



Can my seller change the compensation I have offered to a buyer agent?

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QUESTION: One of my listings is under contract and hopefully about to close. It's been a very difficult transaction. My seller feels strongly that the buyer agent has mishandled a number of things and doesn't believe the buyer agent is entitled to be paid the amount I offered in MLS. The seller has requested that the listing agreement be amended to reduce the amount of compensation offered to buyer agents. Is that something I can do?

ANSWER: Yes, but any amendment to the listing agreement changing the amount of compensation you are authorized to offer other brokers would not have any effect on the compensation your firm will owe the buyer agent's firm, assuming the transaction closes. That's because the compensation owed to the other firm is established by the rules of the MLS, not by the terms of your listing agreement with the seller. According to the "Division of Commissions" rule that REALTOR® association MLSs are required to adopt, the compensation offered by listing agents to other MLS participants is "unconditional except that entitlement to compensation is determined by the cooperating broker's performance as the procuring cause of the sale." In other words, if the buyer agent is the procuring cause of a sale that closes, it constitutes an acceptance of the listing agent's offer of compensation, and results in the formation of a binding contract to pay the compensation offered.

The rule goes on to make it clear that the listing broker can offer an MLS participant compensation other than the compensation indicated in a listing, "provided the listing broker informs the other broker, in writing, in advance of submitting an offer to purchase." Thus, any attempt by you to change the compensation offered would not be effective since it obviously would come well after the offer was submitted. Any such attempt would also violate Article 3 of the REALTOR® Code of Ethics as supported by Standard of Practice 3-2, which provides in relevant part that "[a]fter a REALTOR® has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative compensation."

You might ask, if I tell the seller that he is not in a position to change the buyer agent's commission, what happens if the seller demands that the closing attorney not disburse commissions at closing? It's an interesting question, and one that will be the subject of next week's Q&A. Stay tuned!

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