



## BROKER COMPENSATION

Contributed by Lloyd Williams, SCAOR's Legal Counsel.

The subject of Broker compensation is extensive and involves a myriad of factual situations. This article will only address a few areas which seem to reoccur often, along with a pending change in the C.A.R. Model MLS Rules. In the future, an article will discuss the rights of listing and cooperating brokers to recover a commission.

1. Changing the Compensation in the Offer From What was Offered Through the MLS. This is when the cooperating broker puts into the buyer's offer compensation to the cooperating broker that is different from the amount offered by the listing broker through the MLS. Such an attempt is both a violation of MLS Rule 7.6 and of Article 16 of the N.A.R. Code of Ethics (Standard of Practice 16-16). This Rule and this Standard are quoted below.

Although the listing broker must still present the offer to the Seller, he/she is not obligated to pay the increased commission since 1) as set forth in the C.A.R. Residential Purchase Agreement (RPA-CA), only the seller and the buyer are parties to the contract, not the cooperating or listing brokers; 2) the cooperating broker's right to compensation is based upon the contractual relationship with the listing broker through the listing broker's MLS offer of compensation; and 3) by presenting the offer, the cooperating broker has accepted the listing broker's offer of compensation through the MLS.

If the cooperating broker wants to seek an increase in compensation from what is offered through the MLS by the listing broker, he/she should contact the listing broker before presenting an offer. If the listing broker is unwilling to make the requested change, the cooperating broker may try to have the buyer pay the

difference through a buyer/broker agreement.

MLS Rule 7.6 reads:

7.6 **Change of Compensation Offer by Cooperating Broker.** The cooperating broker, when acting as subagent or buyer's agent, shall not use the terms of an offer to purchase to attempt to modify the listing broker's offer of compensation to subagents or buyer's agents nor make the submission of an executed offer to purchase contingent on the listing broker's agreement to modify the offer of compensation. However, failure of a cooperating broker to comply with this rule shall not relieve a listing broker of the obligation to submit all offers to the seller as required by California law. N.A.R. Standard of Practice 16-16 reads:

16-16 REALTORS®, acting as subagents or buyer/tenant agents or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer's agents or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation.

2. Listing Broker's Disclosure of Commission Share. The issue is whether the listing broker is obligated to disclose to the cooperating broker what commission is being received by the listing broker. An example would be when a cooperating broker responds to a listing in the MLS which includes an offer by the listing broker to pay a specified percentage of the purchase price to a cooperating broker who brings an offer acceptable to the seller. The cooperating broker prepares the offer for the buyer and specifies the commission payable to the cooperating broker, consistent with the offered commission specified in the MLS. The listing broker, however, inserts "per

agreement" in the space for the listing broker to state what he or she is to receive, or that space is left blank. The cooperating broker asks the listing broker what he or she is receiving as a commission, but the listing broker refuses to tell him or her.

MLS Rule 5.12 requires the listing broker, in filing a property with the MLS, to offer a specified compensation to any MLS participant for their services in selling the property. Nowhere in the Rules is there a requirement that the listing broker disclose the total commission that the seller has agreed to pay under the listing agreement. Neither the N.A.R. Code of Ethics or the Department of Real Estate regulations require the listing broker to disclose this information.

Except for the situation discussed in the next paragraph, the cooperating broker would only be entitled to or need to know how much commission the listing broker is receiving where the offered commission is based upon a percentage of what the total commission would be, as opposed to the usual situation of it being a percentage of the sales price of the property.

MLS Rule 5.22 requires the listing broker to disclose in the listing filed with the Service the existence of either a variable or dual commission arrangement. The variable listing occurs when the seller has agreed to pay one commission if there is a cooperating broker involved. The dual commission arrangement arises when the seller has agreed to pay one commission

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## DID YOU KNOW?

- Weekly Tour Cancellations are now posted on the SCAOR website ([www.scaor.org](http://www.scaor.org) – Click on "Members Only").
- 45 Hours of Continuing Education, with instructor Charlie Krackeler, is being held at SCAOR on April 12, 2004. Please call Mary at 650.941.4321 or 800.547.3639 to register.
- Monthly InfoLink Classes are held at the Association office on the third Monday from 10am-12pm. Call 831.464.2000 or e-mail [flint@scaor.org](mailto:flint@scaor.org) to sign up.
- New Members and New Licensees Orientation at SCAOR April 28<sup>th</sup>, 8:30am-5:00pm & April 30<sup>th</sup>, 8:00am-5:00pm.



