UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

May 12, 2005

The Honorable Members of the Alabama Senate
Alabama State House
11 South Union Street
Montgomery, AL 36130

Re: House Bill 156--Proposed Amendments to Section 34-27-84, Code of Alabama

Dear Senators:

We understand that the Alabama Senate is considering whether to vote on Alabama House Bill 156 on May 16, 2005, or sometime shortly thereafter. If enacted, the bill will make it more difficult for real estate professionals to provide their customers with customized real estate brokerage services. Such a law likely will decrease competition among real estate professionals and result in Alabama home buyers and sellers paying higher real estate commissions. The Federal Trade Commission ("FTC" or "Commission") and the United States Department of Justice ("Department of Justice") urge the Alabama Senate to reject the proposed legislation.

Interest and Experience of the FTC and the Department of Justice

Congress has charged the FTC with enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[1] Pursuant to this statutory mandate, the Commission encourages competition in the licensed professions, including real estate brokerage, to the maximum extent compatible with state and federal goals. The FTC has applied this mandate in analyzing aspects of the real estate transaction. For example, the FTC has commented on numerous occasions in support of allowing non-attorneys to compete with attorneys in the provision of certain real estate settlement tasks.[2] Further, in 2002, the Commission held a public workshop on barriers to electronic commerce in many industries, and gathered testimony on state restrictions that may impede competition from online real estate service providers.[3]

The Department of Justice also is entrusted with enforcing this nation's antitrust laws. For more than 100 years, since the passage of the Sherman Antitrust Act, the Department of Justice has worked to promote free and unfettered competition in all sectors of the American economy through its civil and criminal enforcement programs. In particular, the Department has a long history of enforcement efforts in the real estate area that includes several cases involving restrictions on access to multiple listing services and other restraints limiting competition among real estate brokers. The Department recently sent a letter to the Oklahoma State Legislature opposing pending legislation similar to House Bill 156.[4]

The FTC and the Department of Justice also jointly advocated against the passage of regulations proposed by the Texas Real Estate Commission that would have restricted consumers' choices in real estate service levels.[5] In response, both the Oklahoma Legislature and the Texas Real Estate Commission decided to study the consequences of the proposed legislation or regulation before deciding whether to adopt such restrictions.[6]

Industry Background

Traditionally, real estate professionals have performed virtually all services relating to the sale of a home. The key tasks involved in selling a house include marketing it, negotiating with potential buyers, and closing the transaction. Marketing includes listing the property in the local multiple listing service ("MLS"), placing advertisements in local media and on the Internet, and conducting open houses. When providing services relating to the task of contract negotiation, real estate professionals may provide advice on pricing, home inspections, or other contractual terms. For these efforts, the real estate professionals are typically paid a commission based on a percentage of the sales price of the home.

It is becoming increasingly common for home sellers to buy some, but not all, of the traditional brokerage services. For example, some sellers may want help advertising their homes, but want to negotiate the sales price themselves without having to pay a real estate professional. Such consumers may prefer to pay a real estate professional only for the service of listing their homes in the local MLS and placing other advertisements. Other consumers may find a buyer without assistance, but would like to hire a real estate professional to assist them with the negotiation of the sales price or with the paperwork required to close the transaction. The marketplace is evolving in response to these consumers who want to perform some of the steps involved in selling their homes on their own. Real estate professionals who are willing to provide only those services a home seller wants have emerged in Alabama and throughout the country. These "fee-for-service" or "menu-driven" business models are currently legal under Alabama law and typically enable consumers to save thousands of dollars because the consumers pay the real estate professional only for those services they want.

The Proposed Legislation

House Bill 156 would amend existing law governing the provision of real estate services in Alabama. Among other amendments to this law, the bill would require real estate professionals to provide a minimum of services when accepting an agreement to list a home owner's property for sale. Specifically, House Bill 156 reads:

> when accepting an agreement to list an owner's property for sale, the broker or his or her licensee shall, at a minimum, accept the delivery of and present to the consumer all offers, counteroffers and addenda to assist the consumer in negotiating offers, counteroffers, and addenda, and to answer the consumer's questions relating to the transaction.[7]

Because the proposed amendment states that real estate professionals entering agreements with their customers "shall, at a minimum," provide the services enumerated above, the proposed amendment effectively prohibits a real estate professional from contracting with the customer only to place the property listing on the local MLS without also providing the negotiation services.

