UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS** Defendant.	Civil Action No. 05 C 5140 Judge Kennelly

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

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Pursuant to the requirements of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), the United States responds to nine public comments concerning the proposed Final Judgment that has been lodged with the Court for eventual entry in this case. After review of the comments, the United States has concluded that the proposed Final Judgment, with minor modifications to which Defendant National Association of Realtors ("NAR") has agreed, will provide an effective and appropriate remedy for the antitrust violation alleged in the Amended Complaint. The United States will move the Court for entry of the proposed Final Judgment on November 7, 2008, as ordered by the Court, after the comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

The United States brought this civil antitrust action against NAR on September 8, 2005, to stop NAR from violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by its suppression of competition from real estate brokers who use password-protected "virtual office websites," or "VOWs," to deliver high-quality brokerage services efficiently to consumers. On May 27, 2008, the United States and NAR reached a settlement. On that day, the United States filed a Stipulation and proposed Final Judgment to eliminate the likely anticompetitive effects of NAR's policies.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Pursuant to that statute, the United States filed a Competitive Impact Statement ("CIS") on June 12, 2008; the proposed Final Judgment and CIS

were published in the Federal Register on August 14, 2008[1]; and a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, was published for seven days in the *Washington Post*, from June 27th to July 3rd, and in the *Chicago Tribune*, from July 7th to July 13th. NAR filed the statement required by 15 U.S.C. § 16(g) on June 10, 2008.

The sixty-day public comment period ended on October 13, 2008. The United States received nine comments, which are addressed below.

II. SUMMARY OF THE ALLEGATIONS IN THE AMENDED COMPLAINT

A. Overview

The United States' Amended Complaint challenged policies adopted by NAR that restrain the ability of real estate brokers to use VOWs to serve their customers and clients. NAR is a trade association that promulgates rules that govern the operation of its approximately 800 affiliated multiple listing services ("MLSs") across the United States. The Amended Complaint alleged that, through its "VOW Policy," adopted on May 17, 2003, and its "Internet Listings Display Policy" ("ILD Policy"), adopted on September 8, 2005 (collectively, the "Challenged Policies"), NAR suppressed new and efficient competition and harmed consumers. By enjoining NAR from permitting its affiliated MLSs to adopt the Challenged Policies, innovative broker members of NAR's 800 affiliated MLSs would be free to use VOWs to provide their customers better service at a lower cost.

[1] 73 Fed. Reg. 47613. An incorrectly typeset version of the proposed Final Judgment and CIS had been published in the Federal Register on June 25, 2008. 73 Fed. Reg. 36104.

B. Multiple Listing Services

MLSs are joint ventures among virtually all residential real estate brokers operating in local or regional areas. NAR's MLS rules require member brokers who have been hired by home sellers to market their properties to submit information about those listed properties to the MLS.[2] The MLS compiles this information into a database containing all properties listed for sale through member brokers. Member brokers can then search the listings database for properties that prospective buyers might be interested in purchasing.

As alleged in the Amended Complaint, MLSs possess substantial market power because brokers regard participation in the MLS to be critical to their ability to effectively compete with other brokers for home buyers and sellers. By participating in the MLS, brokers can promise seller clients that the information about the seller's property will immediately be made available to all other brokers in the area. Brokers who work with buyers can likewise promise them access to the widest possible array of properties listed for sale through brokers. To compete successfully, a broker must be an MLS member. To be a member, a broker must adhere to any restrictions imposed by the MLS.

[2] For this service, home sellers typically agree to pay real estate brokers a commission based on the ultimate sales price of the property. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting to the MLS with each new listing an "offer of cooperation and compensation," identifying the amount (usually specified as a percentage of the listing broker's commission) that the listing broker will pay to any other broker who finds a buyer for the property.

C. VOW Brokers

NAR's rules permit brokers to provide to prospective buyers information from the MLS about all properties that satisfy the buyers' expressed needs or interests. Brokers typically give this information to buyers by hand, mail, fax, or e-mail. While many brokers who use VOWs ("VOW brokers") operate in most respects like other brokers, they differ from traditional brokers in their use of their password-protected VOWs to provide listings to consumers. A VOW broker's customers can search for and retrieve MLS listings information on the broker's VOW, rather than relying on the personal involvement of the broker in all stages of the process of finding a home.

As alleged in the Amended Complaint, VOWs help brokers operate more efficiently and increase the quality of services they provide. For example, VOWs enable consumers to search for and retrieve relevant MLS listings and educate themselves without the broker's expenditure of time. As a result, a VOW broker can spend less time, energy, and resources educating customers. Lower costs and increased productivity have enabled some VOW brokers to offer commission rebates to their buyer customers.

Some VOW brokers have differentiated themselves further from traditional brokers by focusing solely on the high-technology aspects of brokerage services that can be delivered over the Internet. Like other VOW brokers, these "referral VOWs" allow prospective buyers to search for homes online, but when buyers are ready to tour homes, the referral VOW broker directs them to other brokers or agents who can guide them through the negotiating, contracting, and closing process. The customers of referral VOWs can benefit from the specialized service provided by the referral VOW broker and the broker or agent to whom the customer is referred.

In some instances, referral VOW brokers have also offered commission rebates or other financial benefits to their customers.

D. The Challenged Policies

As alleged in the Amended Complaint, NAR's Challenged Policies discriminate against and restrain competition from VOW brokers. They do so, most significantly, by denying VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods. Under the "opt-out" provisions of the Challenged Policies, NAR permitted brokers to withhold their seller clients' listings from display on VOWs. NAR's MLS rules otherwise do not permit one broker to withhold listings from another broker based on how that competitor conveys his or her listings to customers. By blocking VOW brokers from allowing their customers to review the same set of MLS listings that traditional brokers can provide to their customers, NAR's rules restrained VOW brokers from competing in a way that is efficient and desired by many customers.

The Amended Complaint also alleged that the Challenged Policies restrained competition from referral VOW brokers. NAR's May 17, 2003 VOW Policy prohibited referral VOW brokers from receiving any compensation for the referral of a customer to another broker. NAR's rules do not otherwise restrict broker-to-broker referrals. In its September 8, 2005 ILD Policy, NAR revised and reinterpreted its rule on MLS membership to prevent referral VOW brokers from becoming members of the MLS and obtaining access to MLS listings.

Finally, the Amended Complaint challenged restrictions on VOW brokers' advertising activities and provisions that permitted MLSs to degrade the data the MLS provided to VOW brokers.

III. SUMMARY OF RELIEF TO BE OBTAINED UNDER THE PROPOSED FINAL JUDGMENT

As explained in the CIS, the proposed Final Judgment eliminates the likely anticompetitive effects of NAR's Challenged Policies, prevents the recurrence of anticompetitive effects associated with NAR's Challenged Policies, and enjoins NAR from taking future actions to discriminate against VOW brokers. The proposed Final Judgment requires NAR to repeal its Challenged Policies and to replace them with a "Modified VOW Policy" (attached to the proposed Final Judgment as Exhibit A) that makes it clear that brokers can operate VOWs without interference from their rivals.[3] With respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment imposes a general obligation that NAR and its MLSs not discriminate against VOW brokers.[4]

Under the Modified VOW Policy, brokers are not permitted to opt out and withhold their seller clients' listings from display on VOWs.[5] The Modified VOW Policy instead requires MLSs to provide to VOW brokers, for display on their VOWs, all MLS listings information that brokers can give customers by all other methods of delivery.[6]

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. Some existing referral VOWs have established relationships with Internet companies or other businesses and consequently have developed

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[3] *See* proposed Final Judgment, ¶¶ V.A-V.D.

[4] *See id.*, ¶¶ IV.A-IV.B.

[5] *See* Modified VOW Policy, ¶ I.4.

[6] *See id.*, ¶ III.2.

significant numbers of potential buyer leads. These referral VOWs educate those buyers on their VOWs and then refer those buyer customers to other brokers once the customers have selected properties in which they are interested and are ready to enter the negotiating, contracting, and closing process. The Modified VOW Policy expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.[7]

The Modified VOW Policy allows a broker, who independently qualifies for MLS membership by actively endeavoring to provide in-person brokerage services to buyers and sellers, to either operate its own referral VOW or contract with an "Affiliated VOW Partner" ("AVP") to operate a referral VOW on its behalf and subject to its supervision and accountability. Under the proposed Final Judgment, a broker who actively endeavors to obtain some seller clients for whom it will market properties or some buyer clients to whom it will offer in-person brokerage services can become a member of the MLS and use MLS data as a member, including to populate its referral VOW.[8]

Additionally, such a broker can designate an entity (even another broker) as its AVP, allowing the AVP to receive MLS listings data to operate the VOW on behalf of the designating broker.[9] The MLS must provide listings to the AVP on the same terms and conditions as it

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[7] *See id.*, ¶ III.11.

[8] The proposed Final Judgment permits NAR's affiliated MLSs to implement new requirements for MLS membership that NAR originally adopted with its ILD Policy. *See* proposed Final Judgment, ¶ VI.A. This revised and reinterpreted membership rule, attached to the proposed Final Judgment as Exhibit B, contains an interpretative note that explains that a broker who meets the new rule's membership requirements cannot be denied membership on the grounds that the broker operates a VOW, "including a VOW that the [broker] uses to refer customers to other [brokers]."

[9] *See* Modified VOW Policy, ¶ III.10.

would provide listings to the designating broker, although the AVP's rights to the data would be entirely derivative of the rights of the designating broker.[10] An AVP, just like any broker, can, through Internet marketing or other relationships, establish sources of potential buyer leads. The designating broker can take some or all of the buyer leads from its AVP on whatever compensation terms the designating broker and AVP agree to.[11]

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.

IV. STANDARD OF JUDICIAL REVIEW

Upon the publication of the public comments and this Response, the United States will have fully complied with the APPA and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e), as amended. Because the United States frequently files antitrust actions and consent judgments in the District of Columbia, the Court of Appeals for the District of Columbia Circuit has been the primary source of judicial interpretations of the APPA. No decision from a court in the Seventh Circuit has considered the APPA's requirements.

In making the "public interest" determination, the Court should review the proposed Final Judgment in light of the violations charged in the Amended Complaint, *see, e.g.*, *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir.

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[10] *See id.*

[11] Once an AVP refers a buyer lead to a broker or agent for whom it operates a VOW and the buyer registers on the VOW, that buyer becomes a customer of the broker or agent.

1997) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)), and be "deferential to the government's predictions as to the effect of the proposed remedies." *Microsoft*, 56 F.3d at 1461.

The APPA states that the Court shall consider in making its public interest determination:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). *See generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments to the APPA "effected minimal changes" to the court's scope of review under APPA, and that review is "sharply proscribed by precedent and the nature of Tunney Act proceedings").[12]

[12] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006).

As the Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (*citing United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. *The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest."* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted). *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"). In making its public interest determination, a district court "must accord deference to

the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant "due respect to the [United States'] prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the district court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in the Amended Complaint, and the APPA does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As the District Court for the District of Columbia recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In the 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language effectuated what the Congress that enacted the APPA in 1974 intended, as Senator Tunney then explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).

V. SUMMARY OF PUBLIC COMMENTS AND THE RESPONSE OF THE UNITED STATES

The United States received nine comments during the sixty-day public comment period. Among the commentors were two significant VOW brokers and a real estate franchisor that operates VOWs for hundreds of its broker franchisees. These VOW operators are best positioned to evaluate the likely effects of the proposed Final Judgment on competition from VOW brokers, and none suggested that the public interest would not be served by entry of the proposed Final Judgment. On the contrary, ZipRealty, which founded its VOW-based brokerage in 1999 and currently operates in thirty-five major markets in twenty states, submitted its comment "in support of the [p]roposed Final Judgment" because it believes the proposed Final Judgment "favors public and consumer interests." Real estate franchisor Prudential, which operates VOWs for 480 of its franchisees, also asserted in its comments that "entry of the Proposed Final Judgment is in the public interest" because it "resolve[s] the fundamental issues raised in the [United States' Amended] Complaint against NAR."

Upon review and consideration of each of the nine comments, the United States believes that nothing in the comments suggests that the proposed Final Judgment is not in the public interest. Based on the comments, the United States, with the support of NAR, believes two minor modifications should be made to the Modified VOW Policy to eliminate any ambiguity

and to effectuate the intention of the parties.[13] The United States identifies these minor modifications and summarizes and addresses each of the comments it received below.

