UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

May 23, 2005

Governor Matt Blunt
Office of the Governor
Room 216, State Capitol Building
Jefferson City, MO 65101

**Re: Missouri House Bill 174**

Dear Governor Blunt:

As you may already know, both the Missouri House of Representatives and the Missouri Senate have passed House Bill 174. We understand that you have until July 16, 2005 to veto this bill. The bill will change current law to make it more difficult for real estate professionals to provide Missouri consumers with customized real estate brokerage services. Such a law will likely decrease competition among real estate professionals. With less competition, Missouri consumers will have fewer options for real estate services, causing some home sellers to pay thousands of dollars more in commissions to real estate brokers. Furthermore, the portion of House Bill 174 with which we are concerned does not address any demonstrated consumer harm. Accordingly, the Federal Trade Commission ("FTC" or "Commission") and the United States Department of Justice ("Department of Justice") urge you to veto House Bill 174.

## 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 General Assembly opposing pending legislation similar to House Bill 174.[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] Since then, the FTC and the Department of Justice sent a letter urging the Alabama Senate not to vote for House Bill 156, which would also restrict consumer choice in real estate service levels.[7] To date, the Alabama Senate has not approved that bill.

## 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. Contract negotiation services might include providing 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 might want help advertising their homes, but want to negotiate the sales price themselves. Such consumers might 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 might 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. Real estate professionals who are willing to provide only those services a home seller wants have emerged in Missouri and throughout the country. These "fee-for-service" or "menu-driven" business models are currently legal under Missouri law and typically enable consumers to save thousands of dollars because the consumers pay only for those services they want.

## The Proposed Legislation

House Bill 174 would amend existing law governing the provision of real estate services in Missouri. Among other amendments to this law,[8] the bill would require all exclusive brokerage agreements, as defined by § 339.710(16) of the bill,[9] to specify that the broker, or any affiliated licensees,

> shall provide, at a minimum, the following services:
>
> (1) Accepting delivery of and presenting to the client or customer offers and counteroffers to buy, sell, or lease the client's or customer's property or the property the client or customer seeks to purchase or lease;
>
> (2) Assisting the client or customer in developing, communicating, negotiating, and presenting offers, counteroffers, and notices that relate to the offers and the counteroffers until a lease or purchase agreement is signed and all contingencies are satisfied or waived; and
>
> (3) Answering the client's or customer's questions relating to the offers, counteroffers, notices, and contingencies.[10]

Because the proposed amendment states that real estate professionals entering exclusive brokerage agreements with their customers "shall provide, at a minimum" the services enumerated above, the proposed amendment effectively prohibits a real estate professional from contracting with the customer to provide less than the enumerated services, such as only placing the property listing on the local MLS.

## The Proposed Legislation Likely Would Harm Consumers

Competition and consumer choice provide substantial benefits to consumers. As the U.S. Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services."[11] 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.[12]

Although the minimum service requirements in House Bill 174 are triggered only when exclusive brokerage agreements are involved, as a practical matter the bill will reach most real estate transactions because the Missouri real estate market often gives the consumer no real alternative to exclusive brokerage agreements. We understand that most MLSs, including one of the largest in Missouri, require a real estate professional to enter into an exclusive brokerage agreement with the home seller in order to post property listings to that MLS.

Currently, real estate professionals offering fee-for-service options can enter into an agreement with the consumer that satisfies this MLS rule and gives a home seller the choice to purchase a customized subset of services. If you do not veto House Bill 174, however, Missouri real estate professionals wanting to list houses on MLSs that require an exclusive brokerage agreement will not be able to waive any services enumerated by the statute. The services enumerated by the statute require investments of time, effort, and expertise by the real estate professional. If real estate professionals must provide these services, it is reasonable to expect them to charge for them.

The proposed legislation, if enacted, is likely to reduce competition and harm Missouri consumers in two significant ways. First, consumers who want to perform for themselves some steps involved in negotiating home sales in Missouri will pay real estate professionals more than they do today. For example, based on an informal review of Missouri real estate professionals who offer fee-for-service pricing, a Missouri home seller might pay a broker from $300 to $500 only to list a house in the MLS, leaving all 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 buy only the traditional package for a typical six-percent commission, to be split between the buyer's and seller's brokers, the seller would pay a total of $9,000 to sell the house. In this example, House Bill 174 would cause a Missouri home seller who otherwise would choose the fee-for-service option to purchase $4,000 more in real estate brokerage services than he or she needed or wanted.

Second, House Bill 174 is likely to increase the price that some consumers who prefer full-service brokerage pay for real estate services. Real estate professionals who offer a fee-for-service option 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, House Bill 174 likely will 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 some consumers who prefer to purchase the full range of services from traditional real estate service professionals are likely to pay higher prices.[13]

## Fee-For-Service Options Present No Demonstrated Harm to Missouri Consumers

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 contemplated by House Bill 174. For instance, if there were a concern that home sellers may mistakenly expect to receive more assistance from the fee-for-service real estate professionals with whom they have contracted, one could require that brokers offering fee-for-service options specifically delineate in writing those services the client will *not* receive. This disclosure requirement would highlight what the consumer has or has not purchased and what other services might be available.

Some industry participants in other states have expressed concerns that fee-for-service brokers may impose costs on other brokers. They fear that sellers who retain a fee-for-service broker may shift costs or risks onto the buyer's broker when, for example, a problem has arisen that cannot be resolved without a broker's help. This possibility, the argument continues, could discourage buyers' brokers from showing houses listed by fee-for-service brokers. There is no reason to believe, however, that competition in the marketplace cannot adequately address such a possibility. Sellers using fee-for-service brokers, for example, might find that they must offer buyers' brokers a higher commission to induce them to show their homes. Similarly, a buyer's broker could require a higher fee from his or her client to show homes listed by fee-for-service brokers. In any case, there is no justification for excluding fee-for-service brokerage options from the marketplace.

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 might claim that legislation like House Bill 174 is necessary to protect consumers, this bill limits competition far more than could possibly be necessary to address any plausible consumer protection concerns. 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. Before you approve House Bill 174, or any other similar measure, we urge the Missouri General Assembly and you 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. If any consumer harm were to be demonstrated, we further urge the Missouri government narrowly to tailor any measures to address such harm to minimize any restriction on competition.

## Conclusion

Laws and market practices should encourage innovation and new developments. The success of providers of customized real estate brokerage services demonstrates that there is a

demand for the fee-for-service business model among Missouri consumers. For consumers who live in an area in which the local MLS requires an exclusive brokerage agreement, the proposed amendment would require consumers to purchase the potentially unwanted negotiation services enumerated in the proposed bill. Even some Missouri consumers who prefer full-service brokerage, moreover, are likely to pay more under the proposed legislation. Accordingly, we urge you to veto House Bill 174.

We appreciate this opportunity to present our 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 the Justice Department 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 the 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] Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), *at* http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf.

[8] The FTC and the Department of Justice are not concerned about the competitive consequences of, and therefore make no comment, regarding the portions of the bill preventing certain classes of felons from obtaining or keeping real estate licenses.

[9] An exclusive brokerage agreement is defined as "a written brokerage agreement which provides that the broker has the sole right, through the broker or through one or more affiliated licensees, to act as the exclusive limited agent, representative, or transaction broker of the client or customer that meets the requirements of section 339.780." H.B. 174, § 339.710(16), 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005).

[10] H.B. 174, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005).

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

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

[13] 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 attorneys who offer similar services at closing. In New Jersey, the state Supreme Court found that real estate closing fees charged by lawyers were much lower where they had faced 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.*