blocks. This language is intended to help brokers and agents ease into the explanation of buyer agency and why it may be beneficial to a buyer. It also incorporates existing language reminding buyers that using the service of another broker after the property is introduced or shown by the broker could cause the buyer to owe multiple fees. It also encourages buyers to stop and discuss questions prior to signing the contract, and repeats existing language letting buyers know they can consult with an attorney if they have questions.

Other contracts

The Code of Ethics requires Realtors® to inquire as to whether a prospective client already has an existing exclusive relationship with another broker. This question has been altered to ask if the buyer has a "written agreement, such as a buyer agency contract" with another broker. This is designed to identify *any* agreement, including an exclusive buyer agency, a non-exclusive buyer agency, transaction licensee, or any other contract in which the buyer may potentially have agreed to pay a fee to a different broker.

** Paragraph 1: STARTING & ENDING DATES OF LISTING CONTRACT

Subparagraph (A): Text has been updated to conspicuously state that no law or Realtor® association has predetermined the term of the contract.

Subparagraph (B): Text has been updated to clarify that the contract starts on the execution date unless the parties agree otherwise.

**** Subparagraph (C):** The contract applies to any property "introduced or shown to Buyer by Broker after the signing" of the form. If desired, the parties can list the address(es) of one or more properties, but it is clear that the contract applies to any properties that meet these criteria, whether specifically listed in the contract or not.

> **Practice Tip:** If the intent at the time of signing is to view a specific property or list of properties (with a relocation client, for example) it may be helpful to include the property address(es) to make it clear to the buyer that – at the time of signing - the contract applies only to the listed property. It will be up brokers/agents whether you feel it is necessary or appropriate to add properties to the form if additional properties are covered by the contract at a future date. Whether added to the form or not, agents should keep clear records to show when they have introduced or shown a property to a client with a Non-Exclusive Buyer Agency Contract and should ensure that the buyer is aware of the terms of that contract when additional showings are held.

**** Subparagraph (D):** There is no specific end date to this contract. Broker and buyer can simply choose to not work together for specific properties, or of course the parties could negotiate to terminate the contract in writing. But the contract does end once the buyer settles on a property.

Paragraph 2: BROKER'S FEE

Change From Prior Version: The prior version of this form established the fee as whatever amount a listing broker was offering as cooperating compensation. ***Terms of the NAR settlement agreement specifically prohibit this type of fee clause*.** As a result, except for subparagraph (F), the broker's fee language here is now the same as the broker's fee in the Exclusive Buyer Agency Contract (Form BAC).

> **Practice Tip:** Though the options in the contract terms are the same for both agency forms, this is not to signal that brokers are required to charge the same fees for both types of agency relationships. Brokers and buyers can negotiate whatever fee arrangements are acceptable.

Subparagraph (A): Text has been updated to conspicuously state that no law or Realtor® association has predetermined the term of the contract.

Subparagraph 2(B)(1)(a): Clarification that this buyer broker fee is due for all transactions in which a seller is represented by a broker, even if the same broker represents both sides of the transaction.

> **Note:** Terms of the NAR settlement say a buyer broker cannot retain any amount greater than what was agreed to in the written agreement between the broker and buyer. Since there is no guarantee that a listing broker's fee is sufficient to pay the fees on both sides of the transaction, this should ensure that the broker can collect/retain the stated amount on behalf of the buyer when there's dual agency.
>
> **Practice Tip:** Some brokers or practitioners may have had a prior practice of leaving the fee provision blank or filling in zeroes, "no fee" or similar language, to reflect that they were willing to represent the buyer for whatever amount the listing broker was offering as cooperating compensation.
>
> DO. NOT. DO. THAT.
>
> PERIOD.
>
> Remember that the terms of the NAR settlement state that a buyer broker cannot keep more than the amount of the negotiated brokerage fee, so leaving that provision blank or filling in a zero **means that the buyer broker will not be allowed to collect any fee at all, from any source**. There is no default fee (because PAR does not set or recommend what fee would be charged), so every buyer agency dicussion will require a specific fee negotiation with every buyer, just like you have with every seller before signing a listing contract.

