A Guide to Using the New NYSAR Statewide Forms (revised 8/20/2024)

NYSAR has published new forms that are compliant with the NAR settlement in the Sitzer/Burnett antitrust lawsuit. As you are aware, any time a licensee is working with a buyer, a written compensation agreement is required. NYSAR has amended two forms and developed three new forms for members to utilize in their real estate activities. This guide will help you to understand the changes and the proper way to fill out the forms. For the purposes of this guide, the term broker also applies to real estate licensees associated with the broker.

Exclusive Buyer Agency Compensation Agreement (f/k/a the Exclusive Right to Represent)-amended form

This agreement sets forth that the buyer's agent represents the buyer exclusively for all purchases made during the term of the agreement.

A. Compensation

The most significant change to the form is under the compensation section (see below). The compensation section now requires the buyer to initial and acknowledge the required disclosure "Compensation is not set by law or any Realtor® association or MLS and that compensation to BROKER is fully negotiable between the BUYER and the BROKER.".

The compensation section also includes amended language as to how the buyer's broker is to be compensated. The buyer's broker, or an associated licensee, will fill in the amount of compensation agreed to between the buyer and the buyer's broker as either a flat fee or percentage of the purchase price. The language in the compensation section authorizes the buyer's broker to first seek the agreed upon compensation from the seller of listing broker first. This can be accomplished by contacting the listing broker or checking the listing broker's website to see if any compensation is being offered to a cooperating broker. If the seller or listing broker is not offering compensation, the buyer's broker may request compensation directly from the seller or by including compensation as part of the purchase offer. In the event the seller or listing broker is not offering compensation to a cooperating broker, the buyer will be responsible to pay the buyer's broker the agreed upon amount. In the event the seller or listing broker is offering compensation that is less than the agreed upon amount, the buyer will be responsible to pay the buyer's broker the difference.

Compensation section of NYSAR Exclusive Buyer Agency Compensation Agreement

_____/_____PLEASE INITIAL: Compensation is not set by law or any Realtor® association or MLS and that compensation to BROKER is fully negotiable between the BUYER and the BROKER.

BUYER agrees to compensate BROKER if BUYER or any other person acting on BUYER's behalf buys, exchanges for, obtains an option on, or leases real property. BUYER agrees that BROKER shall be compensated $ _____ or _____% of the purchase price of the property or _____% of the aggregate rental of the Lease and all options as exercised or $ _____, which sum shall become due and payable when BROKER brings about a meeting of the minds between BUYER and the seller/lessor. BROKER is authorized to have the agreed upon compensation paid by the Seller or the Listing Broker under the Purchase Agreement or otherwise except as set forth in section 4(c) or 4(d). However, to the extent that the agreed upon compensation is not paid to BROKER by the Seller or the Listing Broker, BUYER shall be fully responsible to BROKER for the difference between the agreed upon compensation and any amount received by BROKER from the Seller and/or Listing Broker. If BUYER and BROKER agree to dual agency or dual agency with designated sales agents (see section 4(c) and 4(d)), the BUYER shall be responsible for compensating the BROKER the full amount set forth above. BROKER may not receive compensation from any source that exceeds the amount or rate agreed to with the BUYER unless the BROKER and BUYER have agreed to the additional compensation in writing.

B. In-house Sales

Another change to the form contained in the "in-house sales" section addresses compensation in dual agency and dual agency with designated sales agent scenarios (see below). Under paragraph c and d of this section, if the buyer agrees to dual agency or dual agency with designated sales agent, the buyer will be responsible to compensate the buyer's broker the amount of compensation agreed upon. In dual agency or dual agency with designated sales agent, the buyer's broker may not request compensation from the seller or listing broker. Brokers must disclose to a buyer that if they choose to enter into a dual agency or dual agency with designated sales agent relationship, they will be required to pay the agreed upon compensation set forth in the agreement.

