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Virtual Office Websites (“VOWs”)

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Background

The Virtual Office Website (“VOW”) settlement agreement between NAR and the Department of Justice (“DOJ”) has been finalized. As a result, all MLSs are required to adopt and implement NAR’s official VOW rules and policies. To this end, at the January, 2009 Directors’ Meetings in Monterey, C.A.R. adopted the VOW rules and policy into the [California Model MLS \(Multiple Listing Service\) Rules](#) (eff. 2/10/09 -

revisions in red) which are the suggested rules and regulations for an MLS operated as a committee of a local Association of REALTORS® in California.

In addition to adopting all mandatory VOW provisions into its Model MLS Rules, C.A.R. adopted all parity and non-parity optional rules allowed under the VOW policy. To assist your MLS in assessing whether to mirror the C.A.R. Model MLS Rules in including all optional parity and non-parity VOW rules in your local MLS rules, please refer to the [Overview of MLS Considerations Regarding Adoption of VOW Discretionary Areas](#) .

NAR has posted important VOW related documents on its website. To review the DOJ-NAR Final Settlement and these other supporting VOW materials, please visit the NAR Law & Policy webpage by clicking on the following link: http://www.realtor.org/law_and_policy/doj/nar_doj?LID=RONav0021.

Read on to learn about the many facets of NAR’s VOW policy, VOW information specific to California, and useful information for practitioners interested in operating a VOW and/or understanding how their listing data will be displayed on a VOW.

I. Big Picture

Q 1. *What is a Virtual Office Website ("VOW")?*

A Virtual Office Websites ("VOWs") are Internet sites operated by MLS Participants (or Subscribers of the MLS, with the consent of their Participant) through which Participants conduct online brokerage, enabling them to establish relationships and work with clients and customers in cyberspace in ways similar to real estate professionals interacting with clients and customers in a "brick and mortar" environment. Consumers accessing VOWs can search and view MLS listing information after registering and providing their name and email address. A VOW can be a website or a page on a website.

Q 2. *What are MLS "Participants" and "Subscribers"?*

A MLS Participants are brokers or brokerage firms which meet the MLS’s participation requirements (see Section VIII of this Q&A for discussion of the new “Participant” definition) and participate in an MLS. MLS Subscribers are the agent MLS members. Subscribers must be working under an MLS Participant to be eligible to participate in the MLS.

Q 3. *How is “listing information” defined?*

A As defined in the Final Judgment, “‘Listing Information’ means all records of residential properties (and any information related to those properties) stored or maintained by a multiple listing service”.

Q 4. *What's the difference between a VOW and an IDX site?*

A VOWs are Internet websites satisfying all the various requirements adopted by an MLS in implementing the VOW policy. Internet Data Exchange (“IDX”) sites are other Internet websites operated by MLS Participants and Subscribers that can be accessed by any member of the public (even if a password is required) where MLS data can be accessed, searched and viewed. There is significant overlap between IDX sites and VOWs, but key differences do exist.

An IDX site is considered advertising – and listing brokers’ consent is required before another broker may advertise his or her listings. A VOW is considered on-line brokerage. Listing brokers’ consent is not required to display on a VOW any listing otherwise available to MLS Participants and Subscribers for Internet display. Under both policies, sellers retain the ability to withhold their properties from Internet display or to withhold the display of their property’s address from Internet display. However, a website that offers online MLS listing searching capability that does not comply with the detailed requirements of the VOW policy is, by definition, an IDX site.

Consumers must register on a VOW, must disclose certain information about themselves, and must agree to Terms of Use before a VOW enables them to view property data on the VOW. These features are not required on IDX sites in order for the Participant to display or the consumer to view the listing data displayed.

Also, the level of data provided through a VOW or IDX can differ. For instance, sold data can be offered to a consumer through a VOW but, depending on the rules of the MLS, may or may not be allowable for display on an IDX site.

Features referenced in this response will be explained in greater detail in other parts of the paper.

Q 5. *Are VOWs brokerage – or advertising?*

A In California, VOWs would be both online brokerage activity and advertising; the two are not mutually exclusive. NAR’s VOW policy is based on the premise that real estate brokerage can be conducted online, but even if VOWs are also considered to be advertising by the DRE for state regulatory purposes, in order to be in compliance with NAR policy, VOWs in California must still comply with the VOW policy and VOW-related MLS rules.