Subparagraph 2(B)(2): The option for some or all of the broker's fee to be paid in advance has been in the form for years. The new language makes it clear that advance payments would be credited against the total broker's fee *unless* the parties agree to some other option.

Subparagraph 2(B)(4): This new section is required by the terms of the NAR settlement, which says that a buyer broker cannot retain any amount greater than what was agreed to in the written agreement between the broker and buyer.

> **Practice Tip:** Terms of the NAR settlement state that buyer brokers cannot accept/retain any compensation in excess of the fee that they negotiate with their buyer. For example, if the negotiated buyer broker fee is $1000 less than what's being offered the buyer broker would not be able to keep it. The most likely outcomes are that they'd either seek to get that excess credited to their buyer to cover other closing costs or to not have it paid to the buyer side at all. It could be helpful to discuss this with buyers to develop contingency plans for these types of scenarios.

Subparagraph 2(C): Although this is no longer to be used as a tenant agency contract, this subparagraph is maintained in an effort to highlight that a buyer client who decides to pursue a rental during the term of the contract may still owe a fee.

> **Practice Tip:** This provision is optional. If a client clearly is unsure if they're going to rent or buy the best legal approach is to sign *both* a buyer agency contract (Form BAC) *and* a Tenant Agency Contract (TAC).

Subparagraph 2(D): The first line is language required by law, but moved from a different location.

The two subparagraphs are conceptually the same as the *prior* version of the Exclusive Buyer Agency Contract, but the specific words are very different and explain a buyer's options in much greater detail. The provision is now the same as the *current* Exclusive Buyer Agency Contract.

In 2(D)(1), a buyer is made aware that cooperating broker compensation be used to pay some portion of a buyer broker fee and that this can be negotiated between the brokers to reduce a buyer's out-of-pocket expenses.

In 2(D)(2), a buyer is made aware that seller concessions can sometimes be used to pay some portion of a buyer broker fee and that this can be negotiated between the parties in an agreement of sale to reduce a buyer's out-of-pocket expenses.

Practice Tip: Get it in writing! Offers of cooperating compensation can no longer be made through the MLS, which means you cannot rely on MLS rules to define when such an offer has been accepted. If a listing agent puts an offer of cooperating compensation on their website, or in an email or text, it's still just an offer until the brokers negotiate and accept the final amount of compensation. Similarly, if a seller indicates a willingness to negotiate seller concessions, those are not actually part of the contract terms unless and until they are included in the agreement of sale and accepted by both parties.

Best practice will always be to get any and all financial terms in writing and signed by the relevant parties, depending on who is paying whom. Cooperating compensation can be negotiated on the PAR Cooperating Broker Compensation Agreement (or a similar broker form). Seller concessions can be negotiated as part of the Agreement of Sale.

Subparagraph 2(E): As above, the concept here is the same as the prior contract, but the language is clearer. The prior contract said "Buyer will pay Broker the difference" between the negotiated buyer broker fee and whatever is paid by the listing broker or seller. This new language makes the buyer's obligation clearer and more conspicuous.

**** Subparagraph 2(F):** In contrast to the Exclusive Buyer Agency Contract, since there is not a time-based term there is no 'protection period' for the buyer broker after the end of the contract. Instead, it explicitly protects the broker's fee for any property that had been introduced or shown by the broker.

For Contracts Signed Before MLS Policy Changes

NAR recommends that brokers consider amending or replacing any listing or buyer agency contract signed prior to the implementation of these new rules to ensure that the terms of those older contracts still comply with the new rules and the terms of the NAR settlement agreement.

PAR has created a new, limited-time form called the Notice of 2024 Policy Changes (Form NPC – see below) to partially address this issue. Form NPC should be used to facilitate any necessary conversations about how these changes may affect the buyer agency contract and the buyer's overall approach to the transaction (especially as it relates to cooperating compensation and seller concessions).

Note: Form NPC **<u>is a notice and does not actually amend the buyer agency contract</u>**. Brokers who need to amend specific terms in the contract can do that with Change to Listing Contract (Form CLC) or a broker-drafted form. Brokers who decide to sign a new listing contract with updated terms should carefully review the form to ensure that it accurately reflects all the other terms of the contract that will not be changed.