<u>In-house sales section of the Exclusive Buyer Agent Compensation Agreement</u>

IN-HOUSE SALES If BUYER expresses interest in property owned by a seller who has an agency relationship with BROKER ["seller's broker"], a conflict has arisen. The BROKER shall immediately advise both the BUYER client and seller client of the pertinent facts including the fact that a dual agency situation has arisen, and that the following options are available:

a. BROKER and BUYER could dissolve their agency relationship. BUYER may then seek to retain another broker, and/or an attorney, or may represent themself. This would release BUYER from their obligations under this AGREEMENT for that property only. BROKER may continue to act as Agent for Seller.

b. BROKER and seller could dissolve their agency relationship. The seller may then seek to retain another broker, and/or an attorney, or may represent (her)himself. This would release the seller from any listing agreement which was entered into with BROKER. BROKER may continue to act as agent for BUYER and the BUYER remains obligated under this AGREEMENT.

c. With fully informed consent, BUYER and seller may elect to continue with the brokerage firm serving as a consensual dual agent which is the exception to the general rule that agents serve one principal. In dual agency, the BROKER and its agents have a duty of fairness to both the BUYER and seller. As a dual agent, the firm and its agents cannot furnish undivided loyalty to either party. As a dual agent, the firm and its licensee agents have a duty not to disclose confidential information given by one principal to the other principal, such as the price one is willing to pay or accept. Such information may already be known to the firm and its agents. If the information is of such a nature that the agent cannot fairly give advice without disclosing it, the agent cannot properly continue to act as an agent.

d. With fully informed consent, BUYER and seller may elect to continue with the brokerage firm serving as a consensual dual agent with designated sales agents. The BROKER of the firm will be a dual agent and the seller and BUYER will have different agents of the firm advocate on their behalf. The designated sales agent for the BUYER will function as the buyer's agent representing the interests of and advocating on behalf of the BUYER and the designated sales agent for the seller will function as the seller's agent representing the interests of and advocating on behalf of the seller in the negotiations between the BUYER and seller. A designated sales agent cannot provide the full range of fiduciary duties to the BUYER or seller. The designated sales agent must explain that like the dual agent under whose supervision they function, they cannot provide undivided loyalty.

   For transactions where the BUYER and BROKER agree to Dual Agency or Dual Agency with Designated Sales Agent, the BUYER and BROKER agree that the BUYER will be obligated to compensate the BROKER the full amount of compensation pursuant to section 1 of this agreement as the BROKER may not request compensation from the seller or listing broker.

   If BUYER and seller do not mutually agree on one of the options set forth above, the proposed transaction between BUYER and seller shall not be pursued.

C. Dispute Resolution

The last change to the form requires all disputes concerning the agreement to be submitted to the local Realtor® association for mediation. If the local association does not offer mediation, or the matter is not resolved through mediation, it can then be arbitrated through the local Realtor® association.

Non-Exclusive Buyer Agency Compensation Agreement-New Form

Not every buyer will want to sign an exclusive agreement with a broker. NYSAR has developed a form similar to the Exclusive Buyer Agency Compensation Agreement without the requirement that such representation be exclusive in nature.

A. Compensation

The compensation section of this agreement (see below) should be filled out in the same manner as the Exclusive Buyer Agency Compensation Agreement. However, unlike the exclusive buyer agreement that covers any property that is purchased by the buyer during the term of the agreement, the non-exclusive agreement limits compensation to those properties being "located or shown by the broker". The section also includes language to identify properties where compensation may be due under the agreement.

The section specifically states that "A list of such properties located or shown by BROKER and covered under this agreement may be listed below and/or by an addendum." The properties can be listed in the space provided at the end of the form and/or by the use of an addendum. As a best practice, brokers should list the properties located or shown to the buyer in the event the buyer refuses to pay the broker the agreed upon compensation. If the broker fails to list the properties located or shown, how can the broker prove that the property purchased by the buyer is subject to the terms of the non-exclusive agreement.

Compensation under dual agency or designated agency with designated sales agent and the dispute resolution section are the same as the exclusive agreement.

Compensation section of the Non-Exclusive Buyer Agency Compensation Agreement

_____/_____PLEASE INITIAL
Compensation is not set by law or any Realtor© association or MLS. BUYER understands that compensation to BROKER is fully negotiable between the BUYER and the BROKER.