**Continued From Cover**

if the property is sold by the listing broker, alone or with a cooperating broker, and another commission if the seller finds the buyer. In either situation, and upon the request of a potential cooperating broker, the listing broker is obligated to disclose the differential that would result in the different scenarios.

3. Conditional Offers of Compensation. This matter involves N.A.R.'s policy that compensation to a cooperating broker may not be varied based on the performance or non-performance of certain activities. An amendment to C.A.R.'s Model MLS Rules has been proposed to incorporate this policy into the Model Rules. Examples of such offers of compensation are:

- a. One commission amount offered unless the offer made is for the full listed price, in which case a different commission will be paid to the cooperating broker;
- b. One commission amount offered unless the offer specifies the close

of escrow by a certain date, in which case a different commission will be paid to the cooperating broker; and

c. One commission amount offered unless the listing broker shows the property first, in which case a different commission will be paid to the cooperating broker.

N.A.R.'s position is that "procuring cause is the sole test used to determine cooperating broker entitlement to the compensation offered by the listing broker through the MLS...." C.A.R.'s proposed revision to the Model MLS Rules is:

"The amount of compensation offered through the MLS may not contain any provision that varies the amount of compensation offered based on conditions precedent or subsequent,

or on any performance, activity or event. Furthermore, the MLS reserves the right to remove a listing from the MLS database that does not conform to the requirements of this section."



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### NAR MANDATED ETHICS TRAINING

As you all know, the deadline for members to complete their NAR mandated ethics training, December 31, 2004, is fast approaching. In anticipation of this deadline, C.A.R. is providing you with the following FAQ that provides answers to those questions most frequently asked about what members need to do to meet the NAR requirement.

**1. What is NAR's actual requirement?** All REALTORS® are required to take either a New Member Code of Ethics Orientation or Quadrennial Code of Ethics Training (for continuing members), meeting NAR learning objectives, at some time between January 1, 2001, and December 31, 2004. In addition, a REALTORS® obligation is satisfied (they are "grandfathered" in) if they took training, meeting NAR learning objectives, at any time after the 1999 NAR Annual Convention and before January 1, 2000.

**2. Must the local association approve a class for it to satisfy the NAR requirement?** No. Neither the local association, C.A.R. or NAR, is required to approve the class.

**3. Can the local association take the word of its member that the member took a class that satisfies the NAR requirement?** Yes. If a REALTOR® chooses to meet their obligation through training offered by an entity other than their local association, the association, in its discretion, is allowed to take the member's word that they have taken a class that complies. The association is not required to verify that the class actually complies.

**4. Do the Ethics classes that California REALTORS® take for their license renewal satisfy the NAR requirement?** Most Ethics license renewal classes in California probably comply. We know for sure that Ethics classes taken from C.A.R., either the individual Ethics class or the Ethics portion of the six-hour survey class (offered on-line or for an individual home-study), satisfy the NAR requirement, as well as DRE requirements. A member who takes

license renewal classes from another vendor would probably want to check with that vendor.

**5. Are there other sources for the NAR mandated training?** NAR offers the classes for free on the realtor.org web site. In addition, some other vendors and local associations in California offer classes that they say meet NAR requirements. A member would need to check with the provider of the training to ascertain if it meets NAR requirements.

**6. Who is responsible for tracking REALTORS® compliance?** Since NAR policy provides that failure to meet the requirement is a violation of a membership duty that will result in suspension of a REALTORS® membership until the requirements are met, as a practical matter, each local association will need to establish some type of tracking mechanism. However, the method of tracking is at the discretion of the association. For instance, even though there is no requirement that compliance information be entered on NRDS, a members' NRDS record may be a convenient tool for a local association to use as a tracking device.

**7. Is NAR keeping track of a local association's enforcement of the requirement?** No. However, the association should somehow track which members have met the requirement, because in the unlikely event an association is asked by NAR to demonstrate it is operating in compliance with NAR policy, the association would need to provide proof that it enforced the mandatory ethics training requirements with its membership.

**8. Can a local association accept certification from individual REALTORS® that they have complied, without requiring independent verification?** Nothing in NAR's policy precludes an association, as a matter of local determination, from accepting the word of their REALTOR® members that they have met their training obligation.

## HELP WANTED

### A Call for 2005 Board of Directors Nominations

These are exciting times in the Santa Cruz Real Estate Industry! We need you to share your experience and expertise! This is your opportunity to help lead the Santa Cruz Association of REALTORS® in 2005.

