

## **MIDYEAR CHANGES TO THE 2024 GAR FORMS**

GAR is introducing new forms to comply with the terms of the NAR settlement. While there are major changes, adjusting to the NAR settlement should be easier for Georgia REALTORS® than REALTORS® in other states. This is because our forms have long provided for real estate commissions to be paid for by both sellers and buyers. More importantly, Georgia brokers who wanted to represent buyers in a client relationship were required under the Brokerage Relationships in Real Estate Transactions Act (“BRRETA”) to have written agreements with their clients which disclosed, among other things, how the broker would be compensated. As such, buyers’ brokers are already used to explaining their value to buyers and getting them to sign Buyer Brokerage Engagement Agreements. Therefore, having to adjust to the NAR settlement requirement that REALTORS® enter into a written agreement regarding their compensation prior to showing buyers property should be relatively easy for Georgia REALTORS®. (In some states, the seller was responsible for paying all of the commissions, and REALTORS® now have to learn for the first time how to get buyers to sign brokerage engagement agreements.)

While this puts Georgia REALTORS® ahead of the game, there are still changes that may take some getting used to. Let’s take a look at the most significant of these changes. This article will also review some forms changes resulting from changes in legislation.

### **1. CERTAIN NEW DISCLOSURES INCLUDED IN THE GAR FORMS**

The NAR settlement requires that brokerage engagements and compensation agreements with customers include the disclosure “Commissions are negotiable and are not set by state law”. This disclosure has been added to all of the GAR brokerage engagement agreements. However, the GAR Forms Committee felt that this disclosure alone could be confusing because while commissions are negotiable across our industry, it does not mean that individual REALTORS® must negotiate the commissions they charge in every transaction. As a result, the following companion statement was made along with the disclosure: “However, this does not obligate individual licensees and brokerage firms to necessarily negotiate their Compensation”.

### **2. THE USE OF THE WORD “COMMISSION” WAS CHANGED TO “COMPENSATION FOR PROFESSIONAL SERVICES” OR “COMPENSATION”**

The GAR Forms Committee changed the word “commission” to “compensation for professional services” or “compensation” throughout our GAR Forms. While it may take a year or two for the change to be made to all GAR Forms, the Committee believes that the word “compensation” more accurately describes all of the different financial arrangements REALTORS® may enter into in selling their services.

### **3. AGREEMENT TO WORK WITH BUYER AS A CUSTOMER (GAR FORM F116)**

a. **Compensation Language Added to Customer Agreements.** The NAR settlement requires REALTORS® to have written compensation agreements with buyer customers and clients with whom they are working before they are shown properties. As a result, GAR redrafted its Agreement to Work with Buyer as a Customer to include compensation language. Under the NAR Settlement, the compensation a buyer’s broker may receive from a source other than the buyer must also be approved by the customer or client. Therefore, the new compensation language is broken into three different sections.

Section A.4.B. first specifies the compensation to be paid by the buyer to the buyer's broker and is set forth below.

**A.4.B. Compensation to Buyer's Broker:** Buyer agrees to pay Buyer's Broker the Compensation set forth below at the closing of any Contract to Purchase (as that term is hereinafter defined)

- \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the sales price;
- \$ \_\_\_\_\_;
- (other) \_\_\_\_\_.

Section A.4.C. then addresses the maximum compensation the buyer's broker can receive from the seller or seller's broker. This amount must be specific. It cannot be something imprecise such as "I give permission for the buyer's broker to receive any compensation the seller or seller's broker agrees to pay". This section is set forth below.

**A.4.C. Optional Compensation from Seller or Seller's Broker to Buyer's Broker:** Buyer hereby  approves or  disapproves Buyer's Broker receiving Compensation from Seller or Seller's Broker. Nothing herein should be interpreted as a promise by Seller or Seller's Broker to pay or offer to pay Compensation to Buyer's Broker herein.

If Buyer approves such Compensation being paid by the Seller and/or Seller's Broker to the Buyer's Broker, the maximum amount the Buyer's Broker may receive from Seller and/or Seller's Broker is as follows:

- \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the sales price;
- \$ \_\_\_\_\_;
- (other) \_\_\_\_\_  
\_\_\_\_\_.

So, for example, if the broker working with the customer has a right to receive compensation up to eight (8) lollipops from the seller or seller's broker, it would be specified above. The ability of the broker to receive a bonus would also be specified in the section above marked "other". This section also makes it clear that while the buyer's broker may collect compensation from other sources, no promise is being made that other parties will in fact pay such compensation.

The third section, Section A.4.D. addresses whether any compensation paid by the seller or seller's broker reduces the compensation to be paid by the buyer, is in addition to it, or is some combination of the two. This section is set forth below.

