



NATIONAL ASSOCIATION OF REALTORS®

PROPOSED POLICY ON
VOWs
(VIRTUAL OFFICE WEB SITES)

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VOWs

VIRTUAL OFFICE WEB SITES

NAR's proposed policy offers clarity and direction to MLSs and VOWs.

Board decision is expected in May.

Virtual office Web sites. What are they, and why must the NATIONAL ASSOCIATION OF REALTORS® establish a policy for MLSs to regulate them? These are among the key questions NAR answers in this special section of REALTOR® Magazine, prepared by the national association's Legal Affairs and Board Policy and Programs divisions.

In May of 2000, NAR's Board of Directors adopted a policy enabling MLS participants to advertise other brokers' listings on their Web sites, with the consent of the other brokers. This policy, known as Internet Data Exchange ("IDX") or Broker Reciprocity, has been widely adopted and implemented by MLSs across the nation.

At the same time, some MLS participants have developed a business model that they've labeled a virtual office Web site (VOW) in an effort to distinguish their displays of real property listings on the Internet from the displays governed by the IDX policies.

The primary distinguishing feature of a VOW is the requirement that visitors register by entering an e-mail address and receive a password prior to accessing MLS listing data. Some MLS participants also post terms of use on their VOWs and require visitors to agree to those terms.

In large measure, VOWs have emerged in response to changing real estate business models, driven in part by the industry's embrace of the

Internet as a business tool. VOW operators describe virtual office Web sites as vehicles for conducting online brokerage, allowing a company to establish and work with clients and customers in cyberspace in a way that's similar to how a brokerage interacts with its clients and customers in a bricks-and-mortar office. Viewers of MLS data on a VOW must register and, in return, typically receive more robust information on listings.

In contrast, IDX allows brokers to "advertise" each others' listings; the MLS data presented on an IDX Web site is typically less detailed, and viewers of the data remain anonymous.

REALTORS® who operate VOWs maintain that the registration process, coupled with the requirement that visitors agree by mouse click with the VOW operator's terms of use, take such Web sites outside the realm of an MLS's IDX rules. In fact, VOW operators maintain that by registering and agreeing to terms of use, consumers aren't simply site visitors who view real estate advertisements. Instead, they become clients or customers of the company that displays MLS listing information via the Internet.

Because clients and customers in a bricks-and-mortar office could be provided with information that includes all listings available in the MLS, including those of sellers who have prohibited Internet or other electronic display of their property as a term of their listing agreement, as

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well as the listings of participants who have opted out of IDX, such information is often displayed by VOW operators on their virtual office Web sites.

Additionally, some VOW operators display all MLS data fields, including information intended only for other brokers, such as showing instructions and broker-to-broker offers of compensation. Some VOWs also include listings that have been sold, expired, or withdrawn.

The display of MLS data on VOWs currently occurs in an unregulated environment since MLSs have no specific rules addressing the display of MLS content on VOWs.

There's a pressing need for NAR to adopt a policy governing the display of MLS content on VOWs to provide guidance both to VOW operators and to MLSs. The policy needs to address critical issues including

- Is there a meaningful distinction between the display of other participants' listings on an IDX site versus on a VOW?
- What minimum criteria can be required of consumers before they access MLS content via a VOW?
- May an MLS prohibit VOWs from displaying certain listings, such as those for which the seller has withheld consent for display on the Internet?
- May an MLS prohibit VOWs from displaying certain data fields, such as the showing instructions, property security information, and type of listing agreement, i.e., exclusive agency or exclusive right to sell?
- May an MLS require that listings displayed on a VOW include the name of the listing broker?

- May an MLS establish reasonable limits on the number of listings a consumer may view, retrieve, or download from a VOW?

This list represents just a few examples of the many unresolved issues regarding the display of MLS content on a VOW. To address these issues, a VOW work group developed a proposed policy, which appears on the following pages and has been available for comment at *REALTOR.org* since March.

In response to comments on the proposed policy and at the direction of the NAR Leadership Team, the work group is now developing an alternative proposal that includes the option for listing brokers to make independent decisions to opt out of the display of their listings on all VOWs. The policy presented here does not allow that option.

Both proposals will be considered by the Multiple Listing Issues and Policies Committee at its May 15 meeting, during NAR's 2003 Midyear Legislative Meetings & Trade Expo® in Washington, D.C. It's expected that the committee will bring to the NAR Board of Directors a recommendation for its consideration.