If you wish to be considered for nomination to the Board of Directors in 2005, please fill out the form below or send an e-mail including your bio. to Philip Tedesco, RCE, CAE, Chief Executive Officer (ptedesco@scaor.org) by April 23, 2004. You can make a difference!

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(Attach additional sheet if needed)

**NOMINATIONS MUST BE RECEIVED NO LATER THAN APRIL 23, 2004**



# SANTA CRUZ ASSOCIATION OF REALTORS® n.a.r. n.e.w.s

## HUD WITHDRAWS RESPA RULE, REMAINS COMMITTED TO REFORM

NAR applauded a U.S. Department of Housing and Urban Development announcement recently that the department is withdrawing its draft final rule on changes to the Real Estate Settlement Procedures Act. In a March 22 letter to the Office of Management and Budget, which was reviewing the final rule, HUD Acting Secretary Alphonso Jackson said he was withdrawing the rule "due to the significant number of questions raised."

Jackson said in the letter that he was acting on the concerns of members of Congress, industry groups, and consumers. In fact, more than 250 members of Congress, Democrats and Republicans had objected to HUD's decision in December to put forth a final rule for OMB review. HUD has first proposed significant changes to RESPA two years ago, with the aim of creating an incentive for providers to offer packaged services. NAR stridently opposed the changes on the grounds that they would have given an advantage to lenders in the packaging of settlement services without a clear benefit to consumers.

"Congress acted to fulfill its responsibility to review the proposed regulation and ensure that it met the test of congressional intent," said NAR President Walt McDonald in a statement released by

NAR today. "More and more decisions affecting millions of homeowners are being made at the regulatory level today. It's important that Congress continue to actively oversee the regulators." McDonald said Senator Wayne Allard (R-Colo.) and Reps. Judy Biggert (R-Ill.), Ruben E. Hinojosa (D-Texas), and Donald A. Manzullo (R-Ill.) "as well as the more than 250 members of Congress who weighed in on this issue deserve the gratitude of all REALTORS for the leadership they showed."

HUD remains committed to reforming RESPA, a 30-year-old law that was created to protect consumers in the settlement of loans. Jackson said in his letter that he will reexamine and possibly revise the rule and resubmit it for public comment before sending it back to OMB. NAR supports reforms that would keep a level playing field for service providers and put consumers first. "We look forward to continuing to work with Alphonso Jackson and the Administration on efforts to reform RESPA," McDonald said in his statement.

To see the HUD letter, Go To:

<http://www.hud.gov/news/resparule.cfm>. To see NAR's statement, Go To: <http://www.realtor.org/publicaffairsweb.nsf/Pages/RESPAWithdrawal?OpenDocument>

## OCC RULE HARMS CONSUMERS, REAL ESTATE

In a press conference in mid-March, NAR joined other industry groups and members of Congress to oppose the recent move by the U.S. Office of the Comptroller of the Currency that exempts large national banks from state laws, including privacy, insurance, and anti-predatory lending laws. NAR said the preemption of states' authority to regulate these banks harms consumers, small

business, and the local real estate community. NAR President Walt McDonald said the OCC's actions go well beyond the agency's supervisory powers spelled out by Congress. For more info, Go To: <http://www.realtor.org/publicaffairsweb.nsf/Pages/OCCRuleHarms>

## COMMERCIAL REAL ESTATE ON AN UPSWING

Demand for commercial real estate space is trending up, said NAR's chief economist David Lereah in March. With a slowdown in new construction and a modest resurgence in demand, the office, warehouse, and multifamily sectors showed net positive absorption of space in the fourth quarter of 2003, which includes leasing of new space coming on the market as well as space in

existing properties, according to the NAR's Commercial Real Estate Quarterly. The retail sector was down slightly but is projected to build momentum during the course of this year. For more info, Go To: <http://www.realtor.org/publicaffairsweb.nsf/Pages/CmrclQtrly04>



### **SURVEY SHOWS MOST HOMES SOLD BY R.E. PROFESSIONALS**

According to the most recent NAR Real Estate Practitioners Survey, more than half of the real estate professionals questioned said at least 90 percent of the homes in their area are sold with the assistance of a professional. To access the survey results, Go

To: <http://www.realtor.org/Research.nsf/files/REPSJanuary04.pdf>  
For more info, CONTACT: Kevin Thorpe, [kthorpe@realtors.org](mailto:kthorpe@realtors.org).