BUYER agrees that the BROKER shall receive compensation if BUYER or any other person acting on BUYER's behalf buys, exchanges for, obtains an option on, or leases real property located and/or shown by the BROKER to the BUYER. A list of such properties located or shown by BROKER and covered under this AGREEMENT may be listed below and/or by an addendum. BUYER agrees that BROKER shall be compensated $ _____ or _____% of the purchase price of the property or _____% of the aggregate rental of the Lease and all options as exercised or $ _____, which sum shall become due and payable when BROKER brings about a meeting of the minds between BUYER and the seller/lessor. BROKER is authorized to have the agreed upon compensation paid by the Seller or the Listing Broker under the Purchase Agreement or otherwise except as set forth in section 4(c) or 4(d). However, to the extent that the agreed upon compensation is not paid to BROKER by the Seller or the Listing Broker, BUYER shall be fully responsible to BROKER for the difference between the agreed upon compensation and any amount received by BROKER from the Seller and/or Listing Broker. If BUYER and BROKER agree to dual agency or dual agency with designated sales agents (see section 4(c) and 4(d)), the BUYER shall be responsible for compensating the BROKER the full amount set forth above. BROKER may not receive compensation from any source that exceeds the amount or rate agreed to with the BUYER unless the BROKER and BUYER have agreed to the additional compensation in writing.

Exclusive Right to Sell-Amended

The Exclusive Right to Sell (ERTS) agreement has been amended to comply with the settlement. The amendments to the ERTS include a new compensation section, a new cooperating compensation section and a new dispute resolution section.

Compensation

The compensation section of the ERTS has been amended to include the required disclosure that compensation is negotiable between the seller and listing broker as well as disclosing that cooperating is not required. The required disclosure also informs the seller that the cooperating broker may request compensation from the seller directly or through the purchase offer and the seller has the right to accept, deny or negotiate the amount of compensation being requested by the cooperating broker. The seller is required to initial this paragraph to acknowledge their understanding of compensation.

A. Listing Broker Compensation

The ERTS includes two different compensation paragraphs for listing broker compensation. It should be noted that these paragraphs only apply to the compensation being paid to the listing broker, not a cooperating broker (this is explained in section B below). The first paragraph, one if there is a cooperating broker and there are other options if there is dual agency, dual agency with designated sales agent and unrepresented buyers. Brokers may enter different compensation amounts under each of the paragraphs (see section A below).

For instance, a listing broker may agree to compensation of W% if a cooperating broker is involved. The listing broker can also agree to compensation of X% if there is dual agency, Y% dual agency with designated sales agent or Z% for an unrepresented buyer. Dual agency, dual agency with designated sales agent and unrepresented buyers may require the listing broker to perform additional real estate related activities from one of more associated licensees. As such, the listing broker and seller can agree to a different amount of compensation if sold in-house.

B. Cooperating Broker Compensation

Nothing in the settlement prohibits a seller from offering compensation to a cooperating broker directly or through the listing broker. The listing broker would need to fully inform the seller that cooperating compensation is not required and the seller may choose not to compensate cooperating brokers. If the seller chooses not to compensate cooperating brokers, they would acknowledge that by initialing the same on the ERTS under section B of the ERTS below.

With fully informed consent, the seller can agree to compensate cooperating brokers directly or through the listing broker. The seller would then acknowledge how compensation is to be paid to cooperating brokers by initialing whether the seller or cooperating broker is offering compensation to cooperating brokers. The seller should only initial one of the options provided.

The last part of the compensation section is where the amount of compensation to cooperating brokers is provided. Nothing prohibits a seller from compensating a sub agent or a brokers agent. Listing brokers need to advise the seller that the amount of compensation being offered to cooperating brokers is in addition to the agreed upon compensation to the listing broker in section A (below). The seller would then agree upon an amount to compensate the cooperating broker and enter it on the ERTS.