A. Comments Submitted by Entities Operating VOWs

1. Comments Submitted by ZipRealty

ZipRealty is a VOW broker operating in thirty-five markets nationwide. It (along with eRealty, a company later purchased by Prudential) was one of the first two innovative brokers that, in 1999, launched VOWs as a way to provide better service to consumers at a lower price than many of its competitor brokers. It submitted comments (Attachment 1) supporting entry of the proposed Final Judgment, asserting that the proposed Final Judgment "favors public and consumer interests." According to ZipRealty's comments, "had the proposed NAR policy challenged by the United States . . . been implemented, [ZipRealty's] business would likely have faced significant challenges."

[13] The United States and NAR have also agreed to a third, minor modification to the proposed Final Judgment. This modification was not precipitated by a comment from a third party. As filed with the Court and published in the Federal Register, the proposed Final Judgment would require NAR's local Boards or Associations of Realtors that *do not own or operate MLSs* to adopt and adhere to the Modified VOW Policy (which sets forth the rules an MLS must have for VOWs). *See* proposed Final Judgment, ¶¶ V.D & E (requiring all "Member Boards" to adopt the Modified VOW Policy or risk losing coverage under NAR's insurance policy). The United States agrees with NAR that requiring Boards or Associations of Realtors that do not own or operate MLSs to adopt the Modified VOW Policy would serve no purpose. As a result, the United States will move the Court to enter a proposed Final Judgment that clarifies that only Boards or Associations of Realtors that own or operate MLSs must adopt and adhere to the Modified VOW Policy. This additional, minor modification will not necessitate a second public comment period. *See Hyperlaw, Inc. v. United States*, No. 97-5183, 1998 WL 388807, at *3 (D.C. Cir. May 29, 1998) (finding that, because the proposed modification was a "logical outgrowth" of the original proposed consent decree, no additional public comment period was required).

Based on its past experiences with MLSs that favored traditional, bricks-and-mortar brokers over VOW brokers, ZipRealty's comments caution that "it is essential that . . . MLSs reasonably interpret the terms of the Proposed Judgment and [Modified VOW] Policy to ensure that they apply the same policies, rules and regulations to Brokers operating VOWs as are applied to 'traditional' Brokers, and that they do not subject Brokers operating VOWs to inappropriate and unreasonable additional costs, fees or restrictions not imposed on other Brokers."

Under the proposed Final Judgment, NAR is required to direct its affiliated MLSs to adopt, maintain, act consistently with, and enforce the Modified VOW Policy.[14] It is also required to withhold insurance from and report to the United States the identity of any MLS that fails to do so.[15] NAR is also required to forward to the United States any communications it receives concerning any MLS's noncompliance with the terms of the proposed Final Judgment or Modified VOW Policy.[16] The United States believes that these provisions will cause MLSs to comply with the Modified VOW Policy and will provide the United States with the ability to detect whether MLSs are, in fact, complying. If MLSs fail to comply, the United States will be prepared to move to enforce the proposed Final Judgment in the event of NAR inaction, or to consider any additional antitrust enforcement activities, including suing the MLS directly, if necessary.[17]

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[14] *See* proposed Final Judgment, ¶ V.D.

[15] *See id.*

[16] *See id.*, ¶ V.H.

[17] The United States has not been reluctant to sue MLSs to bring an end to violations of the antitrust laws. The United States recently brought actions against two MLSs in South

2. Comments Submitted by Prudential Real Estate Services Company, LLC, and Prudential Real Estate Affiliates, Inc.

Prudential Real Estate Affiliates is a real estate franchisor with over 600 broker franchisees across the United States. Prudential Real Estate Services Company operates websites, including VOWs, on behalf of 480 of Prudential's broker franchisees. These companies ("Prudential") collectively submitted a lengthy set of comments on the proposed Final Judgment (Attachment 2).

Like ZipRealty, Prudential believes that entry of the proposed Final Judgment would be in the public interest. Prudential observes that the proposed Final Judgment, including the Modified VOW Policy resolves the "fundamental issues" raised in the United States Amended Complaint by eliminating a broker's ability to "opt out" of allowing VOW brokers to display the broker's clients' listings and by requiring MLSs to provide VOW brokers the same complete MLS listings that other brokers can give to their customers and clients by traditional delivery methods.

Carolina that are among the approximately 200 MLSs in the country not affiliated with NAR. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia, South Carolina, alleging that its rules restrain competition among real estate brokers in that area and likely harm consumers. *See* Complaint in *United States v. Consolidated Multiple Listing Service, Inc.*, No 3:08-cv-01786-SB (D.S.C. May 2, 2008), *available at* http://www.usdoj.gov/atr/cases/f232800/232803.htm. The United States challenged similar allegedly anticompetitive rules imposed by the MLS in Hilton Head, South Carolina, also not affiliated with NAR. *See* Complaint in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. Oct. 16, 2007), *available at* http://www.usdoj.gov/atr/cases/f226800/226869.htm. The MLS in Hilton Head agreed to settle the case by repealing the challenged rules and agreeing to other conduct restrictions, and the court entered the Final Judgment in the case on May 28, 2008. *See* Final Judgment in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. May 28, 2008), *available at* http://www.usdoj.gov/atr/cases/f233900/233901.htm.

Prudential, however, asks that the United States use this Response to Public Comments "to clarify, or to provide interpretive guidance for certain provisions of the [p]roposed Final Judgment and the Modified VOW Policy." Prudential then lists twelve areas on which it seeks clarification or interpretive guidance. The United States summarizes and responds to Prudential's twelve specific comments below.

(i) Minor Modification Warranted

Prudential raises two provisions that the United States agrees warrant a minor modification of the proposed Final Judgment. First, Prudential seeks clarification of the requirement in paragraph II.2.c.iv of the Modified VOW Policy that a VOW brokers' customers commit, through the terms of use, not to "copy, redistribute, or retransmit" any listings data they receive on the VOW. This provision protects the MLS from someone using a VOW not to purchase a property, but to access and sell the information found on a VOW to third parties. Prudential, however, believes that this requirement as currently written is too broad and would prevent the customer of a VOW broker from saving listings to an electronic property portfolio or from forwarding copies of any listings to spouses, friends, lenders, or others who are assisting the customer in his or her home purchase.

The United States agrees that paragraph II.2.c.iv of the Modified VOW Policy is too broad as currently written and could unreasonably discriminate against VOW brokers by preventing their customers from saving copies of listings in which they might have an interest or sharing listings with persons with whom they wish to consult in making a purchase decision. Customers of traditional, bricks-and-mortar brokers are not subject to the same limitations.

NAR has agreed to a minor modification to paragraph II.2.c.iv to eliminate any unintended discriminatory effect.

> *Current version of paragraph II.2.c.iv*: That the Registrant will not copy, redistribute, or retransmit any of the data or information provided.
>
> *Revised version of paragraph II.2.c.iv*: That the Registrant will not copy, redistribute, or retransmit any of the data or information provided, except in connection with the Registrant's consideration of the purchase or sale of an individual property.

Second, Prudential discussed paragraph II.5.a of the Modified VOW Policy, which permits individual property sellers, concerned with the dissemination of information about their properties over the Internet, to direct that their listings or property addresses be withheld from the Internet. This provision also states that VOW brokers are permitted to provide withheld listings to customers by any other method of delivery such as e-mail or fax. Prudential points out that this provision, as written, does not explicitly authorize VOW brokers to provide withheld property addresses as well to customers using other delivery methods.

This result was unintended. The United States intended that a VOW broker be permitted also to provide customers the property addresses withheld from VOW display, by other methods of delivery. NAR has agreed to a minor modification to paragraph II.5.a to correct this oversight.

> *Current version of paragraph II.5.a*: No VOW shall display the listings or property addresses of sellers who have affirmatively directed their listing brokers to withhold their listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as email, fax, or otherwise, the listings of sellers who have determined not to have the listing for their property displayed on the Internet.

> *Revised version of paragraph II.5.a*: No VOW shall display the listing or property address of any seller who has affirmatively directed its listing broker to withhold its listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as email, fax, or otherwise, the listing or property address of a seller who has determined not to have the listing or address for its property displayed on the Internet.

The United States will move the Court to enter a proposed Final Judgment with these modifications.

(ii) The Proposed Final Judgment Means What It Says

Prudential seeks clarification from the United States that, as to three different provisions of the Modified VOW Policy, the provisions literally mean what they say. It first seeks clarification concerning the requirement in paragraph II.5.a of the Modified VOW Policy that VOW brokers not display the listing or property addresses of sellers who have affirmatively directed that information about their properties be withheld from "the Internet." Prudential says that the provision "presumably means" that information withheld from "the Internet" must mean that the information be withheld "from all forms of Internet display" and excluded from any data that the listing broker or MLS sends to any other websites.

Prudential has interpreted paragraph II.5.a of the Modified VOW Policy correctly. Under the Modified VOW Policy, an MLS may not permit a seller to single out individual VOWs or VOWs generally and withhold the listing or property address from only VOW websites. Rather, the MLS and listing broker would also be required to withhold the seller's listing or property address from all other non-VOW websites.

Prudential next seeks to confirm the meaning of the requirement in paragraph III.2 of the Modified VOW Policy that MLSs provide VOW brokers "all MLS non-confidential listing data." Prudential seeks to clarify that this does not permit MLSs to refuse to provide VOW brokers the listings of sellers who have requested that their listings not be displayed on the Internet. It explains that, unless VOW brokers receive from the MLS even the listings they are not permitted to show on their VOWs, the VOW brokers cannot meaningfully exercise their right under paragraph II.5.a to provide their customers those seller-withheld listings by other delivery methods. Prudential expresses some concern that MLSs might interpret paragraph III.4, which refers to a "VOW-specific feed" from which the seller-withheld listings have been removed, as a basis to disregard the requirement in paragraph III.2 that MLSs provide "all MLS non-confidential listing data" to VOW brokers who request it.

Paragraph III.2 of the Modified VOW Policy is unambiguous in requiring MLSs to provide "*all* MLS non-confidential listing data" (emphasis added) to VOW brokers who request it. MLSs may *also* offer to VOW brokers, under paragraph III.4 of the Modified VOW Policy, a "VOW-specific feed" from which seller-withheld listings or addresses have been removed. Some VOW brokers might opt for the VOW-specific feed as a matter of convenience, but nothing in paragraph III.4 suggests that such a VOW-specific feed could replace the MLS's unambiguous obligation under paragraph III.2. As Prudential explains, a contrary interpretation of the Modified VOW Policy would also prevent VOW brokers from filtering seller-withheld listings and delivering those listings to customers by non-VOW methods of delivery, as expressly permitted under paragraph II.5 of the Modified VOW Policy.

The third provision on which Prudential seeks clarification is paragraph II.5.c of the Modified VOW Policy. That paragraph requires a VOW broker to disable or discontinue, at the request of a home seller, any functionality providing automated market valuations on or any third-party commenting on or reviews about the seller's property. The seller may not, under this provision, selectively target particular VOWs with requests that these activities be discontinued. Under paragraph II.5.c, such a request by a seller is applicable to "all Participants' websites" (*i.e.*, all websites operated by any member of the MLS). Prudential seeks confirmation that this provision cannot be exercised on a selective basis as to any single broker's VOW.

There is also no ambiguity in paragraph II.5.c. A sellers's request, under that provision, to discontinue automated market valuations or third-party comments or reviews about his or her listing applies to "all Participants' websites," whether VOW or non-VOW sites. This provision cannot be exercised selectively against a single VOW or against all VOWs, but would also be applicable to all non-VOW websites operated by all other MLS members.[18]

[18] Prudential also suggests that such an election by a seller should apply to automated market valuations or third-party comments or reviews permitted by non-broker websites that display MLS-supplied listings. Paragraph II.5.c. applies only to MLS "Participants' websites." While an MLS could require third-party websites, as a condition of receiving MLS data, to discontinue valuations, comments, or reviews, the United States believes the potential cost to third-party websites outweighs the benefits of such a requirement and elected not to insist on such a term in its proposed Final Judgment. As written, this provision strikes the appropriate balance among (i) permitting sellers some ability to limit the extent to which their properties might be marketed in a bad light, (ii) preventing VOW brokers' competitors from directing sellers to target VOWs with requests to discontinue these services, and (iii) minimizing the effect on third parties.

(iii) Nondiscrimination Provisions Apply Where Modified VOW Policy is Silent

Prudential seeks clarification or interpretative guidance with respect to two issues on which it suggests the Modified VOW Policy is silent. It first expresses concern that MLSs might interpret the requirement in paragraph II.5.e of the Modified VOW Policy, that VOW brokers refresh information on their websites no less frequently than every three days, to prohibit VOW brokers from refreshing the information on their VOW more frequently than every three days. Prudential states that "[o]perating a VOW with three (3) day old data is totally unacceptable in a web based environment," particularly when VOW brokers' traditional competitors can provide their customers listings data that is refreshed continuously by the MLS.