### **NOMINATE MEMBERS TO BE A GOOD NEIGHBOR**

REALTOR Magazine is seeking nominees for the fifth annual Good Neighbor Awards, which recognize REALTORS® who impact their communities through volunteer work. Many past winners were nominated by their boards. Five winners will be recognized at the 2004 REALTORS® Conference & Expo in Orlando and will receive travel expenses to attend the show and a \$7,500 grant for their community cause. Volunteer work might include

affordable housing initiatives, youth mentoring, homelessness prevention, or anything else that makes a community a better place to live. Entry deadline: May 28. For more info and an entry form, Go To:

<http://www.realtormag.com/rmodaily.NSF/pages/goodneighborhomepage>

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# SANTA CRUZ ASSOCIATION OF REALTORS®

## c.a.r. news

### HOUSING MARKET INDEX UNCHANGED IN MARCH

The National Association of Home Builders' Housing Market Index (HMI) stood at 64 in March, unchanged from February, according to a recent report. The HMI is derived from a monthly survey of builders that NAHB has been conducting for the last 19 years. Homebuilders are asked to rate current sales of single-family homes as "good," "fair," or "poor," where any number over 50 indicates that more builders view sales conditions as good than poor.

"The tremendous pace of home sales in last year's final months has apparently given way to a more sustainable level of activity in early 2004," said NAHB President Bobby Rayburn. "This

climate of stability is a positive sign heading into the spring homebuying season."

Two out of three of the HMI's component indexes slipped in March. The index gauging current sales of new single-family homes fell two points to 69, while the index gauging sales expectations for the next six months declined three points to 70. The index gauging traffic of prospective buyers rose two points to 48, indicating some slight improvement in the flow of visitors to model homes over the last month, according to the report. For more information, visit [www.nahb.org](http://www.nahb.org)

### MORTGAGE APPS INCREASE 25.6 PERCENT, HIGHEST LEVEL SINCE JULY 2003

The Market Composite Index of mortgage loan applications, a measure of mortgage loan applications for purchases and refinancings, increased by 25.6 percent to 1,117.1 on a seasonally adjusted basis for the week ending March 12 from 889.1 one week earlier, according to a report released recently by the Mortgage Bankers Association (MBA). On an unadjusted basis, the Index increased by 24.8 percent for the week ending March 12 compared with the previous week and was down 31.9 percent compared with the same week one year earlier.

"Even with this surge in refinance applications, the share of applications for adjustable-rate mortgages is staying the same

at almost 28 percent of applications and over 42 percent of the dollar volume," said Jay Brinkmann, MBA's vice president of research and economics. "This means that a sizable percentage of these refinance applications are for adjustable-rate loans."

The refinance share of mortgage activity increased to 62.8 percent of total applications for the week ending March 12 from 56.1 percent the previous week. The adjustable-rate mortgage (ARM) share of activity decreased to 27.9 percent of total applications for the week ending March 12 compared to 28.1 percent the previous week, according to the report. For more information, visit <http://www.mortgagebankers.org/news/index.html>.

### CONSUMER CONFIDENCE UNCHANGED IN MARCH

The Consumer Confidence Index, which had declined sharply last month, was unchanged in March and now stands at 88.3 (1985=100) compared to 88.5 in February, according to a report released recently by the Conference Board. The Present Situation Index rose to 84.1 from 83.3 and the Expectations Index dipped slightly to 91.0 from 91.9.

"While consumers claimed business conditions were more favorable in March than last month, they also claimed jobs were less readily available," said Lynn Franco, director of the Conference Board's Consumer Research Center. "The labor market not only continues to dampen consumers' present-day spirits, but it is also making them less optimistic about the short-term outlook."

Consumers' optimism about future conditions continues to wane, according to the report. Those expecting business conditions to improve in the next six months dipped to 19.3 percent from 19.5 percent. Consumers expecting conditions to worsen was unchanged at 9.6 percent. Consumers' assessment of current conditions is more favorable today than last month, with those claiming business conditions improved increasing to 20.7 percent from 19.3 percent. Consumers claiming conditions have worsened was almost unchanged at 23.3 percent. Those anticipating more jobs to become available fell to 15.7 percent in March compared to 16.4 percent the previous month. For more information, Go To: [www.conference-board.org/economics/consumerConfidence.cfm](http://www.conference-board.org/economics/consumerConfidence.cfm)

THE NEWSLETTER OF THE SANTA CRUZ ASSOCIATION OF REALTORS®  
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