



## **CVR MLS COMPENSATION TOOLKIT**

*Effective October 2, 2023*

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## **Tab 1**

### **Why are MLSs changing the Cooperative Compensation Rule?**

There are several reasons why MLSs across the county, including CVR MLS, are changing the cooperative compensation rule. The current rule states that for any listing in the MLS, a listing agent must offer compensation to the buyer agent—that's called cooperative compensation. The amount of the cooperative compensation being offered to the buyer agent cannot be set by NAR or by any MLS—that has always been the prerogative of the listing agent. In fact, it's actually an antitrust violation if any MLS sets the amount of cooperative compensation. Until October 1, 2023, the minimum offer of cooperative compensation in CVR MLS is \$1. That means a listing agent can offer a minimum of \$1 to a buyer agent even though most listing agents and sellers want to offer more compensation to a buyer agent and typically do so.

What's changing at CVR MLS? Effective October 2, 2023, there will no longer be a \$1 minimum of cooperative compensation that must be offered to a buyer agent in the MLS. In other words, the minimum amount of cooperative compensation is being changed from \$1 to zero. Nevertheless, this change does not prevent a listing agent and their seller client from continuing to offer higher cooperative compensation to a buyer agent. So, CVR MLS participants can continue to make blanket offers of cooperative compensation to every buyer agent through the MLS as they do now.

Why is CVR MLS making this small change? The change is for transparency and clarity in any offer of cooperative compensation through the MLS. The amount of cooperative compensation has never been specified by CVR MLS. Recently, NAR announced that entering \$0 in the cooperative compensation field is consistent with NAR policy, so it is prudent for CVR MLS to make this change. Many MLSs nationwide have made this change, including Bright MLS which serves the majority of Northern Virginia areas. This is an industry-wide movement which CVR MLS fully supports.

What's not changing? The CVR MLS Purchase Agreement you use today will continue to be used after October 2. The Buyer Brokerage Agreement you use today will continue to be used after October 2. As a listing agent, you will still discuss the amount of cooperative compensation that the seller wants to offer a buyer agent in the MLS, and you will continue to enter that amount into appropriate field in the MLS system and in the listing agreement. Note, any references to mandatory cooperative compensation will be removed from all CVR MLS forms.

For further information about buyer agent commissions, see Tabs 2 through 5 of the CVR MLS Compensation Toolkit.

## Tab 2

### Yes, Buyer Agent Commissions are Negotiable!

For years, REALTORS® have been cautioned and concerned about negotiating commissions. And rightly so. One wrong conversation could lead to an ethics violation. But in most instances, commissions are negotiable. Nothing has changed but the spotlight is on commissions--particularly how a buyer agent is compensated from the listing firm.

Tab 3 in this Toolkit reviews certain provisions of the REALTOR® Code of Ethics, so you should review that section for specific information on the REALTOR® Code of Ethics. But what are the general perimeters in negotiating buyer agent commissions?

One way to negotiate your buyer agent compensation is to negotiate directly with the listing firm and request additional compensation prior to an offer being submitted to the seller. This does not violate the REALTOR® Code of Ethics (see Tab 3 for explanation). Specifically, Article 3, Standard of Practice 3-1 of the REALTOR® Code of Ethics requires REALTORS® to negotiate potential compensation adjustments prior to submitting an offer. Please know that you **cannot** condition an offer to purchase on additional compensation. The REALTOR® Code of Ethics still requires you to promote the interests of the client, which is paramount to your compensation. So, it is okay to ask for the compensation, but you cannot condition the offer or fail to submit an offer because you were denied additional compensation.

The listing firm should consider the benefits to be gained by offering more compensation to the buyer agent, but has no obligation to increase the compensation to the buyer agent. If there is an increase in the compensation, then best practice is to use the CVR MLS Modification of Compensation Agreement to memorialize any change in the compensation to the buyer agent. While it is not unethical to ask for additional compensation after the contract is ratified, there is little incentive for the listing firm to grant your request at such a later date.

