



FAQs

NAR PROPOSED SETTLEMENT PRACTICE CHANGES

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Note: This document provides guidance on common questions related to the practice changes required by the NAR settlement agreement and Oregon's new law HB 4058. A wide variety of business practices are allowed under the settlement agreement and brokers must consult with their principal broker regarding company policies and practices.

1. What are the primary practice changes agreed to in the NAR settlement?

The practice changes fall into two buckets. The first bucket deals with cooperative offers of compensation. The second bucket deals with written buyer agreements.

Cooperative Compensation

- NAR may not require that listing brokers or sellers make compensation offers to buyer's agents, nor require any compensation offers to be blanket, unilateral, or unconditional.
- NAR will prohibit offers of compensation to buyer brokers, disclosure of listing agent compensation, and disclosure of total compensation on the MLS. Compensation fields will be eliminated in the MLS and no other fields may be used for this purpose.
- Participation in MLS may not be conditioned upon making or accepting offers of compensation to buyer brokers.
- NAR and MLSs may not create, facilitate or support any non-MLS mechanism for listing brokers or sellers to make offers of compensation to buyer brokers.
- Listing brokerages and listing brokers may still, through non-MLS mechanisms, display and communicate offers of compensation to buyer brokers for their own listings (such as through direct negotiation with buyers or buyer's agents or on a

- brokerage website).
- REALTORS® and REALTOR® MLS participants representing sellers must 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 representative of the buyer (including an attorney). Such disclosure must be in writing, provided in advance of any agreement to pay a buyer representative, and specify the amount or rate of such payment.
 - REALTORS® and REALTOR® MLS participants and subscribers may not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the buyer representative.

Written Buyer Agreement

- All REALTOR® MLS participants must enter into a written agreement with buyers before touring a home with the buyer.
- If buyer's agent will receive compensation **from any source** the agreement must conspicuously disclose the amount or rate of compensation, or how this amount will be determined. The amount of compensation must be objectively ascertainable and not open-ended (no language like, "buyer broker compensation shall be whatever the seller is offering").
- REALTORS® and REALTOR® MLS participants may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the written agreement with the buyer (buyer's agent cannot accept more cooperative compensation than they agreed to in the agreement with buyer).
- REALTORS® and REALTOR® MLS participants may not represent to a client or customer that their brokerage services are free or available at no cost to their clients unless they will receive no compensation from any source.

2. When do the changes agreed to in the NAR settlement and Oregon's new buyer representation law take effect?

All MLSs were required to implement NAR settlement practice changes by August 17, 2024. Many MLSs implemented changes in the weeks leading up to August 17, 2024. Oregon's new law requiring buyer representation agreements takes effect January 1, 2025.

3. With cooperative compensation offers disallowed on the MLS, what options do buyers have to get the seller to pay some or all of the buyer's agent's fee?

The buyer's agent's compensation will be set in the buyer representation agreement. The buyer will owe their agent the amount they agree to pay in that document. However, the buyer can get assistance from the seller in paying those fees, as they can with other buyer closing costs.

Buyers who need help paying their agent's fee can request seller concessions for brokerage fees in the purchase and sale agreement offer. Oregon REALTORS® and the

OREF sale agreement have been updated to accommodate this. The [Oregon REALTORS® Residential Purchase and Sale Agreement](#) does this in Section 4f (line 24), and the OREF Sale Agreement does this with the use of the OREF 048 Addendum. The seller can then accept, reject, or counter the buyer's offer.

Sellers do not have to decide at the time of entering the listing agreement whether to contribute to buyer agent fees, and can wait until the buyer includes a request in their offer.

All listing agents should have a conversation with their sellers in advance to prepare for the fact that buyers may include such a request in their purchase offer. The [Oregon REALTORS® Listing Agreement](#) has a section that explains this to sellers (Section 8 on page 2).

Some listing agreements include a space for sellers to indicate that they want to advertise payment of buyer brokerage fees or other concessions upfront (for example, Oregon Data Share and Willamette Valley MLS). Others do not (Oregon REALTORS®, RMLS). Keep in mind that even if a concession is offered upfront, it isn't binding until the buyer and seller agree to it in writing.