As Prudential observes, the Modified VOW Policy is silent as to how frequently VOW brokers may refresh the MLS listings they display on their VOWs. Paragraph II.5.e of the Modified VOW Policy states that VOW brokers "shall refresh MLS data available on a VOW not less frequently than every 3 days." It does not state or imply that VOW brokers cannot refresh their data more frequently than every three days.

The proposed Final Judgment expressly prohibits NAR from adopting rules that discriminate against VOW brokers or that impede the operation of VOWs.[19] When issues concerning VOWs are not expressly covered by the Modified VOW Policy, these provisions would prevent NAR from filling the void with discriminatory rules. Here, the United States agrees with Prudential that, with no express provision in the Modified VOW Policy, the general nondiscrimination provisions found in paragraphs IV.A and IV.B of the proposed Final Judgment would apply to prevent MLSs from restricting the ability of VOW brokers to provide

[19] *See* proposed Final Judgment, ¶¶ IV.A-IV.B.

data to customers that is less current than the data that other brokers can provide to their customers.

Prudential also expresses concern that an AVP that operates VOWs for several different brokers in an MLS could be charged a separate data download fee for each broker for whom the AVP operates a VOW, even though the AVP could operate its entire network of VOWs using only a single data download.

Prudential describes a "common circumstance" in which a single AVP has been designated by several different brokers in a single MLSs to operate VOWs on their behalf. According to Prudential, the AVP would, as a technical matter, need to download the MLS data only one time and could use that data to populate all of the VOWs it operates. Paragraph III.10.b of the Modified VOW Policy prohibits MLSs from charging an AVP more than it charges a VOW broker to download MLS listings, but the proposed Final Judgment and Modified VOW Policy do not expressly address whether the MLS could charge separate downloading fees to the AVP for each VOW it operates. However, because the AVP would need only a single MLS data download, a rule requiring an AVP to pay for additional unnecessary downloads would likely violate paragraph IV.D of the proposed Final Judgment as it would impose fees on the AVP in excess of the MLSs costs in delivering data to the AVP. Moreover, because downloading data imposes some costs on the MLS, a rule requiring multiple unnecessary downloads for no apparent purpose other than to impose additional costs on AVPs and the brokers for whom they operate VOWs would likely unreasonably disadvantage the AVP and VOW broker and violate paragraph IV.B of the proposed Final Judgment.

(iv) Relief Not Sought by the United States

Prudential identifies two areas in which it believes additional relief, not sought by the United States, might be warranted. First, Prudential observes that the proposed Final Judgment would bind only NAR, the sole defendant in this case, and expresses concern whether the proposed Final Judgment sufficiently compels NAR to require its affiliated MLSs to abide by the terms of the proposed Final Judgment, including the Modified VOW Policy. Prudential specifically questions whether paragraphs V.E and V.F of the proposed Final Judgment, which require NAR to take action against MLSs when NAR "determines" that the MLSs are not in compliance, require NAR to find out about any noncompliance in the first place or to determine whether the conduct at issue complies with the proposed Final Judgment.

The United States believes that the proposed Final Judgment adequately compels NAR to direct its affiliated MLSs to comply with the Modified VOW Policy. The second sentence of Paragraph V.E of the proposed Final Judgment clearly says that NAR shall deny coverage under its insurance policy (a consequence that Prudential does not dispute will motivate compliance by the MLS) to any MLS that "refuses to adopt, maintain, act consistently with, or enforce" the Modified VOW Policy.

The proposed Final Judgment is drafted with the assumption that NAR would find out through multiple channels about an MLS's failure to act in accordance with the decree. First, MLSs would turn to NAR and ask if their conduct was consistent with the law and the decree in order to maintain their insurance coverage. MLSs routinely turn to NAR for advice and approval

on various issues in order to maintain coverage under NAR's insurance.[20] Second, brokers who feel aggrieved can complain directly to NAR (or to the United States) about an MLS's conduct.[21] And third, the United States can alert NAR to any actions by an MLS that are inconsistent with the Modified VOW Policy and ask NAR to take action. Thus, there should be little concern that if NAR acts in good faith it will fail to find out that an MLS is acting inconsistently with the Modified VOW Policy.

The proposed Final Judgment does not require NAR to act on frivolous allegations of noncompliance by an MLS. But NAR is required to act when it determines the allegations are well-founded.[22] To the extent NAR operates in bad faith, failing to reach a determination when an allegation is well-founded, the United States could move to enforce the Final Judgment. Additionally, the United States retains the right to sue any MLS directly for violations of the antitrust law.[23]

The United States believes that the enforcement scheme negotiated through these provisions of the proposed Final Judgment appropriately incentivizes NAR to evaluate any

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[20] The proposed Final Judgment also requires NAR to educate its MLSs about the terms of the proposed Final Judgment by providing briefing materials on the "meaning and requirements" of the proposed Final Judgment and by holding an annual program that includes a discussion of the proposed Final Judgment. *See* proposed Final Judgment, ¶¶ V.G.4-V.G.5.

[21] Note that NAR is required under the proposed Final Judgment to furnish to the United States copies of any communications it receives from an MLS or an aggrieved third party concerning allegations of noncompliance by an MLS with the proposed Final Judgment or Modified VOW Policy. *See* proposed Final Judgment, ¶ V.H. The United States' access to such records will ensure that the United States knows what NAR knows about any instances of MLS noncompliance and will allow the the United States to make sure NAR fulfills its obligations.

[22] *See* proposed Final Judgment, ¶¶ V.E and V.F.

[23] *See id.*, ¶ IX.

information it receives concerning MLS noncompliance and to take timely and appropriate actions to bring its MLSs into compliance. NAR understands that its failure to respond where a response is warranted may mean the initiation of an inquiry by the United States. As a membership organization, NAR will want to minimize the circumstances under which its members (as well as NAR itself) receive direct scrutiny by the United States and will act to correct instances of noncompliance that it observes. This enforcement scheme also permits NAR to decline to address allegations of noncompliance that have no merit. The United States believes that these provisions strike the appropriate balance and will ensure that MLSs do not unreasonably discriminate against VOW brokers.

Second, Prudential discusses Paragraph IV.D of the proposed Final Judgment which forbids NAR from adopting, maintaining, or enforcing rules that impose fees or costs on a VOW broker "that exceed the reasonably estimated actual costs" an MLS incurs in providing listings to a VOW broker. Under paragraph III.5 of the Modified VOW Policy, an MLS is authorized to pass along to a VOW broker "the reasonably estimated actual costs incurred by the MLS" in establishing the ability to download listings data to VOW brokers. Prudential expresses concern that, because "costs" is not defined in the proposed Final Judgment or Modified VOW Policy, MLSs might assess against VOW brokers the salaries of software programmers or compliance officers, or other substantial additional expenses incurred by the MLS. Prudential seeks a clarification that "'costs' may include only actual direct costs, and may not include any allocations of salaries, consultant fees, rent, utilities, or other overhead expenses." It also argues that, under paragraph III.5 of the Modified VOW Policy, an MLS may not charge VOW brokers more than it charges other brokers who download listings data from the MLS for other purposes.

The proposed Final Judgment and Modified VOW Policy permit MLSs to charge VOW brokers fees no greater than the MLSs "reasonably estimated actual costs" of providing services to VOW brokers[24] and equal to the "reasonably estimated costs" the MLS incurs in adding or enhancing downloading capacity for purposes of supporting VOWs.[25] Because the circumstances and capabilities of MLSs vary, the United States does not believe it would be appropriate to attempt to express with greater precision the type or level of costs it would be permissible for MLSs to impose upon VOW brokers. The United States believes that imposing on MLSs an obligation to account for the fees they impose on VOW brokers will be adequate to prevent the imposition of exorbitant fees. Furthermore, a definition is unnecessary because the United States agrees with Prudential that the proposed Final Judgment's general nondiscrimination provisions would forbid charging VOW brokers for downloading listings information differently than other brokers, unless the costs to the MLS differed as to each recipient.

(v) Long-Standing Provisions

Prudential expresses concern about three provisions that long existed in NAR's VOW Policy but that the United States did not challenge. First, it discusses a requirement in paragraph II.2.c of the Modified VOW Policy that consumers who seek to register on a VOW "open and review" the VOW's mandatory terms of use. Prudential asserts that this provision might be interpreted to prohibit the usual practice on many Internet websites of opening terms of use in "a scrollable frame" that the viewer can read if he or she desires. Prudential also asserts that,

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[24] Proposed Final Judgment, ¶ IV.D.

[25] Modified VOW Policy, ¶ III.5.

because traditional brokers provide listings information to customers upon a simple request of a consumer, the registration requirement in II.2.c of the Modified VOW Policy discriminates against VOW brokers.

NAR included the "open and review" requirement in the VOW Policy it adopted on May 17, 2003, and over 200 MLSs subsequently adopted rules implementing the VOW Policy. Through its lengthy investigation and litigation of this matter, the United States neither received any complaints about this requirement nor discovered any evidence that it had restrained or was likely to restrain competition from any VOW broker. Had the United States proceeded to trial in this case, it would not have sought relief from the "open and review" requirement.

The United States notes, however, that it sees no inconsistency between the "open and review" requirement and the "scrollable frame" in which Prudential's franchisees currently present terms of use to their customers. In the event that MLSs in the future insist upon different and more onerous procedures from Prudential's franchisees or other VOW brokers than the "scrollable frame" currently offered, the United States would then be in a position to evaluate whether those procedures restrained competition from VOW brokers.[26]

Second, Prudential mentions paragraph II.2.d of the Modified VOW Policy, which prohibits the VOW broker from establishing any representation agreement or imposing any financial obligation upon a customer through use of a "mouse click." According to Prudential, this provision "would be tantamount to preventing VOW operators from engaging in electronic commerce at their websites."

[26] *See* proposed Final Judgment, ¶ IX.

This provision was included in the 2003 VOW Policy. Discovery in this case revealed no evidence that this provision had restrained or was likely to restrain competition from VOW brokers. Additionally, the Modified VOW Policy recognizes explicitly that websites maintained by VOW brokers "may also provide other features, information, or services in addition to VOWs."[27] And, as Prudential concedes, the Modified VOW Policy would not prevent VOW brokers from "engaging in electronic commerce" on those non-VOW portions of their websites. Thus, the United States disagrees with Prudential that paragraph II.2.d of the Modified VOW Policy is likely to restrain competition from VOW brokers or to "prevent[ ] VOW operators from engaging in electronic commerce at their websites."

Third, Prudential mentions paragraph II.6 of the Modified VOW Policy, which requires VOW brokers to "make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy." Prudential expresses concern that MLSs might, under this provision, demand intrusive access to VOW brokers' systems and files and it asserts that MLSs should be permitted to observe only the password-protected portions of the VOW accessible by any customer of the VOW broker.

NAR included a nearly identical provision in its 2003 VOW Policy, which was adopted by over 200 MLSs. The United States heard no complaints nor uncovered any evidence that that provision had been exercised by any MLS in the manner about which Prudential expresses concern. Nevertheless, the United States agrees with Prudential and hereby clarifies that paragraph II.6 of the Modified VOW Policy, by its terms, cannot be used for purposes other than to verify compliance with NAR's policies and it should not provide a basis for MLSs to harass

[27] Modified VOW Policy, ¶ I.3.

VOW brokers or to conduct a detailed examination of VOW brokers' business files or computer systems.

In over four years of investigation and litigation concerning the Challenged Policies, the United States had neither received complaints nor uncovered evidence that these three provisions had been used in the manner Prudential describes. But, by way of clarification and guidance, the United States reiterates that, to the extent that MLSs discriminate against and harm VOW brokers through these provisions in the future, the proposed Final Judgment allows the United States to investigate and bring an antitrust enforcement action as appropriate.[28]

3. Comments Submitted by Home Buyers Marketing II

Home Buyers Marketing II ("HBM II") is a VOW broker operating in approximately 400 markets throughout the United States. HBM II's comments (Attachment 3) identify "particular anticompetitive practices" and seek confirmation that the proposed Final Judgment, including the Modified VOW Policy, would prohibit MLSs from engaging in those practices.[29]

HBM II expresses concern about paragraph II.3 of the Modified VOW Policy, which requires that VOW brokers "be willing and able to respond knowledgeably to inquires from [customers]." It seeks clarification that an MLS would not be permitted to demand a greater

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[28] *See* proposed Final Judgment, ¶ IX.

