



27 January 2014

Mr. Robert Bailey  
MLS Technology and Emerging Issues Advisory Board  
of the Multiple Listing Issues and Policies Committee  
National Association of Realtors  
430 North Michigan Avenue  
Chicago, Illinois 60611

Re: NAR Policy on MLS Participants' Use of MLS data to Create Automated Valuation Models (AVMs)

Dear Mr. Bailey:

The Realty Alliance (TRA) is a network of real estate brokerage companies located throughout the United States and Canada. Each U.S. member of TRA is an NAR member and an MLS Participant, and nearly all of the MLSs in which TRA members participate are owned by associations of Realtors, and subject to the National Association of Realtors Multiple Listing Policy (NAR MLS Policy). The Realty Alliance represents more than 100,000 Realtors, and we are confident the vast majority of NAR members share our view.

The purpose of this letter is to assist the NAR Multiple Listing Issues and Policies Committee and/or any related subcommittee equivalents should they consider clarifying NAR's MLS policy to expressly prohibit MLSs from denying MLS Participants downloads or data feeds of MLS data, including active, sold and off-market data, that Participants may use to generate automated valuation modeling estimates of value (AVMs) on properties using software licensed from a third party and delivering the AVM results to financial institutions in return for compensation independent of a real estate sales commission.

#### THE ISSUE

TRA believes current NAR MLS Policy already permits MLS Participants to use MLS data to create AVMs using third-party software and deliver the AVM results to financial institution end users for a fee separate from any brokerage commission that may be earned on the sale of the subject property. Since the use of MLS data for this purpose is a permitted use under NAR's MLS Policy, MLSs subject to that Policy cannot effectively deny MLS Participants the ability to engage in this permitted use of MLS data by refusing Participants and their technology service providers to use the MLS' VOW data feed to create the AVMs.

Nevertheless, certain MLSs have taken the position that the only uses that MLS Participants may make of MLS data downloaded or accessible through MLS data feeds are (1) to support the Participants IDX and VOW sites, or (2) for the Participant's use in marketing the property included in the MLS' database compilation. Since generation and delivery of AVMs to financial institution end users is not a, strictly speaking, an "IDX" or "VOW" use of the MLS data, nor are the AVMs ordinarily being delivered to the financial institution end users in the course of marketing the property that is the subject of the AVMs, NAR's current MLS Policy does not require MLSs to permit Participants to use MLS data downloaded or accessible through a data feed from the MLS' computerized database compilation to create AVMs for as described above. It is unfortunate that we are forced to have to make this case, but we hope this is helpful.

Because of this disagreement among MLSs and brokers on the proper interpretation of NAR MLS Policy, should the NAR MLS Issues and Policies Committee amend the NAR MLS Policy regarding this issue, TRA believes the right thing to do is for amended policy wording to make clear that MLSs must provide MLS Participants with a source of MLS data that the Participants may use in conjunction with their third-party technology and software providers to generate AVMs for the purposes outlined above. The reasons TRA believes this clarification is based on current NAR MLS Policy are set forth below.

## **BACKGROUND**

TRA has created a program through which brokers (both TRA members and non-TRA members) may license a third-party real estate analytics company's proprietary software that creates AVMs and other real estate market analyses by applying algorithms to information contained in automated databases of information about closed real estate transactions and properties that are, or have been, listed for sale.

Brokers who choose to participate in this program (collectively referred to as "Participants") use the licensed AVM software for two permitted uses, both of which require the software to operate on a database of real estate information that includes MLS data of all types (active, sold, pending and off-market) that the Participants are entitled to utilize as bona fide participants in MLSs.

First, the licenses permit the Participants to use the software to create certain property valuation and market analytics reports appropriate for use in the Participants' business of marketing real estate to potential buyers and sellers. These analytic reports resemble traditional "comparative market analyses" or "CMAs" that Participants supply to customers and clients interested in buying or selling a particular property. Use of MLS data to create CMAs is a long recognized permitted use of MLS data by MLS Participants.

