

Proposed Changes to the DOS Advertising Regulations and NAR's New Clear Cooperation Policy

By John Dolgetta, Esq.

The real estate industry is going through notable changes. New changes are being proposed to the Advertising Regulations (Section 175.25) of the New York State Department of State's ("DOS") Regulations as well as the introduction of new policies by the National Association of Realtors® ("NAR"). These and other recent developments are coming at a time when the overall real estate industry is experiencing a steady stability. However, there is also increasing pressure being felt from a regulatory and policy perspective. In recent months, the newly enacted rental laws in New York (and across the country) are undoubtedly having a negative effect on the rental and multi-family real estate market. Yet, due to the low levels of residential sales inventory, increased competition is causing the utilization of "pocket" listings, "office exclusives", and "coming soon" listings to become more prevalent. As a result, while these and other marketing and advertising techniques have become a critical element for Realtors® to increase business, regulators and trade organizations, such as NAR, are also looking to increase the exposure of properties to the public and increase the protections afforded to consumers.

Proposed Changes to the DOS Advertising Regulations

On October 16, 2019, the DOS filed a Notice of Proposed Rulemaking to amend Section 175.25 of Title 19 of the NYCRR in the New York State Register ("NYS Register"). [[See https://on.ny.gov/33IQyXy](https://on.ny.gov/33IQyXy)]. These changes were proposed and approved by the State Real Estate Board of New York ("Board"). The 60-day comment period began on October 16th and will run until December 15th. A final rule will probably not be adopted until early 2020. Once the public comment period expires, the DOS will review comments and report back to the Board. Upon final approval of the changes, the rule will become effective 180 days after publication of the Notice of Adoption.

The most significant changes were made to Section 175.25(d)(6) entitled "Advertisements Referencing Property Not Listed With Broker." The original language of Section 175.25(d)(6), which is proposed to be deleted, provided as follows:

"Any advertisement that references or includes information about a property that is not listed with the advertising broker or was not sold by the advertising broker shall prominently display the following disclaimer: 'This advertisement does not suggest that the broker has a listing in this property or properties or that any property is currently available.' [emphasis added]. Such advertisement:

- (i) shall not suggest, directly or indirectly, that the advertising broker was involved in the transaction; and
- (ii) shall not refer to property currently listed with another broker absent consent provided pursuant to subparagraph (b)(2)(ii) of this section."

Under the new rule, the advertising broker is no longer required to add the above disclaimer language on advertisements. It was noted in the NYS Register that “[t]he [DOS] and Board have observed that this statement does not appear when required on many buyer lead generation websites (both broker-owned as well as third-party platforms).” The commentary goes on to explain that “[m]any websites do not adequately disclose to the consumer who the exclusive agent is, and when there is a reference to the listing broker, the disclosure is not clear enough. This proposal advances an important consumer need by ensuring that when any advertisement is placed on either a licensee owned website or a third-party lead generation page, including on thumbnail pages, there is a clear and conspicuous reference to the actual listing broker.” The overarching theme is that all of the disclosures now must be “clear and conspicuous.”

Section 175.25(d)(3)(ii) relating to web-based advertising was also revised to require real estate brokers to “...include the information required by these rules and regulations” on “[e]very page of such a website, *including any page that displays multiple properties or property search results...*” The italicized language is the newly added language and it requires that the disclosures now need to be displayed on **any** page that displays properties or search results.

The most significant changes to the Advertising Regulations included the addition of the subsections (i) and (ii) to Section 175.25(d)(6), as follows:

“(i) No real estate broker, associate real estate broker, or real estate salesperson shall advertise in any manner or make reference to in any advertisement property that is subject to an exclusive listing agreement of another broker, without authorization from the exclusive listing broker. Such advertisements must ***clearly and conspicuously*** [emphasis added] disclose the name of the exclusive listing broker immediately after one of the following phrases:

- ‘Listing Provided by [insert name of the exclusive listing broker]’,
- ‘Listing by [insert name of exclusive listing broker]’,
- ‘Listing Broker Contact [insert name of exclusive listing broker]’,
- ‘Listing of [insert name of exclusive listing broker]’,
- ‘Listing Provided Courtesy of [insert name of exclusive listing broker]’,
- ‘Listing Courtesy of [insert name of exclusive listing broker]’, or
- ‘Listing Agent Contact [insert name of exclusive listing broker]’.”