NAR can't allow the display of MLS content on VOWs to continue in an unregulated environment. It's critically important that NAR's Board of Directors make an informed decision and adopt a policy at its May 17 meeting.

The proposed VOW policy that follows includes explanations of its key elements. The alternative policy was expected to be available the week of April 21 at *REALTOR.org*.

For more information

Visit the VOW information center at *REALTOR.org/VOW* to view answers to frequently asked questions about the policy and to read more about VOWs and NAR's IDX policy.

Proposed policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants (*“Virtual Office Web sites”*)



This symbol denotes explanations by NAR's Legal Affairs and MLS and Board Policy departments of key aspects of the proposed policy.

Participants may use MLS data (defined as information fields, images, and other property listing-related content) in connection with providing brokerage services over the Internet (or by other electronic means) in accordance with the policies set forth below. Except as permitted in Section III, MLSs may not adopt rules or regulations that are more or less restrictive than, or otherwise inconsistent with, these policies.



MLSs may not vary from this policy in the requirements imposed on VOWs, although certain optional provisions that an MLS may choose to adopt are set forth in Section III of this policy.

I. Definitions and Scope of Policy

1. For purposes of this policy, the term Virtual Office Web site (“VOW”) refers to a Participant’s Internet Web site, or a feature of a Participant’s Internet Web site, through which the Participant provides real estate brokerage services to consumers with whom the Participant has first established a broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search for MLS data, subject to the Participants’ oversight, supervision, and accountability. As used herein “Participants’ VOWs” and “VOWs” also refers to such Web sites, or features of Web sites, operated by non-principal brokers and sales licensees affiliated with MLS Participants, where permitted by this policy.



This provision defines a VOW, which may be a Web site, but could also be a page of a Web site where consumers have the opportunity to search the MLS listing database. Note that the broker operating the VOW has the duty to exercise “oversight, supervision, and accountability” with respect to the consumer’s search.

2. The right to display listings in response to consumer searches is limited to display of MLS data supplied by the MLS(s) in which the Participant has participatory rights. This does not preclude a firm with offices participating in different MLSs from operating a master Web site with links to such offices’ VOWs.



This paragraph states what may appear obvious, but in application is more subtle. An MLS participant may include on a VOW only listings of the MLS(s) in which he or she participates. That means that a firm with multiple offices, which participate in different MLSs, may not operate a single VOW containing listings of the various MLSs in which offices of the firm participate. Rather, the firm must offer several VOWs in which the listings available on each are only those from the MLS(s) in which the office operating the VOW participates.

3. Participants’ Internet Web sites may also provide other features, information, or services in addition to the VOW (including the Internet Data Exchange function), which other features, information, or services are not subject to this policy. Unless state law or regulation provides otherwise (such as, but not limited to, broker Internet activity being deemed to be advertising), use of MLS active listing data on a VOW does not require separate permission from the listing brokers whose listings will be available to consumers via a VOW.



The first part of this paragraph emphasizes that, as always, state law governs. For example, where state law defines a VOW as “advertising” thereby requiring the consent of listing brokers, a broker operating a VOW must comply with the legal requirement to obtain consent of other brokers whose listings are included, even though this policy does not require obtaining that consent.

This is perhaps the most widely and actively debated provision of the proposed policy—whether listing brokers should be permitted to “opt out” so that their listings do not appear on the VOWs of other brokers. This proposed policy does not require brokers operating a VOW to obtain consent of other brokers; therefore, other brokers are not afforded the opportunity to withdraw permission by “opting out.” An alternative policy proposal now being developed will include the ability for a listing broker to make an independent decision not to have that broker’s listings displayed on any VOW.

Those who assert that listing brokers should not have the right to opt out argue that since, in their view, a VOW is simply another method of delivering brokerage services, conceptually similar to delivering such services in person or by phone, fax, or e-mail, no permission is required and no opt-out right is necessary.

Others argue that an opt-out right is necessary because the ready access of listings on a VOW makes it inherently advertising, requiring listing broker consent. Opt-out proponents also claim that an opt-out right is necessary for listing brokers to retain the ability to control use of the listings they submit to the MLS, including, in particular, whether those listings may be displayed by another broker on the Internet via a VOW. They also state that the operation of a VOW is not simply another brokerage service delivery mechanism, but a fundamentally different use of MLS information.