Second, the licenses permit the Participants to use the software to fulfill orders from financial institution end users (collectively referred to as "End Users") for AVM reports on properties located in the Participants' market areas. In furtherance of this permitted use of the software, the AVM software licensor will also perform a fulfillment function (the "Clearinghouse") for End Users orders for the Participants' AVM reports. End Users desiring an AVM Report will use a unique password and user ID to log into the Clearinghouse website managed by the software licensor for the benefit of the Participants. Once logged in, the End User will specify one or more subject properties for which the End User is requesting an AVM report.

The Clearinghouse software will then identify the Participant that participates in the MLS that maintains the MLS data necessary to create the AVM report(s) on the subject property identified by the End User. The Clearinghouse will then instruct the AVM software to generate the AVM report(s) requested by the End User and return the AVM reports to the End User by email as PDF attachments, or as an Excel spreadsheet. The AVM reports, designed in conjunction with Participants, returned to the End Users will be branded with the logo of the Participant who participates in the MLS whose MLS data was used to generate the AVM. The End Users will also make payment through the Clearinghouse for the AVM reports delivered to them. These fees will then be divided among (1) the Participant(s) whose AVM reports were delivered to the End User, (2) software licensor as a license fee for use of the AVM and Clearinghouse software, and (3) TRA for administration of the Participant network.

TRA believes that NAR MLS Policy permits the above described use of MLS data by MLS participants, and likewise requires MLSs to provide an MLS data feed to the Participants or their technology service providers for the following reasons:

## **EXECUTIVE SUMMARY**

The Participants are permitted under applicable state and federal laws governing real estate appraisal practices to provide AVM reports to End Users, so long as the Participants clearly disclose that the AVM

reports are automated estimates of value generated solely by computer software programs operating on real estate information databases, and are not to be relied upon as human generated "appraisals" as defined under the Uniform Standards of Professional Appraisal Practice (USPAP), Broker Price Opinions (BPOs), or Competitive Market Analyses (CMAs) that are expressions of professional opinions about the values, or the prices at which properties should be offered for sale or acquisition.

TRA contends that NAR's MLS, VOW and Professional Standards Policies confirm that Participants may use MLS data to create and deliver AVM Reports to financial institution End Users using computer hardware and software supplied by third party licensors. That being the case, MLSs must therefore facilitate that use by either providing an MLS data feed, permitting Participants to download the MLS data for such use, or allowing the MLS' VOW data feed to be used not only for the purposes set forth in NAR's VOW Policy, but also for use in generating AVMs for delivery to End Users.

This conclusion is further supported by provisions of NAR's VOW Policy that permit MLS participants to use MLS data to create and deliver CMAs to customers and clients through a VOW. While an AVM report is legally distinct from a CMA, the AVM report is an "estimate of value" of real property, which NAR MLS and Professional Standards Policy expressly authorizes MLS Participants to create using MLS data.

Pursuant to the Participants' AVM software licenses, the AVM reports will be delivered through the Clearinghouse to End Users as products of the Participants. In addition, the license agreements require that the MLS data used to generate the AVM reports must at all times reside on computer servers that are subject to the control of the Participant, although the hardware may be supplied by a third party "cloud services" provider. The license agreements further prohibit the software licensor from making the MLS data accessible to any third parties; therefore, the MLS data will never be accessible to End Users, other than the minimal amount of MLS data contained on the actual AVM reports. The End Users are in turn prohibited from using the AVMs, or the data contained on the AVMs, for anything other than internal collateral valuation or risk management purposes.

## **DISCUSSION**

### **Legal Status of AVM Reports**

AVM reports are calculations of a property's current estimated market value created by computer software operating on electronic databases of real property records. The software locates the property data for the subject property, identifies the best comparable transactions, and performs appropriate calculations to determine an estimate of value. The AVM report presents the valuation together with certain physical characteristics of the subject property, and a summary of the comparable properties that support the valuation. A copy of the AVM report is then delivered electronically to the requesting party.

AVM reports are not "appraisals" as that term is defined under USPAP. USPAP is promulgated by the federally chartered Appraisal Standards Board. Most "federally related" loans secured by real property must be supported by "appraisals" that meet USPAP standards. A USPAP compliant residential "appraisal" is prepared on a Uniform Residential Appraisal Report (URAR) form, and must be performed by a state licensed or certified appraiser who is subject to USPAP standards. It is illegal for an unlicensed person to prepare a USPAP defined "appraisal."

