UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

October 18, 2005

The Honorable Alan Sanborn
Chairman
Committee on Economic Development,
Small Business & Regulatory Reform
Michigan Senate
S-310 Capitol Building
P.O. Box 30036
Lansing, Michigan 48909-7536

David C. Hollister, Director
Michigan Department of Labor &
Economic Growth
611 W. Ottawa
P.O. Box 3004
Lansing, Michigan 48909

Re: Michigan House Bill 4849

Dear Senator Sanborn and Director Hollister:

We are pleased to respond to your requests to analyze the likely competitive effects of Michigan House Bill 4849 ("HB 4849" or "the Bill").[1] This Bill would change current law to require Michigan real estate professionals to provide an array of services to their clients. This requirement will make it more difficult for real estate professionals to provide Michigan consumers with customized real estate brokerage services, and will likely decrease competition among real estate professionals. With less competition, Michigan consumers will have fewer options for real estate services, likely causing some home sellers and home buyers to pay thousands of dollars more in commissions to real estate brokers. Our research, moreover, has found no evidence of consumer harm from allowing fee-for-service brokers to operate in Michigan.

Accordingly, the Federal Trade Commission ("FTC" or "Commission") and the United States Department of Justice ("Department of Justice") urge the Michigan legislature to reject HB 4849 in its current form.

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[1] We also note that Michigan House Bill 4850 would amend current Michigan law to require listing agents to disclose the requirements in HB 4849 to their clients. *See* HB 4850 § 2517(2). Neither bill will take effect unless both are enacted into law.

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.[2] 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 when we have been asked to analyze and comment on 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 services.[3] 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.[4]

The Department of Justice 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. In July, the Department announced a settlement to a civil antitrust suit it filed earlier in the year against the Kentucky Real Estate Commission.[5] Under the settlement, which must be approved by the court, the Kentucky Real Estate Commission agreed to stop enforcing a

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

[3] 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.

[4] 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.

[5] *See* Proposed Amended Final Judgment, *United States v. Kentucky Real Estate Comm'n*, Civ. Act. No. 3:05CV188-H (filed July 15, 2005), *at* www.usdoj.gov/atr/cases/f210100/210142.htm.

regulation that prohibits Kentucky real estate brokers and sales associates from offering rebates and other inducements to attract customers.[6]

The FTC and the Department of Justice have sent joint letters to the Texas Real Estate Commission,[7] the Alabama Senate,[8] and Missouri Governor Blunt[9] regarding proposed regulations and legislation that would impose minimum service requirements on real estate brokers. As we stated in these letters, our concerns with these proposals were that they would reduce competition between fee-for-service brokers and full-service brokers, thus limiting consumer choice and likely increasing the price that some consumers in these states would pay for real estate brokerage.[10] The FTC and the Department of Justice also are planning to hold a workshop on October 25, 2005, for discussion of issues involving competition and the real estate industry.[11]

Industry Background

The traditional brokerage model is to sell a package that includes virtually all of the services associated with 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.

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[6] *See* Complaint, *United States v. Kentucky Real Estate Comm'n*, Civ. Act. No. 3:05CV188-H (filed Mar. 31, 2005), at http://www.usdoj.gov/atr/cases/f208300/208393.htm.

[7] 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. Our comment to the Texas Real Estate Commission was in response to an open comment period. *See* Broker's Responsibility, 30 Tex. Reg. 1400 (proposed Mar. 11, 2005).

[8] Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), *at* http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf.

[9] *See* letter from the FTC and the Justice Department to Governor Matt Blunt (May 23, 2005), *at* http://www.ftc.gov/opa/2005/05/mrealestate.htm

[10] Earlier this year, the Department of Justice on its own sent a letter to the Oklahoma State Legislature opposing pending minimum service legislation. *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/comments/209203.htm.

[11] *See Public Workshop: Competition Policy and the Real Estate Industry*, 70 FED. REG. 53,362 (Sept. 8, 2005).

It is becoming increasingly common for home sellers and home buyers to want 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 advertisements in local media. 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 a customized subset or menu of a la carte services have emerged in Michigan and throughout the country. These "fee-for-service" or "menu-driven" business models are currently legal under Michigan law and typically enable consumers to save thousands of dollars because the consumers pay only for those services they want.

The Proposed Legislation

HB 4849 would amend existing law governing the provision of real estate services in Michigan.[12] Among other amendments to this law,[13] the Bill would require "a real estate broker acting pursuant to a service provision agreement creating an exclusive agency relationship" to,

> at a minimum, provide the following services to his or her client:
>
> (A) When the real estate broker is representing a seller or lessor, the marketing of the clients' property in the manner agreed upon in the service agreement.
>
> (B) Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease the client's property or the property the client seeks to purchase or lease.
>
> (C) Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related documents or notices until a purchase or lease agreement is executed by all parties and all contingencies are satisfied or waived.
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> (D) After execution of a purchase agreement by all parties, assistance necessary to complete the transaction under the terms specified in the purchase agreement.