The Proposed Legislation Would Likely Harm Consumers

Competition and consumer choice provide substantial benefits to consumers. As the Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services."[8] Indeed,

> [t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[9]

House Bill 156 is likely to deprive Alabama consumers of the benefits of robust competition between full-service brokers and fee-for-service brokers without providing any apparent benefits. House Bill 156 would eliminate certain fee-for-service brokerage arrangements as an option for Alabama consumers. Real estate professionals who agree to list property for sale would be forced to provide a state-mandated minimum service package that includes many duties associated with negotiating a property sales contract. Currently, one of the most popular fee-for-service arrangement is to purchase only the service of listing property on the MLS. This service gives home sellers access to an important marketing tool but is not resource intensive for the broker. Under the proposed legislation, Alabama home sellers will no longer have this option. The services enumerated by the statute require investments of time, effort and expertise by the real estate professional. If real estate professionals must, in effect, provide these services, they can be expected to charge for the services as well.

The proposed legislation, if enacted, is likely to reduce competition and harm Alabama consumers in two significant ways. First, consumers who want to perform for themselves some steps involved in negotiating home sales in Alabama will pay real estate professionals more than they do today. For example, based on an informal review of Alabama real estate professionals who offer fee-for-service pricing, an Alabama home seller may pay a broker from $300 to $500 only to list a house in the MLS, leaving other marketing and all negotiating to the seller. If a buyer pays $150,000 for that seller's house, a seller who contracted with a fee-for-service real estate professional for the $500 listing in the MLS, and agreed to pay a three-percent commission to a buyer's real estate professional, would pay a total of $5,000. By contrast, if the same seller could only buy the traditional package for a typical six-percent commission, to be split between the buyer and seller's broker, the seller would pay a total of $9,000 to sell the house. In this example, the effect of House Bill 156 would be that the Alabama home seller bought $4,000 more in real estate brokerage services than he or she may have needed or wanted.

The passage of House Bill 156 is likely to harm consumers in another way. Real estate professionals who offer fee-for-service provide a competitive constraint on the pricing of real estate professionals who offer only the full-service option. By limiting the availability of customized offerings, the passage of House Bill 156 will likely protect real estate professionals who choose to offer the full complement of services from having to compete with those who offer consumers more choices in the quantity and types of services. Because of this reduced competition, even those consumers who prefer to purchase the full range of services from traditional real estate service professionals will likely pay higher prices.[10]

Fee-For-Service Options Presents No Demonstrated Harm to Alabama Consumers

We recognize that some laws limiting forms of competition may be beneficial when they address specific market failures shown to harm consumers. However, such restraints should be drawn narrowly to minimize the lost benefits of competition. Although some may claim that legislation like House Bill 156 is necessary to protect consumers, this bill limits competition far more than could possibly be necessary to address any plausible consumer protection concerns. Before the State Legislature passes House Bill 156, or any other similar measure, we urge it to take steps to determine whether consumers have actually been harmed by contracting with real estate professionals who charge less and allow consumers to perform some services for themselves.

We have seen no evidence that consumers currently are harmed by fee-for-service real estate brokerage. If, however, the results of a study were to show that fee-for-service real estate services result in harm, any such concerns almost certainly could be addressed through a narrower approach than that proposed in House Bill 156. For instance, if the State Legislature is concerned that home sellers who have contracted for fee-for-service options may mistakenly expect to receive more assistance from the real estate professional with whom they have contracted, the State Legislature could require that real estate professionals offering fee-for-service options specifically delineate in writing those services the client will *not* receive. This

disclosure requirement would ensure that the client understands exactly what he or she has or has not purchased and what other services might be available that might meet his or her needs. But a significant restriction on a class of business models is not the answer — especially a model that is evolving to meet consumers' needs for more choice and flexibility in their real estate service purchases.

