

August 2024 Statewide Forms: Changes and Practice Tips

This article is a guide for Maryland REALTORS® members to understand the revisions to existing forms and new forms which will go into effect on August 14, 2024.

The changes reviewed here mainly address one aspect of a real estate transaction: **Broker Compensation**. Broker Compensation has been put in the spotlight following the settlement of the NAR lawsuit and the eventual removal of offers of cooperative compensation from Bright MLS. In response, Maryland REALTORS® has updated existing forms and created new forms to clarify broker compensation and ensure a smooth transition when offers of cooperative compensation are removed from Bright MLS on August 14, 2024.

As always, brokers and office managers seeking additional support are welcome to contact our Legal Affairs Department attorneys to schedule Statewide Forms Update sessions for their agents. Association attorneys are also available via our Legal Hotline service to answer questions about all of our Statewide Forms.

REVISED FORMS

Exclusive Buyer/Tenant Residential Brokerage Agreement

All changes to the Exclusive Buyer/Tenant Residential Brokerage Agreement take place in Paragraph 8 “Broker’s Compensation”. The first change was made to the “Notice” Paragraph where the following language has been added **“Each real estate brokerage independently sets their own commission rates. Commission rates are negotiable between the Buyer and Broker.”** The purpose for this addition is to explain to the client, in plain language, that commissions are not set by law, rather, each broker may set their own commission rate that may be negotiable by the client.

The next change was made to the “Compensation to be Paid by Buyer” Paragraph where the buyer agrees to how they will compensate their broker. Previously, this was a blank paragraph where any form or agreement for compensation could be stated. Our Maryland REALTORS® Legal Hotline has received several calls over the years from agents who are either confused as to what they should write in this blank paragraph or reports of agents who fill in the blank paragraph improperly (for example writing “Per MLS”). Additionally, recently passed SB 542 requires compensation in brokerage agreements to be stated as a percent of the sales price, a percent of the sales price plus a fee or a flat fee. Therefore, we have removed the blank compensation paragraph and now require the parties to agree to compensation in one of three ways: a percent of the sales price, a percent of the sales price plus a fee or a flat fee.

There have also been additions to Paragraph 8B “Compensation Paid By Listing Broker or Seller”. The substance of this Paragraph remains the same, however, we added language that clearly explains to the buyer their responsibility to pay compensation to their broker when the offer of cooperative compensation from a seller is less than, equal to, or greater than the amount of compensation that the buyer has agreed to pay their broker. Per the NAR settlement agreement, we have added a sentence noting that the buyer’s broker may not receive any compensation in addition to the compensation that the buyer has agreed to pay to buyer’s broker. Additionally, we have added language that explains to a buyer that if the offer of cooperative compensation from a seller is less than the amount of compensation the buyer has agreed to pay their broker, the buyer may include with their offer a request that the seller increase their offer of compensation. This request can be made through the new Buyer Request For Seller’s Compensation of Buyer’s Broker Addendum.

The final change to the Exclusive Buyer/Tenant Residential Brokerage Agreement was the addition of a buyer’s initial line at the end of the “Broker’s Compensation” Paragraph whereby the buyer acknowledges that they have read and understand the entirety of the “Broker’s Compensation” Paragraph.

*Practice Tip – Please note that the parties should only check off **one** option for compensation in the revised “Compensation to be Paid by Buyer” Paragraph.*

Exclusive Right to Sell Residential Brokerage Agreement

The changes made towards the beginning of the Exclusive Right to Sell Residential Brokerage Agreement were made in response to Bright MLS’ recent policy changes, notably, the required MLS Disclosures and Residential Seller/Landlord Options form. In Paragraph 7(a), we added a sentence which instructs the seller that the seller and Broker must complete Bright’s new MLS Disclosures and Residential Seller/Landlord form. This form states when the property will be entered into the MLS and in what status. We have also added an “Office Exclusive” header to Paragraph 7(b) to clarify to our members and their clients that this paragraph contains disclosures about an Office Exclusive listing. We have revised the “Coming Soon” paragraph to comply with Bright’s recent rule change. Previously, Bright required all Coming Soon listings to enter an expected “on market” date, which could be no later than 21 days from when the listing was submitted to the MLS. Bright has now removed the 21-day restriction. Thus, the reference to the 21-day rule has been removed from the “Coming Soon” Paragraph. For additional clarity, we deleted the word “soon” and replaced it with “in the future” to avoid misinterpretation of what constitutes “soon”. To wrap up revisions caused by Bright policy changes, we have added in a “Seller Concession” Paragraph. Bright has created a new seller concession field on the MLS whereby the seller can indicate whether they are willing to consider requests for seller concessions by a buyer. The language that we have added mirrors the new Bright MLS field. The seller will fill out this paragraph, and the listing agent can easily transfer its contents to the new field on the MLS.

Many of the changes made to the “Broker’s Compensation” Paragraph mirror the changes made to the Exclusive Buyer/Tenant Residential Brokerage Agreement. In the “Broker’s Compensation” Paragraph, the “Notice” Paragraph now includes new language explaining that brokers independently set their own commission rates and commission rates are negotiable. The blank compensation paragraph has also been removed and replaced with three possible options for compensation: a percent of the sales price, a percent of the sales price plus a fee or a flat fee.