Another way that your buyer agent compensation can be negotiated is by your buyer client. Specifically, a **buyer** client may ask the **seller** directly (through the Purchase Agreement) to pay some or all of your buyer agent compensation. This does not violate the REALTOR® Code of Ethics as it is the buyer, not the buyer agent, making the request. Also, the REALTOR® Code of Ethics does not prevent a buyer agent from informing the buyer of their option to ask a seller to pay some or all of the buyer agent compensation. But a buyer agent must continue to promote the interest of their buyer client if the client elects not to request the seller to pay some or all of the buyer agent compensation.

### Tab 3

#### REALTOR® Code of Ethics

Even with the changing landscape involving cooperative compensation to buyer agents, REALTORS® remain bound by the REALTOR® Code of Ethics to further their clients' best interests, including showing homes that meet buyers' needs regardless of cooperative compensation offered in the MLS.

Article 1 of the REALTOR® Code of Ethics sets out the basic principle that REALTORS® pledge themselves to protect and promote the interests of their clients and Article 3 states that REALTORS® must cooperate with other REALTORS®. When it comes to cooperative compensation in the MLS, Article 16, Standards of Practice (SOP) 16 and 17 are very instructive but may even appear contradictory, so let's review the key points.

Article 16 SOP 16-16 states REALTORS® working as buyer agents "shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation" nor "make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation." Article 16 SOP 16-17 states REALTORS® acting as buyer agents "shall not attempt to extend a listing broker's offer of cooperation and/or compensation to other brokers without the consent of the listing broker."

As a way to understand these SOPs, NAR offers case interpretations. In a case interpretation for SOP 16-17, it was decided that a **buyer** can ask the seller directly (through the Purchase Agreement) to pay some or all of their buyer agent's compensation and that does not violate the REALTOR® Code of Ethics. Thus, the distinguishing factor is that a **buyer**, as opposed to a buyer agent, is permitted to make the request to a seller. Further, it is not unethical for a buyer agent to advise their buyer of buyer's option to request that the seller pay some or all of the buyer agent's compensation. Regardless, a buyer agent must still continue to promote the interest of their buyer client even if the client elects not to request the seller to pay some or all of the buyer agent's compensation.

## FAQs

**Q: With the change to the cooperative compensation rule, can a listing agent still offer compensation to buyer agents in the MLS?**

A: Yes. The change does not affect the listing firm's ability and right to offer cooperative compensation to buyer agents. The MLS remains an efficient, impartial system for offers of cooperative compensation to all MLS participants. Listing agents, in consultation with their seller clients, still retain the prerogative to set the amount of cooperative compensation offered to buyer agents as a way to incentivize both buyers and buyer agents. Listing agents should explain to their seller clients the amount of compensation, if any, offered to a cooperating buyer agent is the seller's decision.

**Q: Do I still need a buyer brokerage agreement to represent a buyer client?**

A: Yes. Virginia law remains the same. In fact, it's probably more important than ever. You must execute a buyer brokerage agreement with your buyer client at the time you commence a brokerage relationship with the client. Best practice is to have your client sign the buyer brokerage agreement before showing them any properties so that your representation and compensation are clearly established. This is the best way to protect yourself.

**Q: If a seller does not offer any cooperative compensation in the MLS, or the compensation being offered only covers a part of the compensation due to the buyer agent under the buyer brokerage agreement, who is responsible for paying the amount due to the buyer agent?**

A: If you use the standard form CVR MLS Exclusive Right to Represent Buyer Agreement (i.e. the buyer brokerage agreement), then this Agreement states the buyer is responsible for paying any compensation that is due to the buyer agent if the listing firm does not offer any or insufficient cooperative compensation.

