

## **Backgrounder Q&A: National Association of REALTORS®**

### **Overview**

#### **1. What is this lawsuit about?**

NAR has promulgated a series of rules, policies, and practices that have been widely adopted by its members which have resulted in a lessening competition among real estate brokers to the detriment of American home buyers. These rules, policies, and practices include:

- Prohibiting multiple listing services (“MLSs”) from disclosing to prospective buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS (“NAR’s Commission Concealment Rules”);
- Allowing buyer brokers to mislead buyers into thinking that buyer broker services are free (“NAR’s Free-Service Rule”);
- Enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers (“NAR’s Commission-Filter Rules and Practices”); and
- Limiting access to lockboxes that provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS (“NAR’s Lockbox Policy”).

### **The Defendant and the Alleged Conduct**

#### **2. What is the National Association of Realtors?**

The defendant, the National Association of Realtors (“NAR”), is a trade association organized under the laws of Illinois with its principal place of business in Chicago. It is the leading national trade association of real estate brokers and agents. Among its members are licensed residential real estate brokers, including brokers who provide real estate brokerage services to home sellers, home buyers, or both.

Among other activities, NAR establishes and enforces rules, policies, and practices, that are adopted by NAR’s 1,400+ local associations (also called “Member Boards”) and their affiliated multiple listing services that govern the conduct of NAR’s approximately 1.4 million-member REALTORS® who are engaged in residential real estate brokerages across the United States.

#### **3. What are multiple listing services?**

A multiple listing service (or MLS) is a joint venture among competing brokers to facilitate the publishing and sharing of information about homes for sale in a geographic area. The membership of an MLS is generally comprised of nearly all residential real estate brokers and their affiliated agents in an MLS’s service area. In each area an MLS serves, the MLS will include or “list” the vast majority of homes that are for sale through a residential real estate broker in that area. In most areas, the local MLS provides the most up-to-date, accurate, and comprehensive compilation of the area’s home listings.

#### **4. How does NAR issue and enforce these rules, policies, and practices?**

NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set forth annually in the *Handbook on Multiple Listing Policy* (“Handbook”). Under the terms of the Handbook, affiliated REALTOR® associations and MLSs “must conform their governing documents to the mandatory MLS policies established by [NAR’s] Board of Directors to ensure continued status as member boards and to ensure coverage under the master professional liability insurance program.”

NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook’s rules, policies, and practices as well as the rules, policies, and practices set forth in NAR’s Code of Ethics. NAR’s Code of Ethics states that “[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership” in NAR.

#### **5. How do these rules, policies and practices violate the antitrust laws?**

NAR’s real estate broker members are direct competitors for the provision of listing broker and buyer broker services. NAR’s and its affiliated MLSs’ adoption and enforcement of these rules, policies, and practices reflect concerted action between horizontal competitors and constitute agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and lower quality service for American home buyers and sellers. The Division has alleged that these agreements individually and collectively unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

### **The Alleged Unlawful Agreements**

*NAR’s “Commission-Concealment Rules”*

#### **6. What are the “Commission-Concealment Rules”?**

NAR’s Commission-Concealment Rules recommend that MLSs prohibit disclosing to prospective buyers the total commission offered to buyer brokers. All or nearly all of NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property – a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays – MLSs conceal this fee from home buyers.

#### **7. What is the alleged anticompetitive effect of the “Commission-Concealment Rules”?**

NAR’s Commission-Concealment Rules relieve buyer brokers from the necessity of competing against each other by offering rebates or offering to accept lower commissions. These rules also make home buyers both less likely and less able to negotiate a discount or rebate off the offered

commission. NAR's Commission-Concealment rules encourage and perpetuate the setting of persistently high commission offers by sellers and their listing agents. The result is higher prices for buyer broker services.

#### **8. Can the “Commission-Concealment Rules” lead to other anticompetitive effects?**

Yes. Because of the Commission-Concealment Rules, buyer brokers may steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When buyers can't see commission offers, they can't detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having buyers steered away from a property is also a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services.