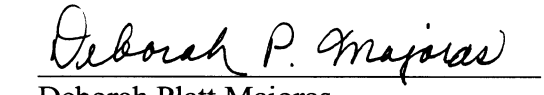
Conclusion

The success of providers of customized real estate brokerage services demonstrates that there is a demand for the fee-for-service business model among Alabama consumers. The proposed amendment would require many consumers to purchase unwanted negotiation services enumerated in the proposed bill. Moreover, all consumers of real estate services in Alabama are likely to pay more under the proposed legislation. Accordingly, we urge the Alabama Legislature not to enact the bill.

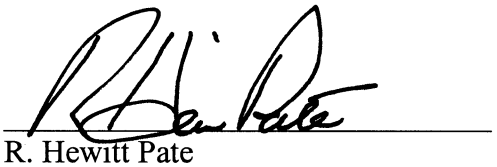
The FTC and the Department of Justice appreciate this opportunity to present their views and would be pleased to address any questions or comments regarding competition policies.

Respectfully Submitted,

By direction of the
Federal Trade Commission



Deborah Platt Majoras
Chairman
Federal Trade Commission



R. Hewitt Pate
Assistant Attorney General
Antitrust Division

Endnotes

[1] Federal Trade Commission Act, 15 U.S.C. § 45.

[2] Letter from FTC and the Justice Department to Massachusetts State Representative Paul Kujawski (Oct. 6, 2004); Letter from FTC and the Justice Department to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); Letters from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); Letter from the FTC and the Justice Department to President of the North Carolina State Bar (July 11, 2002); Letter from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); Letter from the FTC and the Justice Department to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Letter from the FTC and the Justice Department to the Supreme Court of Virginia (Jan. 3, 1997); Letter from the FTC and the Justice Department to the Virginia State Bar (Sept. 20, 1996). These letters can be found at http://www.ftc.gov/be/advofile.htm. *See also* Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in *Lorrie McMahon v. Advanced Title Services Company of West Virginia,* 607 S.E.2d 519 (W. Va. 2004) (filed May 25, 2004), *at* http://www.ftc.gov/be/V040017.pdf; Brief *Amicus Curiae* of the Federal Trade Commission and the United States of America in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), *at* http://www.ftc.gov/os/2003/07/georgiabrief.pdf.

[3] FTC Workshop, POSSIBLE ANTICOMPETITIVE EFFORTS TO RESTRICT COMPETITION ON THE INTERNET (Oct. 10, 2002), *written statements and transcript available at,* http://www.ftc.gov/opp/ecommerce/anticompetitive/agenda.htm.

[4] *See* Letter from R. Hewitt Pate, Assistant Att'y Gen. to Oklahoma State Representative Todd Heitt (Apr. 8, 2005), *at* http://www.usdoj.gov/atr/public/press_releases/2005/208486.htm#letter.

[5] *See* Letter from FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), *at* http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm.

[6] *See* Press Release issued by Texas Real Estate Commission (April 26, 2005), *at* http://www.trec.state.tx.us/pdf/press_releases/20050426-minBrokSvcsRuleUpdate.pdf. *See* Richard Mize, *House Agrees to Delay Real Estate Service Bill*, THE DAILY OKLAHOMAN, April 27, 2005, 2005 WLNR 6585638.

[7] H.B. 156 (Al. 2005).

[8] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted).

[9] *Id.* at 695; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[10] For example, in the analogous case of real estate settlement services, both the New Jersey and the Kentucky Supreme Courts have observed that the settlement services offered by non-attorneys at closing put competitive pressure on the services provided by attorneys at closing. In New Jersey, the Supreme Court found that real estate closing fees charged by lawyers were much lower where they had significant competition from non-lawyers (lawyers charged sellers $350 on average in such areas), than where non-lawyers offered little competition (lawyers able to charge sellers $750 on average in such areas). *See In re Op. No. 26 of the Comm. on the Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995). In Kentucky, in the course of rejecting a Kentucky Bar opinion that would have greatly restricted the ability of title companies to perform settlement services, the Supreme Court of Kentucky noted that "before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher — in some areas as much as 1% of the loan amount plus additional fees." *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003). Further, the court noted that "the presence of title companies encourages attorneys to work more cost-effectively." *Id.*