

Summary and Status of DOJ/NAR VOW Settlement

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As of May 27, 2008, the National Association of Realtors® (“NAR”) reached a settlement with the U.S. Department of Justice (“DOJ”), resolving litigation between them over NAR’s Virtual Office Website (“VOW”) policy. The resurfacing of VOW Policy and the impact of the settlement and Proposed Order will certainly generate many questions, but we have a little time before anyone has to do anything. To read the Proposed Order, click here: [Final Judgment](#) 📄.

Timing and Procedural Backdrop

After the Proposed Order gets published in the Federal Register, a 60 day public comment period commences per the Antitrust Procedures and Penalties Act. The DOJ will have to respond to any public comments submitted during this time. The comments and responses thereto are to be published in the Federal Register. At the conclusion of the public comment period, the parties petition the Court for approval of the Final Order. Once the Court approves the Final Order, MLSs will then have 90 days from the effective date of the Final Order to adopt and implement the revised VOW policy. Participants would have 180 days from implementation of VOW rules to comply.

The Proposed Order was first published in the Federal Register on June 25, 2008, but the publication contained a typesetting error in Exhibit B which necessitated a correction, re-publication and re-starting of the 60 day comment period. The corrected Proposed Order was then published in the Federal register on August 14, 2008, which sets the end of the comment period on October 13, 2008. According to NAR, the DOJ has indicated that it has received comments, although they appear to be unpublished at this time. There are several variables to determining what the actual ensuing deadline for implementation will be, such as the extent and complexity of the comments/responses, the Court’s schedule for approving the Final Order, etc., but we at least know it will not be sooner than mid-January 2009.

It’s possible, probably not likely, but still possible that some piece of the Proposed Order could change following the comment period, so we will have a firmer idea of what we’re dealing with in the Fall.

VOWs

As you will recall, a VOW is an online brokerage conducting its activities on the Internet rather than in a “bricks and mortar” office. However, traditional brokerages can and do operate VOWs. The more common practice during the past several years while the DOJ/NAR litigation was pending has been to display listing data online through IDX. But now that VOW policy is back, all bets are off. In many ways, VOW rules and their registration component are more cumbersome than IDX rules and may not prove to be as productive in practice. However, VOWs potentially allow for a richer data offering than IDX, as IDX usually allows only the display of active listings and can be subject to broker opt out. And to muddy things up, there is no reason why a broker’s online presence couldn’t utilize both IDX and VOW.

Notable Features of the Proposed Court Order's VOW Policy

1) No more Broker Opt Out

This issue was at the heart of the DOJ lawsuit. Former VOW policy allowed brokers to withhold some or all of their listings from other broker's VOWs. No more. Now the only Opt Outs allowed are for sellers who wish to withhold their listing or property address from display on the Internet and who have executed a Seller Opt Out. The seller also has a right to request that a VOW's comments, blogs or automated market value estimate about its listing be disabled or discontinued – although the VOW can state that those features have been disabled “at the request of the seller.”

2) No more prohibition against referral fees

MLSs can't prohibit a broker operating a VOW or otherwise, from referring Registrants (whose identities are obtained from a VOW) to any person or from obtaining a fee for such referral.

3) No more banning advertisements

The ban against having an advertisement appear on a page displaying any portion of the listing is gone.

4) No regulation of data display formatting or appearance

Unless otherwise prohibited by the rules (ex: prohibiting false or misleading representations), the MLS may not restrict or regulate the formatting or appearance of the VOW.

5) No discriminatory treatment or excessive fees

Fees or costs imposed on a VOW operator can't exceed the reasonably estimated actual costs incurred by the MLS in providing such VOW services. The MLS can't set up a differential cost structure between a broker VOW operator vs. a person or entity who operates a VOW on behalf of a broker unless the MLS incurs greater costs in providing one vs the other. The MLS can't unreasonably disadvantage a VOW operator's methods of providing listing data to its customer vs those which a non-VOW broker would be permitted to use.

6) Allowable narrowing of definition of a “Participant” entitled to MLS membership

A crucial prerequisite for MLS membership has been that licensee be “capable of offering and accepting” compensation, but now the standard will be licensees who “offer or accept compensation.” The distinction is intended to mean that MLSs can heighten the criteria for MLS membership to one who “actively endeavors” to make or accept offers of cooperation and compensation with respect to properties in the MLS (even though they may only do it part time or not be very successful at achieving it, etc), rather than one who merely has a license but no intent or ability to offer or accept compensation. Some have considered this new definition a “win” for REALTORS®, but time will tell whether this distinction will be significant in practice. MLSs will not be able to expel or suspend any Participant under this new standard until May 27, 2009.

7) Strict Registration Requirement

Prior to providing data to a consumer who has entered into a “lawful consumer-broker relationship” with the VOW broker, the consumer has to register and provide a valid email address to the site. The VOW operator has to verify the validity of the email address, confirm receipt of a Terms of Use and supply the Registrant with a unique user name and password before the consumer can access the database. These requirements appear to be the same as in the original VOW policy and are noteworthy in that they have been upheld as a distinguishing prerequisite of a VOW.

8) Express Status of Affiliated VOW Partners (“AVP”s)

A VOW operator may designate an AVP to act on its behalf, and the MLS must treat the AVP the same as the Participant. An AVP appears to be one’s tech vendor, although interesting permutations could result.

Unchanged Basics of VOW Policy

Much of the new VOW policy looks like the old one. As earlier stated, it still requires a registration process before data can be displayed. It still requires that the site contain a privacy policy, be refreshed (but now at least every 3 days rather than 7), be open to monitoring by the MLS and erect certain safeguards against scraping. A VOW operator is entitled to receive a “download” and may be required 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.

It maintains the parity mandate which requires that certain restrictions can be imposed on VOW brokers only as long as the same restrictions are in place for non-VOW brokers. Whether off market and sold listing data can be included in the data provided to clients or whether client copies of listings must display the identity of the listing firm are particularly significant issues in this realm since if allowed in one context, they must be in the other as well. MLS data displayed on a VOW can not be changed from how that content is provided on the MLS, although it may be augmented as long as the source for the augmented data or information is identified.

Heavy Hand of Living Under a 10 Year Court Order

Kind of like being on “probation,” the harsh reality of operating under rules that have been put into place by Federal Court Order is that you have to keep checking in with your parole officer.

NAR can’t alter the Modified VOW policy without first getting DOJ approval or an order of the Court. NAR will be subject to ongoing DOJ inspection, staff, officer or agent interviews and request for written reports or responses to interrogatories (under oath if requested).

NAR will be required to police local MLS adoption and enforcement of the VOW policy. It shall deny insurance coverage to any non-conforming MLS and will be required to report to the DOJ the identity of any local MLS which has not adopted the VOW policy or has engaged in a practice contrary to the Court Order. NAR will also be required to furnish quarterly reports to DOJ regarding any communications it receives alleging any local MLS’s non-compliance with or failure to enforce the VOW policy. These requirements may certainly have a “chilling” effect on communication between local Associations/REALTORS® and NAR about VOW matters.

Conclusion

Stay tuned for more. More information on the settlement, the Court's Order and the modified VOW Policy is available on the law and policy section of NAR's website (realtor.org). Furthermore, NAR is ordered to provide further briefing materials to its Member Boards within 90 days of the Entry of the Final Judgment, so additional information will be forthcoming in the days to come.

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