CALIFORNIA ASSOCIATION OF REALTORS®

Memo

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Dear CAR NAR Directors,

As you may recall from CAR's last meeting, CAR's MLS Committee passed a motion which CAR adopted to petition NAR to change its MLS lockbox policy so that an MLS may be allowed to require Participants and Subscribers to use an MLS designated or authorized lockbox on properties submitted to the service. By letter dated February 22, 2012, we submitted our petition to NAR requesting the policy change. Many of you have already received a copy of that letter which is attached hereto for reference. My apologies to those of you receiving duplicate emails.

Following receipt of C.A.R.'s February 22nd letter to NAR seeking a change of MLS Lockbox Policy, NAR has asked for further information. FYI, so that you are in the loop on the latest developments regarding this request, please see the excerpt from my email exchange with Cliff Niersbach outlining CAR's position below:

Hi Cliff,

You have asked for further input on C.A.R.'s request to change MLS Lockbox Policy outlined in C.A.R.'s February 22nd letter to NAR. We appreciate the opportunity to provide additional information in response to your questions. Please see NAR's questions and C.A.R.'s responses below:

- **Does the CAR proposal contemplate that all participants (or all participants and subscribers) will be required to purchase or lease MLS or association-provided (because not all lockbox "systems" are MLS activities) lock boxes as a condition of obtaining or maintaining participant or subscriber rights?**

  The proposal contemplates allowing MLSs to require approved lockboxes as a condition of MLS submission for all listings where any type of a keysafe, lockbox or other enabling access device will be used or is present on the property. As a result, all listings will either have an authorized lockbox present as at least one of the available devices OR no access device present should a seller/occupant refuse to authorize placement.

- **If an MLS or association leases or sells keys, cards, programmers, fobs or other devices enabling use of those MLS or association-provided lockboxes, would the proposal require that such devices be leased or purchased as a condition of obtaining or maintaining participatory or subscriber rights?**

There is no requirement for an MLS participant or subscriber to purchase the lockboxes (cards, programmers, etc.) However the participant could not place any listings in the MLS if it has a non-authorized enabling device unless it ALSO had the authorized lockbox. The practical effect would be unless the participant wanted to physically attend all showings, virtually every participant or subscriber would likely purchase or lease authorized boxes and keycards. This is currently the case but not all have purchased/leased sufficient number of boxes if they have a very large number of listings.

That being said, if allowed to mandate use of authorized lockboxes, MLSs may very well wish to explore the possibility of including the purchase or lease of keycards within the MLS fee structure (i.e. include keycards within the dues) for all participants and subscribers, or at least as an alternative pricing package. In some instances, such a structure may promote greater economies of scale and actually reduce overall cost. If MLSs were inclined to include keycards within MLS participation fees, MLSs would thus seek the right to require that such enabling keycard devices be leased or purchased as a condition of obtaining or maintaining participatory or subscriber rights. While we don't believe our core proposal necessitates that keycards be purchased or leased as a condition of participation/subscription, we request that NAR consider allowing MLSs to bundle their services in this manner, assuming that there is no minimum number of boxes if they are priced per unit.

- **The proposal seems clear that where a seller expressly directs that a lockbox not be placed on the property, that seller's direction must be respected. What would a listing participant's obligation be under the proposal if the listing contract is silent on placement of lock boxes on the sellers property?**

  MLS Rules prohibit Participants and Subscribers from placing a lockbox on a property without written authority from the seller. C.A.R. Model MLS Rule 13.6 <u>Written Authority</u>, states in pertinent part: "Participants and Subscribers shall not place a lockbox on a property without written authority from the seller and occupant if other than the seller." So in the event a listing broker does not obtain such written consent, their listing would be characterized as one where a seller has not authorized placement of an access device. As a result, listing broker may not place any lockbox or other enabling access device on the property. In the event he placed one anyway, he would be in violation of MLS Rule 13.6, and if it were a non-conforming device, he would also have violated the authorized lockbox rule.

- **What would be the effect of the proposal on remote participants who conduct their MLS listing activities via a "virtual office"?**

  The same rules would apply equally to traditional brokers and VOW brokers. All listings would either have an authorized lockbox present as at least one of the available devices OR no access device present. This is actually pro-competitive as it will give more access to show, and therefore a fluid and competitive real estate market, to all buyers of the property and all brokers. Since it is assumed that properties would still be shown to prospective buyers, as opposed to being given no access, then a virtual office would actually be more, not less

efficient with this process. Of course, if there will be no access device whatsoever, a seller would simply show his or her own property in the absence of a physical presence of the listing office agent.