Another way that sellers can contribute toward buyer agent fees—although not recommended—is cooperative compensation (payment from listing agent to buyer's agent). This practice led to the NAR lawsuits. Cooperative compensation is not prohibited outright by the NAR settlement agreement, but it cannot be communicated via the MLS and the clients must agree to it in advance. We are not aware of any listing agreements in Oregon that facilitate cooperative compensation, meaning that sellers and agents would have to draft their own language to utilize cooperative compensation, adding additional risk to the transaction. Moreover, the brokerages exchanging payment would need to enter into a separate written compensation agreement between the brokerages to make any cooperative offer binding, and that agreement would need to be in place prior to the buyer and seller entering a sale agreement (otherwise the seller would be entering into the sale agreement without any certainty that the fee they owe to the listing agent will in fact be shared, and the buyer will be entering the sale agreement without knowing if their agent's fee is covered). Oregon REALTORS® does not produce such a brokerage compensation agreement. Given the risk and complication involved in this approach, Oregon REALTORS® advises against the continued use of cooperative compensation in Oregon real estate transactions.

Before including any upfront offer of buyer broker compensation in a listing agreement—whether the offer is coming through the listing agent or the seller directly—sellers and listing agents should consider a few points.

- The buyer broker cannot accept more compensation than they agreed to in the buyer representation agreement. At the time of entering the listing agreement neither the listing agent nor the seller know a) what the buyer owes their agent, or b) whether the buyer needs the seller's assistance to pay their agent's fee. This means that if a seller offers upfront to contribute toward buyer brokerage fees, they could be offering more than the buyer or buyer agent needs or can accept.

- The U.S. Department of Justice has indicated that it believes that upfront offers to pay buyer broker compensation—whether from the listing agent or the seller—distort the market for brokerage services. The DOJ may continue to pursue the real estate industry over this practice. To understand the DOJ’s argument, we encourage you to read the [U.S. DOJ’s Statement of Interest](#) in the *Nosalek vs. MLS PIN* proposed settlement.
- Concessions earmarked for buyer broker fees cannot be communicated on the MLS. As for concessions generally, talk to your MLS. Each MLS has adopted its own rules about what is allowed as remarks on the MLS.

Given these dynamics, listing agents and sellers may find that upfront offers of compensation—whether directly from seller or through the listing agent—are a poor fit for the new environment and instead choose to negotiate contributions toward buyer agent fees, if any, as a seller concession in the sale agreement at the request of the buyer.

4. What are the details of the new requirements to use written agreements with buyers, both from Oregon law and the NAR settlement?

The NAR settlement practice changes took effect August 17, 2024. The new Oregon law requiring Buyer Representation Agreements ([HB 4058](#)) doesn’t take effect until January 1, 2025. The Oregon Real Estate Agency intends to conduct rulemaking on the bill in the fall of 2024. Stay tuned for updates. Oregon REALTORS® will provide additional training on HB 4058 once the final rules are established.

The NAR settlement agreement requires agents who participate in the MLS and are working with buyers to have a written agreement with the buyer in place before touring a home with the buyer. The settlement agreement does not specify the details or format of the written agreement. However, if the agent expects to be compensated from any source and in any fashion with respect to the home they are showing or the work they are doing for the buyer, the written agreement must conspicuously specify the details of the compensation arrangement, which must be objectively ascertainable. **That is, the fee must be set in the buyer representation agreement itself, between the buyer and the buyer’s agent.** Language such as, “My fee is whatever the listing agent or seller is willing to pay me” is NOT OK. Additionally, under the NAR settlement agreement, a buyer’s agent cannot receive more compensation from any source than what was agreed to in the buyer representation agreement.

HB 4058 requires buyer agents to use written representation agreements with their clients. The bill defines a representation agreement as “a contract between an agent and buyer of real property that authorizes the agent, in exchange for compensation, to act on behalf of the buyer in purchasing real property or identifying real property for purchase.” HB 4058 also states that the agreement must contain the statutory duties that a buyer’s agent owes their client, either directly or by referencing the Initial Agency Disclosure Pamphlet. It may not last more than 24 months, unless actively renewed by both parties. The agreement must be in place before, or as soon as reasonably practicable after, the

agent has commenced efforts to assist the buyer in purchasing real property or in identifying real property for purchase.

