

DOJ sends signal to industry in first commission comment since March

Statements made by a DOJ attorney during a May 21 status hearing in the Nosalek commission case offer new insights into the Justice Department's impression of the proposed NAR settlement

BY [TAYLOR ANDERSON](#), Inman News

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The U.S. Department of Justice broke its silence in court on Tuesday on the impending changes coming for the real estate industry in the wake of settlement agreements by major brokerages and the National Association of Realtors in what experts say was a statement Realtors should heed.

During a status hearing for a case in Massachusetts, Jessica Leal, an attorney for the DOJ, said the regulator would neither support nor oppose the NAR settlement agreement, which will lead to sweeping rule changes this summer.

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But Leal added that the DOJ didn't want to see offers of compensation being made "anywhere," according to [RISMedia](#).

"We believe offers of compensation should not be made anywhere, but certainly not on the MLS," Leal said, [RISMedia reported](#).

It was the first time the DOJ has weighed in since NAR reached a deal with homeseller plaintiffs on March 15 and agreed to make sweeping changes. Among them, NAR agreed to remove offers of compensation from the multiple listing services.

Those changes will take effect in August and Judge Stephen R. Bough is set to consider final approval in November. Leal's comments were made in a separate case known for its lead plaintiffs as Nosalek, involving the MLS Property Information Network (MLS PIN).

In a legal brief filed in the Nosalek [case in February](#), the DOJ signaled regulators wanted agents and brokers completely removed from the commission-setting process.

"If MLS PIN rules prohibited sellers and listing brokers from deciding what buyer brokers would be paid, sellers would be responsible for determining only the compensation of their own broker in the listing contract, while buyers would be responsible for determining the compensation of their own broker in a buyer-broker representation contract," Leal wrote.

Edward Zorn, vice president and general counsel for the California Regional Multiple Listing Service, said Leal's courtroom comment on Tuesday was a signal to the industry insiders currently updating forms and practices that brokerages will rely on come late summer.

"That comment was not just for the court," Zorn said. "That comment was also intended for the industry."

Specifically, the DOJ is likely signaling that it might look to intervene if brokerages adopted listing agreements that included space for sellers to make offers of compensation.

“I believe the statement that the DOJ made, it clearly is not to us in the MLS world, because we in the MLS world have the NAR settlement and have gotten rid of the offers of compensation,” Zorn said. “The DOJ statement may be more for the people who are making forms that support and continue the practice of broker commission-sharing with offers of compensation in the forms continuing the model that currently exists.”

Speaking on stage during the inaugural Inman Connect Miami on Tuesday, [NextHome CEO James Dwiggins warned](#) real estate professionals that those who attempt to cling to the old commission-sharing structure would be putting themselves into legal limbo.

He said in an interview on Wednesday that the DOJ statement was signaling what it would accept in a post-settlement landscape.

“It’s a shot across the bow,” Dwiggins said. “My guess is it’s a political statement to keep everybody aware of how you are structuring this stuff to make sure you are not creating something that’s going to continue practices that the Department of Justice and the lawyers on the plaintiffs side are trying to get rid of.”

Plaintiffs’ attorney Seth Klein declined to comment on the hearing on Wednesday. In court, Klein appeared to confirm Zorn and Dwiggins’ interpretation.

“Ideally in their statement they say they want to prohibit the seller from offering compensation at all,” Klein said in court, according to RISMedia. “I think from the statement that (is) their ultimate position on what they think the world should look like, and I don’t necessarily disagree.”

DOJ still in the spotlight

The courtroom comment came a day after a separate court case kept the tension between the DOJ and NAR high.

NAR on Monday asked the circuit court of appeals in Washington, D.C. for a rehearing in a case that will determine whether the [DOJ can reopen](#) its investigation into NAR’s cooperative compensation rule, also known as its Participation Rule.

NAR had previously reached a settlement with the DOJ in 2020, but the DOJ withdrew from that settlement in July 2021 and resumed its investigation,

NAR had successfully [asked a lower court](#) to set aside the subpoena. That ruling was overturned by a split ruling from the U.S. Court of Appeals for the District of Columbia.

In its filing, NAR’s attorneys wrote that “the panel’s errors are far-reaching and exceptionally important. Every day, federal agencies resolve civil and criminal enforcement actions through agreements with private parties. It is a bedrock principle that the government must honor its word in those contracts, no matter who occupies the White House or leads the Antitrust Division.”

The DOJ is expected to respond within the next two weeks, according to various news reports.

Zorn said the case could be precedent-setting and have implications beyond the real estate industry.

“This is an important issue for NAR to continue to pursue just for the good of the country,” Zorn said.

The activities of the week and anticipated filings show that, while the industry is moving quickly to adapt to the NAR settlement and move past the lawsuits, the DOJ remains front and center in the real estate world.

“At the very least, all eyes are on the DOJ right now,” Dwiggins said. “They kind of have been for a while. But now it’s their turn to weigh in.”