II. Basic VOW Operational Requirements**Q 6. *What is entailed in the VOW registration process before a consumer can access listing information on a Participant’s VOW?***

A Prior to providing listing data to a consumer who has entered into a “lawful consumer-broker relationship” with the VOW broker, the consumer has to register

(become a “Registrant”), provide a valid email to the site and agree to a Terms of Use. The VOW operator has to verify the validity of the email address, confirm receipt of and agreement to a Terms of Use and supply the Registrant with a unique user name and password of fixed duration before the consumer can access the listing information.

Q 7. *Is a “lawful consumer-broker relationship” the same thing as an agency relationship?*

A Not necessarily, although it could lead to the parties deciding to enter into one or exist in conjunction with one which has already been established. See Question 11 below for further discussion of representational agreements.

Q 8. *What are “Terms of Use”?*

A “Terms of Use” are the requirements to which Registrants must agree in order to obtain the right to view and/or download MLS information.

Q 9. *Why must VOW operators establish Terms of Use?*

A VOW operators are required to establish Terms of Use agreements with Registrants to ensure that Registrants use MLS information only as provided for in the VOW policy and under VOW-related MLS rules and regulations.

Q 10. *What are the key elements to be addressed in VOW Terms of Use agreements?*

A Terms of Use agreements must establish, at a minimum, that Registrants: (a) acknowledge entering into a lawful consumer-broker relationship with the participant; (b) agree that all data obtained from the VOW is for Registrants' personal, non-commercial use; (c) have a bona fide interest in purchase, sale, or lease of real estate of the type offered through the VOW; (d) will not copy, redistribute or retransmit any data or information provided; (e) acknowledge the MLS's ownership of and the validity of the MLS's copyright in the MLS database; (f) authorize the MLS and the other MLS Participants to access the VOW for the purpose of monitoring the site's compliance with the applicable MLS rules and policies.

Q 11. *Do Terms of Use agreements establish representational relationships or financial obligations between VOW operators and consumers?*

A No The VOW policy expressly prohibits either representational relationships or financial obligations being established in the context of Terms of Use agreements. Participants can enter into such relationships or agreements via their VOW through an agreement separate from the Terms of Use agreement. It should be noted, though, that agreements creating representational relationships or financial obligations can NOT be

accepted by registrants solely through a "mouse click".

Q 12. *What are other significant operational requirements?*

A A VOW site must contain a privacy policy, be refreshed at least every 3 days, be open to monitoring by the MLS, maintain a means (ex: email address or telephone number) to receive comments by a listing broker about the accuracy of any supplemental VOW added information pertaining to his listing and correct or remove such false information with 48 hours and erect certain safeguards against scraping. The VOW must also prominently display a mode of communication (ex: email address, telephone number, live chat, etc.) by which a consumer can contact the Participant to ask questions or get more information about a property displayed on the VOW, and that Participant or one of his Subscribers must be able to respond knowledgeably about any property displayed on that VOW. A VOW operator must notify the MLS of its intent to operate a VOW and may be required by the MLS to enter into a license agreement. Data provided by the MLS may be used only to establish and operate a VOW on behalf of the Participant and not for any other purpose.

III. Participants and Subscribers - Rights and Obligations

Q 13. *Can MLS Participants “opt-out” of having their listings shown on the VOW sites of other Participants?*

A No. The policy does not provide for broker opt-outs.

Q 14. *Can sales-associates and non-principal brokers have their own VOWs?*

A Yes, subject to the Participant’s consent, supervision and accountability.

Q 15. *Can the MLS limit the right to operate VOWs to MLS Participants only (and not permit Subscribers to have their own VOWs)?*

A No. Whether or not Subscribers (sales-associates and non-principal brokers) may have their own VOWs is left to the sole discretion of their principal broker.

Q 16. *Our MLS participates in a reciprocal data-sharing agreement with other MLSs. Under the agreement, Participants in the other MLSs receive the same information our Participants receive, and the offers of cooperation and compensation are extended to all Participants of all of the MLSs. Can we limit the right to use the listing information our MLS generates to the VOWs of our Participants and Subscribers? Must we include listings from the other MLSs in the VOW feed we provide to Participants and Subscribers to our MLS?*

A Participants and Subscribers are entitled to display on their VOWs all of the listings

they are eligible to receive pursuant to their participation in the MLS, including any listings that are available to them as a result of a reciprocal data-sharing agreement with another MLS.

