



WHITE PAPER

NAR Multiple Listing Policy Statement 7.42 and “MLS of Choice”

Introduction and Purpose:

The National Association of REALTORS® (NAR) is contemplating a revision to existing policy that currently permits Multiple Listing Services (MLS) to require subscription in the MLS in the following two ways: (1) every agent within an office of a participating broker, or (2) every branch office (and all agents licensed therein) within a brokerage serving the market.

The Council of Multiple Listing Services (CMLS) invited feedback from its members and prepared this White Paper to facilitate discussion about NAR’s proposed policy revision and the options that may be available to implement it. This White Paper begins with a discussion of NAR’s current policy, discusses the goals along with the foreseeable consequences of revising the policy, and concludes with three policy alternatives. It is not CMLS’s intent to endorse any of the alternatives but rather to provide insight into this important issue.

A. Current policy.

The existing policy, in place since 2002, is reflected in NAR Multiple Listing Policy Statement 7.42: Jurisdiction of Association Multiple Listing Services (Section 6 of the NAR Handbook on MLS Policy).

NAR Policy Statement 7.42 is stated in full below:

The jurisdiction of multiple listing services owned and operated by associations of REALTORS® is not limited to the jurisdiction of the parent association(s) of REALTORS®. Rather, associations are encouraged to establish multiple listing services that encompass natural market areas and to periodically reexamine such boundaries to ensure that they encompass the relevant market area. While associations are encouraged to work cooperatively to establish market area multiple listing services, the absence of such an agreement shall not preclude any association from establishing and maintaining a multiple listing service whose territory exceeds that of the parent association. Where the territory of an MLS exceeds that of the parent association(s), the authority of the MLS to require offices of a participant or a participant’s firm to participate in the MLS is limited to offices located within the jurisdiction of the association(s) of REALTORS® that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement. MLSs may, as a matter of local determination, require that each of a firm’s offices located within the jurisdiction of the association(s) that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement participate in the MLS if any office of that firm participates in that MLS.



NAR Policy Statement 7.43 provides a corresponding rule for the collection of MLS fees from all affiliated licensees:

Recurring MLS fees, dues, and charges may be based upon the total number of real estate brokers, sales licensees, and licensed or certified real estate appraisers affiliated with or employed by an MLS participant when related to the operation of a computerized MLS system that provides information and services in addition to the compilation of current listing information.

However, an MLS participant may not be assessed any charges or subscription fees for printed MLS sheets/cards/books with respect to any individual who is engaged solely and exclusively in a specialty of the real estate business separate and apart from listing, selling, leasing, or appraising the type of properties which are required to be filed with the MLS.

Both of these Policy Statements would require revision to create an “MLS of Choice” model.

B. Concerns raised with the current policy.

Brokers and agents have raised several concerns with the current policy:

- Agents are required to participate in, and pay for, MLSs that they do not use.
- Brokers are creating costly workarounds, including setting up dummy offices or addresses for their agents outside of the MLS’s territory.
- Brokers and agents are incurring additional MLS subscription fees than they might otherwise choose to pay.
- MLSs should earn their customers’ business.
- Competition among MLSs may be reduced in areas served by multiple MLSs where agents are likely to choose one over another, if given the option.

C. Status of proposed revisions.

NAR has thus far only invited feedback on potential solutions. At the mid-year meeting, NAR provided the following statement describing the intent in considering a revised policy:

The idea is to empower brokers and agents with a nimble MLS service structure that allows for innovation and competition amongst MLSs. The new concept would allow agents a choice in subscribing to any MLS in which their broker is a participant, and it would require MLSs to only assess Brokers a fee based on their affiliated licensees who chose to subscribe to the MLS. However, MLSs will have the discretion to assess fees to agents affiliated with a participating office jurisdiction, if those agents have not



subscribed to another REALTOR® MLS. This would result in a value-driven service structure that encourages competition amongst MLSs, responds to the evolving business needs and varied structures of brokerage firms, and, therefore, is in the best interest of brokers and their affiliated agents.

No proposed policy or policy language have yet been circulated for consideration. The expectation is that draft language will be prepared for this fall's NAR Annual Meeting.

D. CMLS analysis.

CMLS's discussions with its members identified a number of issues to consider about this policy.

1. Serving Clients' Best Interests

CMLS agrees that MLSs should seek to increase their value proposition to agents and brokers whenever possible. A vital component of an MLS's value proposition is the efficiency of the market that is created for brokers, agents, and consumers. To promote the interests of brokers and agents, policies should better enable REALTORS to serve the best interests of their clients. How might clients of agents opting out of an MLS be affected? This is an essential issue to evaluate in each market considering modifications to the participation policy.

