DEPARTMENT OF JUSTICE
Antitrust Division

J. BRUCE McDONALD
Deputy Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)
E-mail: antitrust@usdoj.gov
Web site: http://www.usdoj.gov/atr

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President David Steinborn and the Commissioners
New Mexico Real Estate Commission
5200 Oakland Avenue NE
Albuquerque, NM 87113

Re: Proposed "Minimum Service" and "Advertising" Rules

Dear President Steinborn and Commissioners:

The Antitrust Division of the United States Department of Justice ("DOJ") understands that the New Mexico Real Estate Commission ("Commission") has invited comments on proposed amendments to the New Mexico administrative code that would limit consumers' freedom to choose which real estate services to buy and would define Virtual Office Websites ("VOWs") as advertising. The DOJ has investigated similar restrictive rules in a number of contexts around the country. The proposed amendments would interfere with the free market and harm the interests of New Mexico home sellers and buyers. We urge the Commission not to adopt them.

A. The proposed "minimum service" amendments restrict consumer choice

Currently, Subsection D of 16.61.19.8 NMAC requires New Mexico brokers to provide some negotiation and closing assistance to the client, "unless otherwise agreed to in writing by the customer or client." The current provision allows a broker's client to choose not to receive all of the services the rules require, and the client is protected because the broker must obtain the client's written statement that the client does not expect certain services to be provided. The proposed amendment would strike this waiver language so that customers would no longer have control over which services they purchase. The amendments would replace customer choice with a regulatory requirement mandating that a broker provide a "one size fits all" package of services to the customer, whether or not the customer wants to purchase all of them.

This minimum service issue was addressed in Texas, but the Texas Legislature enacted a law mandating that brokers provide a minimum package of services.[1] Afterwards, some Texas brokers who had provided discount real estate services raised their prices and attributed the increase directly to the new law.[2]

Likewise, preventing New Mexico consumers from purchasing only the services they want would restrict competition for the sale of brokerage services, reduce consumer choice, and cause New Mexico consumers to pay more for real estate services. Many "fee-for-service" brokers, who offer to provide only the services their clients want, have been able to offer lower prices to their clients. We have seen no evidence that consumers have been misled by the availability of fee-for-service arrangements, and the current rules' written waiver requirement ensures that clients get full information.

The DOJ therefore recommends that the Commission reject the proposed amendments to Subsection D. Consumers should be free to choose the specific services that they want to meet their individual needs.[3]

B. The VOW "advertising" amendments are anticompetitive

The proposed amendments to 16.61.32.8 NMAC would define VOWs as "advertising." This is factually incorrect and is likely to hurt consumers by obstructing competition.

All brokers advertise their business to attract prospective clients. But VOWs themselves are not advertising, just another way to provide home listing information to clients. Traditional brokers provide this information to their clients in their brick-and-mortar offices or by mail, fax, e-mail, etc. VOW-based brokers provide the same information to their existing clients using the Internet. VOWs are password-protected websites through which licensed brokers provide listing information to their *existing* clients, not *prospective* clients. The consumer can access information from the VOW only after already establishing a customer relationship with the VOW broker. Indeed, as a federal court concluded: "[A VOW] distributes MLS Data to its clients

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[1] A copy of the DOJ's and the Federal Trade Commission's joint letter to the Texas Real Estate Commission is attached. It analyzes in more economic detail the harm to competition and consumers from minimum service regulation.

[2] *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.").

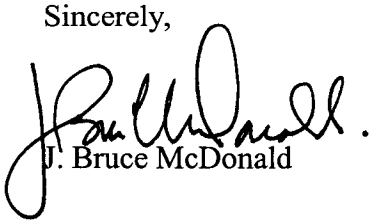
[3] Not only do the proposed amendments to Subsection D of 16.61.19.8 NMAC take away the customer's freedom to choose not to purchase certain services to purchase, but the amendments also expand the level of services that brokers currently must provide to their clients to include accepting delivery of, presenting, and negotiating offers and counteroffers to the client.

using its web site as the medium of distribution instead of paper, e-mail or fax. The Court finds all these methods of distribution are equivalent."[4]

Defining VOWs as "advertising" would stifle innovation and harm consumers. VOWs enable their customers to perform many tasks usually performed by traditional brokers in the search for real estate listings. This allows brokers to be more efficient and may lead to lower commissions. New Mexico MLSs currently have rules that prevent brokers from advertising another broker's listings without that broker's consent.[5] A rule that defines VOWs as advertising could enable traditional brokers to block the customers of their VOW-operating competitors from using the website to review the same set of listings that traditional brokers deliver to their customers by other means. In fact, the DOJ has challenged the National Association of Realtors' rules that restrict the use of VOWs for reducing competition and harming consumers in a lawsuit now pending in federal court.[6]

As we have encouraged other state commissions and legislatures, we encourage you to reject rules that could harm New Mexico home sellers and buyers.[7] The proposed amendments are likely to reduce consumer choice, increase real estate services prices, and undercut incentives to innovate. We appreciate this opportunity to present our views and would be pleased to discuss this with you further.

Sincerely,



J. Bruce McDonald

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[4] *See Austin Board of Realtors v. E-Realty, Inc.*, No. Civ.A-00-CA-154 JN, 2000 WL 34239114, at *2 (W.D. Tex. Mar. 30, 2000) (describing "traditional method of Realtor/client interactions") (opinion attached).

[5] *See, e.g.*, Section 2.7 of the Member MLS Rules & Regulations of the Sante Fe Association of Realtors ("Any listing shall not be advertised by any Participant or User, other than the listing broker, without the prior consent of the listing broker.").

[6] *See* Complaint, *United States v. National Association of Realtors*, Civ. Act. No. 3:05C-5140 (filed Sep. 08, 2005, amended Oct. 04, 2005), at http://www.usdoj.gov/atr/cases/f211700/211751.htm (copy attached).

[7] The Kentucky Real Estate Commission decided to reverse its decision to adopt and enforce rules that limited broker discounting, in a recent settlement of a federal antitrust lawsuit. *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 (copy attached).