I. “OFF-MLS LISTINGS” GENERALLY:

1. What is an Off-MLS listing?

An “Off-MLS listing,” also known as a “pocket listing,” “off-market listing” or “office exclusive listing,” is a listing agreement obtained by a listing agent but not placed on MLSListings.

2. Are Off-MLS listings legal?

While Off-MLS listings can be legal, certain steps are necessary to comply with MLSListings Rules as well as various statutes, regulations, ethics rules and practical considerations that agents and brokers need to take into account, as discussed below.

3. What listings are participants required to post to MLSListings?

Broker participants must input all exclusive right to sell or exclusive agency listings on one to four unit residential properties and vacant residential lots located within the service area of the MLS within 72 hours (with no exceptions for weekends, holidays and postal holidays) after all necessary signatures of the seller(s) have been obtained on the listing.

4. What listings are participants not required to post to MLSListings?

A listing does not need to be posted if the seller refuses to permit the listing to be disseminated by MLSListings and the listing broker submits to MLSListings within 72 hours (with no exceptions for weekends, holidays and postal holidays) an approved certification signed by the seller that the seller does not authorize the listing to be disseminated during the waiver period specified.

5. What are some of the reasons for an Off-MLS listing?

The primary reasons a seller might choose not to list property on MLSListings are privacy, confidentiality, or a desire to limit or restrict access to the home. The agent or broker may also benefit through potentially receiving higher commission rates by avoiding compensation to other brokers, or through granting limited access to favored buyer agents who may provide limited access to their Off-MLS listings in return. These benefits can be seen as a violation of the broker’s fiduciary duty to his/her client if the Off-MLS listing is not in the client’s best interest. Agents and their brokers should ensure that they have fully informed the seller of how MLSListings works and discussed the benefits and drawbacks to Off-MLS listing and whether it fits the particular interests of
the seller. The seller, not the broker or agent, should make the choice to Off-MLS list rather than listing on the MLS.

6. What are the drawbacks to Off-MLS listing rather than listing on MLSListings?

Off-MLS listing drastically reduces exposure to the market, which may result in the seller not receiving the best possible offer, as potential buyers may never have the chance to view the property. Homes sold through the MLS can command higher sales prices by advertising the property for sale to a wide range of people. Listings in MLSListings are available to be seen by over 150,000 MLS subscribers from throughout the state of California. In the MLSListings consumer web site, 500,000 consumers see listings each month from MLSListings’ MLS system. Also, distribution to a wide range of IDX vendors on behalf of thousands of agents and brokers expands that exposure considerably. If a broker or agent opts-in, Realtor.com, Trulia and Zillow add another 200 million consumers to view the listed property. MLSListings also provides an economic incentive to agents by offering compensation to buyer representatives who show their client listed properties, which in turn brings more buyers to the property and gives the property wide exposure.

7. If I obtain a listing and want to share it with a non-MLS group of brokers but not with MLSListings, is that legal?

Assuming the other legal, regulatory and ethical requirements for an Off-MLS listing are met, sharing a listing with such a group is permissible provided the group is in full compliance with applicable anti-discrimination and antitrust laws (discussed below). However, you should carefully consider the potential benefits and risks to using such a group for sharing listings in lieu of using the MLS.

8. If I have an Off-MLS listing but I receive an offer from an agent who is not in my non-MLS group of brokers, do I have to present that offer to the seller?

Yes. Under your fiduciary and ethical obligations as a listing agent, you generally must present all offers to the seller. However, since the Off-MLS listing is not on MLSListings, you may not have an obligation to compensate the buyer’s agent unless you otherwise agree to do so.

9. If my client, a potential buyer, knows about a property not posted on MLSListings and wants to make an offer on that Off-MLS listing, can I submit the offer?

Yes. You can submit your client’s offer to the listing agent, who is required to share the offer with the seller for consideration. You are not automatically entitled to compensation from the agent because the property is not on MLSListings. To ensure compensation, you would have to enter into a separate agreement with your client or with the listing agent.

10. If I plan to place a “Pre-MLS” or “Coming Soon” sign on a property prior to listing on MLSListings, could that be a legal or ethical violation?

California real estate licensing regulations require a licensee to have a listing agreement in place in order to be authorized to represent the seller and market the property. If the property in question is not yet listed, the agent could be in violation of California licensing regulations if the agent is marketing the property. Once the
property is listed, there still could be legal implications if the title “coming soon” is an inaccurate description or is misleading. False advertising is prohibited, whether in a yard sign or through other media. Real estate licensees have legal, MLS and ethical obligations to be truthful when advertising property or services. Legally, licensees may be held liable for fraud or misrepresentation if they make material false statements or material omissions in any medium of advertising. Additionally, licensees may face discipline from the California Department of Real Estate (soon to become the Bureau of Real Estate under the umbrella of the Department of Consumer Affairs). Similarly, REALTORS® have an ethical duty under the NAR Code of Ethics to avoid false advertising, and are required “at all times to present a true picture in their advertising and representations to the public . . .”. MLSListings MLS Rule 12.10 also prohibits false or misleading advertising and requires participants and subscribers to present a true picture in their advertising and representations to the public.