Q 17. *I belong to a large regional MLS. I am not familiar with, and don't market or sell in some areas the MLS services. Can I exclude listings in those areas from display on my VOW? Can I exclude everything but beachfront property?*

A Yes. A VOW operator can choose to exclude listings from display based on objective criteria including, but not limited to, geography, list price, type of property, cooperative compensation offered by the listing broker, or whether the listing broker is a REALTOR®.

Q 18. *While I'm a California broker, a Participant in an MLS in Nevada gave me permission to display her Nevada listings on my website. Can I do this under the VOW policy?*

A If you are a Participant in the Nevada MLS, you have the same right to display listings in the Nevada MLS as any other Participant. If you are not a Participant in the Nevada MLS, then the VOW policy doesn't apply to your use of listings from that MLS because you are not entitled to use those listings in any event. The Nevada broker may authorize you to display her listings on your VOW, but she must supply them to you directly and you cannot simply take those listings from the Nevada MLS unless that MLS expressly permits you to do that.

Q 19. *If a seller withholds consent for the listing of her property to be published in the MLS and the Participant takes an "office exclusive" listing, can the Participant display information about the seller's property on the Participant's VOW?*

A Yes.

Q 20. *I have retained a tech provider to be my Affiliated VOW Partner ("AVP") to provide me with technical support to operate my VOW, and in exchange for this service, I would like to advertise the tech provider's name on my VOW site. Is this allowed?*

A Yes. A Participant may display advertising and the identification of other entities (“co-branding”) on any VOW the Participant operates or that is operated by an AVP on his or her behalf. See further discussion of AVPs in Section VII.

Q 21. *The VOW rule set forth in Section 12.19.21 of the C.A.R. Model MLS Rules provides, in part: A Participant may display advertising and the identification of other entities ("co-branding") on any VOW the Participant operates or that is operated on his or her behalf". If an MLS does not adopt Section 12.19.21 into its*

rules, does that mean VOW operators may not advertise or “co-brand” on their VOWs?

A No. The VOW Policy precludes an MLS from prohibiting or regulating advertising on a VOW except to prohibit deceptive or misleading advertising or co-branding. The first sentence of Section 12.19.21 simply restates this right of a Participant operating a VOW to display advertising or co-branding, but NAR’s VOW Policy gives Participants that right even absent this language. The balance of the text of Section 12.19.21 is the heart of this rule. It establishes the MLS’s authority to discipline a Participant who advertises or co-brands in a deceptive or misleading manner, and provides a presumption “standard” for Participants to follow to insure that their advertising or co-branding will not be deemed deceptive or misleading.

IV. Sellers’ Rights

Q 22. *Can sellers “opt-out” of display of their property listings on VOWs?*

A Sellers may “opt-out” of having their property listing displayed on any Internet sites or, alternatively sellers can “opt-out” of having their property address displayed on any Internet sites. Sellers may not opt out of having their listings shown on some, but not all, VOW sites. This means that if a seller opts out of having his listing or property address displayed on VOWs, the listing (or property address) cannot be displayed on IDX sites, third-party aggregators’ sites or elsewhere on the Internet.

Q 23. *Can sellers direct that their listings appear on third-party aggregators’ websites (e.g. Realtor.com) but not on other Participants’ VOWs?*

A No. As noted in above, if sellers withhold consent for display of their property or display of their property address on the Internet, display on VOW, IDX and on third-party aggregators’ sites is likewise precluded.

Q 24. *Can a seller require that any VOW displaying their property not show an automated valuation of the property in connection with the listing? What about blogging, that is, showing comments of third parties about the property in connection with the display of the property listing on VOW?*

A Sellers can direct that automated valuation and/or blogging features of VOWs be disabled or discontinued with respect to their properties.

Q 25. *If a seller wants a VOW to turn off automated valuation or blogging of their property, how do they make the VOW do that?*

A Sellers who wish to have automated valuation and/or blogging features of VOWs disabled or discontinued with respect to their properties should communicate that

request to their listing broker, who will in turn transmit that request to the MLS.

Q 26. Does C.A.R. offer standard forms for listing brokers to provide to a seller who wants to exclude his listing or some features associated with his listing from the Internet?