Note: The fee provision of the prior Non-Exclusive Buyer Agency Contract (Form NBA) *__does not__* comply with the terms of the NAR settlement agreement (see Paragraph 2, above). Any existing contracts will need to be either updated with a new, more specific, fee clause or simply replaced with a new compliant contract.

Other Related Forms

- **TAC – Exclusive Tenant Agency Contract**
    - New form. Separate form for residential tenant agency relationship so Form BAC no longer does do double duty as buyer/tenant contract.
- **CBAC – Commercial Buyer/Tenant Agency Contract**
    - Similar changes to fee provisions
    - Note that there is no current plan to have a separate commercial tenant agency agreement. This form is drafted to more effectively address both types of transactions in the commercial setting
- **BFA – Broker's Fee Agreement (used where a buyer broker is asking an unrepresented seller pay some portion of the buyer broker fee directly)**
    - Minor changes to fee language consistent with all other forms
    - Add language that buyer broker cannot retain compensation from any source that is greater than the negotiated buyer broker fee

<u>Notice of 2024 Policy Changes</u>

<u>(Form NPC)</u>

General Overview

The terms of the NAR settlement agreement require that MLSs adopt new/updated rules/policies by August 17, 2024. NAR recommends that brokers consider amending or replacing any listing or buyer agency contract signed prior to the implementation of these new rules to ensure that the terms of those older contracts still comply with the new rules and the terms of the NAR settlement agreement.

PAR has created a new, limited-time form called the Notice of 2024 Policy Changes (Form NPC) to partially address this issue. Form NPC should be used to facilitate any necessary conversations about how these changes may affect a listing or buyer agency contract and the buyer's overall approach to the transaction (especially as it relates to cooperating compensation and seller concessions).

> **Note:** Form NPC **<u>is a notice and does not actually amend an agency contract</u>**. Brokers who need to amend specific terms in the contract can do that with the PAR Change to Listing Contract (Form CLC) or Change to Buyer Agency Contract (CBA), or with a broker-drafted form. Brokers who decide to sign a *new* contract with updated terms should carefully review the new form to ensure that it accurately reflects all the other terms of the contract that will not be changed.

> **Practice Tip:** This form should only be necessary to use with clients a broker is working with (or hopes to start working with) prior to the mid-August policy change. For example, if there's already an agency agreement in place with a current client, or if you're negotiating with a potential client, this will help explain what terms may need to change once the policy changes go live. But since any contract signed *after* the policies have changed should already have compliant terms, it's presumed that the broker and agents will already have had the necessary conversations to explain these issues with the new clients.

Parties

This form is drafted to allow use with both buyers and sellers. The noted parties at the top of the form are therefore the "Client" (which could be either a buyer or seller), the broker (company) and the licensee(s) working with the named client.

> **Practice Tip:** If the broker is a dual agent and working with both the buyer and seller, use one form for the buyer and a separate form for the seller.

Introduction

This form provides a very brief overview of the policy changes. A primary goal of the form is to encourage brokers to have more detailed conversations with clients based on the specific needs/wants of the client in that transaction. Or to put it another way, this form should be the *start of a conversation* about whether/how the policy changes may affect a client's approach to their transaction – it should not be viewed as a formality to present with minimal discussion.

> **Note:** Notice that nowhere in the form does it discuss NAR, class action lawsuits, settlements, or anything else along those lines. You can certainly frame the conversation in whatever way seems appropriate, but the goal of the form is merely to highlight the actual policy changes and their potential affects without the technical aspect of the reasoning.

Paragraph 1: COOPERATING COMPENSATION

The prior listing contract contained a term that authorized the listing broker to communicate offers of cooperating compensation through the MLS. This is no longer permitted under the terms of the NAR settlement agreement and is prohibited by the new MLS rules. Rather than amending every listing contract simply to remove this authorization, this Notice explains that the offers of compensation will automatically be removed, since they'll have to be. It goes on to state that sellers can discuss other means of communicating these offers of cooperating compensation (if they're still going to be offered).