In some instances, the NAR settlement agreement will require the written agreement to be in place earlier in time than HB 4058. For example, under HB 4058, if the first thing a real estate licensee did with a buyer was to tour a home, the real estate licensee could tour the home with the buyer and then get a representation agreement in place as soon as practicable after the tour. However, under the NAR settlement agreement a REALTOR® working with a buyer cannot tour a home with the buyer without a written agreement in place. In other instances, HB 4058 will require the agreement earlier in relationship. The Oregon law calls for the agreement to be in place when the real estate licensee is performing initial non-touring activities with the buyer, such as advising them or sending listings.

REALTORS® must comply with both the NAR settlement agreement (beginning August 17, 2024 or sooner, as required by the REALTOR's® MLS) and HB 4058 (beginning January 1, 2025). This means that REALTORS® should have the agreement in place at the earliest time required by either the law or the settlement agreement.

NAR has FAQs and other resources regarding buyer representation agreements at facts.realtor, and Oregon REALTORS® has resources available at OregonRealtors.org/bba. Both [Oregon REALTORS®](https://OregonRealtors.org) and OREF have updated Buyer Representation Agreements that comply with the NAR settlement and HB 4058.

5. What impact will the settlement changes have on buyer financing?

[Fannie Mae](#), [Freddie Mac](#) and the [Federal Housing Administration \(FHA\)](#) have all indicated that, at least for the time being, seller contributions for buyer broker fees **will not** be counted toward the “Interested Party Contribution” (“IPC”) limits for loans (typically between 2% – 9% of loan amount) regardless of whether those payments come from the listing agent as cooperative compensation or from the seller as a concession. The same is true for VA loans.

Additionally, the [VA is now allowing buyers to pay buyer agent fees directly](#)—a practice that they previously disallowed. However, at this point this rule change is only temporary, and we are still awaiting a permanent rule change.

What this all means in practice is that, at least for the time being, buyers will not be disadvantaged by the NAR settlement in terms of Interested Party Contributions or VA loan limitations. However, buyers who are paying their agent out of pocket, without assistance from a seller, will have to have the financial resources to pay their agent’s fee, the loan downpayment, and other closing costs, which could impact the buyer’s ability to afford a home. Buyers should always coordinate with their lender to ensure the lender is aware of the buyer’s financial obligation under the buyer representation agreement.

6. The settlement says we can't sort listings based on the existence or amount of compensation offered to the buyer's agent. What if our buyer instructs us that they only want to see properties offering buyer's agent compensation?

It is critical for buyers to understand that if they need help paying their agent's fee, a seller is offering to pay a buyer's agent fee upfront is a very poor indication of whether the seller will agree to pay it in the end. Many—and perhaps most—rational sellers will wait for buyers to make offers that include any requests for seller concessions, rather than offering them upfront. At the same time, even if a seller offers upfront help with buyer agent fees, the seller may not like the other terms of the buyer's offer and the parties may not be able to come to a deal. With this in mind, it is unclear why a buyer would instruct an agent to only show homes that are offering compensation upfront.

A buyer's agent should never sort or filter listings based on the existence or amount of an upfront offer of compensation. Doing so would be a direct violation of the settlement agreement. That being said, after a buyer reviews the listings and has been advised that submitting an offer is the best way to determine the seller's willingness to make concessions (for buyer agent fees or for anything else), the buyer is in charge of which houses they want to tour or write offers for.

7. If there is an offer of compensation greater than what the buyer's agent agreed to in the buyer representation agreement, what are the options for the excess offered compensation?

This question is a great example of why upfront offers of compensation from sellers or listing agents may not be wise in the post-settlement environment.

Under the settlement agreement, the buyer's agent cannot accept more compensation than what was agreed to with the buyer in the buyer representation agreement. The buyer is also prohibited from passing it on to their client, as ORS 696.290 prevents compensation sharing or rebating commissions to non-licensed individuals, even to an agent's own client. The buyer agent also may not revise the buyer representation agreement to match the higher compensation level, as this would be flouting the settlement agreement.

The only option available to the buyer agent in this scenario is to reject the compensation. However, the buyer and buyer agent now know that the seller may be willing to deal on other concessions and can use that information to inform their offer.