A Yes. C.A.R. has modified two of its standard forms: the Residential Listing Agreement (RLA) and the Seller Instruction to Exclude Listing from the MLS (SEL). The MLS paragraph in the RLA has been modified to reference Internet opt-out options. The SEL has been revised to include optional paragraphs allowing the seller to choose among the various opt-outs (No Internet display at all; No property address on Internet displays; No blogging or comment feature on Internet display of seller’s property; No automatic valuation feature on Internet display of seller’s property).

The new versions of the RLA and SEL have been available on WINForms Online® as of February 15, 2009 and will be in paper forms in early March, 2009 and on WINForms Desktop® at the next revision date in April, 2009.

Since the “former” RLA already gives the broker unrestricted authority to submit the listing to the MLS and, through it, to additional Internet sites, it may continue to be used. The “former” SEL may continue to be used for those sellers who want to exclude the listing from the MLS entirely, including exclusion from any Internet sites receiving data from the MLS. However, the new SEL referenced above must be used if a seller agrees to submit the listing to the MLS, but wants to limit the information that is available to other Internet sites.

Q 27. Can the listing input process include “yes/no” “checkboxes” regarding the seller’s right to withhold consent for automated valuation or blogging on his listing shown on a VOW (e.g. “AV - yes/no”, “Blogging - yes/no”)?

A Yes. Also see Question 76 detailing the RETS Advisory Board’s recommendations regarding implementation.

Q 28. Can MLSs adopt rules to ensure sellers’ requests that automated valuation features or blogging on VOWs be turned off are met on a timely basis?

A Yes.

Q 29. Can sellers require that false information about their property be deleted from VOWs? How?

A If a seller believes that information appearing on a VOW about his property is false, he should share that concern with the listing broker who, in turn, will bring the false information to the attention of the VOW operator, with an explanation as to why the information is false. The VOW operator will then have an obligation to remove any false

information.

Q 30. *If a seller won't permit information about his property to be displayed on other Participants' VOWs but wants it marketed on the listing firm's website, can a Participant accept the listing? Can it be submitted for inclusion in the MLS?*

A If a seller withholds consent for Internet display on all sites except the listing broker's, the listing broker may take the listing but it would not be eligible for inclusion in MLS.

Q 31. *May a seller prohibit display of her property address, automated valuation and blogging related to her property on VOWs while permitting those functionalities on non-VOW Internet advertising?*

A With respect to display of the seller's property address, the VOW rule set forth in Section 12.19.6 of the C.A.R. Model MLS Rules bars display of the seller's property or property address (or both) where the seller has “affirmatively directed the listing broker to withhold the listing or property address from display on the Internet”. “Display on the Internet” includes “non-VOW Internet advertising,” such as IDX display and third-party aggregator sites. This is reinforced in the wording of C.A.R.'s RLA and SEL forms discussed in Question 26 above.

With respect to automated valuation and blogging features, Section 12.19.7 (b) of the C.A.R. Model MLS Rules deals with sellers who have “elected to have one or both of these features disabled or discontinued on Participants' websites”. While not as broad as the prohibition established in Section 12.19.6, it applies to all websites of Participants including their IDX sites.

V. Sold Information

Q 32. *How is “sold information” defined?*

A The VOW policy defines “sold information” as “listing information relating to properties that have sold.”

Q 33. *Is sold information synonymous with “property history” or “listing history”?*

A No.

Q 34. *Can MLSs limit Participants' display or use of sold information on VOWs?*

A Under the VOW policy, MLSs may prohibit display of sold information on VOWs only if the actual sale prices of completed transactions are not accessible from public records. In locations where sales prices are not publically accessible, an MLS may

prohibit sold information from display on a VOW, but if it does, under the VOW policy’s “parity” requirement, it is also required to prohibit sold information from being given by Participants to consumers in other non-VOW mediums, such as the Participant’s physical office. (Please note, however, that as discussed in Question 35 below, sales prices are accessible in California.)

Q 35. *In California, sale prices are not specifically matters of public record, but the amount of the transfer tax assessed by the county is noted on the property deed. Based on this number, however, the sold price can be readily computed. Would this be considered publicly accessible sold information under the VOW policy and rules?*

A Since the deeds are publicly accessible, and a calculation using the transfer tax reflects the actual sales price of a completed transaction, then the information described above could be fairly characterized as “sold information”. Therefore, in California, an MLS may not prohibit sold information from display on VOWs.

