





TITLE AND SETTLEMENT IN FLUX:
YOU AIN'T SEEN NOTHIN' YET

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The hot buttons

- FinCEN reporting rule.
- NAR/MLS lawsuits
- AOLs, Title Waivers and the proposed CFPB rule prohibiting borrowers from paying for title insurance.



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FinCEN proposed rule

- Extending the requirement by ALL settlement agents (including attorneys) to report to FinCEN of any non-financed or all cash sales, including gifts, of residential properties ANYWHERE at ANY PRICE to FinCEN within 30 days of closing.
- Would be sale to a legal entity (LLC, corporation, partnership) or trust. There are some exemptions.



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Report what?

- Beneficial ownership information for the transferee entity or trust.
- Information about the individual representing the entity or trust.
- Information about the reporting person or entity.
- Information about the property.
- Information about the transferor.
- Information about the any payments made.



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It's going to happen

- Strong support for the rule from both sides of the aisle.
- Implementation effective 12/1/25. The requirements are set but the manner of reporting not yet set out.
- Significant penalties for non-compliance or missing the 30 day deadline expected.
- GAO report said cost of private sector implementation anticipated to be \$470m.



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What the NAR lawsuits generally allege

- The Sitzer/Burnet lawsuit and the host of others allege that NAR, along with some real estate companies, violated federal antitrust law by conspiring to require home sellers to pay the broker representing the buyer and thus pay an inflated commission.
- Class in Sitzer/Burnet is sellers. 24 other such suits in federal courts and dozens more in state courts.




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Cooperative Compensation Rule

- Mandatory rule of NAR that requires all listing brokers to make a blanket, non-negotiable offer of buyer broker compensation when listing a property on a Multiple Listing Service (MLS).
- In other words, in exchange for this access, NAR requires sellers who list on an MLS to also agree that the seller will pay a commission to the buyers' agent/broker.
- NAR argued that this offered commission could be \$0.



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Proposed settlement agreement

- NAR and the other defendants have proposed settlement agreements.
- Anywhere, KW and Re/Max offers were approved by the court on May 3, 2024. The NAR and BHHS settlements have been preliminarily approved with final approval expected November 26th.
- Douglas Elliman, Compass, Realty One Group, AtWorld Properties, and The Real Brokerage also have submitted settlement agreements.




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So how much?

- NAR has settled for \$418m payable over 4 years.
- Anywhere-\$83.5m
- Re/Max-\$55m
- KW-\$70m
- Home Services-\$250m
- Far less than the \$1.78b verdict which could become treble damages of almost \$5.4b.




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Who does the NAR settlement apply to?

- NAR
- NAR members
- All state/territorial REALTOR associations
- All association-owned MLS'
- All brokerages with a NAR member as principal that had a residential transaction volume in 2022 of \$2b or below


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What about \$2b and above?

- NAR settlement agreement creates a framework for such firms to opt-in to the settlement. The opt-in expired on 6/18/24.
- Settlement would require depositing into escrow an amount equal to 0.0025 multiplied by its average annual "Total Transaction Volume" over the most recent 4 calendar years and to be bound by the terms of the settlement.
- Independent MLS' can opt-in with payment being 100 multiplied by their 2023 subscribers.


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Notable practice changes as a result of the settlement


- Cooperative Compensation Rule gone and prohibition that such offers be blanket, unconditional and unilateral.
- Prohibits making offers of compensation on the MLS to cooperating brokers or disclosing on the MLS listing broker compensation or total brokerage compensation.
- NAR implementation date 8/17/24.

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Buyer agreements

- MLS participants working with a buyer MUST enter into a written agreement before the buyer TOURS a home with the following:
- Specify and conspicuously disclose the amount or rate compensation received or how it is determined,
- The amount must be objectively ascertainable. Can't be open-ended like "whatever the seller is offering",
- Can't be paid compensation for brokerage services from any source that exceeds the amount or rate agreed-to.




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And more...

- Eliminate and prohibit any requirements conditioning participation in NAR MLS on using the Cooperative Compensation Rule.
- Agree not to create, facilitate or support any non-MLS mechanism for listing brokers or sellers to make offers of compensation to cooperating brokers.




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And still more...