**A.4.D. Possible Reduction in Buyer's Compensation Obligation to Buyer's Broker:** Any Compensation Buyer's Broker receives from Seller or Seller's Broker shall: [Select one. The boxes not checked shall not be a part of this Agreement.]

- reduce the Compensation Buyer shall pay to Buyer's Broker dollar for dollar;
- not reduce the Compensation Buyer shall pay to Buyer's Broker;
- special exceptions to the Compensation paid from Buyer to Buyer's Broker, as set forth below:  
\_\_\_\_\_  
\_\_\_\_\_.

As can be seen from the new section, depending on which box is checked, compensation paid the seller or seller's broker, could reduce the buyer's obligation dollar for dollar where every dollar paid by the seller or seller's broker is one less dollar paid by the buyer. Alternatively, and again depending on which box is checked, it might not reduce the buyer's obligation to pay compensation to the buyer's broker. If the third "special exceptions" box is checked, there might be some special arrangement where, for example, the buyer pays the buyer's broker compensation equal to one percent (1%) of the sales price regardless of what the seller contributes, and the buyer broker can then collect some additional agreed amount from the seller or seller's broker.

Not unsurprisingly, the GAR Forms Committee split the compensation language in the Exclusive Buyer Brokerage Engagement Agreement (GAR Form F110) into these same three sections.

b. **Protected Period added to Customer Agreements.** One challenge for the GAR Forms Committee was whether to give the broker working with a customer some type of protected period. The Committee did not want buyer customers to take advantage of buyers' brokers by getting their help and then simply ditching them (since there is no set term in a customer-broker relationship). Therefore, the Forms Committee added a new Section A.4.E., as follows, that essentially serves as a protected period.

**A.4.E. When Compensation is Due:** Buyer shall be obligated to pay Buyer's Broker the Compensation referenced above at the closing of any property that Buyer purchases that was shown to or identified by Buyer's Broker to Buyer within the later of \_\_\_\_ days of the date of this Agreement (referenced above) or the last date that Buyer's Broker showed any Property to Buyer. Notwithstanding the above, this section shall not apply if Buyer enters into an exclusive buyer brokerage agreement with another broker.

Under this section, for example, if 180 days is filled in the blank above, and the buyer closes on a property shown to the buyer by the buyer's broker working with the customer, the buyer would be obligated to pay the buyer's broker the compensation that was referenced in the agreement. The only exception to this rule is if, in the interim, the buyer enters into an exclusive brokerage engagement with another broker, then no commission would be due to the first buyer's broker. As such, this new language is similar to the protected period sections of the GAR brokerage engagement agreements.

4. **PRE-SHOWING COMPENSATION AGREEMENT (GAR FORM F258).** The most significant change in the NAR Settlement is that buyer brokers can no longer rely on a REALTOR® owned multiple listing service to protect the compensation being offered by seller's brokers.<sup>1</sup> This is because the NAR settlement prohibits brokers from including offers of compensation in any portion of a REALTOR® owned MLS, including remarks and attachments.

As a result, buyer brokers who are being offered compensation by the seller or seller's broker will have to find new ways to protect such offers of compensation. The GAR Forms Committee has developed forms that allow this to be done in a variety of ways. First, the Co-op Commission Agreement (GAR Form F258) is now the "Pre-Showing Compensation Agreement" and can be used by a buyer's broker to get the seller or seller's broker (whoever is paying the compensation) to agree in writing to pay a specified amount of compensation to the buyer's broker.

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<sup>1</sup> There are several MLSs within Georgia that are not REALTOR® owned and, therefore, have a choice as to whether to follow the NAR Rules.

The seller or seller's broker can sign multiple copies of the form in advance stating the compensation that is being offered and have it available to any REALTOR® viewing the property. To protect the buyer's broker, whoever is paying the compensation, be it the seller or the seller's broker, should sign the form. In other words, the seller's broker does not want to represent what the seller has agreed to pay as the compensation since if the seller then refuses to pay, the seller's broker may have liability for what was promised.

It should also be noted that the offer of compensation being made to the buyer's broker is for offers made by the buyer's broker's client or customer within a defined period of time. The GAR Forms Committee felt that it would otherwise unfairly restrict the seller or seller's broker from being able to modify over time the compensation being offered to the buyer's broker.

Ideally, the best way for the buyer's broker to protect their compensation rights when the compensation is being paid by the seller or seller's broker is to get the party paying the compensation to sign this form prior to showing the property to the buyer. The challenge, of course, is that if the buyer wants to see six (6) different properties on a Saturday afternoon, the buyer's broker would need to get six (6) different Pre-Showing Compensation Agreements signed. That may not always be possible. Therefore, in addition to the Pre-Showing Compensation Agreement signed, the GAR Forms Committee has also prepared a Broker Compensation Agreement which we will talk about next.