Q 36. *Do the rules regarding distribution of “sold” information apply to data acquired by the MLS from third-party sources (other than Participants)?*

A No. If the MLS licenses data from third parties for access only by Participants and Subscribers, Participants would not be permitted to provide access to those third-party databases to consumers registering on their VOWs. Participants may independently secure from such third parties their own licenses to display the information on their VOW.

VI. Parity and Other Options

Q 37. *Why are certain restrictions that an MLS can adopt subject to the “parity” principle?*

A The concept underlying the VOW policy is that operation of a VOW is a method by which Participants use MLS listing data in connection with offering online brokerage services to established clients and customers. Because such services involve the use of MLS listing data, it is appropriate for the MLS to establish various requirements on the use and display of that data. The “parity” principle governs certain specific areas of the VOW policy where it has been decided that Participants must have equivalent rights, responsibilities and obligations with respect to both their “physical” and their “virtual” offices. In this regard, if an MLS adopts certain restrictions on VOW operators, it must impose equivalent restrictions to brokers in the non-VOW context.

Q 38. *Does an MLS have to choose to adopt either all or none of the optional “parity” rules? For example, can an MLS choose to adopt certain subsections within a rule (e.g. Section 12.19.15 which has 6 subsections)?*

A An MLS can choose to adopt some, none or all of the optional “parity” provisions of the VOW rules (see Sections 12.19.15-12.19.19 of the C.A.R. Model MLS Rules), including selective adoption of the individual items listed (i.e. expired, withdrawn, or pending) in the subsection set forth in Section 12.19.15. In addition, because these rules are optional, they may be omitted upon initial adoption of the VOW rules and adopted at a later time or, once adopted, may subsequently be deleted. However, if adopted, equivalent requirements must be adopted related to delivery of MLS Listing Information in providing brokerage services using other delivery mechanisms (e.g. in participants’ physical offices, by email, by fax. etc.).

Q 39. *Our MLS allows Participants and Subscribers in their offices and by email to give potential buyers hard copy lists of street addresses (“thumbnails”) of properties in MLS. Names of listing firms do not appear on these lists. Can our Participants and Subscribers still provide these lists if we require that the names of listing firms be shown in connection with listings displayed on VOWs?*

A No. If the MLS chooses to require that the names of listing firms be displayed on VOWs, the same requirement must be imposed on Participants providing brokerage services via all other delivery mechanisms.

Q 40. *May we adopt Section 12.19.18 of the VOW rules but delete the words “listing broker or agent” so that all that’s required is display of the name of the listing firm?*

A Yes.

Q 41. *If an MLS has opted to prohibit expired, withdrawn or pending listing data from being displayed on VOWs and in the “bricks and mortar” context, does that mean that a broker may not use and disclose these listings in connection with CMAs or other advice to a client or customer – either in their offices or via their VOWs?*

A If the MLS chooses to prohibit display of expired, withdrawn or pending listing data on the VOW, Participants may still provide clients and customers with a limited number of such listings in connection with providing brokerage services, including CMAs. This is permissible both on a VOW and “in the office.”

The distinction between display of such data and permitted uses is based on whether the expired, withdrawn or pending listing data provided to the consumer are chosen by the consumer (or selected pursuant to criteria chosen by the consumer), or are selected by the broker in the course of providing brokerage services to the consumer. For example, where the MLS prohibits display of expired, withdrawn or pending listing data on VOWs, the MLS must also prohibit brokers from offering consumers the opportunity to freely review or search such listing data in the office. A broker may, however, develop a CMA for a client or customer and provide the underlying comparable expired,

withdrawn or pending listing data on which that CMA is based, so long as the broker, rather than the consumer, chose a reasonable number of listings to provide in connection with developing, explaining, and justifying the CMA. Conversely, where the MLS prohibits expired, withdrawn or pending listing data display on VOWs, a broker may not provide a client or customer an unrestricted opportunity to review the expired, withdrawn or pending listing data related to homes in a geographic area (such as a neighborhood or zip code) selected by the seller, unrelated to the broker's efforts in marketing the property.

Q 42. *Can an MLS set limits to the number of “expired”, “withdrawn”, and “pending” listings that can be viewed, retrieved or downloaded in response to an inquiry?*

A Yes. However the number should be reasonable and any limits established will require an equivalent limit on participants' delivery of that information “through all other delivery mechanisms.”