[29] Three issues raised by HBM II repeat concerns expressed by Prudential. HBM II repeats Prudential's comment concerning how frequently VOW brokers may update the MLS listings that populate their websites, the meaning of the requirement in paragraph II.2 of the Modified VOW Policy that MLSs provide VOW brokers "all MLS nonconfidential listing data," and whether the United States and NAR intended, in paragraph II.2.c.iv of the Modified VOW Policy, to prevent a VOW brokers' customers from sharing listings with friends, family, lenders, or others with whom they need to consult in their home purchase decision. The United States addressed each of these issues fully in its response to Prudential's comments.

level of knowledge from a VOW broker concerning properties it displays to customers than the MLS demands from other brokers.

Because the Modified VOW Policy does not define the level of knowledge that a VOW broker must possess when responding to customer inquiries, the United States agrees with HBM II that the proposed Final Judgment's general nondiscrimination provisions would prevent MLSs from demanding greater knowledge from VOW brokers than they demand of other brokers.[30]

HBM II also comments on paragraph IV.1.e of the Modified VOW Policy. Under that provision, an MLS may limit to a "reasonable number" the listings that VOW brokers can provide to customers in response to a customer's query, but the number can be no fewer than 100 listings or five percent of all listings in the MLS, whichever is lower. HBM II suggests that even a limit of 100 listings would be unreasonable if the MLS permitted consumers to search without such limits on other websites populated with data provided by the MLS.

The Modified VOW Policy does not define when a limitation on the number of listings a VOW broker could provide to customers would be unreasonable. While Paragraph IV.1.e of the Modified VOW Policy sets 100 listings or five percent of all listings in the MLS as a floor below which an MLS cannot go, the use of the reasonableness limitation suggests that, in some circumstances, a limitation set higher than the floor could still be impermissible. HBM II suggests one such circumstance: a 100-listing limitation applicable to VOWs would be unreasonable if the MLS permitted non-VOW websites to show a greater number of listings to

[30] As HBM II points out, NAR's general counsel explained in a June 16, 2008, speech that brokers cannot "always be expected to have the answer right there" when they receive inquiries from customers. "In many instances, . . . you may have to say, 'I'll find that information out and I'll get back to you.' That would be responding knowledgeably."

customers. The United States agrees with HBM II that, if an MLS were to restrict the number of listings a VOW broker could provide his or her customers but did not restrict in the same way other websites on which it permits its listings to be displayed, the MLS would unreasonably disadvantage VOW brokers and would violate the proposed Final Judgment's nondiscrimination provisions.

Finally, HBM II observes that the proposed Final Judgment or Modified VOW Policy do not define the word "cost." HBM II seeks confirmation that MLSs could not charge VOW brokers for the entire cost of items or services used only partially to support the use of VOWs.

As stated above, because MLSs vary, the United States has not sought to prescribe the types or levels of costs that MLSs could reasonably allocate to VOW-related activities for purposes of establishing fees applicable to VOW brokers. The United States agrees with HBM II, however, that the proposed Final Judgment would prohibit an MLS from "allocat[ing] the cost of facilities (or staff time) used for other purposes exclusively or disproportionately to the VOW feed." Such an allocation would exceed the "reasonably estimated actual costs" incurred by the MLS in performing services for VOW brokers and would unreasonably disadvantage VOW brokers in violation of the proposed Final Judgment's nondiscrimination provisions.

B. Comments Submitted by Exclusive Buyer Agents

Two groups of exclusive buyer agents sent comments. Both expressed concerns that NAR's revision and reinterpretation of its membership rule, attached to the proposed Final Judgment as Exhibit B, might be interpreted to exclude them as members of the MLS. The United States has confirmed that such concerns are unfounded.

The first commentor, the National Association of Exclusive Buyer Agents ("NAEBA"), consists of real estate brokers and agents "who represent buyers only and who never list property for sale or represent sellers." The second commentor, the Buyer's Broker of Northern Michigan, LLC, is a member of the NAEBA. Both the NAEBA and the Buyer's Broker of Northern Michigan submitted comments that are similar in substance. (Attachments 4 and 5).

The NAEBA began its comment by commending the Department for its "efforts on behalf of the nation's consumers to address some of the anticompetitive practices in the real estate marketplace today." But both commentors expressed concern that, under NAR's revised membership rule, brokers or agents who commit to work exclusively with buyers and to be compensated exclusively by buyers, rather than receiving a share of the commission from the listing broker, might be precluded from joining the MLS. They worry that, because NAR's revision to its membership rule opens MLS membership only to licensed brokers who actually "offer or accept cooperation and compensation to and from other [MLS members]," they could be prevented from participating in the MLS.

First, even though exclusive buyer brokers do not list properties or represent sellers, they usually are compensated, at least in part, by a share of the commission that the listing broker offers to the broker who finds a buyer for the property. In such a circumstance, the buyer broker would be accepting cooperation and compensation and would be entitled to MLS membership under NAR's revised membership rule. Additionally, NAR's revised membership rule does not prevent, as the commentors feared, an exclusive buyer broker from accepting the commission offered by the listing broker (even if the offer is zero percent) and supplementing that commission with payment directly from the buyer. Moreover, NAR has told the United States

that it does not interpret its revised membership rule to exclude a buyer broker who always refuses the share of the commission offered by the listing broker and chooses to be compensated entirely by the buyer. NAR recognizes that an exclusive buyer broker is still "cooperating" with the listing broker to sell the property and has stated that it will advise its MLS members in writing that such a broker is not to be excluded from the MLS.[31] Finally, if NAR changes its interpretation so that its MLSs begin to exclude exclusive buyer brokers from MLS membership in the future, the United States remains free to challenge such conduct as anticompetitive.[32]

C. Comments Submitted by MLS4owners.com

MLS4owners.com is a broker operating in the State of Washington. According to its comment (Attachment 6), it is a "flat-fee, limited-service brokerage." Its comment concerns the third paragraph of the preamble to the proposed Final Judgment, which states that "the United

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[31] NAR's rules already prohibit MLSs from excluding buyer brokers. *See* National Association of Realtors, *Handbook on Multiple Listing Policy* (2008), at 25 ("Since the MLS is an association service by which the participants make blanket unilateral offers of cooperation and compensation to the other participants with respect to listings for which they are an agent, no association or association MLS may make or maintain a rule which would preclude an individual or firm, otherwise qualified, from participating in an association MLS solely on the basis that the individual or firm functions, to any degree, as the agent of potential purchasers under a contract between the individual (or firm) and the prospective purchaser (client).").

[32] In its penultimate paragraph, NAEBA expressed an additional concern about provisions IV.1.d and IV.1.f of the Modified VOW Policy, which allow MLSs to require VOW brokers to include the name of the listing broker or agent in any listings the VOW broker displays on its VOW. NAEBA believes this requirement would force an exclusive buyer broker who operates a VOW to advertise its competition – the broker who listed the property. However, NAR included these provisions in its 2003 VOW Policy and the United States chose not to challenge them as there did not appear to be any significant effects from notifying a customer of the identity of the listing agent. Additionally, the proposed Final Judgment allows MLSs to adopt these provisions only if the MLS imposes the same requirements on brokers who provide listings by more traditional methods of delivery. Thus, the MLS cannot use these provisions to discriminate against VOW brokers.

States does not allege that Defendant's Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws." MLS4owners.com believes that NAR's IDX Policy does violate the antitrust laws, by permitting brokers operating IDX websites to exclude exclusive agency or limited-service listings from their own IDX websites.

As MLS4owners.com itself correctly observes, "the IDX Policy was NOT the subject of the DOJ's pre-complaint investigation, complaint, amended complaint or discovery" (emphasis in original). The United States takes no position as to the permissibility under the antitrust laws of NAR's IDX Policy; paragraph three of the preamble to the proposed Final Judgment reflects that this case involved only VOWs and not the IDX websites about which MLS4owners.com is concerned.[33]

To the extent that MLS4owners.com suggests that the United States' Amended Complaint should have challenged NAR's IDX Policy, its argument should be rejected. Review under the APPA should not involve an examination of possible competitive harms the United States did not allege. *See, e.g.*, *Microsoft*, 56 F.3d at 1459 (stating that the district court may not "reach beyond the complaint to evaluate claims that the government did not make").

[33] VOWs are password protected websites through which brokers provide brokerage services to customers or clients, including the opportunity to search MLS listings and other information. NAR's "Internet Data Exchange" or "IDX" rules govern websites operated by brokers though which they can advertise listings to consumers with whom the broker has not yet established a customer or client relationship. As Prudential explains in its comments, "[b]ecause any web visitor can view a broker's IDX pages without having any direct contact with the broker who owns the site, the IDX listing information is the functional equivalent of newspaper or magazine advertising directed to the general public at large. . . . [A]n MLS' IDX data feed does not necessarily include all properties in the MLS' database compilation [or] all of the information about a listed property that MLS participants may delivery to customers or clients . . . ."

D. Comments That Do Not Address the Amended Complaint or Proposed Final Judgment

The United States received three additional comments that do not address the Amended Complaint or proposed Final Judgment.

Bernard Tompkins of Realty Specialist Inc. submitted a comment (Attachment 7) critiquing a report published jointly in 2007 by the Department of Justice and the Federal Trade Commission entitled "Competition in the Real Estate Brokerage Industry."[34] Mr. Tompkins' comments are not relevant to the Court's APPA inquiry.

The United States also received comments (Attachment 8) submitted anonymously by brokers from Montgomery County, Pennsylvania. These commentors propose relief, unrelated to the allegations in the Amended Complaint or the subject of this case, that they contend would "prevent[ ] the loss of competition" and "better serv[e] the public interest." They suggest that brokers should be prohibited from referring customers to mortgage lenders, that brokers provide "maximum exposure" for listed properties, and that properties on NAR's Realtor.com website include home addresses. Whatever the merits of these suggestions, they do not address the allegations in the Amended Complaint or the relief obtained in the proposed Final Judgment.

Finally, an anonymous broker from San Jose, California, submitted a comment (Attachment 9) complaining about an unrelated rule adopted by his MLS that prevents him from publishing on the Internet the same median sold price information that brokers are permitted to publish in the newspaper. This allegation is not related to the United States' Amended

[34] A copy of this report is available at www.usdoj.gov/atr/public/reports/223094.pdf.

Complaint or to the proposed Final Judgment and has no role in the Court's evaluation under the APPA.

VI. CONCLUSION

After careful consideration of the public comments, the United States concludes that, with the minor modifications identified above, the entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. Accordingly, on November 7th, after this Response to Comments has been published in the *Federal Register* pursuant to 15 U.S.C. § 16(b) and (d), the United States will move this Court to enter the proposed Final Judgment.

Respectfully submitted,

s/David C. Kully
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Dated: October 23, 2008

CERTIFICATE OF SERVICE

I, David C. Kully, hereby certify that on this 23rd day of October, 2008, I caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment to be served by ECF on counsel for the defendant identified below.

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s/David C. Kully
David C. Kully

ZIP REALTY

September 23, 2008

Via Email
John Read
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Re: *United States of America v. National Association of Realtors*
United States District Court for the Northern District of Illinois
Civil Action No. 05 C 5140

Mr. Read:

ZipRealty Inc. ("ZipRealty") submits the following comment in support of the Proposed Final Judgment ("Proposed Judgment") in the above referenced matter pursuant to 15 U.S.C. §16.

ZipRealty is a full service real estate brokerage that has operated a VOW[1] since 1999. Presently, ZipRealty operates in 35 major markets in 20 states and has licensed real estate agents serving clients in all such markets. Due to the lack of specific regulation requiring fair and equal treatment for Brokers operating VOWs, various Member Boards and MLSs have subjected ZipRealty to practices and restrictions not applied to "traditional" or "bricks and mortar" Brokers, which placed ZipRealty at a competitive disadvantage due to its operation of a VOW. Further, had the proposed NAR policy challenged by the United States Department of Justice ("DOJ") been implemented, it is ZipRealty's position that its business would likely have faced significant challenges as a result of that policy. Accordingly, ZipRealty supports entry of the Proposed Final Judgment in the above referenced matter.

The Proposed Judgment and incorporated Modified VOW Policy ("Policy") prohibiting Member Boards and MLSs from discriminating against Brokers operating VOWs favors public and consumer interests. However, it is essential that Member Boards and MLSs reasonably interpret the terms of the Proposed Judgment and Policy to ensure that they apply the same policies, rules and regulations to Brokers operating VOWs as are applied to "traditional" Brokers, and that they do not subject Brokers operating VOWs to inappropriate and unreasonable additional costs, fees or restrictions not imposed on other Brokers.