**Q: Can a buyer agent negotiate directly with the listing firm and request additional compensation prior to an offer being submitted?**

A: Yes. The listing firm should consider any benefits to be gained by offering more compensation to the buyer agent, but has no obligation to increase the compensation to the buyer agent. If there is an increase in the compensation, then best practice is to use the CVR MLS Modification of Compensation Agreement to memorialize any change in the compensation to the buyer agent.

**Q: Can I negotiate my buyer agent compensation with a listing firm before I have a buyer brokerage agreement?**

A: Yes, but it is not good practice. It is highly recommended that you execute a buyer brokerage agreement with your buyer client before negotiating any compensation from the listing firm. As noted previously, best practice is to have your client sign the buyer brokerage agreement before showing them any properties so that your representation and compensation are clearly established. This is the best way to protect yourself.

**Q: Can my buyer client ask the seller directly (through the Purchase Agreement) to pay some or all of my buyer agent compensation?**

A: Yes. The REALTOR® Code of Ethics does not prevent the buyer from asking the seller directly to pay some or all of your buyer agent compensation.

**Q: Can a buyer agent advise their buyer client of a buyer's option to request a seller to pay some or all of the buyer agent compensation?**

A: Yes. The REALTOR® Code of Ethics does not prevent a buyer agent from informing the buyer of their option to ask a seller to pay some or all of the buyer agent compensation. But a buyer agent still must continue to promote the interest of their buyer client even if the client elects not to request the seller to pay some or all of the buyer agent compensation.

**Q: Can a buyer finance any portion of the buyer brokerage compensation into their loan?**

A: No. At this time, FHA, VA, VHDA, etc. do not allow buyers to finance any portion of the buyer agent compensation.

**Q: Can my buyer client make their purchase offer contingent upon the seller agreeing to pay some or all of the buyer agent compensation?**

A: Yes. A buyer can make their own decision on which terms to include in their purchase offer. Importantly, a buyer agent may not suggest or require that the buyer make such a contingent offer—it has to be the sole decision of the buyer without prompting from the buyer agent.

**Q: What if a buyer instructs their buyer agent not to show them any properties for which the client will need to pay any portion of the compensation out of their own pocket at closing?**

A: So long as this instruction is at the direction of the buyer (and not recommended by the buyer agent), then there is no violation of the REALTOR® Code of Ethics. A buyer may determine which properties they want to pursue, and that includes not pursuing properties that do not offer cooperative compensation to buyer agents. Best practice is for the buyer agent to get this

instruction in writing from the buyer to ensure clarity and confirmation. As a reminder, pursuant to NAR policy, MLS participants may not search MLS listings by the amount of cooperative compensation offered to buyer agents.

**Q: If I entered into a standard buyer brokerage agreement with my buyer client, can I reduce the services I normally provide to a buyer if it looks like I won't be paid my full compensation?**

A: No. The REALTOR® Code of Ethics requires you to continue to promote the interests of your client whether or not you receive the full amount of your compensation. Additionally, a client could also assert a VREB violation for failing to provide the services of a standard agent through the closing date.

**Q: As a listing agent, can I require the buyer agent to show me a copy of their buyer brokerage agreement before negotiating any additional buyer agent compensation?**

A: No. The buyer agent (and buyer) has no obligation to show a listing agent their buyer brokerage agreement. If the buyer agent wants to show the listing agent the buyer brokerage agreement, then the buyer agent must obtain the consent of the buyer before doing so because the buyer brokerage agreement is confidential information.

**Q: As a buyer agent, can I require the listing agent to show me their listing agreement?**

A: No. The listing agent (and seller) have no obligation to show a buyer agent their listing agreement. If listing agent wants to show the buyer agent the listing agreement, the listing agent must obtain the consent of the seller before doing so because the listing agreement is confidential information.

**Q: Is the Buyer Brokerage Agreement changing as of October 2, 2023?**

A: No. There are no revisions to the Buyer Brokerage Agreement. Best practice is to have your client sign the Buyer Brokerage Agreement before showing them any properties so that your representation and compensation are clearly established. This is the best way to protect yourself.

