

CALCULATING COMMISSIONS BASED UPON "NET SALE PRICE"

An ever-increasing number of REALTORS® have inquired as to how they can require a cooperating broker to accept commission calculated on the "net sale price." As we understand it, the concern has arisen as a result of the fact that more and more buyers are requesting significant concessions in the form of, for example, seller paid closing costs and/or remodeling credits. As the concession amount increases, many sellers are objecting to including the value of these concessions in the purchase price for purposes of calculating the commission.

First and foremost, it is important to understand that it is not enough for the listing brokers to simply include a provision in their listing agreement stating that the commission will be based upon "net sale proceeds." The fact that the listing contract provides for a calculation of the total commission amount based upon the "net," will only reduce the amount that the seller is obligated to pay. It will not automatically reduce the amount that the listing broker will be obligated to pay the cooperating broker.

Consider the following hypothetical:

Listing agreement provides that seller will pay a commission equal to 6% of the "net sale price." In the MLS, listing broker offers cooperating agents a 3% commission. Seller receives an offer for \$200,000 that requires the seller to give the purchaser a \$10,000 remodeling credit and to pay purchaser's closing costs up to \$4,000. Understanding that his commission obligation is limited to 6% of the "net sale price," seller accepts this offer. Listing broker then advises the cooperating broker that the commission will be calculated based on the "net sale price." The cooperating broker refuses to agree to this commission amount. Seller will only owe the listing broker a 6% commission based upon the "net sale price," *i.e.*, \$11,160; but the listing

broker will owe the cooperating broker a commission equal to 3% of the "gross sale price," *i.e.*, \$6,000.

How then does the listing broker require the cooperating broker to agree that the commission will be calculated based upon the "net?" In the context of a particular transaction, this can be handled fairly easily. A seller who has received an offer that contains significant concessions may decide that such offer is acceptable ONLY if the commission will be calculated based upon the sale price less the concession amount. If so, and if that commission adjustment is acceptable to the listing broker, then the listing broker should contact the cooperating broker on behalf of the seller to see whether the cooperating broker will also agree. This discussion should take place and be reduced to writing prior to the seller's acceptance of the buyer's offer.

Instead of working through this issue on a transaction-by-transaction basis, can the listing broker simply indicate in the MLS listing that in all instances the amount of seller concessions will be deducted from the purchase price for purposes of calculating the commission? The answer is "yes," but if, and only if, the MLS has a rule expressly permitting such a practice. Until recently, NAR's MLS Model Rules provided that an offer of compensation must be either: (a) based on a percentage of the gross sales price; or (b) a stated dollar amount. In May of 2008, NAR amended its model MLS rules to say that a local MLS may also choose to allow participants to offer compensation as a percentage of the net sales price defined as the gross sale price minus buyer upgrades (in the case of new construction) and seller concessions (as defined by the MLS).

It should be noted that while to REALTOR® members, the term “net sales price” clearly means the gross sales price less seller concessions, this is not quite so obvious to people outside of the REALTOR® community. To many people outside of the industry, “net” is synonymous with “profit” and, therefore, the “net sales price” would be the gross purchase price less all payouts. This would include the payoff of the seller’s mortgage. Thus, for example, if the sales price was \$200,000 and closing costs and payoff of the seller’s mortgage totals \$190,000, then the commission would be calculated based on a “net” of \$10,000. For this reason, both MLS policy and listing contracts should indicate exactly what expenses will be deducted for purposes of calculating the “net sale price.”

An MLS who wants to permit commissions based upon the net sales price should have a policy that provides along the lines of:

The compensation specified on listings published by the MLS shall be shown in one of the following forms:

1. by showing a percentage of the gross selling price;
2. by showing a definite dollar amount; or
3. by showing a percentage of the net sale price. “Net sale price” shall mean the gross sale price minus: (a) buyer upgrades in the event of new construction; and (b) seller concessions. “Seller concessions” shall mean . . . [insert definition].

The MLS policy will then need to insert a definition for "seller concessions."

Sample definitions of "seller concessions" that we have located include:

1. Anything of value added to the transaction by the seller for which the buyer pays nothing additional and which the seller is not customarily expected to pay or provide.
2. Any costs of the buyer that the seller pays on behalf of the buyer, such as any buyer's closing costs and remodeling credits.
3. Anything of value added to the transaction by the seller.

In summary, it would appear that a number of MLSs around the State permit a REALTOR® to offer compensation calculated on the "net sales price." These MLSs would be well-advised to adopt a formal rule which expressly permits such practice and, in doing so, explicitly defines both "net sales price" and "seller concessions."

Where an MLS does not permit such a practice, any agreement with the cooperating broker to calculate the commission on the net sales price must be done in writing prior to the time the seller agrees to provide seller concessions.