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Legal/MLS Update May, 2011

- (1) Revised C.A.R. Model MLS Rules
- (2) IDX Franchise Policy
- (3) CIVIX Patent Settlement/License

1. Revised C.A.R. Model MLS Rules

At the May 2011 C.A.R. meetings in Sacramento, the Directors voted to tighten the *Lockbox Type Requirement* rule (see 13.2.2) within C.A.R.'s Model MLS Rules and assign placement of the rule into Tier 2 of the Model Citation Policy (see Exhibit B to the CAR Model MLS Rules). The newly revised CAR Model MLS Rules (Effective May 2011) reflecting these changes have been approved by NAR and are now available on the Legal/MLS page at the following link: <http://www.car.org/legal/mls/california-model-mls-rules-5-11/>.

2. IDX Franchise Policy

Back at the November 2010 REALTORS Conference & Expo, the NAR Board of Directors approved an amendment to the Internet Data Exchange ("IDX") policy authorizing participants to provide IDX information to their real estate franchise organizations ("franchisors") to be indexed for display on franchisors' websites. For purposes of this policy (i.e. IDX Franchise Policy), "real estate franchisor" is defined as a company granting real estate brokerage franchises under the franchisor's trademarks pursuant to a franchise disclosure document meeting applicable Federal Trade Commission rules.

However, in the weeks leading up to NAR's May 2011 Midyear Legislative Meetings & Trade Expo, it was clear that significant numbers of REALTORS® and REALTOR® groups opposed this policy and asked NAR to repeal it. However, due to the parliamentary rules impacting when and how a formal repeal vote could occur, the IDX Franchise Policy was not actually repealed at this time. Instead, it was decided that (1) NAR's Multiple Listing Issues and Policies Committee is to re-examine the IDX Franchise Policy and report back at NAR's November 2011 REALTORS Conference & Expo and (2) in this interim period while the policy is being re-evaluated, **the IDX Franchise Policy is amended to permit display of IDX listings on franchisors' websites only if a listing broker affirmatively consents ("opts in") to franchisor indexing and display.** The amendment to the IDX Franchise Policy is effective 30 days following the NAR directors' action.

Thus, as of June 13, 2011, under the interim policy change, a franchisor no longer has the permission otherwise built into IDX to index other brokers' listings. Instead, a franchisor must be provided with express permission from the listing broker in order for that listing to be included in the franchisor's master indexing site.

The implications of the NAR actions are:

- Franchisors have until Monday, June 13, to discontinue display of the listings of MLS participants who have not affirmatively consented to display of their listings on franchisor websites.
- MLSs must permit participants to affirmatively consent to display of their listings on franchisor websites. Participants' consent to franchisor display can be blanket or can be granted only to specified franchisors at Participants' discretion. To facilitate implementation of this discretionary opt-in, MLSs can presume that any Participant affirmatively consenting to display of their listings gives that consent on a blanket basis unless the Participant expressly directs otherwise.
- If an MLS provides a direct data feed to franchisors, only the listings of participants who have affirmatively consented to display of their listings on franchisor sites can be displayed.
- Franchisees who provide IDX information to their franchisor for display -- or have their site indexed by the franchisor -- will need to let the franchisor know which participants have affirmatively consented to display of their listings on the franchisor's site. Only the listings of participants who have affirmatively consented to such display can be displayed on franchisor sites.

The opt-in decision was intended to give brokers control over where their listings are distributed. Since it is likely that NAR will change the IDX Franchise Policy again in November 2011, during this interim period, MLSs should use a simplified approach to support the opt-in to franchisor display of listings.

How best to implement?

An MLS can select the approach most fitting to its size, expectation and technological inclinations.

An MLS can set up an additional opt-in field for franchise display amongst the various 3rd party aggregation sites listing brokers can select for their listing display (i.e. realtor.com, Zillow, etc). Only if a listing broker selects this display field would the listing be allowable for indexing display by the franchisor (either directly or through the local franchisee). The default on the franchisor display opt-in field could be a "select all" option but a menu indicating each franchisor should also be available so they can be selected individually. Alternatively, an MLS could set up an "offline" system to handle instances where only certain specified franchisors are selected. NAR has indicated that it is only aware of franchisor site indexing being conducted by Century-21, REMAX, and Keller Williams, and if in fact this is the case in your area, devising a franchisor menu may not be as difficult as it seems.

On the other hand, some have voiced the opinion that creating an MLS field might be overkill in that the current opt-in is a temporary measure until November (at which time the policy is likely to be re-vamped) and few listing brokers are expected to actually opt-in. If this is the consensus of what is expected in your local area, rather than re-program your MLS, you may find it preferable to send an informational letter to brokers explaining what NAR has done and to let them know that if they wish to opt-in, they can notify the MLS by letter or email. It will then be up to the franchisors, upon receiving notice of consents from the MLS, to put the data on their site.

Additional information from NAR on this subject can be found at the following link:

<http://www.realtor.org/MemPolWeb.nsf/66725b0f826457af862568b90059a8a7/ad815e5689cf129a862576c50069b91d?OpenDocument>.