[1] The definitions set forth in the Proposed Final Judgment shall apply to terms not defined in this letter.

Provided that the terms or the Proposed Judgment and Policy are fairly applied and enforced, it is ZipRealty's position that this Proposed Judgment and Policy will promote fair competition and innovation resulting in a substantial benefit to consumers.

Samantha E. Harnett, Esq.
Vice President and Assistant General Counsel

CC: David Kully

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October 10, 2008

VIA ELECTRONIC MAIL AND OVERNIGHT COURIER

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Washington, D.C. 20530

Re: United States of America v. National Association of REALTORS®, United States District Court for the Northern District of Illinois, Case No. 05 C 5140

Dear Mr. Read:

On behalf of Prudential Real Estate Services Company, LLC ("PRESCo") and Prudential Real Estate Affiliates, Inc. ("PREA"), we offer the following comments pursuant to 15 U.S.C. §16(b) with regard to the Proposed Final Judgment in *United States v. National Association of Realtors®*, Case No. 05 C 5140 and the Policy Governing Use of MLS Data In Connection With Internet Brokerage Services Offered By MLS Participants ("Virtual Office Websites") ("Modified VOW Policy"), attached as Exhibit A to the Proposed Final Judgment.

Both PREA and PRESCo are subsidiaries of Prudential Financial, Inc. PREA is a real estate brokerage franchise company. Pursuant to franchise agreements between PREA and its franchisees, otherwise known as "Affiliates," PREA grants the Affiliates the right to use Prudential trademarks and receive other benefits and services made available to brokerage companies as part of the PREA Network. As of June 30, 2008, the PREA Network consists of over 600 independently owned and operated real estate brokerage companies that have more than 54,000 affiliated sales professionals located in all fifty (50) states.

In January of 2004, Prudential Financial, Inc. acquired eRealty, Inc., a Houston based real estate brokerage company that pioneered the application of Internet technology to the real estate brokerage industry, and reorganized eRealty, Inc. as PRESCo. PRESCo is a technology services provider to PREA Affiliates. Pursuant to Application Services Provider ("ASP") Agreements between PRESCo and PREA

Affiliates, PRESCo designs, hosts and administers websites that are owned and controlled by PREA Affiliates. The sites have been commonly referred to as the PREA "Platform." PRESCo currently operates Platform sites for 480 PREA Affiliates throughout the United States and receives real estate data for use with these sites from 370 Multiple Listing Services ("MLSs").

The PREA Affiliate Platform web sites include "Internet Data Exchange" or "IDX" pages at which any web visitor can access and view IDX listing information supplied by the MLSs in which the PREA Affiliate participates. Because any web visitor can view a broker's IDX pages without having any direct contact with the broker who owns the site, the IDX listing information is the functional equivalent of newspaper or magazine advertising directed to the general public at large.

The National Association of Realtors® ("NAR") amended its Multiple Listing Policy in 2000 to require MLSs owned by one or more Associations of Realtors® to provide IDX data feeds to their participants to enable them to operate IDX websites. These IDX data feeds include listing information about properties listed with all MLS participants who have not "opted out" of the MLS' IDX program.

Since MLS participants can "opt out" of an MLS' IDX program; an MLS' IDX data feed does not necessarily include all properties in the MLS' database compilation that a participant can provide to customers or clients in a "bricks and mortar" environment. The MLS' IDX data feeds also do not necessarily include all of the information about a listed property that MLS participants may deliver to customers or clients using non-browser methods. For example, some MLSs exclude property addresses, property tax assessment information, or room dimensions from IDX data feeds.

The Platform also includes a "Virtual Office Website" feature or VOW. Visitors to the IDX pages of the Platform, who are interested in receiving additional information about a property shown on an IDX page, or wish to be contacted by an Affiliate's sales agent, are invited to register at the Affiliate's VOW. The registration pages of the VOW require a consumer to provide a verifiable email address, create a user name and unique password, and electronically "accept" by a mouse click a Terms of Use agreement that sets forth the terms and conditions upon which the registrant is being allowed to access and use the functionality available on the Affiliate's VOW.

The purpose of the VOW is to permit a consumer who becomes a "Registered User" of the VOW, to access, view, and save to a personal online portfolio, the same non-confidential information about listed properties that MLS participants and subscribers may deliver to their customers and clients in a "bricks and mortar" setting using non-browser based media. During the nearly five (5) years that PRESCo has operated the Platform on behalf of PREA Affiliates, only a few MLSs have been willing to provide PRESCo with a data feed of complete MLS listing content for use with the VOW component of the Platform. In most cases, the MLSs will only provide PRESCo

with a more limited IDX data feed, which PRESCo has been forced to use with both the IDX and VOW features of the Platform. A VOW that is forced to operate with an IDX feed is at a disadvantage compared with a data feed available for use in a "bricks and mortar" environment because the IDX data feed does not contain any "opted out" listings, and also may contain less information about listed properties than is included in the complete MLS database compilation that MLS participants are permitted to access when providing listing information to customers and clients using non-browser based methods.

PREA and PRESCo believe that, on balance, the Proposed Final Judgment, including the Modified VOW Policy resolve the fundamental issues raised in the Government's Complaint against NAR, and that entry of the Final Judgment is in the public interest. These fundamental issues are the so-called "blanket" and "selective" opt out feature of NAR's former VOW and ILD Policies that permitted MLS participants to withhold their listing information from some or all VOW operators, and the refusal of many MLSs to permit VOW operators to provide MLS data to VOW Registrants that is the equivalent of the MLS data that MLS participants may share with customers and clients in a non-VOW environment.

Nevertheless, PREA and PRESCo believe that certain provisions or ambiguities in the Proposed Final Judgment and Modified VOW Policy, if not clarified or modified, could enable NAR or its MLSs to continue to impose unreasonable burdens on the use of VOWs in the real estate brokerage industry to the detriment of real estate brokers and the home buying and selling public. Accordingly, PRESCo and PREA request the Antitrust Division to clarify, or provide interpretative guidance for, certain provisions of the Proposed Final Judgment and the Modified VOW Policy as set forth below to ensure that PREA Affiliates, and their VOW Registrants, will have continuous access on reasonable terms and conditions to current and complete MLS data for use on their VOWs.

Section V of the Proposed Final Judgment Should Be Interpreted To Require NAR To Respond To Complaints About Member Board Violations Of The Modified VOW Policy And To Require Its Member Boards To Report To NAR Concerning Any Complaints About Their Compliance With The Modified VOW Policy.

Significantly, Section III of the Proposed Final Judgment does not define NAR's Member Boards as being "in active concert" with NAR for the purposes of enforcement of the Final Judgment. This is true even though, pursuant to NAR's Constitution and Bylaws, NAR and its Member Boards collaborate to implement NAR's Multiple Listing Policy as adopted by NAR's Board of Directors. As such, the Proposed Final Judgment is directly enforceable only against NAR, notwithstanding that NAR itself does not operate any MLS, but instead adopts MLS Policies that the Member Boards in turn

implement by adopting and enforcing MLS Rules and Regulations in their respective local markets that are not inconsistent with NAR's MLS Policy.

Therefore, since NAR's Member Boards are not themselves bound by the Proposed Final Judgment, whether the Proposed Final Judgment will ultimately achieve its pro-competitive purposes depends, in large part, upon whether NAR adequately carries out its obligations to initially bring its Member Boards into compliance with the Modified VOW Policy, and thereafter ensure that such compliance continues throughout the term of the Proposed Final Judgment. Because NAR bears the primary responsibility under the Proposed Final Judgment to ensure that its Member Boards implement the terms of the Proposed Final Judgment and the Modified VOW Policy, PREA and PRESCo urge that the Antitrust Division clarify that Proposed Final Judgment, as written, imposes an obligation upon NAR to investigate and, if necessary, to take appropriate action against a Member Board when it receives any complaint or other information suggesting that a Member Board MLS is not complying with the terms of the Proposed Final Judgment or the Modified VOW Policy.

PREA and PRESCo contend that the terms of Proposed Final Judgment can be interpreted to impose such an obligation on NAR. Section V. D of the Proposed Final Judgment obligates NAR to direct its Member Boards not only to adopt the Modified VOW Policy, but also "not to adopt, maintain, or enforce any Rule or practice that NAR would be prohibited from adopting, maintaining or enforcing pursuant to Section IV of this Final Judgment. . . " The Proposed Final Judgment further includes Sections V. E. and V. F., which obligate NAR to take certain actions against a Member Board if it "determines" that a Member Board has not timely adopted the Modified VOW Policy, or has taken action that NAR would be prohibited from taking pursuant to the Proposed Final Judgment.

In addition to the provisions of Section V, the Proposed Final Judgment includes Section IV entitled "Prohibited Conduct," which states in the first paragraph that ". . . NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice that directly or indirectly" constitutes any of the actions subsequently enumerated in Sections IV.A through IV.E. Section IV.E specifically prohibits NAR from maintaining or enforcing any Rule that "is inconsistent with the Modified VOW Policy.

Therefore, if NAR were to fail to act upon receipt of a complaint or other information suggesting that a Member Board or its MLS violated the Modified VOW Policy, NAR's inaction could be deemed to be the "maintenance" of a Rule that violates the Modified VOW Policy in violation of Section IV.E of the Proposed Final Judgment. For this reason, the Proposed Final Judgment, as currently drafted, can, and should, be interpreted to impose an affirmative obligation upon NAR to promptly investigate, and thereafter "determine," for the purposes of Section V. F of the Proposed Final

Judgment, the validity of any complaint, or other information that may be brought to NAR's attention, that a Member Board has violated the Modified VOW Policy.

Section V.G (2) of the Proposed Final Judgment obligates NAR's Antitrust Compliance Officer to

> "maintain copies of any communications with any Person containing allegations of any Member Board's (1) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment, or (ii) failure to enforce any Rule implementing the Modified VOW Policy."

Section V.G (2) does not restrict the "communications" that NAR is obligated to maintain to those directed specifically to NAR. The communications subject to Section V.G (2) could include communications directed to the Member Boards or their MLSs, as well as to NAR. Therefore, the Antitrust Division should interpret Section V.G (2) to impose an obligation upon NAR to require Member Boards to provide NAR with copies of communications directed to the Member Boards or their MLSs of the type described in Section V.G (2). These communications provided by the Member Boards should be among the materials NAR's Antitrust Compliance Officer must furnish to the Antitrust Division on a quarterly basis pursuant to Section V.H of the Proposed Final Judgment.

Section II.2.c Of The Modified VOW Policy Should Be Clarified To Require A VOW Operator To "Enable", But Not "Require", A VOW Registrant To "Open And Review" The VOW Terms Of Use Agreement

Section II of the Modified VOW Policy sets forth policies that are applicable to MLS Participants' VOWs. Section II.2.c provides that a VOW operator must require a VOW Registrant to "open and review" a Terms of Use agreement before accepting it by a mouse click. Requiring a potential VOW Registrant to open and review the Terms of Use Agreement before accepting it is unreasonable given the current operation of web sites and the enforceability of Terms of Use Agreements that govern consumers' use of such sites. For example, many websites that require or invite a visitor to become a "registered user" display the applicable Terms of Use agreement within a scrollable frame. If potential registrants are interested in scrolling though the entire agreement within the frame, or printing a copy of it, they are free to do so. Otherwise, they can simply click "I accept" and complete the registration process.

There does not seem to be any reason for a VOW operator to be forced to compel a registrant to use a less user friendly registration process than is used on most other web sites at which consumers are agreeing to be bound by terms of use agreements that impose much more liability upon users of those sites that is imposed upon a VOW Registrant by a VOW Terms of Use. Such "scrollable" Terms of Use agreements are fully enforceable. See *Caspi, et al v. The Microsoft Network, LLC, et al,* 323 N.J. Super. 118, 732 A.2d 528 (N.J. App. Div., July 2, 1999).

Section II.2.c of the Modified VOW Policy is also inconsistent with Section IV B of the Proposed Final Judgment. Section IV.B of the Proposed Final Judgment prohibits NAR from adopting, maintaining, or enforcing any Rule, or entering into or enforcing any agreement or practice that "unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a . . "

In a "bricks and mortar" environment, MLS participants are permitted to, and typically do, deliver full and complete MLS listing information to any consumer who asks for it without any requirement that the consumer and the MLS participant enter into a Terms of Use, or any other type of agreement governing the consumer's use of the information, or reasons for asking for it. Section II.2.c therefore "disadvantages" and "discriminates against" VOW operators as compared to their "bricks and mortar" counterparts by imposing an onerous process for securing a VOW Registrant's acceptance of a Terms of Use Agreement when a Terms of Use Agreement is not even required as a condition of delivering MLS listing data to a consumer in a non-VOW setting. Section II.2.c should be amended to require that a VOW operator simply display the Terms of Use Agreement to the potential VOW Registrant in a form that permits, but does not require, the Registrant to open and review the agreement before accepting it.

