**REBA’s Standards & Forms Committee Offers**

**Provisional Revisions to Residential Purchase and Sale Agreements**

**Relating to Real Estate Commissions**

*In response to inquiries and concerns from members, the Standards and Forms Committee is pleased to offer draft revisions to Paragraph 5.7 of REBA Form No. 66, which relates to payment of real estate broker commissions. This Form, originally approved in 2021, includes various rider provisions for use with residential purchase and sale agreements for single-family, 1-4 family and condominium units.*

*The Committee recommends use of this draft provisional paragraph pending release of a final iteration of Paragraph 5.7, a copy of which is available by clicking here.*

*The issue of broker compensation has been the subject of national and local class action lawsuits, including Sitzer v. Nat’l Ass’n of Realtors et al, Case No. 4:19-cv-00332-SRB (W.D. Mo. 2019) (commonly known as Sitzer/Burnett), Moehrl v. National Association of Realtors, No. 1:2019cv01610 - Document 184 (N.D. Ill. 2020) and locally, Nosalek v. MLS Property Information Network Inc. et al, filed in the United District Court in Massachusetts in 2021 as Case No. 20-cv-12244-PBS.*

*These broker compensation cases alleged the defendants conspired to inflate real estate commissions by enforcing a cooperative compensation rule that required listing brokers to offer compensation to buyer brokers on Multiple Listing Service databases (MLS) resulting in fixed commission rates, and that some Sellers may have not been aware this resulted in Sellers paying the Buyer’s broker’s commission compensation. The jury in the Sitzer/Burnett case agreed, finding the defendants liable for violating Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 and awarded approximately $1.785 billion dollars to the Plaintiffs. Following the Sitzer/Burnett verdict, over thirty copy-cat cases have been filed against over 250 defendants, and it is anticipated additional cases concerning broker compensation and policies of the various MLS companies will surface.[[1]](#footnote-1)*

*As a result, efforts have been made to settle several of the lawsuits, and the National Association of REALTORS® (NAR) and many of the larger corporate defendants have entered into nationwide settlement agreements pending final Court approval. A stay has been issued in the Nosalek case until the NAR settlement is finalized.*

*The below alternatives for paying the Buyer’s broker are based upon the information and settlement terms of the cases available at the time this Advisory Report was drafted. This Form shall be reviewed and revised, if so required, once the cases conclude.*

5.7 BROKERS / BROKER’S COMMISSION

|  |  |
| --- | --- |
| **SELLER's BROKER** | **BUYER's BROKER** |
| Name:  | Name:  |
| MA Lic. No.  | MA Lic. No.  |
| Mobile #  | Mobile #  |
| Email:  | Email:  |
| Brokerage:  | Brokerage:  |
| MA Lic. No.  | MA Lic. No.  |

The Listing Broker (Company)/Agent and the Buyer’s Broker (Company)/Agent shall each provide to the closing attorney within a reasonable amount of time prior to the Closing a commission statement together with the name, address, phone number, email, Agent State License ID number and Brokerage State License ID number.

**Listing Broker (Company)/Agent’s Commission:**

A commission in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is due from SELLER to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, being the Listing Broker (Company)/Agent, payable only upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, but not otherwise.

**Buyer’s Broker (Company)/Agent’s Commission:**

A commission in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is due to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, being the BUYER’s Broker (Company/Agent), payable upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, but not otherwise, and is due from the following:

A. The amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is due from BUYER to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, being the BUYER’s Broker (Company)/Agent.

B. The amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is due from SELLER to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, being the BUYER’s Broker (Company)/Agent, which SELLER agrees and directs shall be paid by the Listing Broker (Company)/Agent from funds held in escrow.

**Direction to Escrow Agent:** The Escrow Agent holding the Deposit as set forth in this Agreement is responsible for disbursing funds in compliance with the terms of this Agreement. Upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, the Escrow Agent shall disburse funds as set forth above and the Escrow Agent shall disburse the balance of the deposit, if any, to the SELLER as excess deposit.  SELLER, BUYER and Escrow Agent acknowledge that all disbursements from funds held in escrow are undertaken in the Escrow’s Agent’s capacity as Escrow Agent and not otherwise. These written instructions to the Escrow Agent constitute mutual, written instructions from the SELLER and BUYER to the Escrow Agent and supersedes any office policy of the Escrow Agent to the contrary.