**Q: Is the Purchase Agreement changing as of October 2, 2023?**

A: No. There are no revisions to the Purchase Agreement. See Tab 6 for a standard provision to use in the Purchase Agreement if your buyer clients seeks buyer agent compensation from the seller.

**Q: Is the Listing Agreement changing as of October 2, 2023?**

**A:** There will be no revisions to the Listing Agreement regarding the listing agent compensation and the amount to offer, if any, to a cooperating broker. But there will be one change to delete the reference as to buyer agent compensation not being negotiated in the Purchase Agreement. Be sure to have a conversation with your seller client on the amount of compensation, if any, they want to offer to the buyer agent through the MLS. Remember, there is no requirement that the seller offer any compensation to a buyer agent, but a buyer can direct their buyer agent not to show them any properties that do not contain compensation to their buyer agent.



## Tab 5

### **Tips in Discussing Your Buyer Agent Compensation with Buyers**

First, be sure to discuss your value with your buyer client—the experience and expertise you bring to the them as you guide them through the home buying process. This process can be daunting for many buyer clients, so your experience and expertise is critical to establishing and maintaining a favorable brokerage relationship.

Next, introduce the buyer brokerage agreement to your buyer client. Inform your client that Virginia law requires that you (and all licensed agents) execute a buyer brokerage agreement with a buyer client at the time you commence a brokerage relationship with the client. This gives you a great opportunity to review the buyer brokerage agreement with your client and discuss how you are paid.

Explain your firm's compensation policy. In other words, what amount do you get paid to represent a buyer client. Be sure this is inserted into the buyer brokerage agreement. Be sure to discuss that listings in the MLS are not required to offer cooperative compensation (i.e. buyer agent compensation).

If the cooperative compensation offered in the MLS is insufficient to pay the buyer agent compensation set forth in the buyer brokerage agreement, it is legal and ethical for a buyer agent to request additional compensation from the listing firm prior to the ratification of a Purchase Agreement. The listing firm should consider any benefits to be gained by offering more compensation, but has no obligation to increase the compensation to the buyer agent. If there is an increase in the compensation, then best practice is to use the CVR MLS Modification of Compensation Agreement to memorialize any change in the compensation to the buyer agent. Your buyer client may also request the seller to pay additional compensation to you as the buyer agent. This request should be set forth in the Purchase Agreement at the time an offer is presented to the seller. Note, as of the date of the publication of this Toolkit, a buyer may not finance any portion of the buyer brokerage compensation into a loan.

If the above actions still do not cover your buyer brokerage compensation set forth in the buyer brokerage agreement, then explain to your buyer that they are required to pay the difference at settlement, unless you waive that requirement (which you are not required to do). Be sure to instruct the closing attorney/settlement agent to collect the amount that is due to you from the buyer. The amount of the compensation should be added to the settlement statement/closing disclosure. Be sure to let the closing attorney/settlement agent know of your compensation that is due at the time you send the Purchase Agreement and other information to the closing attorney/settlement agent as you do not want the closing delayed because you failed to timely provide the information.

**Tab 6**

**Standard Clause to CVR MLS Purchase Agreement\***  
**(If a Buyer seeks buyer agent compensation from the Seller)**

[insert into Paragraph 23 or add as an addendum to the CVR MLS Purchase Agreement]

Seller agrees to pay Selling Broker the sum of \_\_\_\_% of the Purchase Price of the Property at settlement, which sum shall be credited towards the amount Purchaser is obligated to pay to Selling Broker pursuant to the buyer broker agreement between Purchaser and Selling Broker. The said sum is in addition to any amount the Listing Broker has offered to pay Selling Broker as cooperative compensation in the MLS.

\*This standard clause is applicable to the CVR MLS Purchase Agreement only and is not intended to be used with non-CVR MLS forms.