Q 43. *Can MLS listing information be changed or supplemented?*

A As long as equivalent rules are in place for VOWs and non-VOWs, an MLS may prohibit making any changes to MLS data but permit MLS data to be supplemented with additional information, provided that the source of the supplemental information is identified.

Q 44. *Should there be an “accuracy disclaimer” on VOWs?*

A As long as equivalent rules are in place for VOWs and non-VOWs, an MLS may require the Participant to provide a disclaimer indicating the while MLS information is deemed reliable, the MLS does not guarantee its accuracy.

Q 45. *Our MLS licenses databases such as public records, mortgage information and neighborhood information at considerable cost, for access only by Participants and Subscribers. The license agreement does not give the MLS authority to permit access to those databases to consumers on brokers' websites. Is the MLS required to re-negotiate these license agreements to allow for consumer access via brokers' VOWs?*

A If the MLS licenses databases from third parties for access only by Participants and Subscribers, the MLS has no obligation to re-negotiate those license agreements and can prohibit Participants and Subscribers from providing unauthorized access to those databases by third-parties.

Q 46. *What are the optional rules that an MLS can impose solely on VOWs?*

A An MLS is permitted to adopt VOW-only regulations governing (a) the length of time Registrants’ passwords have to be reconfirmed, (b) misleading advertising and co-branding, (c) identification and/or separate searching of non-MLS sources, (d) execution of a license agreement with the MLS and (e) providing a copy of a Seller’s Opt Out to the MLS (see Section IV for discussion on seller opt outs).

VII. Affiliated VOW Partners (“AVPs”)

Q 47. *What is an Affiliated Vow Partner (“AVP”)?*

A An Affiliated Vow Partner (“AVP”) is a vendor or other service provider that operates a VOW on behalf of a Participant, subject to the Participant’s supervision, accountability and the terms of the VOW policy.

Q 48. *Must an MLS provide a VOW feed to an AVP?*

A Yes. An MLS must, at the request of a Participant, provide a direct data feed to the Participant’s AVP, and may not require that MLS Information be retransmitted by the Participant to their AVP.

Q 49. *Can the fees charged AVPs be higher than the fees charged Participants and subscribers?*

A AVPs can be charged fees higher than those charged to Participants only if the MLS incurs greater cost in providing service to an AVP. In any instance, the costs charged must reasonably relate to the actual costs incurred in providing the service to Participants or to AVPs.

Q 50. *Does the VOW policy impose a cap on the fees for VOW data feeds?*

A No, except that fees charged may not exceed the reasonably estimated costs incurred in adding or enhancing its downloading capacity to enable Participants, Subscribers or AVPs to operate VOWs.

Q 51. *If an AVP operates VOWs on behalf of several Participants, can we charge the AVP fees based on the number of VOWs it operates?*

A If the MLS charges a single fee to all VOWs that combines both the fixed costs of supporting VOWS and the variable costs associated with delivery of a data feed, and the variable costs of providing the feed are insubstantial, then the MLS may charge the AVP a fee based on the number of VOWs they operate. If the MLS charges a separate fee for providing the data feed, and an AVP only receives one feed, it may only be charged one fee.

Q 52. If an AVP operates several VOWs for different Participants and misuses MLS information with respect to one of the VOWs, can we terminate the data feed?

A Yes, although the MLS should be sure to give the Participants and the AVP notice and an opportunity to correct the problem so that the use of the feed to service the VOWs of the other Participants is not unnecessarily interrupted.

VIII. Definition of MLS “Participation”

Q 53. What is changed by the revised MLS “membership” rule?

A The revised membership rule is similar to the longstanding definition of MLS “Participation” except that it requires that Participants “offer or accept cooperation and compensation to and from other Participants”. This differs from the earlier policy that merely required that Participants be “capable of offering and accepting cooperation and compensation”. The official definition of MLS “Participant” can be found in NAR’s Multiple Listing Policy Statement 7.9, Definition of MLS “Participant” and includes further explanatory language as follows:

“Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm 'offers or accepts cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. “Actively” means on a continual and on-going basis during the operation of the Participant's real estate business. The “actively” requirement is not intended to preclude MLS participation by a Participant or potential Participant that operates a real estate business on a part time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a Participant or potential Participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law.

The key is that the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a Participant or potential Participant that operates a Virtual Office Website (“VOW”) (including a VOW that the Participant uses to refer customers to other Participants) if the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a Participant or potential Participant “actively endeavors during the operation of its real estate business” to “offer or accept cooperation and compensation” only if the MLS has a reasonable basis to believe that the Participant or potential

Participant is in fact not doing so.

