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The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

Submitted via: <https://ftcpublic.commentworks.com/ftc/realestateworkshop/>

Re: Competition in Residential Real Estate Brokerage Workshop Project #747

Dear Chairman Simons:

The National Association of REALTORS® (NAR), whose 1.3 million members identify themselves as REALTORS®, represents a wide variety of real estate industry professionals. REALTORS® have been early adopters of technology and are industry innovators who understand that consumers today are seeking real estate information and services that are fast, convenient and comprehensive. Increasingly, technology innovations are driving the delivery of real estate services and the future of REALTORS® businesses. NAR welcomes the opportunity to comment on the state of competition in the real estate brokerage industry.

NAR believes the Department of Justice (DOJ) and the Federal Trade Commission (FTC) should conclude that the residential real estate industry is robustly competitive with multiple business models offering consumers the prices and services to fit their needs.

I. Over the past decade, technology has positively enhanced the real estate consumer's experience

It is undisputed that technology has fundamentally changed the real estate brokerage industry over the last ten years. It allows for listing information to be distributed widely and to be freely accessible to consumers. A primary example of this is the explosion in the availability of property listing data to consumers. Today, property listing data is available to consumers on thousands of websites and mobile applications.

In order to demonstrate how REALTORS® enable a consumer friendly real estate environment, it is helpful to understand the data involved in creating, marketing and ultimately executing the transaction that is based upon a property listing.

Property listings are created each time a homeowner decides to sell their property. Real estate brokers and agents invest a considerable amount of time, money and energy obtaining a listing and creating a trusted relationship with their client. For example, agents target markets in neighborhoods, follow up on leads, advertise, and make listing presentations in order to secure a listing. All of this work is uncompensated until the property sells. These efforts expended by real estate brokers and agents to organize, build and distribute listing information form the backbone of the MLS.

What's more, real estate brokers and agents are liable for the use and content of the information contained in a listing under state and federal law.¹ They are liable to their clients to properly protect that data and ensure its accuracy as well as liable to third parties like



¹ For example, state advertising laws and federal fair housing laws.

Multiple Listing Services (MLSs) and advertising platforms to whom they represent and warrant the accuracy of the data.

Once the listing is created by the agent and broker, in the majority of cases, it is transferred to the MLS. The MLS, through its rules and policies, organizes and standardizes the listing data to create an efficient marketplace for home buying and selling transactions.

From the MLS, listing data can be licensed and transferred at the direction of the broker to varying third parties including: consumer facing advertising platforms, appraisers and other broker websites (via Internet Data Exchange (IDX) and Virtual Office Website (VOW) feeds) with all of these data flows ultimately delivered to the consumer for their benefit. While consumers may not be aware of the role the MLS plays in delivering listing data to the sites they ultimately visit, it is the MLSs who provide the important mechanisms and create industry policies and standards to deliver timely, accurate and relevant information to consumers.

Despite recent calls for “freeing listing data”² economist Frederick Flyer concluded in a recent economic report that:

“There is nothing exclusionary about preventing third-party data aggregators from using MLS data. Real estate websites such as Zillow and Trulia are in the business of vying for Internet ‘eyeballs’ and are not in the business of providing brokerage services hence limiting these sites’ access to proprietary MLS data does not harm consumers of brokerage services nor does it limit their access to information. These sites are not even essential to consumers who use actual real estate brokerage services, since these data aggregation sites do not provide consumers of real estate brokerage services with any greater access to information.”³

Real estate brokers and agents invest resources into obtaining property listings. They have rights and responsibilities to control the distribution of their listings. Appropriation of a commercial entity’s data, work product, or intellectual property for exploitation by another commercial entity is not justified.

As Flyer concludes, policy demands for greater public access to proprietary MLS listing data are based on faulty expectations that unrestricted access to listing data will help consumers. Instead, “freeing” the listing data can alter important incentives to the creation of that listing data ultimately harming consumers. Simply put, effective policies must be cognizant and protective of real estate brokers’ property rights.⁴

Real Estate Data Standards Promote Innovation

The Real Estate Standards Organization (RESO) is a non-profit 501c (6) membership based open source standards organization that maintains the standardized methods and formats for distributing and accessing real estate data including the RESO Data Dictionary, the RESO Web API, and the RESO RETS standards. These widely-adopted industry standards simplify access and encourage innovation to real estate data for new companies to engineer their solutions with the latest technological techniques for distribution of data. Over 750 companies actively participate today in the development and adoption of RESO open source standards.⁵

The real estate industry has worked hard over the past several years to simplify and speed up the process of gaining access to MLS data. MLS Policy outlined by the National Association of REALTORS®⁶ now requires MLSs to provide timely approvals to applications for MLS data. In May 2017, NAR enacted the following policy: Requests for IDX

² Daniel Castro, Michael Steinberg, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help* Internet Technology Industry Foundation, November 6, 2017.

³ Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data, Frederick Flyer, Ph.D., April 5, 2018, available at: <https://www.nar.realtor/procompetitive-benefits-of-policies-limiting-access-to-local-multiple-listing-service-data>.

⁴ *Id.*

⁵ See, Real Estate Standards Organization <https://www.reso.org>.

⁶ See, National Association of Realtors, MLS Policies: <https://www.nar.realtor/about-nar/policies/mls-policy>.

feeds/downloads must be acted on by the MLS within five (5) business days from receipt, barring extenuating circumstances related to an individual's qualification for MLS Participation, and review of the participant's and vendor's use of the IDX information consistent with the MLS rules, in which case an estimated time of approval or denial must be issued.

Today, due to the hard work of the Real Estate Standards Organization, there are over 3,000 fields and values available in a standardized format while also allowing access to additional localized fields in each individual MLS. These fields include everything from bedrooms and baths to home energy efficiency information to saved search-sharing options.

The efforts RESO has taken in standardizing the way real estate data is described and transported is making it much easier for new and established companies to innovate. RESO has published two cases that clearly outline the cost and time advantages standardized data delivers. MyTheo, a start-up organization proved that using RESO data saved them 40% of their development time. Homes.com, a well-established online platform recently published a case study that demonstrated that the industry could save \$1 billion overall by fully deploying data standards.

There is no doubt that technology companies that provide services to agents and brokers have access to comprehensive, accurate and timely real estate data by simply applying to the MLS with authorization from the MLS participant that is requesting data access.

Technological Innovation Comes with Costs

While technology has enabled more efficient marketing of listing data, it has not necessarily driven down costs. Instead, costs have shifted or, in many cases, increased. For example, the home seller's agent costs of preparing a listing have increased via demands for high resolution photography and video. Additionally, advertising and promotional costs on third party advertising platforms continue to go up. Lead generation costs through programs like Zillow's "Premier Agent" have steadily increased, and reportedly tripled, over the past several years.

While advertising on online platforms has added a layer of cost for brokers and agents, that technology has not reduced the human cost of managing a real estate transaction. Agents and brokers are still critical to completing the real estate transaction. As such, these platforms act as a super-intermediator in the real estate market and not a disintermediator as certain technology has in other service industries, such as travel.

II. Despite technology's positive contribution, consumers still choose to hire real estate professionals.

In 2017, ninety-two percent of consumers used a real estate professional in their transactions. Specifically, eighty-seven percent of buyers recently purchased their home through a real estate agent or broker, and seven percent purchased directly from a builder or builder's agent leaving only 5% that did not work with a real estate professional.⁷

In response to critics of information restrictions who opine on why the Internet hasn't played a more significant role in the provision of real estate brokerage services, economist Frederik Flyer explains, "effective brokerage services still require substantial personal services for which there are no computer substitutes (currently)...so comparing this industry to others with far less human capital requirements [such as travel industry] leads to misleading inferences on the level of innovation occurring in brokerage services."⁸

Consumer facing home listings websites empower consumers by providing more choice when it comes to choosing a real estate professional to represent them. The fact that the overwhelming majority of consumers choose to work with a real estate agent demonstrates the value they bring to the transaction. It is critical to acknowledge that real estate agents do more than push buttons and unlock doors, among the many values a real estate agent provides is to act as a trusted

⁷ 2017 *Profile of Homebuyers and Sellers*, National Association of REALTORS®.

⁸ Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data, Frederick Flyer, Ph.D., April 5, 2018, available at: <https://www.nar.realtor/procompetitive-benefits-of-policies-limiting-access-to-local-multiple-listing-service-data>.

advisor who helps the consumer emotionally manage the home buying process. Real estate brokers and agents reduce uncertainty for home buyers and sellers about market conditions given the infrequency with which most home buyers and sellers are in the market.

Robust competition exists among real estate brokers and agents on many variables. From For Sale By Owner (FSBO) to full service brokerage and myriad service and price options in between, consumers have numerous choices for real estate brokerage services and numerous fee options to choose from. In fact, the FTC-DOJ Workshop⁹ featured panelists representing several competing brokerage models including discount, flat-fee, and full-service hybrid, and ibuyer brokerage models.