5. **BROKER COMPENSATION AGREEMENT (NEW GAR FORM F259)**. The Broker Compensation Agreement is a new GAR Form that is intended to be attached as an exhibit to the GAR Purchase and Sale Agreement. It should be used in lieu of the buyer's broker writing a special stipulation into the Purchase and Sale Agreement regarding the seller or seller's broker paying compensation to the buyer's broker.

The challenge in making compensation part of the Purchase and Sale Agreement is that the brokers are not parties to the Agreement. As such, they may have little ability to prevent the buyer and seller from amending the Purchase and Sale Agreement to reduce a broker's compensation from what was previously agreed to by the broker. So, for example, let's say that the seller agrees to pay the buyer's broker seven (7) lollipops as compensation for finding a buyer for the property. Later, when the seller realizes that he has to make substantial repairs to the property, the seller proposes to the buyer that they amend the buyer's broker's compensation to two (2) lollipops. The buyer agrees to the amendment over the objections of the buyer's broker. If all the buyer's broker did was include a special stipulation dealing with compensation paid by the seller or seller's broker, the buyer's broker may just be out of luck in trying to collect compensation of seven (7) lollipops.

To mitigate this risk, the Committee added language to try to protect the buyer broker's compensation once a Compensation Agreement is signed. Specifically, a provision was added stating that "Once this Agreement is signed, it cannot be further modified without the express written consent of the Broker(s) whose compensation is set forth herein and any such modification shall be null and void without the affected Broker's written consent". Other language designed to protect the buyer's broker was also included.

6. **EXCLUSIVE SELLER BROKERAGE ENGAGEMENT AGREEMENT (GAR FORM F101)**

a. **Section A.4.b.** The major change to this form was the complete revision of the compensation section. Section A.4.b. set forth below states, as would be expected, the compensation the seller agrees to pay to the seller's broker.

**A.4.b. Compensation to Seller's Broker:** Seller agrees to pay Seller's Broker the following Compensation at the closing of any Contract to Sell (as that term is hereinafter defined) of the Property as follows:

- \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the sales price;
- \$ \_\_\_\_\_;
- (other) \_\_\_\_\_.

b. **Section A.4.c.** A second section entitled "Optional Compensation to Buyer's Broker" addresses whether the seller and / or seller's broker is offering compensation to the buyer's broker and constitutes approval of such compensation. The new language is set forth below.

**A.4.c. Optional Compensation to Buyer's Broker:** Seller hereby approves the following Compensation, if any, being paid to Buyer's Broker by either  Seller (in addition to the Compensation being paid to Seller's Broker);  Seller's Broker (out of the Compensation being paid to Seller's Broker); or  Seller and Seller's Broker as set forth in "other" section below.

- \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the sales price;
- \$ \_\_\_\_\_;
- (other) \_\_\_\_\_

There is also a section where the seller can specify if the seller's offer of compensation is conditional. So, for example, if a seller were to agree to pay the buyer broker compensation in a specified amount, but only if the buyer's offer is above a certain amount, this would be specified here. The new language is set forth below.

- If Seller's offer of Compensation to the Buyer's Broker is conditional, specify the conditions here: \_\_\_\_\_

For all purposes herein, the term "Buyer's Broker" shall mean the Broker, including the Broker representing the Seller, if they are also working with or representing the Buyer as a customer or client.

## 7. **INSTRUCTIONS TO CLOSING ATTORNEY (GAR FORM F255)**

The Instructions to Closing Attorney form was revised largely to reflect all of the different ways that compensation can be paid to the brokers in real estate transactions. In a world where compensation may be more heavily negotiated, there may be new and different arrangements for the payment of compensation. The Instructions to Closing Attorney form tries to reflect all of these different possible arrangements.

Three significant changes were made to the Instructions to Closing Attorney form. The first is that if it is signed by a real estate licensee of a broker, the licensee warrants that they have the authority to sign the Agreement on behalf of their broker. Therefore, real estate licensees should get confirmation that they have the authority to sign the Instructions to Closing Attorney

on behalf of their brokers. This change was made so that if the seller's broker is offering compensation to the buyer's broker, the buyer's broker can hopefully rely on the promise as being the representation of the broker.

The second change was the addition of a line for the seller to sign the Instructions to Closing Attorney form. Please note that it should only be signed by the seller if the seller is paying the compensation to the buyer's broker. If the seller's broker is paying compensation to the buyer's broker, the form does not need to be signed by the seller.