> **Practice Tip:** This is intended as a prompt for brokers/agents to facilitate a broader conversation about cooperating compensation. If it appears to be in the seller's interests to adjust whether/how to offer cooperating compensation, the listing contract would need to be amended or replaced to reflect those terms.

Paragraph 2: SELLER CONCESSIONS

The prior listing contract contains a single line for a possible "seller assist" to be offered by the seller. The current contract has updated language for "seller concessions," and the revised Agreement of Sale has terms to negotiate the different types of concessions (for buyer broker fees and/or typical closing costs). This paragraph informs both parties of the terminology change and notes that any prior references to a "seller assist" will be interpreted as a "seller concession" moving forward. For example, if there is an existing agreement of sale with a negotiated seller assist it will not be necessary to amend the contract simply to update that term.

Practice Tip: This only applies where the issue is just terminology. If the parties wanted to adjust how a seller assist/concession is attributed within the transaction (e.g., instead of a $5000 seller assist for typical closing costs they wanted to change it to a $2000 concession towards buyer broker fees and a $3000 concession for other closing costs) that would require an amendment to the contract.

Practice Tip: This is intended as a prompt for brokers/agents to facilitate a broader conversation about seller concessions since a buyer or seller may want to rethink their willingness to negotiate for seller concessions based on how that might affect their transaction. If either party wants to substantively change their approach (e.g., a seller wants their listing broker to communicate a willingness to discuss concessions), the agency contract would need to be amended or replaced to reflect those terms.

Paragraph 3: BUYER BROKER CONTRACTS

This paragraph informs buyers that it is likely necessary for them to have a written agreement with a broker who is working with them (buyer agent or transaction licensee). It also describes the basic requirements of that contract, include language required by the NAR settlement agreement that a buyer broker cannot retain a fee greater than what they have negotiated with the buyer.

IMPORTANT NOTE: It is anticipated that a fair number of buyers will not have buyer contracts in place even though they have been working with a broker. ***THOSE BUYERS WILL ABSOLUTELY NEED TO SIGN A BUYER CONTRACT FOR THE BROKER TO COMPLY WITH THE NEW MLS RULES***.

IMPORTANT NOTE: Even for buyers who do have an existing contract, ***any PAR standard form signed prior to the release of the current forms revisions will not be in compliance*** since they will not have the necessary language limiting the fees that a buyer broker can retain. In addition, any existing contract that doesn't have a specified brokerage fee is not in compliance. (Or to be more specific, a buyer agency contract that does not list a fee would not entitle the broker to collect any fee at all for the transaction.) ***ANY EXISTING BUYER CONTRACT THAT DOES NOT HAVE THE REQUIRED FEE LANGUAGE MUST BE AMENDED IN WRITING OR REPLACED WITH A NEW CONTRACT.***

Paragraph 4: ADDITIONAL CONTRACT CHANGES TO BE IN WRITING

As noted in the prior paragraphs, this reminds all parties – including the brokers/agents – that any substantive revisions must be in writing.

> **Practice Tip:** "In writing" means – as it usually does – that the writing should be memorialized on paper (physically or electronically) and signed by the relevant parties. ***DO NOT*** rely on conversations, phone calls, emails or texts as purported amendments to your listing or buyer agency contracts – use an appropriate form (PAR Forms CLC and CBA or a broker-drafted amendment) and be sure that the client and broker both sign.

Signature Lines

Though this is a notice and not a contract addendum/amendment, it's important to be able to verify that the client received the notice and understood their options. The client(s) noted above sign at the bottom, as well as the broker or their authorized representative.

> **Practice Tip:** Remember that brokers can have policies on who can sign on their behalf. Consider whether to authorize all licensees to sign this form on behalf of the broker or whether you may want to limit the authority to the broker or managers.

Other Related Forms

- **XLS/BAC/NBA/TLC –**
  - Could potentially decide to renegotiate portions of existing agency agreements and sign new ones to reflect changed terms related to compensation.
- **CLC – Change to Listing Contract**
  - Include two rows for seller concessions (buyer broker fee and closing costs)
- **CBA – Change to Buyer Agency Contract**
  - No changes to form. Recommend that any substantive changes to buyer agency or transaction licensee form be done by signing a new contract rather than trying to modify using this form.