- **We had some earlier albeit limited discussion about "digital doorknobs". Those devices are also referenced in the February 22 letter. It appears the CAR proposal would require placement of an MLS or association-provided lockbox on a property when the listing broker utilizes a digital doorknob. What would the proposal require of listing participants in cases where the digital doorknob is the homeowner's? Or where it's placed by the seller (possibly a financial institution or an REO company) but not by the listing participant?**

  As stated earlier, the proposal contemplates allowing MLSs to require approved lockboxes as a condition of MLS submission for all listings where any type of a keysafe, lockbox or other mass enabling access device will be used or is present on the property. As a result, all listings should either have an authorized lockbox present as an available device in addition to a digital doorknob OR no access enabled by virtue of the digital doorknob should a seller/occupant refuse to authorize mass access by virtue of a keysafe or other access device. So, where a seller/lender/REO company places a digital doorknob or other access device on the property and utilizes it for mass access while the property is listed on the MLS, listing broker is still required to place an authorized lockbox on the property. If such a seller happens to have a digital doorknob on the property yet does not wish to authorize any type of mass access by it or any other means, the seller may disable it, have the listing treated as a seller refusal to authorize lockbox and not be required to use an authorized lockbox. In such a case, the listing broker would have to personally give access to the property as would be the case with a true seller refusal to authorize lockbox. If a seller uses the unauthorized device for mass access and refuses the authorized lockbox, the listing has to be removed and the broker would be sanctioned for violating the lockbox rule. Simply stated, a seller may leave the door wide open if they like or put a key under the mat. But for both the security of the licensees, the people being shown the property, and to avoid the anticompetitive limitations on showings, use of the authorized lockbox is the prerequisite for allowing listing to remain in the MLS if there is any mass access system used.

- **If the lock box activity is an association of REALTORS® activity and not an MLS activity, would the requirements apply to all REALTOR® members, or only to MLS participants and subscribers?**

  As an MLS rule, the requirement would apply to all MLS participants and subscribers.

- **Has CAR legal staff assessed the proposal from an antitrust perspective? Or obtained an opinion from antitrust counsel. Put another way, do you believe the proposal is legally defensible?**

  CAR staff presented its proposal for allowing MLSs to require approved lockboxes as a condition of MLS submission to outside experienced antitrust counsel. When articulated with the benefits to the industry outlined in our opening letter to you, as well as additional ones set forth below,

he believes it passes antitrust muster even under the more onerous California laws. In fact, the pro-competitive underpinnings of the proposal are compelling.

Requiring approved lockboxes as a condition of MLS submission is pro-competitive:
(1) requiring use of a shared access device is the most effective way to facilitate universal access to listed properties;
(2) facilitating universal access increases cooperation so the greatest number of licensees and hence potential buyers can access properties which then promotes fair and open sales of property;
(3) current resistance to enabling the common system actually restricts competition by enabling and rewarding "hoarding" of listed properties and more limited showings and thus fewer competitive offers presented to sellers, creating a more exclusive, closed and possibly deflated market;
(4) authorized access system has built-in safeguards for safety and accountability regarding who accesses the property (not to mention NAR has outlined a whole policy designed to assure safety and security through an MLS/AOR approved lockbox program) which reduce the potential for harm to people, property and surrounding communities and thus helps to elevate the market as a whole;
(5) use of non-authorized access systems for listings in the MLS wrongly legitimizes representations of access and may wrongly suggest the presence of a sanctioned device when they have not been vetted by MLSs/AORs and conducting such vetting would be unreasonably and overly burdensome;
(6) using the MLS to enable non-conforming devices which are inherently unreliable or selectively manipulated to undercut cooperation and selectively deny access subverts the ability to show properties and cooperation which impairs commerce;
(7) free rider problem: MLS is a product built upon good will and the agreement to cooperate, and allowing those to partake in benefits and get an easy marketing vehicle but not make good on cooperation is unfair to all rule-following participants.

Please let us know if you have questions or need anything further. Thank you.

Regards,
Elizabeth

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