II. Policies Applicable to Participants' VOWs

1. Participants may provide brokerage services via a VOW that include making MLS active listing data available, but only to consumers (hereinafter "Registrants") with whom the Participants have first established lawful consumer-broker relationships, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers. Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s). Where state law permits any of the requirements imposed on Participants or consumers to be satisfied after brokerage services are commenced, all such requirements and obligations shall nevertheless be satisfied before access to MLS active listing data is provided to the Registrant via the VOW.



Because a VOW is defined as a method of delivering brokerage services, the broker operating the VOW must first establish a relationship with consumers pursuant to which brokerage services will be delivered, and must satisfy any requirements of state law that arise in the context of such a broker-consumer relationship. Stated another way, because a VOW is a method for delivering brokerage services, it isn't just for "lookers" who have no established relationship with the broker.

2. Participants' VOWs must obtain the identity of each Registrant and obtain each Registrant's agreement to Terms of Use of the VOW, as follows:



A consumer who wishes to search listing data on a VOW must register as described here, and for that reason is referred to in this policy as a Registrant.

- a. A Registrant must provide his or her name, telephone number, a valid e-mail address, and, at the option of the MLS, a street address. The Participant must send an e-mail to the address provided by the Registrant confirming that the Registrant has agreed to the Terms of Use (described in subsection c below). The Registrant may be permitted to access the VOW only after the Participant has verified that the e-mail address provided is valid and that Registrant received the Terms of Use confirmation.
- b. The Registrant must supply a user name and a password, the combination of which must be different from those of all other Registrants on the VOW, before being permitted to search and retrieve information from the MLS database via the VOW. The user name and password may be established by the Registrant or may be supplied by the Participant, at the option of the Participant. An e-mail address may be associated with only one user name and password. The Registrant's password and access must expire on a specified date. The Participant must at all times maintain a record of the name, telephone number, e-mail address, and, if required by the MLS, a street address supplied by the Registrant, and the username and current password of each Registrant; such records to be kept for not less than 180 days after the expiration of the validity of the Registrant's password. If the MLS has reason to believe that a Participant's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants, the Participant shall, upon request, provide to the MLS a copy of the record of the name, e-mail address, username, current password, and audit trail, if required, of any Registrant identified by the MLS to be suspected of involvement in the violation.
- c. The Registrant must be required to affirmatively express agreement to a "Terms of Use" provision that requires the Registrant to open and review an agreement that provides at least the following:



The broker may include other terms in the Terms of Use agreement, but must, at a minimum, include those described here.

- i. That the Registrant acknowledges entering into a lawful consumer-broker relationship with the Participant;
- ii. That all data obtained from the VOW is intended only for the Registrant's personal, non-commercial use;
- iii. That the Registrant has a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through the VOW;
- iv. That the Registrant will not copy, redistribute, or

- retransmit any of the data or information provided;
- v. That the Registrant acknowledges the MLS's ownership of and the validity of the copyright in the MLS database.

After the Registrant has opened for viewing the Terms of Use agreement, a "mouse click" is sufficient to acknowledge agreement to those terms. The Terms of Use Agreement may not impose a financial obligation on the Registrant or create any representation agreement between the Registrant and the Participant.

- d. An agreement entered into at any time between the Participant and Registrant imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant must be established separately from the Terms of Use, must be prominently labeled, and may not be accepted solely by mouse click. The Registrant must also receive a subsequent confirmation of the terms of the agreement and the agreement may not become effective until the Registrant acknowledges acceptance of those terms, by mouse click or otherwise. Prior to entering into a representation agreement, the Participant must ask the Registrant whether the Registrant is a party to an existing exclusive representation agreement.



This provision addresses the case where, in addition to (or as a part of) providing brokerage services, the consumer appoints the broker to be his or her agent or other form of representative, or agrees to compensate the broker in some way. In that case, the consumer's agreement to the terms of such representation or compensation must be established and agreed to separately from the "Terms of Use," and in the more rigorous manner specified in this paragraph.

- 3. A Participant's VOW must protect the MLS data from misappropriation by employing reasonable efforts to monitor for and prevent "scraping" or other unauthorized access, reproduction, or use of the MLS database.
- 4. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS participants and their affiliated licensees:
 - a. Expired or withdrawn listings or, unless the MLS affirmatively acts (pursuant to section III.6 of this policy) to permit such use, "sold" data.



"Sold" data may not be provided to a Registrant unless the MLS has specifically authorized MLS participants to make "sold" data available on VOWs.

- b. The compensation offered to other MLS Participants.
- c. The type of listing agreement, i.e., exclusive right to sell or

exclusive agency.