<u>Compensation section of Exclusive Right to Sell</u>

_____/_____PLEASE INITIAL: SELLER understands that compensation is not set by law or any Realtor® association or MLS and that compensation is fully negotiable between the SELLER and the LISTING BROKER. An offer of compensation to the COOPERATING BROKER who produces the buyer for the listed property is not required. However, SELLER may choose to offer compensation directly to the COOPERATING BROKER or through the LISTING BROKER to the COOPERATING BROKER. A SELLER may receive requests for

compensation from a COOPERATING BROKER as part of the purchase offer or separately. The SELLER has the right to accept, deny or negotiate the amount of compensation being requested by the COOPERATING BROKER.

(A) LISTING BROKER COMPENSATION.

i. SELLER shall pay the LISTING BROKER compensation of _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing whichever is the greater sum unless otherwise modified in paragraph 9(B).

ii. In the event of dual agency SELLER shall pay the LISTING BROKER compensation of _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing whichever is the greater sum. (for an explanation of the types of agency, please see the NYS Agency Disclosure Form).

iii. In the event of dual agency with designated sales agent SELLER shall pay the LISTING BROKER compensation of _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing whichever is the greater sum. (for an explanation of the types of agency, please see the NYS Agency Disclosure Form).

iv. In the event of an unrepresented buyer, SELLER shall pay the LISTING BROKER compensation of _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing whichever is the greater sum. (for an explanation of the types of agency, please see the NYS Agency Disclosure Form).

The compensation set forth in (i), (ii), (iii), or (iv) above shall be earned and payable under any of the following conditions: (a) If the LISTING BROKER or COOPERATING BROKER produces a buyer ready, willing and able to purchase the PROPERTY on such terms and conditions acceptable to the SELLER; (b) If through the LISTING BROKER or COOPERATING BROKER's efforts a buyer and the SELLER reach an agreement upon all the essential terms of a transaction; (c) If the PROPERTY is sold or rented during the term of this LISTING AGREEMENT whether or not the sale or rental is a result of the LISTING BROKER'S efforts and even if the PROPERTY is sold as a result of the efforts of the SELLER or any other broker or agent not acting under this LISTING AGREEMENT; (d) If the LISTING BROKER or COOPERATING BROKER is the procuring cause of a transaction. If within _____ days after the expiration of the LISTING PERIOD, SELLER accepts a purchase offer on the PROPERTY from any person to whom the PROPERTY has been shown during the LISTING PERIOD, SELLER will pay LISTING BROKER the aforementioned compensation as if LISTING BROKER had made the sale provided the PROPERTY goes to closing. The preceding sentence shall not apply if during said period, SELLER lists the PROPERTY with another real estate broker.

(B) COOPERATING COMPENSATION (please initial one below)

_____/_____ PLEASE INITIAL: SELLER **IS NOT** offering compensation to COOPERATING BROKERS *(please continue to part C of this section)*

SELLER **IS** offering compensation to COOPERATING BROKERS (*please initial one of the following and fill in paragraph below*):

____/____ SELLER is offering compensation directly to COOPERATING BROKERS

____/____SELLER is authorizing LISTING BROKER to offer cooperating compensation to COOPERATING BROKER

In addition to the compensation offered to the LISTING BROKER under paragraph 9(A), SELLER will offer compensation to COOPERATING BROKERS directly or through the LISTING BROKER, as SELLER has indicated above, who is the procuring cause of the PROPERTY sale/transfer during the LISTING PERIOD as set forth in paragraph 9(A). SELLER agrees to the following offers of compensation to COOPERATING BROKERS:

BUYER'S AGENT: _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing;

BROKER'S AGENT: _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing;

SUB AGENT: _____ percent (%) of the selling price or a fee of _____ dollars ($) at closing;
(for an explanation of the types of agency, please see the NYS Agency Disclosure Form).

Cooperating brokers that are seeking compensation from the seller may utilize this form as an agreement to be compensated by the seller. The cooperating broker would indicate the type of agency relationship they have with the buyer and the amount of compensation being requested or an amount that was already agreed upon between the seller and cooperating broker.