In this situation, the seller may have negotiated against themselves.

8. Have there been changes to forms that address the settlement agreement's requirements?

Yes. On July 29th, 2024, Oregon REALTORS® released updated forms including a listing agreement, buyer representation agreement, and sale agreement, among other forms. To read about the changes, preview the updated forms, and access training, visit orforms.org/forms-updates/. OREF has also released updated forms [which can be viewed online](#). MLSs have also updated their listing agreements and other forms, and most have issued an amendment/addendum for listing agreements that were signed prior to the practice changes. Reach out to your MLS to make sure that you have the latest documents.

9. What are the Principal Broker review and recordkeeping requirements for Buyer Representation Agreements?

Buyer Representation Agreement Recordkeeping Requirement:

Representation agreements are a part of professional real estate activities and therefore under ORS 696.280, the principal broker must maintain “complete and adequate records” of those agreements within the state for at least six years after the agreements was created. The agreements can be stored electronically, but only in a non-erasable “WORM” (write once, read many) storage device.

Buyer Broker Agreement Review:

Under OAR 863-015-0140(4), the supervising principal broker must review each document of agreement generated in a real estate transaction “within seven banking days after it has been accepted, rejected, or withdrawn.” Under the rule, document review can be electronic or hard copy, but electronic record review must show the name of the reviewer and the date the review occurred. If the record is reviewed in hard copy, the supervising principal broker must initial and date the document at the time of the review. The reasonable interpretation of the rule holds that Buyer Representation Agreements are documents of agreement that must be reviewed by the supervising principal broker within that seven banking day timeframe after the client accepts the representation agreement.

10. Can I use a Touring Agreement in Oregon?

The NAR settlement agreement requires written agreements with buyers to be in place prior to touring a home. If buyer's agent will receive compensation from any source, the agreement must conspicuously disclose the amount or rate of compensation the buyer's agent will receive or how this amount will be determined. The amount of compensation must be objectively ascertainable and not open-ended (that means no “buyer broker compensation shall be whatever the seller is offering” language).

The settlement agreement does not require the written agreement to be a representation agreement, and it does not include any minimum requirements for the term or scope of service.

Our understanding of a touring agreement is that it is a written agreement for touring homes that does not include agent compensation. Thus, a touring agreement appears to be compliant with the settlement agreement **so long as the agent signing the agreement really has no expectation of being paid for the touring services.**

However, a touring agreement that does not include agent compensation does not meet the requirements of a Buyer Representation Agreement under Oregon laws that take effect January 1, 2025. Oregon law defines a “representation agreement” to be a contract between an agent and buyer of real property that authorizes the agent, in exchange for compensation, to act on behalf of the buyer in purchasing real property or identifying real property for purchase. Additionally, Oregon law requires the agreement to describe the duties owed by the agent to the client either directly or by reference to the Oregon Initial Agency Disclose Pamphlet. A touring agreement that does not include compensation and/or that does not describe the agent’s duties in this manner would not be a compliant buyer representation agreement.

Beginning January 1, 2025, Oregon law will require that a statutorily compliant Buyer Representation Agreement be entered into before, *or as soon as reasonably practicable after*, the licensee has commenced efforts to assist the buyer in purchasing real property or in identifying real property for purchase.

Thus, come January 1, an agent can use a touring agreement to commence services with the buyer (e.g. touring a home) but would need to get a Buyer Representation Agreement in place as soon as reasonably practicable after the tour if they intend to continue working with the buyer.

Alternatively, if an agent wants to sign an agreement with a client for touring a home or a few homes, they can just use the Buyer Representation Agreement in the first place, but write the agreement with a limited scope and term (for one house, three houses, one day, a week, etc.). If the agent and client want to continue working together, they can amend the Buyer Representation Agreement to broaden the scope and term.

11. Can my seller and I write cooperative compensation into additional provisions or an addendum of listing agreement?

We are not aware of any listing agreements in Oregon that facilitate cooperative compensation (seller paying a listing broker fee that includes compensation for buyer’s agent and carries an expectation that the listing agent shares a portion of the compensation with the buyer’s agent).

Cooperative compensation led to the NAR lawsuits that resulted in the settlement agreement.