Neither an AVM report nor a Broker Price Opinion (or "BPO") is an "appraisal" as defined by USPAP. A BPO is sometimes referred to as a Competitive Market Analysis or "CMA." USPAP defines an "appraisal" as an "opinion of value" of a parcel of real estate that is rendered by a state licensed or certified appraiser. BPOs, on the other hand, are performed by real estate brokers or agents, most of whom are not licensed real estate appraisers. Unlike a USPAP appraisal, which is typically performed by an appraiser for a mortgage lender, a BPO is normally generated by a real estate broker for a seller who is determining the

price at which to list a property for sale, or for a buyer who is determining the price to offer to purchase a property. Because a BPO is a judgment about the "price" at which offers to buy or sell a property should be made, rather than a judgment about the "value" of a property, a BPO is not considered an "appraisal" for USPAP or state real estate appraiser license law purposes.

Certain mortgage lenders, however, request real estate brokers to perform BPOs for the purpose of estimating the value of a property without any intention of listing the property with the brokers performing the BPOs. Some state real estate appraiser license laws prohibit a real estate broker or agent who is not also a licensed or certified appraiser from performing a BPO for a mortgage lender or other lien holder that is not incident to the potential listing of the subject property.

While also an "estimate of value" of a real estate parcel, an AVM report is not a URAR appraisal or a BPO for the purposes of USPAP or state real estate appraiser license laws. Both a BPO and a URAR appraisal are the results of a broker's or appraiser's selection and analysis of real estate data on which to base the broker's or appraiser's professional judgment about the "price" or "value" of the subject property. An AVM report, on the other hand, is not the result of any human analysis or judgment. It is a computer generated calculation performed by software interacting with an automated real estate database compilation. Because an AVM report does not include any human judgment or analysis, it is not considered an appraisal or a BPO and may not be represented as being the equivalent of an appraisal or BPO to any user or institutional customer. The AVM reports delivered by Participants to End Users through the Clearinghouse include clear and conspicuous disclosures that the AVM reports are not appraisals or BPOs, and cannot be relied upon as such.

Notwithstanding its limitations, an AVM report may be used by financial institutions for purposes that do not involve the valuation of property as collateral for a mortgage loan. For example, AVM reports may be used for "quality control" purposes to determine if URAR appraisals performed for the institution are within acceptable ranges of accuracy. AVM reports may also be used to monitor the value of the collateral securing promissory notes that are in a pool of mortgage backed securities to assess the quality of the security, or predict the likelihood of borrower default. Because they are not the product of human analyses, AVMs are also not susceptible to human error or manipulation, which is why they are used to double check human generated appraisals or BPOs.

#### **NAR's Code of Ethics Permits Realtors to Perform Property Valuations Other Than Incident to a Listing Opportunity or to Advise a Buyer Client.**

The NAR Code of Ethics expressly permits Realtors to provide property valuations independent of listing or selling property under certain specified conditions. The NAR Delegate Body and Board of Directors amended Article 11 of Realtors Code of Ethics and Standard of Practice 11-1 at NAR's 2009 Annual Convention to address Realtor preparation of property valuations other than incident to a listing presentation or in support of a customer's or client's attempted acquisition of a property. The amended Standard of Practice 11-1, which took effect on January 1, 2010, provides:

"When Realtors prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

- 1) identification of the subject property
- 2) date prepared
- 3) defined value or price
- 4) limiting conditions, including statements of purpose(s) and intended user(s)
- 5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
- 6) basis for the opinion, including applicable market data

7) if the opinion is not an appraisal, a statement to that effect”

Standard of Practice 11-1 was adopted for the express purpose of setting standards by which Realtors can create estimates of value for monetary compensation other than incident to a listing or purchase of the subject property. More recently, NAR has, through its Realtor University, published a training course to instruct Realtors on how to supplement their income by performing BPOs for third party valuation services companies. This training course demonstrates how to create BPOs using MLS data. See <https://www.learninglibrary.com/aspdotnetstorefront70/p-616-bpos-the-agents-role-in-the-valuation-process.aspx>.