II. LEGAL AND ETHICAL IMPLICATIONS OF OFF-MLS LISTING

A. California Real Estate Law

1. Can an Off-MLS listing violate California real estate law?

Yes. Listing agents have a fiduciary duty to the seller. If an Off-MLS listing is made solely for the listing agent’s benefit and is not in the seller’s best interest, it can be deemed a breach of the listing agent’s fiduciary duty.

2. What is my fiduciary duty?

Under California real estate law, an agent owes a complete duty of the highest good faith in his/her dealing with the client and cannot use the position to his/her own advantage. A listing agent has a “duty of utmost care, integrity, honesty and loyalty” when dealing with the seller.

3. How can an Off-MLS listing be deemed a breach of my fiduciary duty?

Off-MLS listings provide an upside to the broker in that the listing agent does not need to compensate the buyer’s representative and can keep the full commission. Also, providing an Off-MLS listing to a small non-MLS broker group might allow the agent to obtain access to certain properties in return. The benefit to the seller is less certain, as the seller’s home is reaching a limited group of potential buyers. As the upside to the broker in receiving a higher commission and potentially providing his/her other clients access to limited properties is readily apparent, Off-MLS listings can be seen as being beneficial to a listing agent of broker for his/her own advantage without consideration of the seller’s best interest, and thus a violation of the agent’s and/or broker’s fiduciary duties.

4. What are the consequences if I breach my fiduciary duty?

If an agent or broker breaches his/her fiduciary duty, the client may bring a civil lawsuit against both, potentially resulting in liability for any damages suffered. Separately, even in the absence of a lawsuit finding him/her liable, the agent or broker may be subject to discipline by the California Department of Real Estate for any substantial misrepresentation, fraud, dishonest dealings, negligence or incompetence, and he/she may face loss or suspension of his/her real estate license.
5. How can I avoid violating the law?

Listing agents should fully inform sellers of the benefits and drawbacks to Off-MLS listing and ensure that the seller voluntarily agrees to Off-MLS listing before the agent withholds the listing from MLSListings. The listing agent should understand clearly why the seller has chosen to do an Off-MLS listing. The listing broker shall then submit to MLSListings within 72 hours an approved certification signed by the seller that the seller does not authorize the listing to be disseminated by MLSListings.

B. REALTOR® Code of Ethics and Standard and Practices

1. Can an Off-MLS listing violate the NAR Codes of Ethics?

Yes, similar to the fiduciary duty under California real estate law, the Code of Ethics requires a REALTOR® to “promote and protect the interests of the client” and to inform the seller of his/her “company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities.” This may include informing the seller of the compensation offered to buyer’s representatives when listing on MLSListings, and comparatively the lack of such compensation for Off-MLS listings.

The Code of Ethics also imposes a duty to cooperate on a REALTOR®, which “relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers/tenants when it is in the best interests of sellers/landlords.” As Off-MLS listings restrict the property availability for showing to prospective buyers, a REALTOR® should only withhold the listing from the MLS when it is in the best interests of the client.

C. Antitrust Laws

1. Can Off-MLS listings create a violation of antitrust law?

Yes. Brokers who have Off-MLS listings in non-MLS brokerage groups with competing brokers could risk antitrust liability depending on the particular practices of that group. For example, price-fixing arrangements are generally per se antitrust violations. If competing brokers formed a group that set minimum commission rates for members, all participants could face potential liability for violating antitrust laws.

D. Fair Housing

1. Can an Off-MLS listing create a fair housing violation?

Yes. Brokers and agents are under strict legal and ethical obligations to not engage in any type of unlawful discrimination. Even if discrimination is not overt and there is no intent to discriminate, Off-MLS listings create a risk of a fair housing violation based on disparate impact. A fair housing violation can be found when a “practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.” For example, if an Off-MLS listing is for a property
located in a neighborhood mainly consisting of one racial group and the Off-MLS listing is made available only to a specific non-MLS broker club that happens to market primarily to members of that racial group, the property will most likely be sold to a member of that group. Even where there is no intent to discriminate, there is a disparate impact—the property is likely to be sold to members of that particular racial group, which perpetuates the racial housing pattern in that neighborhood. If the same property were listed on MLSListings, the property would be marketed to everyone, and no particular racial group would be targeted. Even if the buyer from MLSListings ends up being someone from the same predominant racial group of the neighborhood, that result was not predetermined by the practice, and would not “actually or predictably” result in perpetuating the racial housing pattern.

2. What are the consequences of a fair housing violation?

An individual or the federal government may bring a civil lawsuit against the agent or broker, resulting in significant fines for each proved violation, punitive damages and attorneys’ fees. Additionally, the agent or broker could face suspension or loss of his/her license.

3. Are there any defenses to a fair housing violation?

Yes. If disparate impact was found, a broker or the non-MLS broker group can defend themselves by showing that the practice is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests” of the person engaged in the practice and those “interests could not be served by another practice that has a less discriminatory effect.” Specifically, the defendant would need to show the reasons for engaging in the practice and why those goals could not be met using an alternate practice that would not guarantee a discriminatory impact, such as posting on MLSListings.