This subsection (i) ensures that the listing broker’s name is not buried somewhere in an advertisement or web page, and further that it is not in a font size that is illegible. This protects the listing broker and directs the consumer to the broker who actually listed the property. The brokers, as well as all salespersons and members of teams, must ensure that the above language and disclosures are including in all advertisements, including websites, social media, print ads, etc.

Subsection (ii) of Section 175.25(d)(6) further provides that “[a]ny real estate broker, associate real estate broker, or real estate salesperson that pays a third-party for advertising involving a property that is subject to an exclusive listing agreement of another broker must, in addition to the requirements in subparagraph (i), include in any advertisement that provides the advertising broker’s name ***words to disclose that the advertisement is a paid advertisement***

[emphasis added] using at a minimum the word ‘advertisement’ immediately following the real estate broker, associate real estate broker, or real estate salesperson’s name.” This subsection (ii) deals specifically with those properties that are advertised on third-party websites or portals. Again, the “clear and conspicuous” requirement applies to these types of advertisements, and in addition to complying with disclosure of the listing broker information as provided for in subsection (i), a broker must also include words that indicate it is a “paid advertisement”.

NAR’s New Clear Cooperation Policy

On November 11, 2019, the MLS Clear Cooperation Proposal issued by the NAR Technology and Emerging Issues Advisory Board [*see* <https://bit.ly/33LTfYc>] was approved overwhelmingly by the NAR Board of Directors in a 729 to 70 vote. Similarly, this policy has developed out of the need for properties, when being advertised, to be offered to the public for the benefit of both the seller-consumer and the buyer-consumer. The Clear Cooperation Policy was adopted in the NAR Handbook on Multiple Listing Policy as New MLS Statement 8.0 and provides as follows:

“Within 24 hours of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.”

NAR’s rationale for the new policy is that “[d]istribution of listing information and cooperation among MLS participants is pro-competitive and pro-consumer. By joining an MLS, participants agree to cooperate with other MLS participants except when such cooperation is not in their client’s interests. The public marketing of a listing indicates that the MLS Participant has concluded that cooperation with other MLS participants is in their client’s interests. This policy is intended to bolster cooperation and advance the positive, procompetitive impacts that cooperation fosters for consumers.”

The main goal of the Clear Cooperation Policy is to ensure that the use of tools such as “pocket” listings, “coming soon” listings, and “office exclusives” are only used when in the best interest of the consumer and client, with the client’s full knowledge and consent, and not to advance the business and economic interests of the broker to the detriment of the client. NAR recognizes that “office exclusive” listings “...are an important option for sellers concerned about privacy and wide exposure of their property being for sale. In an office exclusive listing, direct promotion of the listing between the brokers and licensees affiliated with the listing brokerage, and one-to-one promotion between these licensees and their clients, is not considered public advertising.”

NAR points out that some examples of when an “office exclusive” can be utilized include divorces or where there is a celebrity client. However, the moment these listings are “advertised” or “shown” to the public, then they must be listed on the MLS immediately. NAR further explains that where properties are offered on “Private Listing Networks” that are open to brokers or

licensees outside of those within a particular brokerage firm, then that would be deemed “advertising” and would require immediate submission of the listing to the MLS.

In connection with “coming soon” listings, NAR explains that if they are advertised to the public then they must be submitted to the MLS. NAR does indicate that “MLSs may enact ‘coming soon’ rules providing for delays and restrictions on showings during a ‘coming soon’ status period, ensuring flexibility in participants’ listing and marketing abilities, while still meeting the participant’s obligations for cooperation.” However, again, the moment access to the property is provided to any participant (outside of an office exclusive setting) then access must be provided to all participants, and therefore, must be submitted to the MLS.

While these latest changes come from two different sources, the goal is very similar, to control the marketing of properties to the public in a way that benefits both the consumer and the real estate brokerage industry. Article 12 of the NAR Code of Ethics, states, in part, that “Realtors shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing and other representations. Realtors shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional.” In this age of the internet and other web-based media advertising, agents and brokers must ensure they are in compliance with the DOS Regulations. In the case of Realtors, in addition, they must comply with NAR’s requirements, MLS Policies and its Code of Ethics.

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