

FAQ – Consent Agreement with the Commissioner of Competition

1. So what's different now than before this agreement?

This completes the process with the Bureau before the Competition Tribunal and addresses the Commissioner's concerns. The Consent Agreement clarifies that Boards and Associations cannot adopt, maintain, or enforce rules to discriminate against mere postings on their Board MLS® Systems or that discriminate against members because they offer mere postings. It was always clear to us (and reflected in current practices) that our rules allowed for many different service models, including mere postings.

2. Can the public put properties directly on Board MLS® Systems?

No. Board MLS® Systems are still member to member services. Home sellers can hire a brokerage to list and sell their property and negotiate the level of service they want from their REALTOR® and the commission or fees they want to pay for that service.

3. As a REALTOR® do I have to accept a mere posting?

No. REALTORS® wishing to offer mere posting services must not be discriminated against on that basis by CREA or Board and Association rules. However, REALTORS® are free to choose the business model that they wish.

4. Do mere postings require an agency relationship?

CREA's Rules do not require a common law agency relationship. CREA's Agency Pillar provides that a listing REALTOR®/brokerage must act as agent for the seller to post, amend or remove a property listing in a Board's MLS® System. Acting "as agent" for the purposes of the Agency Pillar means that the listing REALTOR® must do what is required of them as specified in the agreement between the REALTOR® and his or her client and abide by CREA and Board Rules.

Whether or not an agency relationship is formed between a listing REALTOR® providing a mere posting service and his or her seller under applicable provincial real estate legislation must be determined on a province-by-province basis. Common law may also impact whether or not an agency relationship is formed between a listing REALTOR® providing a mere posting service and his/her seller, depending on the agreement between them. The Consent Agreement has no bearing on whether or not an agency relationship is formed between a listing REALTOR® and his or her seller.

5. How are FINTRAC obligations impacted by a mere posting?

CREA has been in consultation with FINTRAC regarding mere postings and compliance with the Proceeds of Crime (Money Laundering) and Terrorist Financing (PCMLTF) legislation. CREA provided FINTRAC with a copy of the Ontario Real Estate Association (OREA) standard listing contract as an example of the type of agreement that listing agents enter into, even when providing mere postings. FINTRAC has taken the position that any broker “who lists a property under the OREA listing agreement acts as an agent in respect of the purchase or sale of real estate and is, therefore, subject to the PCMLTFA and associated regulations”. CREA assumes this conclusion applies to all mere posters that enter into a listing agreement with a seller, not just those using the OREA form.

This means that all members, including mere posters, must comply with the obligations of real estate agents and brokers set out in the PCMLTF Act and Regulations. It will be up to brokers that offer mere posting services to ensure that they comply with the reporting and record keeping obligations. For example, if the broker or salesperson will not be involved with offers or closing, which is presumably when most REALTORS® complete their records, they would have to ensure they get the correct forms filled out when they accept the listing. CREA will be confirming with FINTRAC that this interpretation of their answer is correct.

6. Are mere postings exempt from other obligations?

All MLS® listings including mere postings must comply with CREA’s Three Pillars and the Interpretations. This means that listing REALTORS® that take mere postings must:

- offer compensation for the cooperative selling of the property;
- be available to provide professional advice and counsel to the seller on all offers and counter offers unless otherwise directed by the seller in writing;
- take responsibility for the accuracy of the information submitted for inclusion in a Board’s MLS® System;
- specify in the REALTOR® remarks if the seller has reserved the right to sell the property himself/herself in the MLS® listing (SRR listing).

Further, listing REALTORS® that take mere postings must also comply with all Board/Association Rules for the efficient operation of a Board’s MLS® System (for example, be responsible for reporting sales, etc.). As well, all mere posting business models must comply with the applicable provincial real estate legislation and any other provincial or federal legislation.

7. Are Brokerages required to offer mere posting services?

No. CREA does not tell its members how to run their businesses and the Consent Agreement does not obligate Brokers to offer mere posting services. The Consent Agreement simply specifies that Board and Association rules cannot prevent or discriminate against mere posting business models.

8. How will buying agents be compensated in mere posting transactions? Will potential buyers have to ask their banks to give them a higher mortgage to allow for compensating their agent?