Many states licensure laws require agents to promote their clients' best interests; some states specifically require selling agents to obtain broad marketing while other states require that agents obtain the best overall terms for their clients. NAR's Standard of Practice requires, "the duty to cooperate established in Article 3 relates to the obligation to share information on listed property and to make the property available to other brokers for showing to prospective purchasers/tenants when it is in the best interests of sellers/landlords," and when REALTORS® create opinions of value they must "have access to the information and resources necessary to formulate an accurate opinion."

MLS participation is widely recognized as a primary means to serve clients' interests in obtaining the broadest marketing of a home and the most trusted search functions to find a home. For these reasons, MLSs have prioritized policies that promote consumers' best interests. For example, because MLSs are generally the tool to create the broadest distribution and marketing of a listing, some MLSs permit agents to not list homes in the MLS but only if the client expressly agrees in writing to an alternative promotion strategy. Many brokerages, associations, and MLSs have implemented legal disclosures for those listings not being submitted to MLSs serving the applicable market area (a/k/a "pocket listings") because those listings typically will not receive as wide promotion.

Changes to the NAR policy therefore should contemplate the ability to disseminate and access market information so that consumers' best interests are served.



2. Cooperation and Compensation

Any reduction in MLS participation necessarily means that cooperating among agents will change. How might an MLS of Choice policy impact access to the listings of agents opting out of MLSs? Listings that would have been submitted to multiple MLSs under the current policy might only be submitted to one MLS if the policy is modified. How might this impact the duty of brokers to cooperate with their listing information?

In some markets, in order to list a home for sale with optimal promotion, or to efficiently find a home for a buyer, agents must access several MLSs that cover overlapping geographies. That is, in some areas, agents must list a home on several MLSs and, when searching for a home, search several MLSs. Does an agent comply with the obligation to their clients if the agent chooses to access only one MLS and, as a result, cannot promote listings or search listings that represent the full set of listings in the area?

Policy changes also may diminish the offer of compensation in the marketplace. For example, consider a listing that was submitted under the current policy to both a large, regional MLS with 10,000 subscribers as well as to a small, resort-town MLS with 200 subscribers. This listing would extend an offer of compensation and listing access to all 10,200 subscribers in the marketplace. Under an MLS of Choice policy, with no data share or offer of compensation extended between MLSs, a listing submitted to only the resort-town MLS would result in the vast majority of the market losing the offer of compensation as well as access to that listing. Does this ultimately serve the best interests of consumers in that market? Would this comply with NAR's Standard of Practice? Would this comply with the duty to promote the client's best interest in accordance with state law?

NAR also may consider additional aspects of the MLS-participation policy, such as the related policy on the options for agents to calculate shared compensation (i.e., percentage of gross price, fixed dollar amount, etc.). Some MLSs today allow compensation based on net sales price while their neighboring MLSs in the same market allow compensation only based on gross sales price, with other variations on the calculation of compensation. For a change in the MLS-participation policy to facilitate maximum agent flexibility, it should also address offers of compensation and related discrepancies across MLSs. CMLS has not addressed this issue in the draft policy language options discussed in this White Paper.

3. Impact of Data Sharing

Data-sharing agreements among MLSs impact their subscribers' ability to have a true MLS of Choice while at the same time serving the best interests of their clients. Some MLS data-share arrangements, such as those in many areas of Southern California, result in listings automatically appearing in all participating MLSs. Offers of compensation are also extended among all those MLSs' subscribers. In markets like this, an MLS of Choice policy would not conflict with the duty of agents to best serve their clients or affect the offers of cooperation and compensation among brokers. While some MLSs have data-sharing agreements in overlapping regions, this is not the case for most MLSs.



A revised NAR policy on MLS of Choice should uphold the duty of cooperation and compensation in markets that are not sharing data or extending offers of compensation.

4. Access Management

Current implementations of this policy generally require participation in the MLS in the following two ways: (1) every agent within an office, or (2) every branch office (and all agents licensed therein) within a brokerage serving the market.

Many MLSs believe this practice simplifies enforcement activities related to unauthorized access, saving the MLS on technical and staffing costs. However, this frequently results in brokerages creating costly workarounds. Some brokerages spend time and money setting up dummy offices or addresses for their agents outside of the MLS's territory. These brokerages might have multiple suite numbers within the same physical office space that correspond to the dummy branch offices they have created to work-around their MLS's participation policy. If agents or brokers are currently sharing login information or access to data feeds within these offices, an MLS of Choice Policy would likely have no impact on their existing unauthorized access. However, MLSs might see an increase in unauthorized access for brokerages that have not pursued this workaround.

It is recommended that if an MLS of Choice Policy is implemented, MLSs seek certification from the brokerage that unauthorized access is not being allowed. This may be accomplished through a form to be completed by the broker, along with a corresponding fine policy. MLSs should consider other options and be permitted the flexibility to implement locally specific rules.