The settlement agreement itself does not expressly prohibit off-MLS cooperative compensation, but the U.S. Department of Justice disfavors cooperative compensation and continues to pursue the real estate industry over this practice. To learn more about

the DOJ's argument, we encourage you to read the [U.S. DOJ's Statement of Interest](#) in the *Nosalek vs. MLS PIN* Settlement.

Because the forms do not facilitate it, brokers and sellers who continue to use this practice would have to write their own language into a listing agreement, increasing the level of risk in the transaction.

Moreover, the brokerages that are exchanging payment would need to enter into a separate written compensation agreement with the cooperating brokerage to make any cooperative offer binding, and that agreement would need to be in place prior to the buyer and seller entering a sale agreement (otherwise the seller would be entering into the sale agreement without any certainty that the fee they owe to the listing agent will in fact be shared, and the buyer will be entering the sale agreement without knowing if their agent's fee is covered). Oregon REALTORS® does not produce such a brokerage compensation agreement.

In summary, while a listing agent and client can agree to any terms in a listing agreement that are not otherwise unlawful or in violation of the REALTOR® Code of Ethics, adding cooperative compensation into a listing agreement would add significant risk and cumbersome steps to the transaction and we advise against it.

12. Can a seller write seller-paid concessions such as contributions to buyer brokerage fees into a listing agreement?

The Oregon REALTORS® listing agreement does not include a dedicated space for sellers to offer concessions to buyers for brokerage fees or otherwise.

Some listing agreements in Oregon do have such a dedicated space for sellers (not listing agents) to include a pre-specified advertised amount of compensation offered to the buyer broker, or for other concessions.

While it is not unlawful for sellers to make upfront offers to pay buyer brokerage fees, there are some things that REALTORS® and sellers should know before doing so:

- The buyer broker cannot accept more compensation than what they have agreed to in the buyer representation agreement. At the time of entering the listing agreement neither the listing agent nor the seller knows a) what the buyer owes the buyer agent or b) whether the buyer needs the seller's assistance to pay their agent's fee. This means that if a seller offers upfront to contribute toward buyer brokerage fees, they could be offering more than the buyer or buyer agent needs or can accept.
- Buyers can ask for contributions to broker fees or other closing costs in the sale agreement offer, should they need assistance paying those costs. Both Oregon REALTORS® and OREF forms have been updated so that buyers can easily include a request for seller contributions to brokerage fees or other closing costs in the offer. This allows the buyer to submit an offer that makes the deal work for them, and the seller to respond by either accepting, rejecting, or countering based on the totality of

buyer's offer and the factors that are most important to the seller, such as net proceeds. This aligns with a typical negotiation process.

- The U.S. Department of Justice has indicated that it believes that upfront offers to pay buyer broker compensation—whether from the listing agent or the seller—distort the market for brokerage services. The DOJ may continue to pursue the real estate industry over this practice. To understand the DOJ's argument, we encourage you to read the [U.S. DOJ's Statement of Interest](#) in the *Nosalek vs. MLS PIN* proposed settlement.
- Concessions earmarked for buyer broker fees cannot be communicated on the MLS. As for concessions generally, talk to your MLS. Each has adopted its own rules about what is allowed on the MLS.

Given these considerations, the clearest path for buyers who need help paying their agent's fee is to request concessions for brokerage fees in the purchase and sale agreement offer. The seller can then accept, reject, or counter based on the seller's needs.

However, should a seller want to use the listing agreement to authorize their agent to communicate concessions for buyer brokerage fees or other closing costs upfront, it can be done on the lines provided in the listing agreements that have dedicated concession fields, or through "additional provisions" or an addendum for those that don't.

13. Is a written agreement with buyers required for open houses hosted by listing firm?

Under the NAR settlement agreement, written agreements are required before touring a home with a buyer, when working with a buyer.

If you are hosting the open house on behalf of your seller to help them sell the home rather than to acquire buyer clients, you are working with the seller, not the buyer, and you do not need a written agreement with the buyer.

On the other hand, if you are pursuing a disclosed limited agency relationship with any of the buyers touring the open house, or if you are otherwise providing advice to them as if you were a buyer's agent, then you would also be working with them and need a written agreement with the buyer.