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[12] Specifically, HB 4849 would amend MICH. COMP. LAWS § 339.2512.

[13] The FTC and the Department of Justice make no comment on the portions of the Bill not related to minimum-service requirements.

(E) Furnishing, or causing to be furnished, a complete and detailed closing statement as required by R 339.22311 of the Michigan Administrative Code.[14]

The Bill defines "service provision agreement," as "an agreement between the broker and the client that establishes an agency relationship through a listing agreement or a buyer agency agreement."[15]

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."[16] Indeed, as the Court stated:

> [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.[17]

We read HB 4849 as triggered by any exclusive agreement between a broker and client, such as an exclusive listing agreement or an exclusive agency agreement, that creates an agency relationship. By requiring real estate professionals who enter into such agreements with their customers to provide "at a minimum" the services enumerated above, HB 4849 prohibits such real estate professionals from contracting with the customer, for example, only to place the property listing on the local MLS. As a practical matter, the Bill is likely to apply to almost all of the real estate transactions in many areas of Michigan.[18] Many MLSs in Michigan require that the listing broker establish an "agency relationship" before allowing a broker to list a property in

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[14] HB 4849 § § 2512D(1)(A)-(E). The Bill also would make failure to furnish the enumerated services a violation subject to penalties set out in MICH. COMP. LAWS § § 339.601 *et seq*. *See* HB 4849 § 2512(j).

[15] HB 4849 § 2512D(2).

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

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

[18] Many fee-for-service brokers enter into exclusive listing agreements. Some, however, are serving as "transaction coordinators," who, under current Michigan law, can contract to provide services to both buyers and sellers without creating a principal-agent relationship with either party. Our research indicates that some MLSs in Michigan do allow agents who act as "transaction coordinators" to place listings into the MLS. It is unclear whether the minimum-service provisions of HB 4849 would apply to these transaction coordinators. Even assuming, however, that HB 4849 does not reach agreements between transaction coordinators and their clients, if MLSs that allow transaction coordinators to place listings were to change their rules to require listing brokers to enter into "agency relationships," then the requirements of HB 4849 would apply to transaction coordinators who wish to list their clients' properties in the MLS.

the local MLS. Therefore, consumers who live in areas that are served by MLSs with such rules and who wish only to have their house listed in the MLS must sign brokerage agreements that create an agency relationship and bring into play the minimum services requirements.

Currently, real estate professionals in Michigan offering fee-for-service options can enter into an exclusive agency relationship with a consumer and give a home seller or home buyer the choice to purchase a customized subset of services. If HB 4849 were enacted, however, Michigan real estate professionals who want to list homes on MLSs whose rules require a brokerage agreement that creates an exclusive agency relationship will have to provide the services enumerated by the statute.

The proposed legislation, if enacted, is likely to reduce competition and harm Michigan consumers in two significant ways. First, some consumers who want to perform for themselves some steps involved in negotiating home sales and purchases in Michigan will pay real estate professionals more than they would today. For example, based on an informal review of Michigan real estate professionals who offer fee-for-service pricing, a Michigan home seller might pay a broker from $400 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 in brokerage fees.

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 in brokerage fees to sell the house. In this example, HB 4849 would cause a Michigan 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. In fact, after the Texas Legislature enacted a law that required real estate professionals to provide a full array of services, some Texas brokers raised their prices to cover their costs of providing the newly mandated services and attributed the price increase directly to the new law.[19] Further, if required to pay for services that they do not want or need, some consumers who otherwise would choose a fee-for-service listing may decide to go without brokerage services all together. In either case, HB 4849 would deprive consumers of the opportunity to purchase their preferred choice.

Second, HB 4849 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, HB 4849

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[19] *See* Glenn Roberts Jr., *Flat-fee brokers adapt to new real estate law Texas' new minimum-service law enacted Sept. 1*, Inman News, Oct. 12, 2005, available online at http://www.inman.com/inmannews.aspx?ID=48325; *see also* http://www.texasdiscountrealty.com/laws.htm (website of Texas Discount Realty explaining that "because of the added responsibilities forced on to you, the seller and us the broker, by [the Texas minimum service law], we are forced, as most brokers to adjust our prices).