Standard of Practice 11-1 clearly permits a Realtor ethically to create a BPO other than incident to a listing presentation for a buyer client. While an AVM report is not a BPO, the AVM report is a “valuation” of real property. Therefore, Standard of Practice 11-1 supports the conclusion that a Realtor may supply AVM reports to interested third parties provided that the requirements of Standard of Practice 11-1 are met.

### **NAR has Recognized the Legitimate Role of AVMs in the Independent Valuation of Real Property**

In February of 2012, NAR published its “Responsible Valuation Policy” statement. In that Policy NAR supports “independent valuations of real property” and states that when Realtors provide “non-appraisal” opinions of value they are ethically obligated to do so in an independent and objective manner by citing Article 11 of the Realtors Code of Ethics and Standard of Practice 11-1.

NAR’s Responsible Valuation Policy also addresses AVM reports. NAR’s Policy acknowledges that AVMs are often used by originators or secondary market investors to determine the collateral worth of mortgages secured by a consumer’s principal dwelling. NAR’s Policy commentary on AVMs goes on to state that individuals or companies that create AVMs should ensure that AVMs:

1. Protect against the manipulation of data, including disassembly and redistribution without explicit authorization
2. Employ appropriate quality control measures, including disclosure of a confidence score calculated using a statistical methodology, such as forecast standard deviation
3. Utilize only data which has been explicitly licensed and authorized
4. Avoid conflicts of interest
5. Require random sample testing and reviews
6. Not be used as the principle method of valuation in mortgage origination

NAR’s Professional Standards Policy, therefore, acknowledges that Realtors may ethically create “non-appraisal” estimates of value that adhere to the provisions of Standard of Practice 11-1. NAR Responsible Valuation Policy further acknowledges that AVM reports may legitimately be used by originators or secondary market investors to determine the collateral worth of a mortgage secured by a consumer’s principal dwelling provided that such AVM reports conform to the criteria set forth in that Policy.

When generating AVM reports for End Users through the Clearinghouse utilizing the licensed AVM software Participants will comply in all respects with Article 11 of the Realtors Code of Ethics and Standard of Practice 11-1. The Participants’ AVM reports will also conform to the criteria for permissible AVM reports set forth in NAR’s Responsible Valuation Policy.

### **NAR MLS Policy Permits Participants to Use MLS data to Generate AVM Reports**

The NAR MLS Policy also expressly authorizes MLS Participants to use MLS data to generate estimates of value for real property. NAR's MLS Policy defines an "MLS" to include serving as:

"a means by which information is accumulated and disseminated to enable authorized participants to prepare appraisals, analyses, and other valuations of real property for bona fide clients and customers."

The NAR Model Rules for MLSs that are owned or operated by associations of Realtors includes Rule 12.2 governing the use of the MLS' copyrighted compilations, which MLSs are required to adopt. Rule 12.2 states in part that:

*"None of the foregoing shall be construed to prevent any individual legitimately in possession of current listing information, sold information, comparables, or statistical information from utilizing such information to support an estimate of value on a particular property for a particular client. However, only such information that an association or association-owned multiple listing service has deemed to be nonconfidential and necessary to support the estimate of value may be reproduced and attached to the report as supporting documentation. Any other use of such information is unauthorized and prohibited by these rules and regulations."*

Emphasis added.

NAR has also issued interpretations of its current VOW Policy that state that Realtors operating VOWs may use MLS sold data to support CMAs provided to customers or clients, whether through a VOW or otherwise. To assist MLSs in implementing the revised VOW Policy, NAR has issued a series of answers to Frequently Asked Questions (FAQs). Question 5.8 of NAR's VOW Policy FAQs states as follows:

"Q 5.8 Where sold data is not 'publicly accessible' and the MLS prohibits sold data from being displayed/accessible on VOWs under optional Rule 19.15(f), the rules require an 'equivalent requirement must be imposed on Participant's use MLS Listing Information in providing brokerage service through all other mechanisms.' What requirement must be imposed on use of sold data in the 'bricks and mortar' context? Does that mean that a broker may not use and disclose sold listings in connection with CMAs or other advice to a client or customer—either in their offices or via their VOWs?"