It's philosophically the difference between answering the buyer's question "how much should I offer on this property" with "listing price is ____" versus talking them through a complicated valuation using market conditions, time on market, etc.

14. Is a written agreement with buyers required for open houses hosted by a firm other than the listing firm?

You should check your company policies and your E&O insurance about whether you are even able to allow other firms to host open houses for your listing, and whether your insurance covers you (typically E&O insurance does not).

If a firm other than the listing firm is hosting the open house, presumably it is for the purpose of obtaining buyer clients. If a potential buyer walks into the open house, looks around, and walks out without talking to the agent, a written buyer agreement wouldn't be required because the agent wasn't working with the buyer.

However, if the agent hosting the open house talks to potential buyers and provides any advice or guidance that would be typical for a buyer's agent to provide, at that point the agent would be working with the buyer and would need a written agreement in place. For this reason, it may be wise to have all buyers sign a written agreement when they enter an open house hosted by a firm other than the listing firm, or to avoid the situation by not hosting open houses for other firms' listings.

15. Can I amend/revise a buyer representation agreement to adjust the compensation level?

You and your buyer have the freedom to adjust your contracts based on factors that are important and agreeable to you and your buyer, but compensation levels should never be adjusted to simply match a seller or listing agent offer of compensation. The purpose of the settlement agreement is for buyer agent compensation to be set between the buyer and the buyer agent, and the listing broker compensation to be set between the seller and the listing broker. The seller and listing broker should not be influencing buyer agent compensation.

What this means in practice is that you should never increase your fee to match a seller or listing agent offer of compensation.

When it comes to lowering your fee, that is a business decision for you to make and should be based on the unique circumstances of the situation, not based on a seller or listing agent's offer. You have no obligation to lower your fee. At the same time, like any other professional, you can decide to give a client a break to get a deal done, to create repeat customers, or for whatever other business factors motivate your decision-making.

16. What are best practices when representing a seller and dealing with an unrepresented buyer?

When working as a listing agent and dealing with an unrepresented buyer, the listing owes the following duties to all parties in a transaction, including the unrepresented buyer under [ORS 696.810](#):

- To deal honestly and in good faith;
To present all written offers, written notices and other written communications to and from the parties in a timely manner without regard to whether the property is subject to a contract for sale or the buyer is already a party to a contract to purchase; and
- To disclose material facts known by the seller's agent and not apparent or readily ascertainable to a party.

Beyond that, the listing agent's duties are with the seller exclusively and the listing agent must take great care not to imply that they are the buyer's agent or otherwise looking out for the interests of the buyer.

Both Oregon REALTORS® and OREF have a form that addresses unrepresented buyer situations. Oregon REALTORS'® is [Form 9.5 Buyer Non-Agency Agreement](#). This document makes clear that the listing agent is not the buyer's agent and owes no duties to the buyer other than those owed to all parties in a transaction. It advises the buyer to seek advice from the buyer's own experts. It explains that while the listing agent may assist the buyer in the preparation of documents or take other actions to assist the parties in culminating the transaction, the listing agent is doing this for the exclusive benefit of the seller.

However, even with this document signed by the buyer, the listing agent must be careful not to take any actions that imply they are representing the buyer.

While acting as a scribe for an unrepresented buyer to complete an offer on a standard form does not itself create an agency relationship, it is preferable to avoid any situation where the unrepresented buyer may be asking for your advice on the terms of an offer. Thus, a better method for securing an offer from an unrepresented buyer would be to allow the buyer to use their own forms, provide blank standard forms for the unrepresented buyer to complete (should your forms provider allow it), or for the seller to make the offer to the buyer.

Oregon REALTORS® forms license agreement allows the Oregon REALTORS® forms to be shared with an unrepresented buyer to assist the seller in obtaining an offer. [OREF's policy on sharing forms with an unrepresented buyer is posted on their website.](#)

To prepare a seller and listing agent for the possibility of offers from unrepresented buyers, the Oregon REALTORS® listing agreement has been updated to allow a seller and listing fee specific to unrepresented buyer situations. The fee can be the same, higher, or lower than the listing fee established for other transactions. It allows the seller and the listing agent to discuss in advance any issues relevant to working with an unrepresented buyer, such as the increased risk to the agent and the extra work required when dealing with someone who does not have professional representation.