CREA does not tell its members how to run their businesses. A buyer's agent with a client that is interested in a mere posting might choose to have the client enter into a buyer's agent agreement that addresses compensation in the event that the seller does not pay a sufficient commission (if buyer agent agreements are not already required by law). Alternatively, the buyer's agent may want to inquire whether the seller will offer to pay a cooperating commission directly to the buyer's agent.

9. Can an agent sell sold information to individuals who want to sell their own home?

The Privacy Commissioner has advised that sold prices may constitute personal information for the purposes of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). This means that sold prices cannot be disclosed unless the seller, and perhaps the buyer, has consented to the disclosure of their personal information for that purpose. Some listing agreements require sellers to consent to the disclosure of a sold price to enable REALTORS® to conduct comparative market analyses, but these consents would likely not extend to disclosure of sold information to other potential sellers.

Therefore, it seems that REALTORS® in provinces where PIPEDA applies do not have the proper consents necessary to sell sold information to potential sellers. In provinces where PIPEDA does not apply, REALTORS® would need to determine if they have the proper consents necessary to sell sold information under the provincial privacy legislation.

Further, Boards and Associations may have Rules regarding authorized use of information in their MLS® System database. Selling sold information to potential sellers may not constitute authorized use of MLS® information pursuant to Board/Association Rules.

10. Please describe what is, and isn't, allowed in the remarks section of a mere posting.

Generally, there are two different remarks sections of MLS[®] listings: the REALTOR[®] only (non-public) remarks section and the general (public) remarks section of MLS[®] listings, which is often the remarks section that appears as the General Description on REALTOR.ca.

In order to maintain the integrity of Boards' MLS[®] Systems (which are member-to-member systems that have been built using the resources of CREA members), while at the same time maintaining the ability of REALTORS[®] to provide a wide and diverse range of products and service offerings, CREA's Rules were amended to make clear that the words "visit the REALTOR[®] website to obtain more information" (or in the alternative the REALTOR[®] brokerage website) may be included in the general (public) remarks section of an MLS[®] listing and on REALTOR.ca. Consumers can then click on a direct link to the REALTOR[®] website that appears on REALTOR.ca.

CREA's Rules provide that the seller's contact information shall not appear on REALTOR.ca or in the general (public) remarks section of a listing on a Board/Association's MLS[®] System. Further, comments such as "visit the REALTOR[®] website for seller contact information" would not be permissible as these comments specify the nature of the additional information.

CREA's Rules further provide that where the seller directs the listing REALTOR[®] in writing to do so, the seller's contact information may appear in the REALTOR[®] only remarks (non-public) section of a listing on a Board/Association's MLS[®] System.

Boards and Associations also have Rules regarding what can and cannot appear in the remarks sections of MLS[®] listings, which listing REALTORS[®] must abide by. For example, a Board may have a Rule that states that only property-related information (i.e., no personal promotion) is allowed in the public remarks section of a listing.

11. What are the obligations of a Broker to the public if they only post a property on a Board/Association's MLS[®] System?

Any obligation of a Broker to the public would be found in legislation (e.g., provincial licensing legislation, the *Competition Act*, privacy legislation, etc.), codes of ethics such as the REALTOR[®] Code, and possibly common law.

12. What is the Brokerage liability regarding accuracy of information?

Listing REALTORS® are responsible for the accuracy of the information that he or she provides to a Board's MLS® System. However, this does not mean they have to provide an absolute warranty for the accuracy of the information in all circumstances. It means they have to take responsibility for the accuracy of the information and they cannot shift responsibility to the buyer. If a listing REALTOR® is not willing to take responsibility and be accountable for the accuracy of the information, then the listing should not be taken as an MLS® listing. Inaccurate information decreases the value of a Board's MLS® System by undermining its reliability.

13. How do CREA's Rules apply to mere postings that are advertised by the listing REALTOR® or seller on private websites?

Sellers and listing REALTORS® are free to advertise mere postings (or any postings) on any website as long as the advertisement complies with regulatory requirements and CREA's trademarks are used in an authorized manner. Sellers are not licensed to use CREA's trademarks in marketing the property. Given that SRRs and "mere postings" may be submitted to a Board's MLS® System, and given that these types of listings permit sellers to try and sell their property themselves, some sellers may try to use CREA's trademarks on their private for-sale signage and advertising. That is absolutely prohibited. It would be an infringement of our trademarks to do so.