Section II.2.c.iv Of The Modified VOW Policy Should Be Clarified To Permit VOW Registrants To Deliver Information About "Saved" Listings To Relatives, Friends, Or Mortgage Loan Officers.

Section II.2.c.iv of the Modified VOW Policy requires that the Terms of Use Agreement that the VOW Registrant must accept include terms providing that the Registrant will not "copy, redistribute, or retransmit any of the data or information provided [on the VOW]." It is unclear what is meant by "copy, redistribute, or retransmit" the MLS data made accessible on the VOW.

The PRESCo Platform includes functionality through which VOW Registrants can "save" specific listings to a personal portfolio or "account. This functionality also permits a Registrant to forward a "saved" listing to a spouse, relative, or friend for review or comment, or to a mortgage loan officer with an indication that the property may be the object of the Registrant's upcoming loan application. This functionality is extremely useful to VOW Registrants and is quite commonly offered on almost all VOWs, as well as many IDX sites. Section II 2.c.iv of the Modified VOW Policy would seem to prohibit VOW operators from making this very valuable functionality available to VOW Registrants, and should be amended to make clear that VOW Registrants may "save" individual listing records in a personal portfolio and may retransmit such "saved" listing records to third parties, so long as the retransmission involves only isolated listing records and not the all, or substantially all, of the MLS data accessible on the VOW.

Section II.2.d Of The Modified VOW Policy Should Be Amended To Permit VOW Operators To Enter Into "Mouse Click" Agreements With VOW Registrants That Obligate The Registrant To Pay A Fee Or Create A Representation Relationship Between The VOW Operator And The Registrant If The "Mouse Click" Agreements Are Entered Into On A Non-VOW Section Of The VOW Operators Website.

Section II.2.d .of the Modified VOW Policy provides that:

"An agreement entered into at any time between the Participant and Registrant **imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant** must be established separately from the Terms of Use, must be prominently labeled as such and **may not be adopted solely by a mouse click."**

Emphasis added.

While they have not yet done so, PREA, PRESCo and PREA's Affiliates may decide to make available to VOW Registrants the opportunity to acquire ancillary products or services, for a fee, either from PREA, PRESCo or the Affiliate, or from third parties with whom these parties have executed joint marketing agreements. PREA, PRESCo and PREA Affiliates may also choose to enable VOW Registrants to enter into online representation agreements with the VOW operator at the VOW operator's website. VOW Registrants acquisition of these products or services, or execution of a representation agreement, would be accomplished online at the VOW by a "mouse click." In this respect, the VOW operator would include offerings similar to those made available in the participant's "bricks and mortar" office, which include mortgage loan, home owner's and title insurance, or home warranty products sold through affiliated business arrangements between the VOW operator and providers of such products.

The section of the Modified VOW Policy quoted above would permit such "mouse click" transactions to occur at a VOW so long as the "Participant" (i.e. the PREA Affiliate) is not a party to the transaction. It is illogical to permit a VOW operator to enable a third party to enter into "mouse click" transactions from the operator's VOW that require a Registrant to pay a fee, form a representation relationship, but forbid the VOW operator itself to enter the identical types of transactions or agreements.

Section II.2.d of the Modified VOW Policy presumably only applies to agreements entered into on the VOW section of the PREA Platform. Thus, a VOW operator would be free under Section II.2.d of the Modified VOW Policy to enter into agreements through a "mouse click" with VOW Registrants that would otherwise be prohibited by Section II.2.d so long as such agreements are formed on a section of the MLS

participant's website other than the VOW. Section I.1 of the Modified VOW Policy clearly states that a VOW may be one of several features of a Participant's website. Likewise, Section I.3 of the Modified VOW Policy expressly provides that "Participants' Internet websites, including those operated by AVPs, may also provide other features, information, or services in addition to VOWs (including the Internet Data Exchange ("IDX") function)."

Therefore, a VOW operator is presumably free to link VOW Registrants to these other sections of the VOW operator's website at which the VOW operator and the Registrant may via a mouse click enter into agreements of the type that Section II.2.d would prohibit from being consummated by a mouse click on the operator's VOW. Section II.2.d of the Modified VOW Policy should, therefore, be interpreted to make clear that its prohibition on mouse click agreements only applies to the VOW portion of a broker's website, and not any other portion of the broker's site. Needless to say, a VOW operator's ability to enter into mouse click agreements on other sections of the VOW operator's website demonstrates that Section II.2.d does not serve any useful purpose and should be deleted.

If Section II.2.d were interpreted to prohibit VOW operators from entering into mouse click agreements of the type prohibited by Section II.2.d on any page of an operator's website(s), Section II.2.d would be tantamount to preventing VOW operators from engaging in electronic commerce at their websites. If any other consortium of competitors enacted rules prohibiting their members from engaging in electronic commerce with consumers such an agreement would almost surely violate Section 1 of the Sherman Act. Likewise, there are not any state or federal consumer protection laws that prohibit companies operating in other industries from engaging in "e-commerce" transactions with consumers via "mouse clicks." If the operators of thousands of other e-commerce websites are trusted to enter into financial transactions with consumers by a "mouse click" so should a VOW operator.

Section II.5.a and Section III.4 of the Modified VOW Policy Should Be Interpreted To Make Clear That The Right Of Sellers To Exclude Their Listings From Internet Display May Only Be Exercised On A Blanket Basis And Must Also Apply To Any Other Internet Display Of Information About The Seller's Listing

The Modified VOW Policy at Section II.5.a provides that VOW operators must not "display listings or property addresses of sellers who have affirmatively directed their listing brokers to withhold their listing or property address from **display on the Internet**." Emphasis added. The use of the words "display on the Internet" in Section II.5.a presumably means that a VOW operator is bound by Section II.5.a only if (1) the seller has made an election to withhold his or her listing, or listing address, from all forms of Internet display, including all other VOW sites (a "blanket opt out"), and (2) the seller has directed the listing broker to exclude the seller's listing or listing address from

any data feed that the listing broker, the Member Board or its MLS sends to other web sites that aggregate real estate listing information such as Google Base, Yahoo Classifieds, Zillow, Cyberhomes, or Trulia. Section II.5.a should be interpreted to make explicit the foregoing limitations on its applicability.

Section II.5.a. Of The Modified VOW Policy Should Be Amended To Permit VOW Operators To Deliver Seller Excluded Addresses To VOW Registrants.

The last sentence of Section II.5.a provides that notwithstanding a seller's election to withhold the display of a listing, or the listing's address, on the Internet, a VOW operator "may provide to consumers via other delivery mechanisms, such as email, fax or otherwise, the listings of sellers who have determined not to have the listing for their property displayed on the Internet." This express permission to a VOW operator to deliver to VOW Registrants using non-browser based media information about listings that sellers have "opted out" of Internet display is limited only to listings that sellers have elected to withhold in their entirely from Internet display, and does not extend to the delivery through non-browser media of the listing **addresses** that the seller has decided to withhold from Internet display.

It is totally illogical to prohibit a VOW operator from delivering seller excluded addresses to VOW Registrants using non-browser media, but permit a VOW operator to deliver to a VOW Registrant using non-browser media, an entire seller-excluded listing record, including the seller's address, when the seller has elected to withhold all data about the listed property from Internet display. The last sentence of Section II.5.a of the Modified VOW Policy should be amended to permit VOW operators to deliver seller excluded addresses to VOW Registrants using non-browser media.

Section III.2 and Section III.4 Of The Modified VOW Policy Should Be Interpreted To Insure That MLSs Must Provide Seller Excluded Listings And Addresses In The "Download" Of MLS Data Required By Section III.2, Notwithstanding An MLS' Right To Exclude The Same Data From A "VOW-Specific Feed" Pursuant To Section III.4.

Despite the permission granted to VOW operators in the last sentence of Section II.5.a, Section III.4 of the Modified VOW Policy provides that "If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data included in the feed described in paragraph 2 above, **except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet."** Emphasis added. Section III.2 of the Modified VOW Policy, however, provides that

> . . . **MLSs shall, if requested by a Participant, provide basic 'downloading' of all MLS non-confidential listing data, including without limitation address fields, listings types, photographs, and links to virtual tours.** Confidential

> data includes only that which Participants are prohibited from providing to customers orally and by all other delivery mechanisms.. . . . "

Emphasis added. Section III.2 appears to require an MLS to provide basic downloading of non-confidential MLS data that includes any and all seller excluded listings or property addresses. Such data would not be deemed "confidential" based on the second sentence of Section III.2 since it is not data that MLS Participants are "prohibited from providing to customers orally and by all other delivery mechanisms."

To exercise the authority granted in the last sentence of Section II.5.a, a VOW operator must have the seller-excluded data on its VOW server. When a VOW Registrant executes a search request that would include otherwise have included the seller-excluded data, the VOW software code can be programmed to retrieve the seller-excluded data and deliver it to the VOW Registrant via an email alert.

This functionality can operate only if the seller excluded data is maintained on the same server as the other MLS data that can be displayed on a VOW. Section III.2 appears to require MLSs to permit this seller excluded data to be included in the MLS data that an MLS must permit to be "downloaded" by a VOW operator. An MLS must not be permitted to disregard the mandate of Section III.1 by providing a "VOW specific feed" that complies with the terms of Section III.4. Otherwise the permission granted to VOW operators in the last sentence of Section II.5.a is wholly illusory. Therefore, Sections III.2 and III.4 should be interpreted to require an MLS to provide the "downloading" mandated by Section III.2 whether or not an MLS elects to offer a "VOW-specific feed" pursuant to Section III.4.

Section II.5.c Of The Modified VOW Policy Should Be Interpreted To Require Any Seller Who Exercises A Right To Require The Disabling Of VOW Features That Permit Third Parties To Post Comments About The Listed Property, Or The Display Automated Valuations Of The Listed Property, To Do So Only On A Blanket Basis, And Also To Prohibit The MLS Or Listing Broker From Delivering The Seller's Listing To Any Real Estate Listing Aggregation Website That Permits The Display Of Third Party Comments Or Links To Sites That Provide Automated Valuations Of The Seller's Property.

Section II.5.c of the Modified VOW Policy obligates a VOW operator whose VOW includes functionality that (1) enables third parties to post comments about a listed property, or (2) retrieve automated estimates of value for the listed property to disable those features with respect to any listing for which the seller has "elected to have one or both of these features disabled or discontinued on all Participants' websites." The language "discontinued on all Participants' websites" in Section II.5.c should be interpreted to require that Section II.5.c only applies if the seller makes any directive to disable the identified functionality on a "blanket" basis applicable to all VOW operators, and not on a "selective" basis applicable only to certain VOW operators

Likewise Section II.5.c should be interpreted to mean that a VOW operator is not required to observe the seller's mandates to disable the identified functionality unless the seller also directs the listing broker to exclude the seller's listing from any data feed provided by the MLS to a real estate listing aggregation web site that permits the display of consumer comments about, or valuation estimates or, the seller's listing. Such real estate aggregation websites include Realtor.com, Trulia, Google Base, Yahoo Classifieds, Cyberhomes, or the MLS' own publicly accessible website.

It is understood, however, that sellers cannot prevent third party web sites, such as Zillow, that enable visitors to generate automated value estimates of unlisted as well as listed property from enabling visitors to generate an automated value estimate on a seller's property. On the other hand, a listing broker can direct that the MLS exclude the seller's listing from any feed of listed properties sent by the MLS to other non-VOW sites that allow consumer comments on listed property or links to automated value estimates.

Section II.5.e Of The Modified VOW Policy Should Be Interpreted To Make Certain That MLSs Must Provide MLS Data Feeds To VOW Operators Or AVPs That Are Updated In Real Time.