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*Notes: Delete and customize the above for the agreed contract terms and delete the introductory text and the below notes from the final Purchase and Sale Agreement or Rider.*

*1. The amount of the brokers’ commissions may be filled in as the commission percentage or the calculated dollar amount. However, if written as a dollar amount then the amount may need to be correspondingly edited in the event of a sale price change.*

*2. Both Sellers and Buyers could be using the services of a broker (corporate or individual) or a designated agent. This form uses the word “broker” to mean the Seller’s and Buyer’s representative, and the form should be edited as applicable. However, all commission payments are made to the broker (corporate or individual) and not to the agent who works for that broker.*

*3. The Buyer’s broker is paid the amount contracted between the Buyer and its broker. Many brokers require a written fee agreement (sometimes referred to as a Buyer’s Commission Agreement or an Exclusive Buyer’s Agreement). In Massachusetts, Buyer’s broker written fee agreements are not a requirement for MLS PIN as of the time this Advisory Report was drafted, however practice changes provided in some of the case settlement terms require their use. None of the settlement terms prevent a Buyer or Seller from representing themselves and make it clear that a Buyer contacting a Seller’s broker can do so without an agreement provided that the Seller’s broker is working on behalf of and showing the property for the benefit of their Seller client.*

*4. The Buyer’s broker commission may be paid in whole or in part by the Buyer and/or the Seller. Both the Nosalek and NAR preliminary settlements allow the Buyer’s Offer to include a Seller concession marked for Buyer’s broker compensation that can be accepted or denied like all other Offer terms. The breakdown of who is paying the Buyer’s broker’s commission should be clearly set forth in the P&S and the above should be edited, as applicable.*

*5. At the time of this Advisory Report, cooperative commissions are a permissible option for Listing Brokers (Company)/Agent to employ, and therefore a third option to pay the Buyer’s broker’s commission may be as follows:*

C. The amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is due from the Listing Broker (Company)/Agent to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, being the BUYER’s Broker (Company)/Agent.

*This option, given the current landscape, will likely become less common. Listing brokers should take caution that it is only permissible if done correctly with supporting underlying written fee agreements, proper disclosures, not reflected in an MLS, among other requirements.*

*6. Notwithstanding co-operative commission splits remains permissible at this time, it is noted MLS PIN has changed its practices stemming from the Nosalek case and any compensation listed on MLS PIN may not include a payment between brokers, although Sellers may choose to accept an offer term to pay all or a portion of the Buyer’s broker’s commission as an agreed term of the purchase and sale agreement.*

*7. The NAR preliminary settlement practice changes provide that a Buyer’s agent cannot accept a larger commission than as set forth in their written fee agreement nor can they accept additional payment from any other party than the Buyer, Seller or Seller’s Listing Broker (Company)/Agent, as and if applicable*

*8. Other parties could be acting as the Escrow Agent for the deposit, including either Seller’s or Buyer’s counsel, a title insurance company, or others. Revise the above as applicable to identify the Escrow Agent holding the deposit.*

*9. The Seller may direct in the purchase and sale agreement that its broker (or other Escrow Agent) shall disburse the Seller’s agreed payment (if any) to the Buyer’s broker from Seller’s funds held as escrow agent (i.e., the purchase deposit) after the closing concludes and the deed is recorded. The case Zang v. Nrt New England Inc., 77 Mass.App.Ct 665 (2010) provides that if a party holds the deposit in escrow pursuant to a purchase and sales agreement (which is typically the Seller’s broker) they are automatically authorized and bound to comply with the purchase and sale agreement disbursement instructions for the funds it holds in escrow without the need for the escrow agent to otherwise be a party or a counter-signatory to the purchase and sales agreement.*

*10. REBA’s Ethical Standard No. 4 provides “An attorney shall not act as both attorney for a party in a real estate transaction and as a real estate broker to a party in the same transaction.”*

1. *Multi Service Listing, or MLS, is a common term for a centralized listing of properties for sale. MLS Property Information Network, Inc, (MLS PIN), is one company that operates in Massachusetts and there are several other companies in Massachusetts and nationally that include MLS in their trade names. To minimize confusion among the companies, specific names are used in this Advisory Report if applicable, and otherwise MLS is used to mean a centralized property listing database.* [↑](#footnote-ref-1)