*NAR's “Free-Service Rule”*

#### **9. What is the “Free-Service Rule”?**

NAR's Free-Services Rule allows buyer brokers to mislead buyers into thinking the buyer broker's services are free and hiding the fact that buyers have a stake in what their buyer brokers are being paid.

#### **10. Why is the “Free-Service Rule” allegedly anticompetitive?**

Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If buyers are told that buyer broker services are “free,” buyers are less likely to think to negotiate a lower buyer broker commission or to view buyer broker rebate offers as attractive. In these ways, NAR's Free-Service Rule likely leads to higher prices for services provided by buyer brokers.

*NAR's Commission-Filter Rules and Practices*

#### **11. What are NAR's Commission-Filter Rules and Practices?**

NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria.

For example, buyer brokers or agents may use an MLS's software to filter out any listing where buyer broker will receive less than 2.5% commission on the home sale. The buyer broker would then provide to its home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

## **12. Why are NAR's Commission-Filter Rules and Practices allegedly anticompetitive?**

NAR's Commission-Filter Rules and Practices are anticompetitive because they facilitate steering by helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. The practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of home buyers.

*NAR's Lockbox Policy*

## **13. What is NAR's Lockbox Policy?**

Lockboxes hold the keys to a house to allow brokers and potential home buyers to access homes for sale, with permission from the selling home owner, while continuing to keep the homes secure. Such lockboxes are access by a real estate broker using a numerical code or digital Bluetooth® 'key' enabling the real estate broker to show buyer homes that are listed for sale.

NAR and its members have adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of NAR and subscribe to the NAR-affiliated MLS. Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes.

## **14. How does NAR's Lockbox Policy allegedly impact competition?**

Because only real estate brokers that are members of NAR and subscribe to the NAR-affiliated MLS are permitted access to lockboxes, this policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential home buyers. This lessens competition for buyer broker services as real estate brokers that are not members of NAR cannot access lockboxes and show properties to their clients.

## **Terms of the Settlement**

### **15. How does the proposed settlement with NAR resolve the Division's concerns?**

The proposed settlement with NAR requires NAR to repeal, eliminate or modify its rules, practices and policies that the Division alleges violate antitrust law. Under the terms of the settlement, memorialized in the proposed Final Judgment, NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

- a. Prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;
- b. Permits or requires MLS Participants, including buyer brokers, to represent or suggest that their services are free or available to a client at not cost to the client;

- c. Permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer broker or the name of the brokerage or agent; or
- d. Prohibits, discourages or recommends against the eligibility of any licensed real estate agent or broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

**16. How long will the Final Judgment remain in place?**

Unless the court grants an extension, the Final Judgment will be in place for 7 years from the date of its entry, except that after 5 years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the court and NAR that the continuation of the Final Judgment no longer is necessary in the public interest.

**17. What happens now that the Division has filed a complaint and proposed settlement with the court?**

NAR has agreed to abide by and comply with the provisions of the proposed Final Judgment, pending the Court's entry of the proposed Final Judgment. The proposed settlement will be published in the Federal Register as required by the Antitrust Procedures and Penalties Act. At the conclusion of the 60-day comment period, the court may enter the proposed final judgment upon a finding that it serves the public interest.

**18. Where can comments regarding the proposed Final Judgment be sent to?**

Any person may submit written comments regarding the proposed final judgment within 60 days of its publication to the Chief of the Office of Decree Enforcement and Compliance, Antitrust Division, U.S. Department of Justice, 950 Pennsylvania Ave., NW., Washington, DC 20530.

**19. What impact, if any, does this settlement have on any pending private lawsuits against NAR?**

This settlement addresses and resolves the Division's concerns with regards to the conduct set forth in the complaint. While the Division has previously filed statements of interest in two pending private litigations involving NAR, this settlement has no impact on those or any other private lawsuits to which NAR is a party.