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, some consumers who prefer to purchase the full range of services from traditional real estate service professionals are likely to pay higher prices.[20]

Fee-For-Service Options Present No Demonstrated Harm to Michigan Consumers

We recognize that some laws limiting forms of competition may be beneficial when they address specific market failures shown to harm consumers. However, we have seen no evidence that consumers currently are harmed by fee-for-service real estate brokerage.[21] Because HB 4849 does not appear to be necessary to address any demonstrated consumer harm, if enacted, it is likely to deprive Michigan home buyers and sellers of the benefits of competition without providing any countervailing benefits.

If, however, the results of a study were to show that fee-for-service real estate services result in harm, any such concerns most likely could be addressed through a narrower approach than that contemplated by HB 4849. For example, Ohio recently organized a task force that included members from all sides of the minimum service debate to study whether minimum service legislation should be enacted.[22] The Ohio Task Force ultimately recommended that real

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[20] 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 were 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.*

[21] Discussions with relevant members of Michigan's Department of Labor and Economic Growth ("DLEG") – the Michigan agency charged with overseeing real estate licensees – reveal that they are unaware of any complaints against fee-for-service brokers.

[22] The Report and Recommendations by The Ohio Association of Realtors states:

At the 2005 OAR Winter Conference, the President was requested by the Board of Directors to appoint a Task Force to examine the subject of minimum service standards for listings. The rationale for the recommendation cited concerns raised by members regarding marketplace issues posed by minimum service listings and the need to have a formal process in place to study action taken in other jurisdictions and determine whether similar actions should be taken in Ohio. It also

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estate agents be required to provide certain services, such as aid in negotiating the sales price of the home, unless the client specifically waives that right. Although we see no evidence indicating the need for any minimum service legislation, if the Michigan legislature nonetheless believes that such legislation is necessary, we urge it to consider the Ohio Task Force approach, which puts the consumer in the driver's seat and significantly reduces the competitive harm from minimum service bills, such as House Bill 4849.

A disclosure and waiver model would appear to address concerns that proponents of minimum service legislation have voiced.[23] 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 cooperating 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. Additionally, we understand that some brokers may be concerned about undisclosed dual agency that may arise if a buyer's agent were to answer questions posed by a seller who is party to a fee-for-service contract and performs his or her own negotiations.

Allowing the seller to waive the right to receive the service after full disclosure, however, would appear to be a much less restrictive means to solving any problem that may exist. Disclosure, for example, would inform sellers that they may not expect assistance from buyers' agents. In conjunction with such disclosure, moreover, there is no reason to believe that competition in the marketplace cannot adequately address this potential issue. Sellers using fee-for-service brokers, for example, might find that they must offer buyer brokers a higher commission to induce them to show their homes, which in turn may cause fee-for-service brokers to lower their fees. In any case, to date, we have found no justification for excluding fee-for-service brokerage options from the marketplace. With regard to the potential of liability for undisclosed dual agency, disclosure and waiver is likely to reduce the probability that an unrepresented seller will expect help from a buyer's agent. Further, license law or regulation

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[22](...continued)
encouraged that the Task Force be comprised of members representative of all approaches to delivering real estate brokerage services to the public.

[23] As noted above, however, we have seen no evidence to date that these concerns have materialized.

could be amended to clarify that negotiations with a party that has chosen not to use his broker for such negotiations do not imply an agency relationship.[24]

Although it may sometimes be necessary to regulate competition when marketplace failures harm consumers, such restraints should be drawn narrowly to minimize the lost benefits of competition. Although some would state that legislation like HB 4849 is necessary to protect consumers, we believe that this Bill limits competition far more than necessary to address any plausible consumer protection concerns. A significant restriction on a class of business models – especially a model that is evolving to meet consumers' needs for more choice and flexibility in their real estate service purchases – generally is not the answer. We therefore recommend that the Michigan Legislature 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 Michigan government to narrowly 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 growing success of providers of customized real estate brokerage services demonstrates that there is a demand for the fee-for-service business model among Michigan consumers. For consumers who live in an area in which the local MLS requires brokers to enter into agreements that create an exclusive agency relationship, the proposed amendment would require consumers to purchase the potentially unwanted services enumerated in the proposed Bill. Moreover, even some Michigan consumers who prefer full-service brokerage are likely to pay more under the proposed legislation. Accordingly, we urge the Michigan legislature to reject HB 4849 in its current form.

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[24] For example, the Ohio Association of Realtors Task Force on Minimum Services for Listings recommended amending Ohio law to provide that agents do not violate license law by "negotiating with a party whose exclusive agent has given another agent written authorization to do so," and urged clarification "that such negotiations do not imply an agency relationship between that agent and the other party."

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 P. Majoras

Deborah Platt Majoras
Chairman
Federal Trade Commission

Thomas O Barnett

Thomas O. Barnett
Acting Assistant Attorney General
Antitrust Division

cc: Tom Martin
Director, Office of Policy & Legislative Affairs
Michigan Department of Labor & Economic Growth