

## FAQs on the VOW Policy and the Model VOW Rules

Fall, 2008

### Acronyms/Terms to Know

- 1.1 VOW - Virtual Office Brokerage Website
- 1.2 Brick and Mortar - Traditional Brokerage with Physical Location
- 1.3 AVP - Affiliated VOW Provider
- 1.4 Registrant - The person signing up to view a VOW
- 1.5 Participant - Broker
- 1.6 Subscriber – Agent
- 1.7 IDX – Internet Data Exchange

### General

Q 2.1 How is "listing information" defined?

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 2.2 Does the VOW policy impose a cap on the fees for VOW data feeds?

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 Affiliated VOW Partners to operate VOWs.

Q 2.3 Will NAR provide software that automatically monitors participants' VOWS for compliance with the VOW rules?

No, NAR has not developed such software.

## **Participants and Subscribers - Rights and Obligations**

Q 3.1 Can MLS Participants 'opt-out' of having their listings shown on the VOW sites of other Participants?

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

Q 3.2 Our state regulators have taken the position that Internet display of listing information is advertising, and that listing brokers' consent to display their listings on other brokers' sites is required. How does this impact the "no opt-out" aspect of the VOW policy?

To the extent that state law or regulation requires that MLS Participants have the right to "opt out" of having their listings shown on the VOW sites of other Participants, those requirements of law or regulation take precedence over NAR policy.

Q 3.3 Can sales-associates and non-principal brokers have their own VOWs? Yes,

subject to the Participant's consent, supervision and accountability.

Q 3.4 Can the MLS limit the right to operate VOWs to MLS Participants only (and not permit subscribers to have their own VOWs)?

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 3.5 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?

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 3.6 Can I exclude listings from display on my VOW where the listing broker offers less cooperative compensation than I'm willing to work for?

Yes. VOWs can 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 3.7 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?

Yes. As noted above, geography is an objective criterion for categorizing listings, and for excluding them from display on VOWs.

Q 3.8 I'm a broker in Illinois. A Participant in an MLS in Arizona gave me permission to display her Arizona listings on my website. Can I do this under the VOW policy?

If you are a Participant in the Arizona MLS, you have the same right to display listings in the Arizona MLS as any other Participant. If you are not a Participant in the Arizona 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 Arizona 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 Arizona MLS unless that MLS expressly permits you to do that.

Q 3.9 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?

Yes.

### **Sellers' Rights**

Q 4.1 Can sellers "opt-out" of display of their property listings on VOWs?

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, or even all, VOW sites.

Q 4.2 Can sellers direct that their listings appear on third-party aggregators' websites (e.g. Realtor.com) but not on other Participants' VOWs?

No. If sellers withhold consent for display of their property on the Internet, that direction precludes display on VOW, IDX and on third-party aggregators' sites.

Q 4.3 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?

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

Q 4.4 If a seller wants a VOW to turn off automated valuation or blogging of their property, how do they make the VOW do that?

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 4.5 Can the listing input process include "yes/no" "checkboxes" regarding the seller's right to withhold consent for AVM or blogging on his listing shown on a VOW (e.g. "AVM - yes/no", "Blogging - yes/no")?

Yes.

Q 4.6 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?

Yes.

Q 4.7 Can sellers require that false information about their property be deleted from VOWs? How?

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 4.8 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?

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.

### **Sold Information**

Q 5.1 How is "sold information" defined?

The VOW policy defines "sold information" as "listing information relating to properties that have sold".

Q 5.2 Can MLSs limit Participants' display or use of sold information on VOWs?

MLSs may prohibit display of sold information on VOWs only if the actual sale prices of completed transactions are not accessible from public records.

Q 5.3 If we prohibit display of sold information on VOWs; must we also prohibit giving sold information to consumers in Participants' physical offices?

Yes.

Q 5.4 Is sold information synonymous with "property history" or "listing history".

No.

Q 5.5 Do the rules regarding distribution of "sold" information apply to data acquired by the MLS from third-party sources (other than participants)?

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.

Q 5.6 In our state, sale prices are not specifically matters of public record but can be computed multiplying the conveyance tax by the tax rate per thousand. Would this be considered publicly accessible sold information under the VOW policy and rules?

If that information is publicly accessible, and if the calculation accurately reflects the actual sales price of a completed transaction, then the information described above could be fairly characterized as "sold information".

Q 5.7 In our state, sold information is not publicly accessible. We provide participants with sold information for their "back-office" systems, but participants may not distribute that information to clients and customers. Must we permit display of sold information on participants' VOWs?

No.

### **Other Issues**

Q 6.1 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?

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 6.2 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?

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.

### **Affiliated VOW Partners ("AVPs")**

Q 7.1 What is an Affiliated Vow Partner ("AVP")?

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 7.2 Must an MLS provide a VOW feed to an AVP?

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 7.3 Can the fees charged AVPs be higher than the fees charged Participants and subscribers?

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

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 7.5 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?

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.

### **Definition of MLS "Participation"**

Q 8.1 What is changed by the revised MLS "membership" rule?

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 Multiple Listing Policy Statement 7.9, *Definition of MLS "Participant"*.

The new requirement that a Participant be engaged in making or accepting offers of cooperation and compensation to other Participants is explained further in the informational "Note" that accompanies Section 3, Participation, in the model MLS Bylaws, which provides:

*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 8.2 Must we adopt the revised definition of MLS Participation? Yes.

Q 8.3 Once adopted, how does the revised definition affect current Participants who do not meet its requirements? Must we terminate their participatory rights? If yes, how quickly?

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 8.4 Will NAR defend our MLS if we terminate a Participant who doesn't meet the new criteria?

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 8.5 Can an MLS require that Participants engage in listing and selling?

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

Q 8.6 How do we determine the intent of prospective Participants seeking admission to the MLS to list or sell property?

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.

Q 8.7 How do we determine whether a Participant (or potential Participant) is able to "respond knowledgeably" to questions about property displayed on the Participant's VOW?

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 8.8 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?

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 8.9 Can we conduct periodic audits or evaluations to ensure Participants are continuously engaged in actively listing or selling property?

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

Q 8.10 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?

Yes. The explanatory "Note" explaining Section 3 - Participation, in the model MLS Bylaws confirms that 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 8.11 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?

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

Q 8.12 What is the consequences if an MLS determines a Participant is not actively listing or selling property?

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 8.13 Does the requirement to actively endeavor to list or sell property also apply to subscribers?

No.

Q 8.14 Can we require applicants to demonstrate a history, e.g. 6 months or a year, of actively endeavoring to list or sell?

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 8.15 What effect does the membership rule have on appraisers - both those currently participating in our MLS and those who apply in the future?

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 8.16 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?

Yes.

Q 8.17 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?

Yes.

## **IDX**

Q 9.1 What's the difference between a VOW and an IDX site?

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. Sellers retain the ability to withhold their properties from Internet display or to withhold the display of their property's address from Internet display. 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.

Q 9.2 Does the settlement agreement affect the IDX policy?

No.

Q 9.3 Can we "graft" elements of the new VOW policy onto our existing IDX rules?

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

## **The Settlement Agreement**

Q 10.1 After the settlement agreement is final; can the VOW policy be changed?

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 10.2 Does the settlement agreement have implications for Commercial Information Exchanges?

No.