



## Key Takeaways From The NAR Commission Lawsuit Settlement March 21, 2024

### What the NAR Lawsuits Generally Allege

Most of the class action lawsuits allege that the National Association of Realtors (“NAR”), along with some of the largest real estate companies,<sup>1</sup> violated federal antitrust law by conspiring to require home sellers to pay the broker representing the buyer and thus pay an inflated commission.<sup>2</sup>

Plaintiffs’ claims center around NAR’s adoption and implementation of a mandatory rule that requires all listing brokers to make a blanket, non-negotiable offer of buyer broker compensation (the “Cooperative Compensation Rule”) when listing a property on a Multiple Listing Service (“MLS”).<sup>3</sup> In other words, in exchange for this access, the NAR requires sellers who list on an MLS to also agree that the seller will pay a commission to the buyer's agent.<sup>4</sup>

NAR and the plaintiffs have reached a [proposed settlement agreement](#) that would end litigation of claims discussed above and others raised by home sellers. Below is summary of the proposed settlement (the “Settlement”), key takeaways, and a brief discussion of MBA’s next steps and implications for the mortgage industry.

### Overview of The Settlement

A proposed nationwide class of home sellers has reached a **\$418 million** joint settlement with NAR that will resolve claims in some of the antitrust class actions against NAR. The Settlement with NAR is in addition to prior settlements (totaling \$208.5 million) reached with defendants Anywhere Real Estate, RE/MAX, and Keller Williams.

Under the terms of the Settlement, NAR will be responsible for paying \$418 million in four annual installments along with interest, for the benefit of home sellers across the United States, as well as \$3 million toward settlement notices. It also provides for far-reaching changes to NAR’s rules governing real estate broker compensation and the MLS system.

### Who Does This Settlement Apply To?

The Settlement would resolve claims against NAR, over one million NAR members, all state/territorial and local REALTOR associations, all association-owned MLSs, and all brokerages with an NAR member as principal that had a residential transaction volume in 2022 of \$2 billion or **below**.

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<sup>1</sup> Realogy, HomeServices of America, RE/MAX and Keller Williams.

<sup>2</sup> Note that there are still lawsuits brought on behalf of homebuyers that have not been settled and remain outstanding with similar concerns.

<sup>3</sup> Most MLSs are controlled by local NAR associations, and access to these MLSs is conditioned on brokers following all mandatory rules set forth in NAR’s Handbook on Multiple Listing Policy. The MLS is a web of roughly 600 local databases around the country.

<sup>4</sup> For background, see MBA’s Updated December 2023 summary of the real estate compensation lawsuits [here](#).



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NAR's release does not cover agents affiliated with HomeServices of America and its related companies as they are still litigating.

**NOTE:** Firms that have a total transaction volume of \$2 billion or **above** are *not* covered by the Settlement. However, the Settlement creates a framework for these larger firms to opt-in to the Settlement to resolve actual or potential claims against them. A firm that wishes to opt-in to the settlement route must deposit into an escrow account an amount equal to 0.0025 multiplied by its average annual "Total Transaction Volume" over the most recent four calendar years and agree to not to engage in the certain prohibited practices.<sup>5</sup> It is unclear at this stage whether the larger firms will in fact opt-in to the Settlement. A similar opt-in provision exists for independent MLS, with the payment being 100 multiplied by their 2023 subscribers.

### **Notable Practice Changes As A Result of The Settlement**

In the Settlement, NAR has agreed to various practice changes<sup>6</sup> which are to begin 120 days after the plaintiffs seek preliminary approval of the Settlement:

- ***Eliminate and prohibit*** any requirement by NAR and NAR MLSs that listing brokers or sellers must make offers of compensation to cooperating brokers or other buyer representatives, and prohibit and eliminate any requirement that such offers, if made, must be blanket, unconditional or unilateral (effectively, eliminating its rules requiring "cooperative" commissions as a condition of listing a home on the MLS);
- ***Requires*** MLS participants working with a buyer enter into a written agreement before the buyer tours a home with the following:
  - (a) specify and conspicuously disclose the amount or rate of compensation to be received or how the amount will be determined.
  - (b) the amount of compensation must be objectively ascertainable. It cannot be open-ended such as "buyer broker compensation shall be whatever amount the seller is offering to the buyer."
  - (c) MLS participants may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer.
- ***Prohibit*** NAR MLS participants, subscribers, other real estate brokers, other real estate agents, and sellers from:
  - (a) making offers of compensation on the multiple listing service to cooperating brokers or other buyer representatives (either directly or through buyers) or
  - (b) disclosing on the multiple listing service listing broker compensation or total brokerage compensation;

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<sup>5</sup> HousingWire has done the math on the "subscription fee" for some of the largest brokerages, like Compass, eXp Realty, Douglas Elliman, Hanna Holdings, and @properties, in an [article](#) titled "Deal or no deal? What opting in to NAR's settlement could mean for some of the nation's largest brokerages". For example, they report that Compass would be on the hook for \$570 million (based on \$228 billion in sales volume in 2022).

<sup>6</sup> Pages 27-31 of the Settlement.



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- ***Eliminate and prohibit*** any requirements conditioning participation or membership in a NAR MLS on offering or accepting offers of cooperative compensation;
- ***Agree not to create, facilitate, or support*** any non-MLS mechanism for listing brokers or sellers to make offers of compensation to cooperating brokers or other buyer representatives;
- ***Require*** NAR MLS participants acting for sellers to conspicuously disclose to sellers and obtain seller approval for any payment or offer of payment that the listing broker or seller will make to another broker, agent, or other representative acting for buyers; and
- ***Require*** MLS participants to disclose to prospective sellers and buyers in conspicuous language that broker commissions are not set by law and are fully negotiable.

**NOTE:** Cooperative commission is **not** banned – listing brokers and sellers can continue to offer compensation for buyer broker services, just not through the MLS.

**NOTE:** The Settlement does **not** prevent sellers from offering seller concessions through the MLS (e.g., for general buyer closing costs), so long as such concessions are not limited to or conditioned on the use of or payment to a buyer broker.

### **What Does This Mean for the Mortgage Industry?**

This is certainly a landmark settlement, and it could drive changes in how agent commissions work and, in turn, how buyers engage in the home sales process. In the long run, it could also impact the role of the MLSs in the home listing process. It is premature to draw definitive conclusions on how the market will evolve to accommodate these changes, but MBA will monitor the impact of the settlement and provide education opportunities for our members. We continue to strongly support buyers being represented by agents in real estate transactions.

MBA will work with NAR and other trade associations to limit possible disruption from the settlement and ensure that its provisions are not overly disruptive to home financing. It is important to understand how a change to buyer paid commissions might impact seller contribution limits and we have already advocated for the Department of Veterans Affairs (VA) to lift their prohibition on veterans' payment for the buyer side agent. We are also very interested to hear from our members about how they think this could impact our industry and encourage you to reach out. In particular, we need to hear from members how actual market practices develop and evolve.

### **When Will These Changes Take Effect?**

The Settlement is subject to court approval, but we can likely see changes to go into effect mid-July 2024. There is also a possibility that the Department of Justice may weigh in on whether the settlement goes far enough, which could result in changes, delays or abandonment of the settlement. NAR will continue to update [competition.realtor](#) with the latest information.

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