

## Appeals court to allow DOJ to reopen its investigation into NAR

The three-judge panel was split 2-to-1 in its decision

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A three-judge panel for the U.S. Circuit Court of Appeals in D.C., has ruled that the [Department of Justice](#) can reopen its investigation into the [National Association of Realtors](#).

In an opinion filed on Friday, Circuit Court judges Florence Pan and Karen Henderson ruled that the settlement agreement reached by the DOJ and NAR in November of 2020, does not prevent the DOJ from reopening its investigation into the trade group's Participation Rule and Clear Cooperation Policy. The opinion was written by Judge Pan. Judge Justin Walker, the third judge on the panel, filed a dissenting opinion.

"As framed by the parties, the issue before us is narrow. DOJ argues only that the plain language of the closing letter does not bar it from reopening its investigation and issuing a new CID regarding the Participation Rule and the Clear Cooperation Policy. We agree," Pan wrote.

At the center of the debate is [a letter](#) the DOJ sent to NAR in Nov. 2020, in which the DOJ agreed to close its investigation into NAR.

"The plain meaning of that provision is that DOJ closed its then-pending investigation and relieved NAR of its obligation to respond to two specifically identified Civil Investigative Demands," Pan wrote. "We discern no commitment by DOJ — express or implied — to refrain from either opening a new investigation or reopening its closed investigation, which might entail issuing new CIDs related to NAR's policies. Put simply, the fact that DOJ "closed its investigation" does not guarantee that the investigation would stay closed forever. The words "close" and "reopen" are unambiguously compatible."

Additionally, Pan points out in her opinion that the DOJ included a "no inference" clause in its closing letter, which states that "[n]o inference should be drawn . . . from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree."

"That clause confirms that DOJ did not intend to imply any additional terms in the letter, such as one prohibiting a reopened investigation," Pan wrote.

Pan also noted that based on a precedent set in *United States v. Winstar Corp.*, the court "will not interpret a contract to cede a sovereign right of the United States unless the government waives that right unmistakably.

"The closing letter contains no "unmistakable term" ceding DOJ's power to reopen its investigation," Pan continued.

In his dissenting opinion, Judge Walker agreed with the other two judges that in its letter the DOJ unmistakably made it known that it was closing its investigation. However, Walker disagrees with his colleagues, stating in his dissent that "because DOJ misreads one isolated word ("closed") to nullify what the Realtors gained from an otherwise comprehensive and comprehensible contract, [he] respectfully dissents."

In Walker's view, "the sole question is whether DOJ is correct that it could have immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation.

"Because DOJ's sole argument is wrong, I would affirm the district court on the narrow grounds presented to us by DOJ's appeal," Walker wrote.

Walker focuses on the DOJ's assertion that "closed" and "reopen" compatible terms, something he says he accepts, "But because "context may drive such a statement in either direction," a promise to close something may at times preclude an immediate reopening.

"By context, I mean the rest of the contract's text. And here, the text suggests a quid-pro-quo bargain that precludes DOJ's sole argument," he continues.

Walker concludes by writing that the DOJ "bargained for a binding contract."

"That bargain required DOJ to close an investigation, and it did not allow DOJ to immediately reopen the "closed" investigation. In arguing otherwise, DOJ has invited our court to go where no court has gone before — or at least no court identified by DOJ.

"After today, behind the facade of its promise to close an investigation, the government can lure a party into the false comfort of a settlement agreement, take what it can get, and then reopen the investigation seconds later," Walker concluded.

This ruling comes over four months after the three-judge panel [heard oral arguments](#) from both NAR and the DOJ.

In 2020, the DOJ's antitrust division agreed to a settlement after investigating the trade groups listing and [agent compensation policies](#). The settlement proposed at the time included requirements for NAR to boost transparency about broker commissions and to stop misrepresenting that buyer broker services are free.

However, the DOJ, under new leadership in the Biden administration, withdrew the settlement [in July 2021](#), stating that the terms of the agreement prevent regulators from continuing to investigate certain association rules that they feel harm buyers and sellers.

NAR filed a [petition](#) in September 2021 to set aside or modify the DOJ's probes into the trade group.

In late [January 2023](#), Judge Timothy Kelly of the U.S. District Court for the District of Columbia, a Trump appointee, ruled in favor of NAR, stating that the earlier settlement terms were still valid, and that allowing the investigation to continue would take away the benefits NAR had negotiated in the original settlement.

The DOJ [appealed the ruling](#) in March and filed its [first brief](#) in early June. NAR filed a [reply brief](#) in late July.

The investigation into NAR by the DOJ and ensuing appeal is not the only legal battle the DOJ and the real estate industry are currently involved in.

In late September 2023, [became involved](#) in the Nosalek [commission lawsuit](#), filing a motion to extend the deadline for the final approval of the [settlement agreement](#) reached between the

Nosalek plaintiffs and defendant **MLS Property Information Network**. In mid-February, the DOJ filed its [statement of interest](#) in the Nosalek suit, in which it advocated for the prohibition of cooperative compensation.

The DOJ's involvement in the Nosalek suit has led many to believe that the government will [seek to get involved](#) in the other [commission lawsuits](#), but that remains to be seen.

In October, a [Missouri jury](#) found that NAR, along with **HomeServices of America** and **Keller Williams**, had conspired to artificially inflate real estate agent commissions, a judgement that hinged upon NAR's Participation Rule, which requires listing brokers to make a blanket offer of compensation to buyer's brokers in order to list a property on a Realtor association affiliated MLS. [NAR](#), as well as [Keller Williams](#), have since entered into settlement agreements for this and other [commission lawsuits](#). These agreements are still waiting for final approval from the court.

NAR has not returned a request for comment. The trade group has the option to appeal the appellate court's decision to the Supreme Court. Additionally, it remains unknown if the DOJ will ultimately decide to pursue this reopened investigation into NAR.