Section II.5.e of the Modified VOW Policy provides that "[e]ach VOW shall refresh MLS data available on the VOW not less frequently than every 3 days." The Modified VOW Policy is silent, however, on how frequently the MLS must provide a "refreshed" VOW data feed to VOW operators pursuant to Section III.4 or permit the VOW operator or AVP to "download" the MLS data pursuant to Section III.2. Since Section II.5.e permits a VOW operator refresh the VOW data only at three (3) day intervals, a Member Board MLS could decide that it will only refresh the "VOW specific data feed" or permit a broker to download the MLS data every third day, as opposed to in "real time." Operating a VOW with three (3) day old data is totally unacceptable in a web based environment. The Modified VOW Policy should be amended to make clear that Member Board MLSs must make MLS data available for display on a VOW at the same time the data is accessible to MLS participants and subscribers accessing the MLS' database compilation in a "bricks and mortar" environment. This requirement would be entirely consistent with the mandate of Section IV B of the Proposed Final Judgment.

Section II.6 Of The Modified VOW Policy Should Be Interpreted To Make Clear That VOW Operators Must Make Their VOWs "Accessible" For Compliance Purposes Only To The Extent Such Accessibility Is Made Available To A Registered User.

Section II.6 of the Modified VOW Policy requires a broker operating a VOW to "notify the MLS of its intention to establish a VOW and must make the VOW **readily accessible** to the MLS and **all MLS Participants** for purposes of verifying compliance with this Policy and any other applicable MLS rules or policies." Emphasis added.

Section II.6 does not provide any definition of the terms "make the VOW readily accessible."

It is possible for a Member Board MLS, or its MLS participants, to construe these terms to mean that a VOW operator or AVP must provide access to its computer servers, software source code, or the terms and conditions of agreements with AVPs or joint marketing partners, as part of an effort to "verify" compliance with the MLS' rules and regulations. This type of intrusive inquiry would be unreasonable and harassing, and totally inappropriate if undertaken by a competitor of a VOW operator.

It is also inappropriate for the MLS to undertake such an intrusive inquiry absent "probable cause" that the VOW participant was in fact violating the MLS' rules and regulations. Section II.6 should therefore be interpreted to mean that a VOW operator need only provide the MLS and other interested MLS Participants with a user name and password to access the VOW for compliance monitoring purposes, and then only to the extent the VOW can be accessed by a bona fide Registrant.

There is not any equivalent provision of the NAR MLS Policy that requires MLS participants to make their "bricks and mortar" real estate offices "readily accessible" to their competitors to enable those competitors to investigate whether the participants are using MLS data in violation of the MLS' rules. Obligations imposed upon VOWS that are not also imposed upon "bricks and mortar" offices are inconsistent with Section IV B of Proposed Final Judgment.

Sections III.5 Of The Modified VOW Policy And Section IV.D Of Proposed Final Judgment Should Be Interpreted To Prohibit MLSs Or Member Boards From Passing On Costs To VOW Operators Or AVPs That Include Allocations Of Staff Salaries Or Administrative Overhead.

Section III.5 of the Modified VOW Policy provides that "[a]n MLS may pass on to those Participants who will download listing information the reasonably estimated costs incurred by the MLS in adding or enhancing its 'downloading' capacity to enable such Participants to operate VOWs." Section IV D of the Proposed Final Judgment prohibits NAR (as opposed to a Member Board MLS) from adopting any Rule

> "that imposes fees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW-related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs in providing a service to a Person who operates a VOW for a Broker that it incurs in providing the same service to the Broker."

These Sections of the Modified VOW Policy and the Proposed Final Judgment do not adequately define the "costs" that are permissible to be assessed against a VOW operator. For example, there is not any definition of "actual costs incurred by a Member Board in providing Listing Information to the Broker or [AVP]." So-called "actual costs" could include the salaries or consultant fees for software programmers, "compliance officers" who are charged with monitoring and auditing VOWs, or an allocation of the MLS Chief Executive Officer's salary based on the time the Executive spends on administering and enforcing the MLS' policies relating to VOWs.

If only a handful of MLS participants in a particular Member Board MLS operate VOWs, and these types of overhead costs are allowed to allocated to those few VOW operators, the costs imposed on any single VOW operator can be highly disproportional to equivalent fees assessed to "bricks and mortar" MLS participants. Furthermore, such a "surcharge" would strongly deter MLS participants from starting a VOW. Therefore, both Section IV D of the Proposed Final Judgment and Section III 5 of the Modified VOW Policy should be interpreted to make clear that the term "costs" may only include actual direct costs, and may not include any allocations of salaries, consultant fees, rent, utilities, or other overhead expenses.

While Section IV D of the Proposed Final Judgment refers to "estimated actual costs" that an MLS may impose upon VOW operators, Section III 5 of the Modified VOW Policy only refers to "reasonably estimated costs", omitting the word "actual." Hence, Section III 5 of the Modified VOW Policy would permit an MLS to annually budget for VOW administration and enforcement expenses and then divide the budget estimate among those MLS participants that are currently operating VOWs. Depending upon how the Member Board MLS chooses to allocate its budget between VOW and non-VOW activities, the "reasonably estimated costs" imposed upon VOW operators could be exorbitant. This is especially true when only a handful of MLS participants may be operating VOWs in a particular market. Such a VOW "surcharge" would act as a strong deterrent to MLS participants considering the creation of a VOW.

Section III 5 of the Modified VOW Policy should be interpreted to permit a Member Board MLS to impose VOW related "surcharges" on VOW operators only if surcharges for the same types of "reasonably estimated expenses" are also imposed upon MLS participants operating IDX sites and those participants who receive an MLS data feed for use solely in a "bricks and mortar" environment. If participants receiving feeds of MLS data for non-VOW uses are not required to pay special surcharges to cover the "reasonably estimated costs incurred by the MLS" in delivering those non-VOW services, then the Member Board MLS' imposition of such surcharges upon VOW operators would violate Section IV. B of the Proposed Final Judgment, which prohibits the imposition of a rule or policy that "unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW. . . "

Section III.10.b Of The Modified VOW Policy Should Be Interpreted To Prohibit An MLS Or Member Board From Imposing More Than One Surcharge Upon An AVP Regardless Of The Number Of MLS Participants For Whom The AVP Operates A VOW.

Section III.10.b of the Modified VOW Policy provides that:

"An MLS may not charge an AVP, or a Participant on whose behalf an AVP operates a VOW, more than a Participant that chooses to operate a VOW itself (including any fees or costs associated with a license to receive MLS data, as described in (g) below), except to the extent the MLS incurs greater costs in providing listing data to the AVP than the MLS incurs in providing listing data to a Participant."

The comments on Section III.5 of the Modified VOW Policy on the circumstances under which an MLS may impose surcharges upon VOW operators are equally applicable to the types of surcharge costs that may be imposed upon AVPs who operate VOWs for their broker clients pursuant to Section III.10.b.

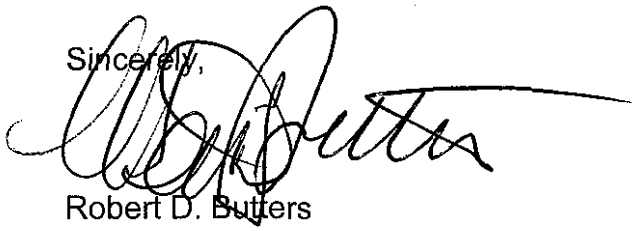
Section III.10.b provides that MLS may not impose higher charges upon AVPs than it imposes upon MLS participants who operate VOWs without the services of an AVP. Section III.10.b does not, however, address the common circumstance in which an AVP, such as PRESCo, operates VOWs for multiple participants in the same MLS. If each of the MLS participants using the same AVP were to operate their VOWs without an AVP, each MLS participant could, in theory, be assessed the VOW surcharge imposed by the MLS on VOW operators. These fees are ostensibly assessed for the costs of delivering the VOW data feed to the MLS participant.

On the other hand, an AVP operating VOWs for multiple participants in the same MLS typically only receives a single VOW data feed, or download, from the MLS, which the AVP then uses with the VOWs of each of its customers or clients who participate in that MLS. Under this scenario, it would be unreasonable for an MLS to assess an AVP with multiple clients who participate in that MLS a separate VOW surcharge for each of the MLS participants since the AVP is only receiving a single VOW data feed, or download, from the MLS.

Therefore, an MLS should be prohibited from assessing the AVP more than a single VOW surcharge even if the MLS could justifiably assess such VOW surcharges to each of the AVP's MLS participant clients had those clients chosen to operate their VOWs without the use of an AVP. Accordingly, Section III.10.b should be interpreted to make clear that an MLS that may only impose a single VOW surcharge upon an AVP regardless of the number of participants in that MLS on whose behalf the AVP operates a VOW.

PREA and PRESCo appreciate the opportunity to submit the foregoing comments on the Proposed Final Judgment and Modified VOW Policy. If you have any questions concerning these comments please do not hesitate to contact me at your convenience.

Sincerely,



Robert D. Butters

RDB:lp

cc: Ms. Laurie Keenan, President, Prudential Real Estate Affiliates, Inc.
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October 7, 2008

VIA U. S. MAIL AND E-MAIL

John R. Read
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street NW
Washington, DC 20530

Re: United States v. National Association of Realtors®, 05 C 5140 (N.D. Ill.)
Evaluation of Settlement Under Antitrust Procedures and Penalties Act

Dear Mr. Read:

I represent Home Buyers Marketing II, Inc. ("HBM II"), a national real estate company that provides online real estate brokerage services in approximately 400 markets. HBM II submits these comments regarding the determination to be made by the United States District Court under the Antitrust Procedures and Penalties Act: whether the proposed settlement of the above-referenced antitrust lawsuit brought by the United States Department of Justice is "in the public interest."

HBM II strongly supports what the Department of Justice describes as the "fundamental principle" intended to be embodied in the settlement: "that an association of competing brokers, operating [a multiple listing service, or "MLS"], cannot use the aggregated power of the MLS to discriminate against a particular method of competition (in this case, VOWs)."[1] HBM II also supports the general nondiscrimination principles included in the proposed final judgment. However, as an online broker with firsthand knowledge of the discriminatory MLS practices identified by the Department, HBM II is concerned that the settlement could create uncertainties that MLSs could exploit to persist in discriminating against online brokers. Consequently, as a prerequisite to approval of the settlement, it is essential that the Department confirm that MLSs are prohibited from engaging in certain anticompetitive practices that are either (a) not explicitly addressed in the Modified Virtual Office Website ("VOW") Policy attached as Exhibit A to the Proposed Final Judgment, or (b) are addressed in a way that is potentially ambiguous.

[1] *United States v. National Association of Realtors®*; Proposed Final Judgment and Competitive Impact Statement 73 Fed. Reg. 47613, 47629 (Aug 14, 2008).

I. Background

A. *About HBM II*

HBM II, an innovator in online real estate brokerage, has helped more than two million buyers find homes. In the past, HBM II has focused on serving buyers when they are searching for homes, leaving it to a different broker to negotiate the terms of purchase and close the transaction. HBM II has led the way in adding new features that have improved the online experience of the home buyer, and continues to provide what is believed to be the most complete and detailed Spanish translation of MLS property information to be offered by any online real estate company.

In response to changes in the real estate industry, including the announcement of the proposed settlement of the Justice Department's lawsuit against the National Association of Realtors® ("NAR"), HBM II is adding a new dimension to its business model. Across the United States, HBM II is in the process of hiring full service brokers – knowledgeable real estate professionals who will seek to list and sell homes. HBM II will also continue to provide its cutting-edge online services for buyers who ultimately go to closings with other brokers.

B. *How the Challenged NAR Policies Discriminate and Restrain Competition from Online Brokers*

As the Competitive Impact Statement filed by the Department of Justice explains, Defendant NAR engaged in a number of "Challenged Policies" that "discriminate against and restrain competition from brokers who use VOWs."[2] These policies "denied VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods."[3] As an online broker operating in markets across the country, HBM II has repeatedly encountered and been injured by these discriminatory policies.

The Challenged Policies that discriminated against online brokers included (a) "opt-out" policies that permitted traditional brokers to withhold their listings from VOWs, (b) "anti-referral" policies that prohibited brokers from using VOWs to support alternative business models, (c) policies that prohibited VOWs from selling advertising on pages displaying listings, and (d) policies that permitted MLSs to degrade the data provided to VOWs, thus limiting a VOW's ability to offer innovative services.[4]

These and other anticompetitive policies challenged by the Department of Justice have caused substantial harm to competition. As the Competitive Impact Statement points out, the existence of opt-outs "renders a VOW broker unable to promise customers access to all relevant

[2] *Id.* at 47627.
[3] *Id.*
[4] *Id.* at 47627-28.

MLS listings, materially disadvantaging brokers who use a VOW to compete."[5] Restrictive membership and anti-referral rules prevented "two brokers from working together in an innovative and efficient way, with a VOW broker attracting new business and educating potential buyers about the market, and the other broker guiding the buyer through home tours and the negotiating, contracting, and closing process."[6] The practice of giving VOWs an inferior data feed also prevented online brokers from competing on a level playing field.