3. CIVIX Patent Settlement/License

By now, your local association and/or MLS has heard of or has even been served with a demand letter regarding the CIVIX patent infringement litigation. CIVIX-DDI, LLC (“CIVIX”) is a company that claims to own enforceable patents for an online geographic search system that allows MLS systems, and those who use them, to locate, search for and transmit to others, property information about homes, such as the location, property characteristics and detail, local school district, and photos or other graphical displays of the homes. CIVIX claims that essentially all MLS systems infringe its patents.

CIVIX’s claims are not limited solely to the real estate industry. CIVIX has already settled infringement litigation it brought against Microsoft, Expedia, MOVE and other major companies. Prior to MOVE settling, MOVE requested that the patents be reexamined by United States Patent and Trademark Office (“USPTO”). The USPTO rejected portions of the CIVIX patents but several key components of the patents survived.

In light of the very high cost involved in defending patent litigation cases and the potential liability facing MLSs and the real estate industry, NAR has taken the lead in negotiating a potential nationwide settlement structure with CIVIX in which electing MLSs can participate. The settlement, in effect, entails the purchase of a license to use the CIVIX patents at a group discount rate of **\$9.06 per subscriber**. Participating MLSs are asked to tabulate their settlement exposure **based on the total number of paying participants and subscribers as of May 1st, 2011**. Under the terms of the NAR settlement, the license granted to MLSs covers all of the MLS’s shareholders, brokers and agents (i.e. participants and subscribers) and extends to all of the vendors used by them and their participants, including software used by the brokers and agents and any contained in products and services they may use in their brokerage activities.

Note: certain third parties are excluded from the scope of the proposed license in order to keep the license fee as low as possible. Those third parties are Zillow, Trulia, Craigslist, Google and CoStar. Those entities are not part of the settlement’s definition of the real estate industry and would need to obtain a license from CIVIX; however, if an MLS obtains a license, CIVIX can go after these vendors, but not the MLS, the brokers or agents.

The NAR settlement proposal at issue is favorable in contrast to CIVIX’s individualized licensing demands to MLSs to use the CIVIX patents for a fee of \$6 per member/subscriber per year for four years, for a total of \$24 per subscriber. Not only is the NAR rate discounted but the individualized \$24 fee demand includes only a license for the primary MLS system. The NAR settlement, on the other hand, includes other software used by others associated with an MLS, such as IDX vendors, public records providers, web site providers, brokerage company software, agent software or any other industry software. Participation in the NAR settlement thus offers the potential for broad real estate industry immunity beyond just an MLS’s primary system. **Eligibility for participation, however, is time sensitive.**

How does it work?

90-day timeline:

In the first 30 days since negotiating the proposed settlement (i.e. by **June 16th**), NAR must collect **\$2.5 million** in order for any MLS to receive a license. If it meets that target, every MLS that paid in the first 30 days will receive a license; if it falls short, none of those MLSs will get a license, and NAR will return their money to them.

Then, in the next 30 day period (**between June 16 and July 16**), NAR must collect an **additional \$2.5 million to bring the sum total of all funds collected up to \$5 million**. If NAR meets that target, every MLS that contributed up to July 16 will receive a license; if it falls short, none of the MLSs contributing between June 16 and July 16 will receive a license, and NAR will return their money to them.

The same process holds for the final 30 days in that by **August 16th, another \$2.5 million must be collected for the sum total to reach \$7.5 million**. If NAR receives \$7.5 million by the 90 day deadline, then a total real estate industry wide immunity will have been achieved. NAR will then be the exclusive holder of the right to license the CIVIX patent in the real estate industry. NAR has suggested that MLSs seeking a license for the CIVIX technologies after the 90 days would still have to pay NAR. If NAR collects additional money for licenses over the \$7.5 million, it would pay the overage back to MLSs on a pro rata basis (depending on how much they paid in). This may incentivize MLSs (even very small ones) to pay up during the first 90 days. If, however, the \$7.5 million is not reached, the permissive license will only rest with those who successfully participated in the settlement in the earlier timeframes, and CIVIX is free to then go after those who did not participate.

In light of timing of the settlement, if your MLS is considering accepting the proposed resolution, it should do so in the first 30 days when the collection bar is the lowest.

Vendor Participation:

The NAR settlement documents do not propose any division of the costs between MLS vendors and MLSs. This issue is left to negotiation between MLSs and vendors. Sources indicate that vendor strategies are quite varied, as are vendor contract indemnification clauses, and your MLS will want to learn what your vendor is planning to do. You may also want to consult with your local counsel to evaluate your vendor agreement's indemnification clauses and other related issues to be factored into your final decision.

MLS Action:

In light of the many moving parts and tight timeframe, your local association/MLS should be assembling to discuss how to proceed as soon as possible. **For those inclined to participate, you should do so by June 16th to assure your positioning in this first 30 day period where satisfaction of the financial threshold is most likely to be met.**

For more comprehensive information on the CIVIX matter, NAR has posted a host of documents, FAQs, etc. on its resource center located at the following link:
<http://www.realtor.org/letterlw.nsf/pages/civixpatents0511?OpenDocument&Login>.