Competition among agents and brokers is robust. There are low barriers to entry, many competing business models and greater consumer choice in how to buy and sell real estate today. Consumers are indicating their preference and satisfaction with real estate brokerage services by continuing to engage real estate professionals to represent them in purchase and sale of their homes.

Commissions

Because consumers have a multitude of choices in service and fee models, they also have great choice regarding payment for real estate services. Importantly, sellers have the ability to discuss and negotiate with their broker what fee they are willing to pay for their broker's services and what fee they are willing to pay a cooperating broker for bringing a willing and able buyer to close the transaction.

Moreover, real estate agents do not get paid unless the transaction is successfully brought to a close. This contingent fee model is inherently pro-consumer. In many cases, agents expend a great deal of time, money and energy working for a consumer but will not be compensated for any of it unless they succeed in closing the transaction.

The customary model of having the seller's broker pay the buyer's broker creates efficiencies in the marketplace. Homebuyers may not be able to afford to pay out of pocket for real estate professional services. Allowing the cost to be financed within the transaction allows consumers, especially lower income consumers, the ability to hire professional representation in the home buying process.

The NAR 2017 Profile of Homebuyers and Sellers indicates that 48% of real estate agents initiated a discussion about commissions/fees with their clients, 20% of clients brought up the subject of commissions/fees with their agent, 10% of clients knew that the commission/fees were negotiable but did not discuss them with the agent and 15% of clients did not know that commissions/fees were negotiable.¹⁰

Moreover, the REAL Trends consumer research shows that a majority of consumers are aware that they can sell or purchase a home without using an agent, they are aware that there are alternatives to using a full service, full price agent and that they often try other methods to either sell or buy a home prior to the selection of an agent.¹¹

From this, we can see that the majority of real estate consumers are aware of the multitude of market options available to them when buying or selling a home and that the majority engage in a conversation about commission/fees with their agents. Consumers benefit from disclosure of the commission structure as well as expanding choices in what type of fee/service model they wish to engage. Consumers indicate their preference and satisfaction with these services by continuing to engage real estate professionals to represent them in transactions.

III. The market for real estate brokerage services is robustly competitive with low barriers to entry.

With the full cooperation of NAR's 1500 local and state associations, the NAR-DOJ consent decree on Virtual Office Websites (VOWs) was implemented and has been carefully adhered to over the past ten years.

⁹ *What's New in Residential Real Estate Brokerage Competition*, an FTC-DOJ Workshop, June 5, 2018.

¹⁰ 2017 *Profile of Homebuyers and Sellers*, National Association of REALTORS®.

¹¹ 2016 *Brokerage Compensation Report*, REAL Trends.

Regardless of the consent decree, MLSs have always facilitated an efficient marketplace where competing brokers work together in the best interest of buyers and sellers, including easy access to information on homes for sale in a particular market. NAR's Internet Data Exchange (IDX) rules have evolved over time to allow MLSs and MLS participants to facilitate indexing of listings by Google and others, display listings on social media sites, require implementation of the RESO data dictionary to facilitate standardization of data categories, and require use of RESO API to facilitate data sharing with third parties, among other innovations.

The expiration of the decree will have no impact on the extent to which MLSs make their services available to participants. They will continue to do so uniformly, irrespective of the manner in which participants provide brokerage services to consumers.

After a thorough examination of the comments submitted and discussion held at the June 5 workshop, NAR is confident the FTC and DOJ will conclude that the market for residential real estate is highly competitive. Multiple competing fee and service models exist in the market and consumers are aware of the growing number of options available to them. Ultimately, there is no need for continuing the consent decree.

IV. MLSs are critical to competition in the real estate marketplace

Courts, regulators, online advertisers, and the real estate industry all agree that local multiple listing services promote competition between real estate brokers, which ultimately benefits consumers. MLSs organize property listing information in a common database resulting in lower search costs, greater exposure of inventory to potential buyers, and easy market entry for new brokers to compete. MLSs also provide a means for communicating unilateral offers of compensation to other participants and they enforce rules and dispute resolution processes to ensure the orderly functioning of the real estate brokerage market.¹²

MLSs depend upon participating brokers to voluntarily agree to share their property listing information with and compensate other participating brokers for the sale of those listings. Participating brokers immediately gain access to the MLS, regardless of size of the brokerage firm, age of the business, or model by which they provide services or charge fees.