The membership requirement shall be applied on a nondiscriminatory manner to all Participants and potential Participants.”

Q 54. *Must an MLS adopt the revised definition of MLS Participation?*

A Yes.

Q 55. *Once adopted, how does the revised definition affect current Participants who do not meet its requirements? Must an MLS terminate their participatory rights? If yes, how quickly?*

A The revised definition applies to Participants upon adoption. If there is any question as to whether a Participant meets the requirement, he or she should be given an opportunity to demonstrate compliance. If he or she is found not to be in compliance under the revised rule, termination may not be effective until May 27, 2009. New Participants may, however, be required to comply immediately as a condition of admission.

Q 56. *Will NAR defend a local MLS if it terminates a Participant who doesn't meet the new criteria?*

A A lawsuit against an MLS filed by a Participant terminated for failure to satisfy the new membership requirements would be generally covered under the NAR-provided professional liability insurance policy. Coverage for such a claim under that policy would be available on the same terms and conditions as it is in any other case, and in particular, would apply only if the rules and policies of the MLS were in compliance with those imposed by NAR.

Q 57. *Can an MLS require that Participants engage in listing and selling?*

A No. The fact that a broker engages in either listing or selling satisfies the requirement.

Q 58. *How does an MLS determine the intent of prospective Participants seeking admission to the MLS to list or sell property?*

A The MLS may include a provision in the application for participatory rights by which the applicant would be required to affirmatively state his or her intent to list and/or sell real property. To assist local AORs/MLSs, C.A.R. has revised its model C.A.R. REALTOR® and/or MLS Membership Application to expressly reference the new Participant definition. The applicant is asked to certify by a yes or no checkbox that she “actively endeavors” to list and/or sell real property. The revised Application has been

posted for use by Association Executives in their portion of C.A.R.’s website.

Q 59. *How does an MLS determine whether a Participant (or potential Participant) is able to “respond knowledgeably” to questions about property displayed on the Participant’s VOW?*

A It should be assumed that individuals who qualify for MLS participatory rights will be able to respond knowledgeably until such time as an issue arises that calls this ability into question.

Q 60. *Is the requirement that Participants “actively endeavor” to list property or accept offers of cooperation and compensation merely a requirement to gain participatory rights in MLS, or is it an ongoing obligation?*

A Actively endeavoring to list real property and/or to accept offers of cooperation and compensation from other Participants is an ongoing requirement of MLS participation.

Q 61. *Can MLSs conduct periodic audits or evaluations to ensure Participants are continuously engaged in actively listing or selling property?*

A Yes, as long as the audits are performed uniformly and consistently.

Q 62. *Some of our Participants are part-time or “seasonal” (e.g., they list and sell property only during the summer and early fall). Are they eligible for ongoing MLS participatory rights under the revised membership rule?*

A Yes. Such individuals are entitled to participation so long as they are engaged in the business “on a continual and ongoing basis during the operation of (their) real estate business.”

Q 63. *How does the revised membership rule apply to MLS Participants who spend all their time running real estate companies (e.g., hiring, training, marketing, etc.) and where the firm’s non-principal brokers and sales associates do the listing and selling?*

A The fact that the real estate brokerage company is actively engaged on an ongoing basis in listing or selling satisfies the requirement.

Q 64. *What are the consequences if an MLS determines a Participant is not actively listing or selling property?*

A If it is established that a Participant is no longer engaged in either listing or selling real property, he is not eligible for participatory rights.

Q 65. Does the requirement to actively endeavor to list or sell property also apply to Subscribers?

A No.

Q 66. Can MLSs require applicants to demonstrate a history, e.g., 6 months or a year, of actively endeavoring to list or sell?

A No. The fact that an applicant can show he or she is currently and intends to continue to be engaged in listing or selling real property is sufficient.

Q 67. What effect does the membership rule have on appraisers – both those currently participating in our MLS and those who apply in the future?

A The requirement that a Participant be engaged in listing or selling does not apply to appraisers, who are granted participatory rights on the basis of their appraisal activities.

Q 68. Can an MLS participation application require applicants to confirm that they are (or will be) actively endeavoring to list real property or accept (or will accept) offers of cooperation and compensation from other Participants in the MLS?