- d. The seller(s) and occupant(s) name(s), phone number(s) and e-mail address(es), where available.
 - e. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.
- Notwithstanding the foregoing, such information may be provided to a Registrant if the listing broker has expressly and affirmatively consented to the Participant's providing such information for that listing broker's listings, either with respect to a particular Registrant or to all Registrants.
- 5. A Participant's VOW must comply with the following additional requirements:



This is the so-called "clean copy" rule. No advertising of services of any other person may appear on a page where the listing of an MLS participant, other than the VOW operator, is displayed, in whole or in part. The VOW operator may, however, include his or her name, address, phone number, and company logo, and any other information required by state law.

- b. MLS data fields authorized for display may not be changed. The MLS data may be augmented with additional data so long as the source of such other data is clearly identified. This requirement does not restrict the format of MLS data display or display of fewer than all of the listings or fewer authorized data fields.
- c. The VOW must display a notice on all MLS data displayed indicating that the data is deemed reliable but is not guaranteed accurate by the MLS. Furthermore, a Participant's VOW may include other appropriate disclaimers necessary to protect the Participant and/or the MLS from liability.
- d. Listings or property addresses of sellers who have directed their listing brokers to withhold their listing or property address from display on the Internet (including, but not limited to, publicly accessible Web sites or VOWs) shall not be accessible to Registrants. Notwithstanding the foregoing, listing brokers may display on their VOWs or other Web site(s) the listing or property address of a consenting seller.



In some cases sellers may, because of security or privacy concerns, direct their listing brokers to refrain from posting their listing on the Internet. Listing brokers are required to obey such direc-

tives. In such cases, those listings may not be made available for search on VOWs of other MLS participants. If the seller consents, however, the listing broker may display the listing on his or her own Internet sites, including VOW, IDX, or other company Web sites.

- e. Non-principal brokers or sales licensees affiliated with Participants may operate VOWs if their Participant consents, such VOW to be subject to the control of the Participant. In such cases both the Participant and the non-principal shall be accountable for compliance with these policies.



This provision confirms that agents may operate their own VOWs, subject to the consent and supervision of their brokers. An agent's broker is responsible for any failure of an agent to comply with these policies in operating a VOW.

- f. MLS data available on a VOW shall be refreshed not less frequently than every seven (7) days.
- g. Except as provided elsewhere in this policy or elsewhere in an MLS's rules and regulations, a VOW or a Participant operating a VOW may not distribute, provide, or make any portion of the MLS database accessible to any person or entity.
- h. Any listing displayed on a VOW shall identify the listing firm.



This provision requires identification of the listing firm but not the listing agent. A VOW operator may choose to include the names of listing agents, but the MLS may not require the VOW operator to do so.

- i. A Participant's VOW must display a privacy policy that informs Registrants of the ways in which information obtained from them will be used.
- j. A Participant may exclude listings from display on the Participant's VOW based only on objective criteria such as geography, list price, type of property, or cooperative compensation offered by listing brokers.
- k. A Participant may not provide the identity of a Registrant to any other entity for compensation. Notwithstanding the foregoing, a Participant may provide the identity of a Registrant to another broker for compensation if (1) the Participant's residential real estate brokerage activities principally consist of listing or selling the types of properties required to be filed with the MLS, (2) the Registrant is seeking property of a type, in a price range, or in a location for which the Participant does not ordinarily provide real estate brokerage services, and (3) the number of Registrant identities provided or the corresponding revenue

generated is an insubstantial portion of the Participant's real estate brokerage activities.



This provision precludes the sale of names and other identifying information provided by VOW Registrants to other service providers, including offering that information to other real estate brokers in exchange for a referral fee. Such information may be provided without compensation, that is, for free. Although a broker may not operate a VOW to collect and sell referral leads to other brokers, an exception is provided for referrals made by brokers who are regularly and primarily engaged in the business of listing and selling properties but who wish to make a referral in cases where they do not provide brokerage services for the type, location, or price range of the property the consumer seeks. Whether a broker is sufficiently engaged in real estate brokerage to take advantage of this exception for certain referrals is determined by the MLS. The MLS would base that determination on whether the number of such referrals, or the revenue earned from them, was "insubstantial" when compared with the total of the broker's real estate brokerage business.

For purposes of this paragraph, selling does not include making referrals of prospective purchasers to other real estate brokers and listing does not include making referrals of prospective sellers to other real estate brokers.