The compensation section contains the required disclosure that compensation is negotiable as required in the other agreements. The amount of compensation requested or already agreed upon is then entered into the last paragraph below.

Cooperating brokers should contact the listing broker to inquire whether compensation is being offered and what amount. If the amount is agreeable, the cooperating broker can submit the form to the listing agent separately or as part of the purchase offer and the seller would then sign the form.

If there is no compensation being offered, or the cooperating did not inquire about cooperating compensation with the listing broker, the cooperating broker can provide the form to the listing broker separately or as part of the purchase offer. If no compensation is being offered, the seller may accept, deny or negotiate the amount being requested. If the seller will not compensate a cooperating broker or the amount of compensation being offered is less than the amount agreed to in the buyer agency compensation agreement, the buyer would have to pay the amount to their broker or the difference between what was offered and what was agreed upon. For more information on buyer compensation agreements, please see the applicable sections of this guide.

Agency section of the Cooperating Broker Compensation Agreement with Seller

The COOPERATING BROKER is acting as a:

_____ BUYER'S AGENT

SELLER understands that COOPERATING BROKER is acting as a BUYER'S AGENT acting in the best interest of the BUYER(S), the COOPERATING BROKER is not representing SELLER. COOPERATING BROKER has been authorized by the BUYER to receive the cooperating compensation set forth below from the LISTING BROKER.

_____ SUB-AGENT

SELLER understands that the COOPERATING BROKER is acting as a SELLER'S AGENT acting in the best interest of the SELLER.

_____ BROKER'S AGENT

SELLER understands that the COOPERATING BROKER is acting as a BROKER'S AGENT acting in the best interest of the LISTING BROKER.

Compensation section of the Cooperating Broker Compensation Agreement with Seller

SELLER understands that this Contract is only a compensation agreement for selling SELLER'S Property to the aforementioned prospective BUYER. SELLER is not listing SELLER'S Property with COOPERATING BROKER. SELLER understands that SELLER can sell SELLER'S Property to other buyers even though this Contract has not expired. This agreement does not authorize COOPERATING BROKER to show the property to any other prospective BUYERS, nor obligate SELLER to pay compensation to COOPERATING BROKER, except in connection with a sale of the property to this BUYER.

_____/_____PLEASE INITIAL: COMPENSATION: SELLER understands that compensation is not set by law or any Realtor® association or MLS and that compensation is fully negotiable between the SELLER and the COOPERATING BROKER.

The undersigned SELLER agree(s) to pay to the undersigned COOPERATING BROKER, compensation in an amount equal to _____% of the sales price or $ _____ for the sale of the above described property shown to the BUYER(S), if a contract is ratified between the parties within _____ days of showing. Such compensation shall be paid at closing.

Cooperating Broker Compensation Agreement with Listing Broker-New Form

If a listing broker has been authorized by the seller to offer cooperating compensation to a cooperating broker this agreement would be used between the listing broker and the cooperating broker. The type of agency and amount of cooperating compensation being offered would have already been agreed to by the seller. The cooperating broker would need to inquire whether the listing broker is offering cooperating compensation and the amount. This agreement should only be used if the listing broker has communicated to the cooperating broker that cooperating compensation and the amount is being offered by the listing broker. The amount the listing broker is authorized to compensate the cooperating broker is then entered on the form.

The dispute resolution section requires any disputes to be submitted to a local board of Realtors pursuant to your obligations under Article 17 of the NAR Code of Ethics.

Compensation section of the Cooperating Broker Compensation Agreement with Listing Broker

The LISTING BROKER and COOPERATING BROKER understand that this Contract is only a COOPERATING COMPENSATION agreement for selling SELLER'S PROPERTY to the aforementioned prospective BUYER.

COOPERATING COMPENSATION: The undersigned LISTING BROKER agrees to pay to the undersigned COOPERATING BROKER, compensation in an amount equal to _____% of the sales price or $ _____ for the sale of the above described property to the BUYER(S), if a contract is ratified between the parties within _____ days of showing. Such compensation shall be paid at closing.