Cooperating Broker Compensation Agreement
(Form CBC)

General Overview

The Cooperating Broker Compensation Agreement provides a simple way for brokers to create a written agreement that memorializes offers of broker-to-broker cooperating compensation.

Terms of the NAR settlement agreement will change how this cooperating compensation can be communicated and advertised by prohibiting these offers in the MLS. Because the prior MLS rules regarding the offer and acceptance of compensation will no longer be in place, it will become critically important for brokers who wish to offer/accept this type of compensation to get those fee agreements in writing using Form CBC or some similar brokerage form.

> **Note:** The decision of whether to offer cooperating compensation is up to individual listing brokers, with the consent of their seller clients. Similarly, the decision to seek cooperating compensation or negotiate the amount is up to individual buyer brokers, with the consent of their buyer clients. The continued presence of this form in the PAR standard forms library is not to suggest any particular business practice, but merely to facilitate cooperating compensation when those offers are made/negotiated.

Title/Introduction

NOT TO BE USED AS AN ADDENDUM TO THE AGREEMENT OF SALE…

This clause has been just below the title of the form since its inception, as a reminder that the NAR Code of Ethics, Standard of Practice 16-16, says that Realtors® working as buyer agents "shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation…nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation." This concept is included just under the title and restated more clearly in the introduction to the form.

> **Note:** The Code does not prevent renegotiation of an offer of cooperating compensation after an agreement of sale has been signed, but neither the listing broker nor buyer broker can unilaterally change the cooperating compensation once it's been offered and accepted – which is why it is important to get that agreement in writing with clear terms.

...OR WHEN THE SAME BROKER REPRESENTS BUYER AND SELLER

This new language is added to the current draft as a reminder that, by definition, "cooperating compensation" only exists where two *different* brokers are representing the buyer and seller. Where a single broker is representing both parties any broker-level compensation issues are handled in-house by the brokerage.

> **Note:** Buyers and sellers can still consider negotiating seller concessions in the agreement of sale – the identity of the broker(s) makes no difference in this regard.

Paragraph 1: COOPERATING COMPENSATION

This paragraph allows the brokers to negotiate an offer of cooperating compensation, to be entered into the appropriate blank(s).

The default language states that the offer of cooperating compensation is earned by the cooperating broker working with the buyer if that broker is "the procuring cause of a successful purchase transaction." Why is it based on procuring cause, you might ask?

It is not uncommon for buyers to work with, or at least have substantial contact with, more than one broker/agent during the course of a transaction. If more than one broker works with the same buyer client and each signs a cooperating compensation form there needs to be a way to determine which one of them would be entitled to actually get paid. The Realtor® Association has encouraged and offered procuring cause arbitration services for over 100 years, so it is a default condition with a term of art that should be well known and understandable to those using the forms.

> **Practice Tip:** There is no requirement that cooperating compensation be offered based on procuring cause. But consider that any other conditions should be carefully drafted with the assistance of broker counsel to ensure that they are clear and enforceable, and that they are in the interests of the seller client.

> **Note:** As in several other forms, the default language for a percentage fee is based on the gross "Purchase Price" as stated in the agreement of sale. If the parties negotiate to have the fee calculated on the net price or some other similar criteria it will be important to define exactly what costs are being backed out to ensure the parties have a common understanding of this term.

Paragraph 2: ARBITRATION

Speaking of arbitration…this paragraph states that the parties agree to resolve disputes over cooperating compensation via the Realtor® association arbitration process. Article 17 of the NAR Code of Ethics already binds Realtors® to arbitrate many types of fee disputes, but this ensures that the brokers confirm their intent and willingness to arbitrate.

> **Note:** Arbitration hearing panels are limited to reviewing compensation agreements and determining whether the parties have met their obligations to pay/receive compensation. If brokers do a poor job of drafting their own forms or adding their own conditions to the offer of compensation a hearing panel may not be able to effectively hear the case and render a decision.

