



U.S. Department of Justice

Antitrust Division

Liberty Square Building
450 Fifth Street, NW
Washington, DC 20530

February 8, 2011

VIA ELECTRONIC MAIL

The Honorable Gage Froerer
Utah House of Representatives
350 North State, Suite 350
Salt Lake City, UT 84114

Re: House Amendment #1 to Utah H.B. 91

Dear Representative Froerer:

Thank you very much for taking the time to speak to my staff yesterday about proposed Amendment #1 to Utah House Bill 91. At your request, we are submitting this letter expressing the views of the Department of Justice, Antitrust Division, on the effect of this Amendment on competition and consumers in Utah. We believe that minimum service laws unnecessarily reduce consumer choices, restrict competition for real estate brokerage services, and ultimately raise prices to consumers. Although Utah has chosen to require certain minimum services of real estate brokers in exclusive brokerage agreements, Amendment #1 will expand these minimum service requirements to cover non-exclusive brokerage agreements. Essentially all brokerage agreements in the State of Utah would then be subject to these requirements. We believe this Amendment would reduce choice and raise prices for Utah home buyers and sellers.

As you may know, the Department is one of two federal agencies (the other being the Federal Trade Commission) charged with enforcing the federal antitrust laws to protect competition and consumers. Part of our mission is to share our experience evaluating policies that may affect consumers and the impact that proposed government action may have on the competitive process. The Antitrust Division has been active in preserving competition in the real estate brokerage industry. With the Federal Trade Commission, we published a report in April 2007 entitled "Competition in the Real Estate Brokerage Industry." We have also submitted comments to numerous state legislators and regulatory bodies on the effects of proposals in the real estate field – including minimum services requirements – on competition and consumers. For more information on the Department's findings and its role in protecting competition in the real estate industry, see our website *Competition and Real Estate*, at: www.usdoj.gov/atr/public/real_estate.

Competition in the real estate brokerage industry has opened up new options for consumers. Traditionally, real estate brokers performed virtually all services related to buying and selling a home, including listing the home in the local multiple listing service, marketing the

house to prospective buyers, hosting open houses, negotiating the sales contract and other forms, and assisting with closing. Home sellers had only two options: engage a broker for the full range of services or not use a broker at all.

In recent years, however, traditional brokers have faced increasing competition from fee-for-service brokers who charge only for those services the consumer chooses to buy. These fee-for-service brokers “unbundle” the package of real estate services offered by traditional real estate brokers and charge a fixed or hourly fee for specific services, such as listing the home in the multiple listing service, negotiating or closing contracts, or providing advice on matters such as pricing the home. Consumers who are willing to do some of the work themselves can negotiate a customized package of services from a fee-for-service broker. These new brokerage models enable consumers to save thousands of dollars by allowing them to purchase only those services they want.

To illustrate how consumers can save money with fee-for-service options, consider the following example set forth in the table below. It is based on a home with a selling price of \$189,000, the approximate median sale price of a single-family home in Utah, according to the Utah Association of Realtors’ December 2010 statistics. Some consumers may choose Option 1, in which the home seller hires a full service broker who charges a 5% commission (with half of that amount going to the buyer’s broker). Others may choose Option 2, in which the home seller pays \$300 to a broker to list his home in the Multiple Listing Service and does all the other tasks himself. The consumers who choose Option 2 can save thousands of dollars by engaging a fee-for-service broker:

	Home Price	Payment to Listing Broker	Consumer Savings
Option 1 (Traditional Full Service)	\$189,000	\$4,725 (2.5% of sales price)	\$0
Option 2 (Fee for Service – MLS only)	\$189,000	\$300	\$4,425

The great majority of states protect consumer choice and reject the notion that consumers must be forced to buy real estate services they do not need. Today, Utah stands as one of only twelve states to have some form of mandatory, non-waivable minimum service law.¹ However, Utah’s law is less restrictive than many other states because it preserves the option for home sellers to enter into non-exclusive brokerage agreements that are exempt from minimum services requirements. Proposed Amendment #1 would eliminate this option.

¹ An additional eight states have minimum service requirements but allow consumers to waive those extra services, preserving choice. For a complete list of state laws on minimum services, please see our *Competition and Real Estate* website at: http://www.justice.gov/atr/public/real_estate/fee_details.htm.

Minimum service laws can harm competition in three ways. First, they restrict consumer choice. Mandatory minimum service requirements limit the types of fee-for-service packages brokers are permitted to offer. For instance, a statutory requirement that brokers be involved in negotiating the sale of the property would prevent them from offering an MLS-only option to consumers who prefer to negotiate for themselves. Today, Utah consumers are allowed to choose an MLS-only option if they enter into a non-exclusive listing agreement. If consumers wish to purchase other services, such as negotiation services, brokers can offer them for an hourly fee or a flat fee. Amendment #1 would prevent brokers from offering these types of creative products. Second, minimum service requirements increase the costs of doing business. This means that brokers must build the costs of complying with the minimum service law into the prices they charge. When brokers are freed from minimum service requirements, they are able to pass their savings along to consumers. Third, minimum service laws create barriers to entry for new competitors. We have observed that in other states, some fee-for-service brokers have been deterred from entering due to the existence of minimum service requirements that do not exist in other states. This lost competition ends up hurting all consumers.

Full and open competition from fee-for-service brokers also benefits the many Utah consumers who wish to purchase the full range of services that traditional brokers offer. When full-service brokers face competition from a broad array of fee-for-service options, they must work hard to encourage consumers to pay for their full-service offerings, rather than choosing a lower-cost fee-for-service option. Traditional brokers do this by offering higher-quality service and lower prices – exactly the kinds of benefits that competition brings to so many other industries.

Some who support minimum service legislation argue that these measures ensure that consumers will receive better quality services, or that they will not be taken advantage of by unscrupulous brokers who fail to disclose the limited nature of their services. But the evidence does not support these claims. Minimum service laws do not ensure quality. They merely require that real estate brokers provide – and consumers purchase – more services. Indeed, competition from fee-for-service brokers causes traditional brokers to win business by providing higher-quality services and explaining the benefits of those services to consumers who are choosing what kind of broker to work with. State policymakers concerned with ensuring quality real estate brokerage services can achieve that objective by fostering open competition among real estate brokers and by enforcing state licensing, continuing education, and disciplinary rules.

In addition, states wishing to safeguard consumers from making uninformed purchasing decisions can do so in other ways less damaging to competition than minimum service laws. For example, instead of barring competition from fee-for-service brokers, states could require all brokers – whether traditional or fee-for-service – to disclose to consumers precisely what services they will and will not be providing.

Competition among real estate brokers has brought significant benefits to Utah consumers. The availability of fee-for-service brokerage options is good for consumers, whether or not they choose those options. Enacting Amendment #1 to House Bill 91 would take away those options, resulting in reduced competition, less innovation, and higher prices for the majority of home buyers and sellers in Utah.

We would be happy to answer any questions you or other members of the legislature may have. Please contact Matthew Bester (202-353-3491) or Ben Matelson (202-616-5871) of my staff with any questions. We urge you to consider these significant adverse effects in evaluating the proposed legislation.

Sincerely,

John R. Read
Chief
Litigation III Section