The accuracy requirement for the listing data in CREA's Interpretations applies to listings placed on Boards' MLS® Systems. That requirement ties into the member-to-member obligations inherent in the operation of MLS® Systems and not to information placed by a seller on a private site, although reliance on inaccurate data in any location may give rise to claims for damages against the person/organization who so advertises.

14. How will the Brokerage be protected from errors, omissions or misinterpretation between the Buyer and Seller?

CREA's Rules do not address errors and omissions. Questions about liability should be directed to a Broker's own counsel or Regulator.

CREA's Rules do, however, require listing REALTORS® to disclose whether a seller has reserved the right to sell the property himself/herself (SRR listing). Disclosing the fact that a listing is an SRR listing in the Board's MLS® System enables buyer's agents to assess any risk that may exist and make informed decisions when working on those listings. For example, a

buyer's agent with a client that is interested in an SRR listing might choose to have their client enter into a buyer's agent agreement that addresses compensation in the event that the seller does not pay a sufficient commission or other remuneration to a cooperating selling office. It is up to the buyer's agent and the buyer to agree on how to proceed.

15. How are we going to continue to report sales when we will, in a lot of cases, not be involved in the sale? For that matter, how will we know when to report a property as pending?

In order to ensure the accuracy and integrity of information in a Board's MLS[®] System, Board rules should include a requirement that members report the sale of any property listed by the member on a Board's MLS[®] System. It is up to the REALTOR[®] to make appropriate arrangements with clients to ensure that the REALTOR[®] can comply with Board Rules requiring reporting of sales, for example, by ensuring that a seller who has the right to sell privately is contractually obliged to report the sale price to the listing REALTOR[®] when sold.

16. Whose sign goes on the lawn when listed? What if it is an MLS[®] listing, is advertising limited to the Listing Brokerage or can the Seller use FSBO signage? Can an MLS[®] sticker be placed on a FSBO sign? If not, are we not breaking another Rule that says if a property is listed on the MLS[®] System, the signage must indicate that fact?

Whose "for-sale" sign goes on a seller's lawn and whether or not the listing REALTOR[®] is to be involved in marketing a property is to be determined by agreement between the listing REALTOR[®] and the seller. That said, if the seller is going to market the property by themselves, the seller is not allowed to use CREA's trademarks in that marketing. Only authorized Board/Association members can use MLS[®] trademarks on their own signage.

17. In the past, listing agents presented offers to the vendors. I would expect that with a reduced service listing, this may not be the case... so how is this handled? Is the MLS[®] Info sheet going to give instructions regarding presentation of offers?

Whether or not a listing REALTOR[®] will be involved in the offer process depends on the agreement between the listing REALTOR[®] and his or her client. For example, a seller may agree with a listing REALTOR[®] that all offers are to be sent directly to the seller, and this may be specified in the REALTOR[®] (non-public) remarks section of an MLS[®] listing. How the offer process will be handled will depend on the agreement between the listing REALTOR[®] and the seller, Board rules, and applicable regulatory requirements.

18. Are commissions now to be negotiated?

Consumers can, and always have been able to, negotiate the level of service they want and the fees or commission they want to pay for that service. CREA members offer a wide variety of services and add value to real estate transactions in whatever fashion they have agreed with their clients. Consumers choose with whom they want to work and negotiate the terms (service and fees) of the relationship with their REALTOR[®].

19. Are listings on ICX impacted by the Consent Order?

Any listing which appears on a Board's MLS[®] System for residential real estate is subject to the operating rules of the Board. Therefore, as a practical matter, in an indirect fashion commercial property on such an MLS[®] System may be indirectly impacted by the Consent Order. Commercial transactions that are not on a Board's MLS[®] System (i.e., are solely on ICX) are not affected by the Consent Agreement.

20. Recent media reports indicate that the Bureau has launched a further investigation into the industry with regard to MLS[®] data.

CREA is not aware of any such investigation. We look forward to a return to a constructive relationship with the Bureau.