Signature Lines

The terms “Cooperating Broker” has been added as a signature line for consistency

> **Practice Tip:** Though the basic purpose of the form has not changed, it is possible that this form – or ones like it – will become very prevalent. Remember that by rule any cooperating compensation is paid *between brokers*, and a broker is likely obligated to any agreement signed by an agent who had the actual or apparent authority to sign on their behalf. Brokers are encouraged to consider whether to create policies around who can sign these forms – e.g., only the broker; only the broker or a manager; any agent; etc.

Other Related Forms

- **CBCR – Cooperating Broker Compensation Agreement for Rentals**
    - Changes to fee provisions

Agreement of Sale for Residential Property

(Form ASR)

General Overview

The Agreement of Sale has always included a paragraph in which the parties could negotiate seller concessions for the purpose of paying a buyer's closing costs at settlement. PAR has also published a form called the Compensation Addendum to the Agreement of Sale (Form CAS) for transactions in which the parties want to negotiate a concession specifically to help offset the buyer's brokerage fee.

The new amended form merely combines these two items into a single paragraph (and thereby eliminates the need for Form CAS, which is now discontinued). Note that the language in the Agreement of Sale tracks language found in the listing and buyer agency forms so it remains consistent throughout the transaction.

Paragraph 3: SELLER CONCESSIONS

Though the terms of the NAR settlement agreement limit how listing brokers can market/advertise cooperating compensation or seller concessions (listings in the MLS cannot condition payment specifically for the purpose of paying a buyer broker's fee), there is no limitation on *negotiating* seller concessions that are earmarked for specific purposes in the agreement of sale. In fact, many lenders are likely to want the parties to show how much of a concession is being used for typical closing costs and how much is being used for buyer broker compensation.

> **Practice Tip:** Most loan products have limits on the amount of a seller concession that be used for a buyer's typical closing costs (taxes, title insurance, recording fees, etc.), but it is anticipated that most will not count payments towards buyer broker fees in that amount.
>
> ***MAKE SURE BUYERS CHECK WITH LENDERS ABOUT ANY LIMITS OR CAPS ON ACCEPTABLE CONCESSIONS BEFORE NEGOTIATING THESE TERMS***.
>
> **Practice Tip:** Regardless of how a seller concession initially may be offered (MLS, marketing/advertising materials, written or verbal communications between brokers), it will not be a binding term of the transaction until it is included in the Agreement of Sale and signed by the parties.

Subparagraph (B): Buyer Broker Fee

This subparagraph allows the parties to negotiate a seller payment towards a buyer broker fee that may be owed by the buyer, if desired; the default amount is 0 unless some amount is filled in. The first sentence of the subparagraph makes it clear that the negotiated amount would be ***in addition to*** any broker-to-broker cooperating compensation that might have been negotiated.

> **Practice Tip:** *IF* brokers negotiate cooperating compensation it should be recorded in writing, which could be done in the Cooperating Broker Compensation Agreement (PAR Form CBC) or a similar broker form. Brokers should be sure to share that information with their own clients to ensure that final negotiations in the agreement of sale are based on full knowledge of compensation at that point in the process.

> **Note:** Negotiations for this sort of assistance had previously been facilitated by the Compensation Addendum to the Agreement of Sale (Form CAS). That form has now been discontinued since the concept/language is included in the full Agreement of Sale.

Subparagraph (B): Closing Cost Assistance

This language is similar to the "Seller Assist" paragraph in the prior version of the form. Any amount negotiated here, if any, (the default amount is still 0 unless an amount is filled in) could be used towards buyer closing costs OTHER THAN a buyer broker fee (since that amount is negotiated in subparagraph (A) in the current contract).

> **Practice Tip:** Terms of the NAR settlement state that buyer brokers cannot accept/retain any compensation in excess of the fee that they negotiate with their buyer. For example, if the negotiated buyer broker fee is $1000 less than what's being offered the buyer broker would not be able to keep it. The most likely outcomes are that they'd either seek to get that excess credited to their buyer to cover other closing costs or to not have it paid to the buyer side at all. It could be helpful to discuss this with sellers to develop contingency plans for these types of scenarios.

Other Related Forms

- **All other agreements of Sale (ASC, ASMH, ASNC, ASVL)**
    - Similar changes to seller contribution provisions

Document Updates

If changes are made to this document the version number and date at the bottom of the pages will be updated and a brief summary will be included here.