The third change was the elimination of the sentence that signing the Instructions to Closing Attorney form still allowed the parties to arbitrate the entitlement to compensation after the Closing. The thought of the Committee was that while compensation claims are always arbitrable between REALTORS®, signing the Instructions to Closing Attorney form should be viewed as evidence of the broker's position regarding entitlement to compensation.

It should also be noted that in most cases where the Broker Compensation Agreement Exhibit has been added as an exhibit to the Purchase and Sale Agreement, the Instructions to Closing Attorney will be unnecessary because the closing attorney will simply look to the exhibit for direction about broker compensation. It is more likely that the Instructions to Closing Attorney form will only be used when a Pre-Showing Compensation Agreement was signed prior to contracting in lieu of making the Broker Compensation Agreement Exhibit part of the agreement or in cases where no other written agreements regarding compensation exist.

## **8. CHANGES TO THE PURCHASE AND SALE AGREEMENT (GAR FORM F201)**

The major changes to the Purchase and Sale Agreement were made to the section on the Compensation of Broker (previously the Brokerage section). The revised section explains that if the desire of the parties is to state the compensation of any brokers in the Purchase and Sale Agreement or is to modify previously agreed upon compensation, then a Broker Compensation Agreement (GAR Form F259) should be attached as an exhibit to the Purchase and Sale Agreement. This section also states that if any provision in this Agreement changes the total compensation due to any broker, then such change shall only be binding if the affected broker consents to the change in writing. This change was made to try to prevent buyers and sellers from altering the compensation to be paid to a broker in an amendment to the contract. This section also includes the language that licensees of brokers have the legal authority to bind their broker in agreeing, for example, on a change to their compensation.

Finally, a broad definition of "Compensation" was added to the Purchase and Sale Agreement to reflect that it can be a commission, a flat fee, a bonus or some combination of these items.

## **9. NEW LANGUAGE TO COMPLY WITH NEW STATE STATUTES**

a. **Limitation on Buying Property Within Ten Miles of a Military Base (O.C.G.A. § 2-1-7).** A new statute was passed preventing certain foreign persons from buying land within ten (10) miles of a military base, installation or airport. While there is certainly logic behind the adoption of such a law, it unfortunately requires real estate brokers to explain the "requirements and limitations" of the law to consumers. This part of the law, unfortunately, attempts to require REALTORS® to be lawyers and to assume responsibility for explaining a fairly complicated law to buyers and sellers. As such, it may well be unconstitutional since explaining complicated laws is normally the exclusive purview of lawyers (and REALTORS® are not trained as lawyers). In our Georgia Constitution, only our Georgia Supreme Court (and not the Georgia Legislature) can

decide what is the practice of law and who can practice it. Therefore, this statute arguably infringes on the court's authority. Nevertheless, unless it is successfully challenged, REALTORS® will owe a duty to explain a fairly complicated piece of legislation to consumers. To try to mitigate the risks this new legislation poses to REALTORS®, the GAR Forms Committee added the following disclaimer to relevant brokerage engagement agreements as follows:

**Disclaimer Regarding the Sale of Certain Property**

Seller acknowledges that the Official Code of Georgia section 2-1-7 prohibits certain nonresident aliens, foreign persons, foreign companies and U.S. companies owned by any of the above from buying or possessing certain land within a 10-mile radius of any military base, military installation, or military airport. Seller agrees to carefully read the entirety of the above referenced Code section before contracting to sell such land. Seller should consult with legal counsel to fully understand the law. If Seller has not submitted written questions to Broker regarding the law to Broker prior to contracting to selling prohibited property, Seller acknowledges that Seller fully understands the limitations and requirements of the law and Broker shall have no responsibility for further doing the same. In such event, Seller shall indemnify and hold Broker harmless from any and all claims, causes of action, suits and damages arising out of or relating to Seller's failure to comply with the law. Violating the law can subject Seller to civil and criminal penalties. The law also requires certain sellers and others to divest themselves of such property within certain time periods if they are now no longer legally able to purchase such property.

b. **New Law Limiting Security Deposits.** The other new state law that required a change to the GAR forms is a new statute providing that "no Landlord shall demand or receive a security deposit in an amount that exceeds the equivalent of two months' rent". (See, O.C.G.A. § 44-7-50). Therefore, the GAR leases were updated to be consistent with this new law.

**CONCLUSION**

The GAR Forms Committee is always working to keep its forms in compliance with Georgia law, NAR rules and sound business practices. Hopefully, it has done so with this group of changes.

*Seth G. Weissman is GAR General Counsel and the senior partner of the law firm of Weissman PC.*