One of the changes made to the Exclusive Right to Sell Residential Brokerage Agreement that differs from the Exclusive Buyer/Tenant Residential Brokerage Agreement comes in the “Authority To Cooperate With And Compensate Other Brokers” Paragraph. There have been three major changes to this Paragraph. First, we have defined what “cooperate” means in terms of a real estate transaction, as many consumers do not understand what “cooperation” means and/or how it differs from “compensation.” Second, this Paragraph previously referenced the seller’s broker’s cooperation with and compensation of “buyer **agents**.” This reference to “buyer **agents**” has been replaced with “Buyer Brokers” as the seller’s broker cooperates with and compensates the buyer’s broker – **not the buyer’s agent**. Third, we have replaced the reference to “fee sharing” between brokers with the more appropriate term “compensation”.

The next change to the Exclusive Right to Sell Residential Brokerage Agreement was the addition of a paragraph at the end of the “Authority To Cooperate With And Compensate Other Brokers” Paragraph which states that the broker and seller must execute the “Listing Broker’s Offer of Cooperative Compensation” agreement. The “Listing Broker’s Offer of Cooperative Compensation” agreement is a new form whereby the listing broker and buyer’s broker or subagent agree to the amount of cooperative compensation that will be paid by the listing broker.

Finally, we have added a seller’s initial line at the end of the “Broker’s Compensation” Paragraph and the “Authority To Cooperate With And Compensate Other Brokers” Paragraph whereby the seller acknowledges that they have read and understand the entirety of both Paragraphs.

*** Please note that all changes to the Exclusive Right to Sell Residential Brokerage Agreement will also be made to the Exclusive Right to Sell Unimproved Land Brokerage Agreement and the Exclusive Right to Lease Residential Brokerage Agreement. ***

Practice Tip – Per Bright MLS’ rules, the new MLS Disclosures and Residential Seller/Landlord Options form must be completed at the same time as the Exclusive Right to Sell Residential Brokerage Agreement.

Residential Contract of Sale

The new Buyer Request For Seller’s Compensation of Buyer’s Broker Addendum has been added to the list of Addenda in Paragraph 11.

Seller Contribution Addendum

With offers of cooperative compensation being removed from the MLS, it is going to be crucial that the parties make it very clear to lenders what seller/listing broker compensation is being used to compensate the buyer's broker and what compensation is being used for regular closing costs. Lenders treat a seller's contribution to regular closing costs as an Interested Party Contribution ("IPC") which counts towards a lender's IPC cap. However, lenders typically do not consider a seller's or listing broker's compensation of a buyer's broker as an IPC, and thus, such compensation is not counted towards the lender's IPC cap. To make this distinction clear, we have added a disclaimer at the top of the Seller Contribution Addendum to note that any compensation of the buyer's broker should not be included in the Addendum. Rather, the parties must memorialize any agreement to compensate the buyer's broker in the Buyer Request for Seller Compensation of Buyer's Broker Addendum or the Listing Broker's Offer of Cooperative Compensation agreement. By including this disclaimer, the parties and lender now know that any compensation of the buyer's broker, which will not count as an IPC, can be found in those other two forms and not in the Seller Contribution Addendum.

NEW FORM

Buyer Request For Seller's Compensation of Buyer's Broker Addendum

This new Addendum may be used in one specific scenario: when the seller's offer of cooperative compensation to the buyer's broker is less than the amount of compensation the buyer has agreed to pay their broker. In the Exclusive Buyer/Tenant Residential Brokerage Agreement, the buyer agrees to compensate their broker in a certain amount. This amount is credited against any offer of cooperative compensation. Thus, if the offer of cooperative compensation is greater than or equal to the amount the buyer has agreed to pay their broker, the buyer will not have to pay anything. However, if the offer of cooperative compensation is less, the buyer will be responsible for paying their broker the difference. Therefore, a buyer who does not want to or cannot afford to pay their broker can include this new Addendum with their offer to request that the seller increase their offer of cooperative compensation to match the amount of compensation that the buyer has agreed to pay their broker. If the seller agrees, the buyer will not be responsible for paying compensation to their broker.

Practice Tip – Although most lenders do not consider compensation of a buyer's broker to be an IPC, the Buyer should contact their lender for confirmation.

Listing Broker's Offer of Cooperative Compensation

Per the settlement agreement, offers of cooperative compensation are being removed from Bright MLS. Now, listing brokers need a different way to memorialize their agreement to provide cooperative compensation to a buyer broker or

subagent. Thus, we have created the Listing Broker's Offer of Cooperative Compensation agreement. In this agreement, the listing broker stipulates how much cooperative compensation they are offering to a buyer broker or subagent who produces or assists a buyer that leads to a sale or exchange of property.

Practice Tip – As noted on the top of the agreement, this agreement should never be uploaded to the MLS because it would be a violation of the NAR settlement agreement.

Practice Tip – The amount of offered cooperative compensation must mirror the amount of cooperative compensation that the seller has authorized in the Exclusive Right to Sell Residential Brokerage Agreement.

Practice Tip – This agreement is not a part of the Contract of Sale. Rather, it is an agreement between the listing broker and a buyer's broker or subagent.