5. MLS and Association Revenue and Billing

It is possible that MLSs' and associations' revenue will initially be negatively impacted by an MLS of Choice Policy. New agents that do not yet have clients might delay joining the MLS and association until they have a transaction in sight. Part-time agents with infrequent transactions might choose to not maintain their participation on a consistent basis. Buyers' agents may choose to utilize brokerage back-office data feeds or IDX/VOW sites in lieu of subscribing to an MLS.

As many MLS subscribers join the association only to gain MLS access, a decrease in MLS subscriptions might also result in a decrease or delay in association membership. Additionally, many MLSs bill subscribers on a wholesale basis, meaning the MLS bills its participating associations, and then the associations bill their members directly, based on a price set by each association. If not all association members were required to subscribe to the MLS, then associations would need to modify their member data and billing practices to account for a more complex fee calculation – each association would need to bill only for those members that selected the MLS.

The net effect is that MLS and association services will be paid primarily by producing agents as opposed to being subsidized by those with infrequent use. This could result in MLSs and associations raising their fees to cover losses due to diminished membership.



E. Draft Policy Options and Their Implications

The following provides a set of policy options based on the above considerations. These are provided for the purpose of providing concrete options for the industry to consider.

Option 1. “MLS of Choice” Policy – Based on Licensees’ Certification of Non-Use

Draft Policy Language for 7.42:

“An MLS must allow a Licensee affiliated with a participating REALTOR® firm to not subscribe if the REALTOR® firm or Licensee certifies in writing that the Licensee is engaged solely in activities that do not require use of the MLS’s systems or data.”

Draft Policy Revisions for Statement 7.43:

Recurring MLS fees, dues, and charges may be based upon the total number of real estate brokers, sales licensees, and licensed or certified real estate appraisers affiliated with or employed by an MLS participant who choose to access the MLS system or data.

Advantages Over Existing Policy:

- Allows MLSs to permit the option to enroll in only one MLS, as long as brokers and licensees certify they are not using the MLS’s systems or data in any way, which could include using the data through a back-office feed or other feed
- Reduces costs to Licensees who would otherwise pay for MLSs that they do not use
- Reduces brokerages’ desire to create “dummy” offices or suites to reduce costs
- Reduces administrative costs to brokers and agents
- Flexibility to choose any MLS, regardless of location
- Leaves flexibility for MLSs to implement custom policies and procedures to verify compliance with rules governing system access (e.g., verification that no agents have access to an MLS to which they do not subscribe).
- Empowers brokers and agents with a structure that allows for innovation and competition amongst MLSs

Disadvantages Over Existing Policy:



- May reduce agents' ability to promote or search for listings where multiple MLSs cover the same area
- Decreased income to MLSs and associations; may mean MLSs increase fees to make up for declines in revenue
- Risk of unauthorized use/login sharing
- Reduced participation in cooperation and compensation

Option 2. "MLS of Choice" Policy – Based on Clients' Best Interests

Draft Policy Language for Statement 7.42:

"An MLS must allow a Licensee affiliated with a participating REALTOR® firm to not subscribe to the MLS if the REALTOR® firm concludes that the Licensee's subscription is not necessary to serve clients' best interests."

Draft Policy Revisions for Statement 7.43:

Recurring MLS fees, dues, and charges may be based upon the total number of real estate brokers, sales licensees, and licensed or certified real estate appraisers affiliated with or employed by an MLS participant who choose to access the MLS system.

Advantages Over Existing Policy:

- MLSs would be required to permit agents to enroll in only one MLS, but only if a broker concludes that "opting out" of certain MLSs still serves clients' interests
- Reduces administrative costs to brokers and agents
- Reduces brokerages' desire to create "dummy" offices or suites to reduce costs
- Flexibility to choose any MLS, regardless of location
- Leaves flexibility for MLSs to implement custom policies and procedures to verify compliance with the policy and rules governing system access (e.g., verification that no agents have access to an MLS's system to which they do not subscribe)

Disadvantages Over Existing Policy:



- May reduce agents' ability to promote or search for listings where multiple MLSs cover the same area
- Decreased income to MLSs and associations; may mean MLSs increase fees to make up for declines in revenue
- Risk of unauthorized use/login sharing, or access to data through other data feeds such as back-office feeds or IDX
- Reduced participation in cooperation and compensation

Option 3. No change.

This would leave the policy unchanged.

Advantages Over Modifying the Policy:

- Maintains status quo
- Continues to promote widest participation in MLSs
- Producing and non-producing agents pay for MLS system
- MLSs' and associations' membership and budgets remain stable

Disadvantages to Existing Policy:

- See above - Section B 'Concerns raised with the current policy'