NAR's Answer to Question 5.8 is as follows:

*"If the MLS chooses to prohibit display of sold data on the VOW (or, for that matter, expired, withdrawn or pending listing data), Participants may still provide clients and customers with a limited number of such listings in connection with providing brokerage services, including CMAs. This is permissible both on a VOW and 'in the office'."*

Emphasis added.

The NAR VOW Policy permits an MLS operating in a state in which sales price information is not on the public record to refuse to permit sold data from being displayed on a VOW. But if an MLS makes such an election, it must also forbid the equivalent use of sold data in a "bricks and mortar" setting. The purpose of Question and Answer 5.8 is to make clear that, even in those circumstances in which an MLS has prohibited the display of sold data on a VOW, an MLS must still permit an MLS Participant to use sold data to deliver CMAs to customers or client, including by electronic means through the MLS participant's VOW.

According to NAR's VOW Policy, an MLS cannot prohibit a VOW operator from providing VOW registrants with CMAs (or BPOs) through a VOW, so long as the VOW operator only provides the customer or client

with the CMA or BPO results, and not full access to the MLS' sold data inventory. Relying on the logic of NAR's Answer to Question 5.8, if a VOW operator can use MLS data to provide CMAs to customers or clients through a VOW, the VOW operator should also be able to use the same MLS data to provide AVM reports to customers or clients through other electronic means, such as the Clearinghouse.

The NAR VOW Policy also has been interpreted by the United States Justice Department ("DoJ") to permit a single Affiliated VOW Partner or AVP to operate a single VOW platform for the benefit of two or more MLS participants. The DoJ's Competitive Impact Statement filed with the court in conjunction with the court's approval of the NAR/DoJ settlement of the DoJ's antitrust complaint against NAR provides as follows in footnote 15:

*"Nothing in the Modified VOW Policy requires an AVP to hold a broker's license. An unlicensed technology company would be permitted under the Modified VOW Policy to host a VOW for a broker or brokers (or for one or more agents or sales associates, with the consent of their supervising brokers).*

Emphasis added.

Therefore, the current NAR VOW Policy as interpreted by the DoJ permits a single unlicensed technology company, such as the Participants' AVM software licensee, to operate a VOW that is used or "shared" by more than one MLS participating broker. The Clearinghouse as described above, while not a "VOW" per se, as that term is defined in the NAR VOW Policy, is operated by an unlicensed technology company (the AVM software licensor) that serves as a single technology platform at which multiple Participants deliver real estate related services (AVMs) to registered End Users. As such the Clearinghouse serves the same purpose as a VOW operated for multiple brokers as expressly permitted under NAR's VOW Policy.

#### **The NAR-DoJ Final Judgment in the VOW Antitrust Litigation Expresses the DoJ's Views on Anticompetitive Restrictions on the Online Use of MLS data**

The NAR-DoJ Final Judgment (the "Judgment") applies to the manner in which NAR and the MLSs subject to NAR's MLS Policy must administer MLS Policies applicable to VOWs. MLS Participants use of MLS data to generate and deliver AVMs is not, strictly speaking, the same as displaying MLS listing and other content to registered users of a VOW. Nor is the Clearinghouse functioning identically to a VOW, since the Clearinghouse is a means through which End Users order and receive the Participants' AVMs, rather than view information about properties available for sale in the local real estate market.

Having said that, Section IV of the Judgment entitled "Prohibited Conduct" includes Subsections A and B, which prohibit NAR from adopting, maintaining or enforcing any Rule that

"A. prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other method of delivery;

B. unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other method of delivery;"

These provisions of Section IV of the Judgment set forth the underlying antitrust policy upon which the DoJ based its attack on the prior version of the NAR VOW Policy. According to the DoJ's Complaint, NAR violated the federal antitrust laws by applying more restrictive rules to MLS Participants' use of MLS data

when dealing with customers and clients through a web-based automated applications than the rules governing the MLS Participants' use of the same MLS data to deliver services to customers or clients through agent or broker intervention using non-internet based technology, or through a "bricks and mortar" setting.