- Require NAR MLS participants acting for sellers to conspicuously disclose to sellers and obtain their approval for any payment or offer of payment made by listing broker or seller to buyers' broker.
- Require MLS participants to disclose to prospective buyers and sellers that broker commissions are not set by law and are negotiable.




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But...

- Cooperative commission is NOT banned. Just can't offer it through the MLS.
- Seller concessions may still be offered through the MLS so long as such concessions are not limited to or conditioned on the use of or payment to a buyer broker.


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Reactions by other players

- The GSEs will not count buyer agent costs in cap on seller concessions.
- VA has prohibited the veteran borrower from paying any real estate commission. In June VA "temporarily" allowed veterans to pay buyer brokers.
- FHA allows up to 6% of sales price in seller concessions. FHA will not count buyer agent costs in the cap.


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Potential impact on title and settlement


- Will we see an expansion of dual agency (where allowed) where listing broker also represents buyer?
- Very common and allowable by law in some markets and not common in others.
- Where buyers' agent broker has been common source of business will that shift to listing?
- May occur in some markets and not in others.

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Other impacts

- Relocation industry has historically generated revenue from being paid a portion of buyers' brokerage commission.
- Potential impact on home affordability.
- With reduction in number of real estate agents already occurring how many more agents will be gone? Some analysts say as much as 70% of present buyer agents within 2 years.




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Boldly into the future


- US Judicial Panel on Multidistrict Litigation did NOT allow consolidation of Sitzler/Burnet settlement in 21 other pending federal cases in 9 federal districts. The show will go on.
- The US District Court for the DC Circuit has allowed DOJ to continue their own criminal investigation into the NAR/MLS alleged anti-trust activity. DOJ has advised they oppose commission offers being made "anywhere".



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But there's more

- In September Compass, and later Anywhere, advocated elimination of the Clear Cooperation Policy. KW and Re/Max opposed them.
- The Clear Cooperation Policy set forth by NAR requires its members to enter into the MLS any listing taken within 24 hours of the listing agreement being signed.
- NAR is trying to reach a compromise.



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And not just consumers

- On 8/22/24 Homie Technologies, a Utah-based flat fee and discount broker, filed an anti-trust lawsuit against Wasatch Front MLS, NAR, Anywhere, Re/Max, KW, and BHHS in federal court alleging the defendants steered customers away from their listings and created “express and tacit” boycotts of their listings.
- Homie claims to have emails and texts from the defendants supporting their allegations.



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So what’s a title agent to do?

- Stay on top of your market as to market shifts from buyer agent/broker referrals to listing agent referrals especially in regard to dual agency. You amy need to develop sales and marketing to target both.
- Read all real estate contracts provided carefully and ask questions.
- Expect greater demand for ABAs particularly with brokers that do high levels of buyer representation and expect consolidation of brokerages.



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Alternatives to title products and who pays


- Attorney Opinion Letters (AOLs)
- Title waiver programs
- CFPB rule prohibiting borrowers from paying for lender’s title insurance



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AOLs


- Freddie has accepted them with conditions since the mid 90s. Fannie with explicit requirements since April of 2022. VA since October of 2022.
- ACREL/ABA standards provide that numerous requirements of the Fannie AOL are unethical to provide.
- The GSE standards require that they can be provided where such evidence is "customary".
- MBA white paper by the Blank Rome firm provides numerous concerns for lenders.



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TRAC+


- On 5/16/24 United Wholesale Mortgage (UWM) announce TRAC+ . UWM will handle title review, closing and disbursement ("..no longer need to work with a title company or settlement agent...") for a flat fee of \$1850.
- Eligible for any qualified residential refinances (including FHA/VA) and requires using UWM's UClose 3.0 platform.



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Title Waiver


- The GSEs have been charged by the White House to develop programs for waiver of title insurance on qualified residential refinances.
- Fannie had examined such a program in 2022-23 and decided to not so pursue in October Of 2023.
- Are the GSEs enthused about this?




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CFPB rule prohibiting borrowers paying for lender's title policies

- In April the CFPB disclosed it was considering a rule to prohibit lenders from charging borrowers for lender's title insurance.
- Announcement of such a rule is considered to be coming imminently.
- How would this work?
- And remember the CFPB's funding was just ruled constitutional by a 7-2 vote.




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QUESTIONS?
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THANK YOU



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