The availability and immediate access to listing information facilitates the growth of new brokerage entrants. In fact, a recent article in *Real Estate Economics* concluded: "the MLS found in practically every local real estate market acts to level the playing field because listings from small firms or new entrants receive equal exposure with those of large established firms"¹³

In his economic report, Frederick Flyer found that "the net harm to consumers from diminished broker reliance on the MLS can manifest in different ways as brokers attempt to preserve the value of their listings including: greater participation in private listing markets (pocket listings), delay in posting listings to the MLS and broker withdrawal."¹⁴

Policy demands for greater public access to brokers' proprietary listing data or MLS information are based on faulty expectations that unrestricted access helps consumers of real estate brokerage services. It is important to remember that incentives for participants also impact outcomes. Forcing brokers to provide unrestricted access to proprietary MLS information can alter important incentives for the creation of listing information that would ultimately harm consumers.

¹² See National Association of REALTORS®, *Handbook on Multiple Listing Policy*, available at: <https://www.nar.realtor/handbook-on-multiple-listing-policy>.

¹³ See Scott, Yelowitz "Concentration and Market Structure in Local Real Estate Markets," *Real Estate Economics*, 2012 *V. 40 3: pp. 422-460*.

¹⁴ Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data, Frederick Flyer, Ph.D., April 5, 2018, available at: <https://www.nar.realtor/procompetitive-benefits-of-policies-limiting-access-to-local-multiple-listing-service-data>.

V. Non-broker advertising platforms have benefits and drawbacks.

Consumers have access to much more home listing information today than ten years ago and they can access that information on many more platforms. While large consumer advertising platforms create benefits for consumers, regulators should be mindful of their growing market power and the potential for consumer harm that it creates. Advertising platform dominance can create competition issues in the residential real estate market in the same way other large technology platforms create competition concerns and raise the specter of consumer harm.

As Steven Brobeck of the Consumer Federation of America noted during the FTC/DOJ Workshop on June 5th, certain features and products offered by the advertising platforms could cause consumer confusion and frustration and may bear additional investigation from regulators.

Zillow's premier agent advertising program wherein agents purchase from Zillow the exclusive right to advertise in a specified market on the Zillow platform leads to consumer confusion. Consumers searching for homes on Zillow see agent contact information next to a particular listing and are led to believe that agent is the listing agent. They click to seek more information on the listing and are then subject to marketing from an agent who is not the listing agent and has no additional information on the listing the consumer is interested in. As Redfin CEO, Glenn Kelman put it, "There is now a multibillion dollar industry based on fundamental misdirection."¹⁵ In fact, in his testimony during the June 5 FTC/DOJ workshop, Kelman described advertising platforms as "a tax we have to pay" and indicated that his agents pay \$5,000 to \$6,000 a month to portals."

Furthermore, in 2017 the Real Estate Board of New York asked New York regulators to investigate whether the Premier Agent program violates New York state advertising laws¹⁶ citing the practice as a "maelstrom of consumer confusion."

Another advertising platform product, *Zestimates* creates consumer confusion over the value of properties either for determining listing price or for offers on properties for sale. According to Zillow CEO Spencer Rascoff, nationwide *Zestimates* have a median error rate of about 8%. However, according to nationally syndicated real estate reporter Ken Harney, localized median error rates far exceed the national median.¹⁷ Consumers largely do not understand the wide margin of error in *Zestimates* and this can create conflicts when pricing a home for sale or for a buyer determining what price to offer.

While advertising platforms offer consumers an easy and entertaining home shopping experience, as the platforms add features and services they bear scrutiny over potential anti-consumer impacts. Antitrust regulators should be monitoring advertising platforms for market power and anticompetitive behavior.

In conclusion, NAR believes that the FTC/DOJ Workshop on June 5 showed that the residential real estate industry is robustly competitive with multiple business models offering consumers the prices and services to fit their needs.

Sincerely,



Katie Johnson
General Counsel and Chief Member Experience Officer
National Association of REALTORS®

¹⁵ Kelman speaking at What's New in Residential Real Estate Brokerage an FTC-DOJ Workshop, June 5, 2018.

¹⁶ REBNY *Asks State to Probe StreetEasy's Premier Agent feature*, The Real Deal, March 8, 2017.

¹⁷ *Inaccurate Zillow 'Zestimates' a Source of Conflict Over Home*, Ken Harney, Los Angeles Times, February 8, 2015.