A Yes. And, as stated in Question 58 above, to assist AORs/MLSs in that regard, C.A.R. has revised its model C.A.R. REALTOR® and/or MLS Membership Application to ask the applicant to certify by a yes or no checkbox that she “actively endeavors” to list and/or sell real property.

Q 69. Is an exclusive buyer’s broker who rejects the offer of compensation offered by listing brokers and is compensated only by the buyer still eligible for MLS participation?

A Yes.

IX. IDX

Q 70. What’s the difference between a VOW and an IDX site?

A VOWs are Internet websites satisfying all the various requirements adopted by an MLS in implementing the VOW policy. Internet Data Exchange (“IDX”) sites are other Internet websites operated by MLS Participants and Subscribers that can be accessed by any member of the public (even if a password is required) where MLS data can be accessed, searched and viewed. There is significant overlap between IDX sites and VOWs, but key differences do exist.

An IDX site is considered advertising – and listing brokers’ consent is required before another broker may advertise his or her listings. A VOW is considered on-line brokerage. Listing brokers’ consent is not required to display on a VOW any listing otherwise available to MLS Participants and Subscribers for Internet display. Under both policies, sellers retain the ability to withhold their properties from Internet display or to withhold the display of their property’s address from Internet display. However, a website that offers online MLS listing searching capability that does not comply with the detailed requirements of the VOW policy is, by definition, an IDX site.

Consumers must register on a VOW, must disclose certain information about themselves, and must agree to Terms of Use before a VOW enables them to view property data on the VOW. These features are not required on IDX sites in order for the Participant to display or the consumer to view the listing data displayed.

Also, the level of data provided through a VOW or IDX can differ. For instance, sold data can be offered to a consumer through a VOW but, depending on the rules of the MLS, may or may not be allowable for display on an IDX site.

Q 71. Does the VOW settlement agreement effect the IDX policy?

A No.

Q 72. Can an MLS “graft” elements of the new VOW policy onto its existing IDX rules?

A Not at this time. It is possible that the IDX policy may be amended by NAR to incorporate certain elements of the VOW policy.

Q 73. If MLSs limit the number of listings that can be viewed, retrieved or downloaded in response to a Registrant’s inquiry on a VOW (per Section 12.19.19 of the C.A.R. Model MLS Rules), must they establish a similar requirement for display in Participants’ physical offices? Does the limit MLSs establish apply to Participants’ IDX sites as well?

A A limit on the number of listings that may be viewed, retrieved or downloaded in response to a Registrant’s inquiry on a VOW requires a similar limit to Participants’ use of MLS Listing Information in providing brokerage services through all other delivery mechanisms. Display on an IDX site is considered advertising rather than brokerage and the limits as to the number of listings that may be displayed in response to a consumer’s search on an IDX site may be different.

X. The Settlement Agreement

Q 74. Can the VOW policy be changed?

A It is possible, although unlikely, that NAR may at some future time propose changes to the VOW policy. Any changes would require approval by the Department of Justice. Once MLSs adopt the VOW policy and VOW rules they may not make changes to them unless those changes are permitted by the current VOW policy.

Q 75. *Does the settlement agreement have implications for Commercial Information Exchanges?*

A No.

XI. Real Estate Transaction Standards (“RETS”)

Q 76. *Does the RETS Advisory Board have any recommendations for implementing the VOW policy and rules?*

A The Advisory Board suggests:

“When implementing the policy, the addition of several data points to the representation of a listing are obvious and that those data points should have the following names:

- Visible Long Name System/Standard Name
- VOWEntireListingDisplay VOWList
- VOWAddressDisplay VOWAddr
- VOWAutomatedValuationDisplay VOWAVM
- VOWConsumerComment VOWComm

The data type of each point is boolean with '0' (zero) representing false and '1' (one) representing true.

Specifically, the listing input form should have check-box selections for the selling party to explicitly Opt Out of each of displaying a listing; displaying the address of the listing; displaying an automated valuation; displaying consumer comments. In the interests of having consistent representations of these data points and the intent of the RETS Schema workgroup to add these data points to the Listings schema model, the group decided on these representations.

The interpretation of the data points are that the seller has opted in to each of the actions of displaying the listing, address, automated valuation and consumer comment when the value is true.”

Q 77. *Where can I get more information?*

A This article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please

visit *C.A.R. Online* at www.car.org.

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