- 6. MLS Participants must notify the MLS of their intention to establish a VOW and make their VOW directly accessible to the MLS for purposes of monitoring/ensuring compliance with applicable rules and policies.

III. Policies Applicable to Multiple Listing Services

- 1. Associations of REALTORS® and their Multiple Listing Services shall enable MLS Participants to operate VOWs, subject to the requirements of state law and the requirements above.
- 2. MLSs shall, if requested by a Participant, provide basic "downloading" of active listing information sufficient to operate a VOW, but excluding the listing or the property address, respectively, of any seller who affirmatively directs that the listing or the property address not appear on the Internet or other electronic forms of display or distribution. For purposes of this policy, "downloading" means electronic transmission of data from MLS servers to Participants' servers on a persistent or transient basis, at the discretion of the MLS. In addition, Associations and MLSs can also offer alternative display options including framing of Board, MLS, or other publicly accessible sites displaying Participants' listings (with permission of the framed site). This policy does not require

associations or MLSs to establish publicly accessible sites displaying Participants' listings.



MLSs must provide a "data feed" sufficient to allow MLS participants to operate a VOW, but may do so in one of the several ways described here: a "persistent" download, meaning the MLS database is actually transferred to the VOW operator, or a "transient" download, meaning that the VOW operator searches the database on the MLS server and only the listing data satisfying the search criteria are made available to the VOW operator to present on the VOW. MLSs and associations may also offer brokers the ability to "frame" an available board, MLS, or other site.

3. MLSs may charge the costs of adding or enhancing their "downloading" capacity to enable Participants to operate VOWs to those Participants who will download listing information for that purpose. Assessment of such costs should reasonably relate to the actual costs incurred by the MLS.
4. MLSs that allow persistent downloading of the MLS database by Participants for display or distribution on the Internet or by other electronic means may require that Participants (1) utilize appropriate security protection, such as firewalls, which requirement may not impose on Participants security obligations greater than those employed concurrently by the MLS, and/or (2) maintain an audit trail of Registrants' activity on the VOW and make that information available to the MLS if the MLS has reason to believe that a Participant's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants.
5. MLSs may not prohibit Participants from displaying other brokers' listings obtained from other sources, e.g., other MLSs, non-participating brokers, etc., but may require that each listing obtained from another source display the source of the listing.



A VOW may include property listing information from sources other than a particular MLS, such as that of other MLSs in which the broker participates. Listings from various sources may be provided to a Registrant in response to a search request, but each listing must indicate the source that provided it.

6. An MLS may permit Participants to make "sold" data available on a VOW for search by Registrants. If "sold" data is made available, the MLS may establish reasonable limits on the number of "sold" records that Registrants may retrieve or download in response to an inquiry.



As noted above, VOW operators are prohibited

from making "sold" information available to Registrants unless, pursuant to this provision, the MLS authorizes making that information accessible via a VOW.

7. MLSs may establish reasonable limits on the number of listings that Registrants may view, retrieve, or download in response to an inquiry.



The policy permits, but does not require, the MLS to limit the number of listings that may be sent in response to a Registrant's search request. The limit must be reasonable, which may take into account the number of listings available in the MLS because, for example, large MLSs will likely produce more listings that satisfy specific search criteria than small MLSs.

8. MLSs may establish a maximum period during which Registrants' passwords are valid, after which such passwords must be changed or reconfirmed.
9. MLSs may require that Participants require Registrants to supply a street address prior to accessing a VOW.

Effective date:

The foregoing policies shall become effective upon adoption by the NAR Board of Directors, except that (1) MLSs have until not later than Jan. 1, 2004, to adopt and implement the foregoing policies and (2) Participants shall have until not later than 180 days following adoption and implementation of these policies by an MLS in which they participate to cause their VOW to comply with these provisions.



Current VOW operators will be required to make their VOWs compliant with these policies within 180 days after their MLS acts to adopt rules implementing the policy.

See below, Appendix A of the policy, for Sanctions Available for MLS Rules Violations and Data Misappropriation

Internal Remedies for MLS Rules Violations

1. A fine of up to \$5,000
2. Suspension of MLS privileges
3. Termination of MLS privileges

Judicial Remedies for Data Misappropriation and Copyright Infringement

1. Injunctive relief
2. Statutory damages, which may range from \$750 to \$30,000, in the discretion of the court, or up to \$150,000 if the infringement is willful.
3. Actual damages and lost profits
4. Attorneys' fees and costs, at the discretion of the court
5. Potential criminal penalties