MLSs run the same risk of a federal antitrust violation when they permit Participants to use MLS data to deliver human-generated estimates of value, such as BPOs, to the same customers and clients through non-web based technology and communication media, but prohibit Participants from delivering "automated" estimates of value (AVMs) through the Clearinghouse to the same financial institutions to whom the Participants are permitted to deliver BPOs using MLS data.

Many providers of valuation services to financial institutions, such as CoreLogic, LPS, and Clear Capital, have formed networks of real estate brokers and agents through which the providers deliver BPOs to financial institutions. None of these companies are themselves participants in MLSs; however the brokers in their networks are MLS Participants. These companies receive orders for BPOs from their financial institution customers, often through a web-based portal. The companies then route the BPO order to a real estate licensee in their network doing business in the market where the subject property is located. The real estate licensee prepares the BPO, typically on a form mandated and branded by the provider, and not the broker, using MLS data from the MLS in which the licensee participates. The real estate licensee then typically returns the completed BPO to the valuation services company, who in turn delivers it to the requesting financial institution as the company's work product. The company collects a fee from the financial institution and remits a portion of that fee to the real estate licensee that created the BPO.

As discussed above, Standard of Practice 11-1 of NAR's Realtors Code of Ethics confirms that Realtors may ethically create BPOs in accordance with the Standard of Practice, and NAR has developed a training course instructing Realtors on how to supplement their income by creating BPOs for financial institutions using MLS data.

In sum, NAR MLS and Professional Standards Policy permits, if not encourages, Realtors to generate BPOs for financial institutions for a fee by participating in networks organized by companies providing valuation services to such institutions. Many MLS Participants do in fact participate in such networks, create BPOs that are branded by the companies providing the BPOs to the financial institutions, and are paid a fee for having done so without regard to whether the companies' customers intend to list the subject property for sale with the MLS Participant who created the BPO.

MLS Policies that allows MLS Participants to use MLS data to create BPOs for compensation as part of valuation service company networks, but allows MLSs to prohibit the same Participants from using MLS data to create AVMs for compensation through an online Clearinghouse, discriminates in the permissible use of MLS data based on the method and medium used to generate and deliver the valuation products to the end user. This type of discrimination that disadvantages an MLS Participant's use of automated methods of delivering services to a customer or client is same type of conduct that the DoJ attacked when it challenged NAR's prior VOW Policy as a violation of the federal antitrust laws.

#### **MLSs May Require Participants and Their AVM Software Vendors to Enter into License Agreements Limiting the Use of the MLS data to Permitted Purposes**

TRA recognizes that MLSs have legitimate interests in insuring that Participants and their technology and software providers use the MLS data in accordance with license agreements that limit the use of the MLS data only for purposes permitted under the MLS' Rules and applicable NAR Policies. These license agreement may properly include provisions addressing, among other things, authorization to the MLSs to periodically monitor the operation of the Clearinghouse to be sure that the MLS data is being used for



authorized uses, and that the AVMs delivered through the Clearinghouse are being delivered to permitted End Users as work products of the Participant

### CONCLUSION

For all of the foregoing reasons, TRA and its members respectively request that, if changes are made to the language of current policy in this area, that NAR's MLS Issues and Policies Committee recommend to NAR's Board of Directors that NAR's MLS Policy be amended to clarify that an MLS must provide Participants, upon request, with a data feed, or permit Participants to download the MLS data from the MLS' database compilation, for use by the Participants to create and deliver AVMs to customers and clients through automated means, such as the Clearinghouse described above. This result could be accomplished by amending the MLS Policy to provide that the same data feed that MLSs must provide to Participants in as required by NAR's VOW Policy may also be used by Participants to create AVMs as described above, subject to reasonable license agreements among the MLS, the Participant, and the Participant's technology or software vendor.

Thank you for your consideration of this input. We are happy to provide a representative to speak to these matters via teleconference or in person at a future meeting of any subcommittee equivalent's upcoming meeting(s) and/or at the full committee meeting itself if you wish. Just let me know in advance and we will make the arrangements at our expense, if necessary.

Sincerely,



Craig Cheatham  
President and CEO

c: Bill Lublin  
Jeanne Radsick  
Linda Lee  
Clifford D. Niersbach  
Gary Thomas  
Dale Stinton  
Robert Moline  
Joe Horning