These policies, individually and collectively, plainly violated the federal antitrust laws prohibiting unreasonable restraints of trade for the reasons set forth in the Competitive Impact Statement. As the Department explains, a MLS "cannot create rules that unreasonably impede competition among brokers and harm consumers."[7] *See United States v. Realty Multi-List*, 629 F.2d 1351, 1371 (5th Cir. 1980). NAR's Challenged Policies restrain competition because they (1) "dictate how the MLS's broker-members could compete–specifically, restricting how they could compete using a VOW," (2) "impede the operations of a particularly efficient class of competitors: VOW brokers," (3) deny consumers "the full MLS listings information (including valuable information such as sold data and data fields such as days on market) that consumers want", and (4) "produced no procompetitive benefits that justified the restraints."[8]

C. *How the Settlement Purports to "End the Competitive Harm" Caused by the Challenged NAR Policies*

1. Specific Practices Addressed under The Modified VOW Policy

The proposed settlement is embodied in a submission that consists of three documents: (a) a "Proposed Final Judgment" that sets forth the general principles underlying the settlement, (b) a "Modified VOW Policy," Exhibit A to the Proposed Final Judgment, that includes more detailed rules about how MLSs must treat VOWs, and (c) a red-lined membership rule and accompanying explanatory note, attached as Exhibit B. If the settlement is approved and becomes effective, NAR would be bound by the Proposed Final Judgment, NAR-affiliated MLSs would be directed to adopt the Modified VOW Policy, and NAR would be permitted to adopt the revised membership rule and accompanying note.

The Modified VOW Policy explicitly addresses some of the anticompetitive practices that MLSs have used to harm online brokers and restrain competition. For example, the Modified VOW Policy requires a MLS to provide basic downloading of all MLS non-confidential listing data [Section III(2)] and prohibits a MLS from prohibiting "branding" or "co-branding." [Section III(6).]

As discussed more fully below, there are a number of anticompetitive practices encompassed in the lawsuit that are either (a) not explicitly addressed in the Modified VOW

[5] *Id.* at 47628.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 47628-29.

Policy or (b) are addressed in a way that is potentially ambiguous. The Department of Justice suggests that even if such anticompetitive practices are not explicitly addressed by the Modified VOW Policy, they are prohibited under the Proposed Final Judgment's "general non-discrimination provisions," which state:

> Subject to the provisions of Sections V and VI of this Final Judgment, the Modified VOW Policy (Exhibit A), and the definition of MLS Participant and accompanying Note (Exhibit B), NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly[:]
>
> A. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;
>
> B. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customer by hand, mail, facsimile, electronic mail, or any other methods of delivery...[9]

According to the Department's Competitive Impact Statement, "[w]ith respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment's general nondiscrimination provisions apply."[10]

II. The Department should confirm that MLSs are prohibited from engaging in certain anticompetitive practices that are either (a) not explicitly addressed in the Modified VOW Policy or (b) are addressed in a way that is potentially ambiguous

HBM II supports the general nondiscrimination provisions set forth in the Proposed Final Judgment. Unfortunately, in light of recent history, there is a legitimate basis for concern that these provisions, standing alone, may not stop MLSs from engaging in anticompetitive practices that are either (a) not explicitly addressed in the Modified VOW Policy or (b) are addressed in a way that is potentially ambiguous.

The general nondiscrimination principles included in the Proposed Final Judgment restate antitrust principles that have been well-established for many years. *See, e.g., United States v. Realty Multi-List, Inc.* 629 F.2d 1351, 1371 (5th Cir. 1980) (prohibiting MLSs from adopting rules that unreasonably restrain competition); *Austin Board of Realtors v. e-Realty, Inc.*, No. 00-

[9] *Id.* at 47618.
[10] *Id.* at 47629.

CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000) (prohibiting discrimination against online brokers). However, even after being confronted with these precedents and general principles, MLSs have continued to engage in anticompetitive practices that discriminate against online brokers. In the face of such anticompetitive conduct, the online broker can then choose to litigate (*see, e.g., Austin Board of Realtors*) or, under the Proposed Final Judgment, make a complaint. However, when the online broker is forced to litigate just to preserve its right to compete, even the best outcome is nothing more than a Pyrrhic victory because of litigation costs, uncertainty and delay. An online broker must be able to count on MLS compliance without the need to resort to expensive litigation.

Accordingly, notwithstanding the general nondiscrimination principles included in the Proposed Final Judgment, the Department should confirm that MLSs are not permitted to engage in particular anticompetitive practices, as follows:

A. *MLSs are not permitted to discriminate against Internet-based residential real estate brokers ("online brokers") and their customers by updating the MLS data feed provided to online brokers less frequently than the databases made available to other persons or entities (e.g., traditional bricks-and-mortar brokers, websites offered by the MLS to the public, websites offered by other brokers, Realtor.com, etc.).*

This is a common and extremely important form of MLS discrimination against online brokers and their customers. Customers want to work with a broker who can provide the newest listings and developments affecting existing listings, such as the announcement of a reduction in the price of a listing. Working with such a broker, the customer can be confident that he or she will be among the first to learn of new developments.

In general, MLSs update the MLS database used by bricks-and-mortar brokers continuously, so that bricks-and mortar brokers always have the most up-to-date information. However, when it comes to the VOW or other feed[11] provided to online brokers, some of the same MLSs update data only once per day.[12] Under such circumstances, a customer working with an online broker would not have access to new information readily available to customers of traditional brokers.

Discriminating by updating the MLS data feed provided to online brokers less frequently than the databases made available to other persons or entities is not explicitly addressed in the Modified VOW Policy. However, this practice "unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW," in violation of the general nondiscrimination principles.

[11] In many markets, including markets where there is no VOW feed, online brokers are relegated to an IDX advertising feed.

[12] San Antonio, Ann Arbor and Portland, Maine currently update their VOW feeds only once per day.

B. *MLSs are not permitted to discriminate against online brokers by abusing the rule that prohibits any VOW fee in excess of the "reasonably estimated actual cost" of providing the VOW feed by allocating the cost of facilities used for other purposes exclusively or disproportionately to the VOW feed.*

Although the Proposed Final Judgment prohibits NAR from adopting or enforcing any rule that imposes fees on online brokers in excess of the "reasonably estimated actual costs" of providing MLS data to a VOW,[13] that term is not defined in the settlement. The absence of a definition creates a danger of abuse. For example, a MLS could (a) hire a non-technical staff member to look for violations of MLS rules by online brokers (but not traditional brokers) to use as a pretext for expelling online brokers, and (b) inflate the fee charged for a VOW feed to pay for the discriminatory surveillance. In fact, there are MLSs that charge exorbitant fees for the feeds provided to online brokers, whether viewed in absolute terms or by comparison to fees charged by other MLSs (which may themselves be excessive).[14]

Short of litigation, online brokers do not have any way to make the MLSs accountable for such exorbitant fees. The MLS simply declares, "these are our reasonable costs," and otherwise ignores any objections. The settlement agreement endorses the principle of "reasonably estimated actual costs" but does not explicitly include any more specific reference points for preventing violations.

The general nondiscrimination principles dictate that an MLS cannot allocate the cost of facilities (or staff time) used for other purposes exclusively or disproportionately to the VOW feed. For example, if the MLS uses the same server to provide an IDX feed and/or a feed to Realtor.com that it uses to provide the VOW feed, the MLS cannot treat the entire cost of the server as a "reasonably estimated actual cost" of providing the VOW feed. Similarly, the MLS cannot inflate the purported cost of providing the VOW feed by purchasing unnecessary equipment or engaging in other inefficient practices.

C. *MLSs are not permitted to discriminate against online brokers and their customers by prohibiting an online broker from downloading and receiving all listings, including "do not display" listings, where the online broker is able and willing to comply with an instruction not to display "do not display" listings.*

Appendix A of the Proposed Final Judgment provides a form a seller can use to (a) prevent his or her property from being displayed on the internet or (b)

[13] 73 Fed. Reg. at 47618.
[14] For example, the MLS in Denver charges $1,000 per month (plus a $5,000 set up fee) for the feed made available to populate VOWs.

prevent the address of his or her property to be displayed on the internet. All brokers, including online brokers, are permitted to provide these listings to their customers via e-mail, fax or other delivery mechanisms. Section II (5)(A).

Under existing practice, MLSs that provide a VOW feed include all listings in the VOW feed along with instructions as to which listings cannot be displayed. This practice is both nondiscriminatory and efficient. It is nondiscriminatory because the MLS includes all listings on the data feeds made available to traditional brokers. The current practice is efficient because the online broker (a) can display typical unrestricted listings on its website, (b) receives notice of ***all*** listing information of interest to its buyers and (c) can inexpensively deliver "do not display" listings to home buyers electronically, via e-mail, as permitted under the settlement.

Section III(2) of the Modified VOW Policy confirms an online broker's right to download and receive information about all listings. Thus, Section III(2) confirms an online broker's right to receive "do not display" listings.

One passage in the Modified VOW Policy, read in isolation, could conceivably be read to authorize a MLS to withhold "do not display" listings from online brokers even if the online broker is willing and able to comply with an instruction not to display such listings.[15] Section III(4) states:

> If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data included in the feed described in paragraph 2 except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the internet.

It is our understanding that Section III(4) merely contemplates that there may be online brokers who would prefer a feed that does not include "do not display" listings so they are not burdened with complying with "do not display" instructions. Thus, Section III(4) does not purport to undermine the nondiscrimination principles set forth in Section III(2). To avoid any misunderstanding, however, the Department should confirm that as long as an online broker is ready and willing to comply with "do not display" instructions, the online broker is entitled to download and receive "do not display" listings.

[15] If a MLS were to withhold "do not display" listings from an online broker ready and willing to comply with "do not display" instructions, the online broker would not be able to use the VOW feed to learn about new "do not display" listings or to distribute e-mails about those listings. In fact, practically speaking, the online broker would not be able to use ***any*** method to inform its customers about "do not display" listings.

D. *MLSs are not permitted to discriminate against online brokers and their customers by prohibiting home buyers from sharing (via e-mail, fax or other means of electronic communication) listings they see on a VOW with their friends, family members, financial advisors, lenders or other persons assisting the buyer in connection with the purchase of a home.*

Home buyers look to family members, friends, financial advisors and lenders for advice and support regarding their decision to purchase a home. Accordingly, whether they are customers of traditional or online brokers, home buyers routinely share individual listings, either in-person or electronically (e.g., by e-mail). They may also save individual listings, either by keeping paper copies of listings or electronically. *See* Competitive Impact Statement, 73 Fed. Reg. at 47626-27 ("Many VOW brokers also allow customers to maintain a personal portfolio of properties they are monitoring, with the VOWs automatically updating those listings as their price or status changes".)

Unfortunately, portions of the Modified VOW Rules that are intended to prohibit persons from misusing access to steal and/or sell the MLS database for commercial gain are written so broadly that a MLS seeking to restrain competition from online brokers could argue that the rules prevent a home buyer shopping on a VOW from e-mailing an individual listing to his mother or to the lender arranging his financing. *See*, e.g., Proposed Final Judgment, Exhibit A, II(2)(c)(iv), 73 Fed. Reg. at 47620 (Home buyer required to agree that he or she "will not copy, redistribute, or retransmit any of the data or information provided"). The Department should confirm that, notwithstanding the breadth of such language, customers of online brokers are free to share listings electronically with friends, family members, financial advisors, lenders or other persons assisting the buyer in connection with the purchase of a home.

E. *MLSs are not permitted to discriminate against online brokers and their customers by creating and enforcing "knowledge" requirements for online brokers that are not evenhandedly applied to and enforced upon traditional brokers.*

The Modified VOW Rules create a vague requirement that a Participant in a MLS (or a non-principal broker or sales licensee licensed with the Participant) "must be willing and able to respond knowledgeably to inquiries from Registrants about properties within the market area served by that Participant and displayed on the VOW."[16] The Modified VOW Rules do not explain what it means to be "able to respond knowledgeably." Furthermore, the rules do not provide any mechanism to ensure that the standard applied to online brokers is evenhandedly applied to and enforced upon traditional brokers.

[16] Fed. Reg. at 47620-21.

The reality is that any broker's knowledge about properties in a MLS will vary according to the location of a property. MLSs cover large areas that may include numerous counties, cities, neighborhoods and blocks. Some MLSs include more than 100,000 listings at any given time. No broker, traditional or online, is going to be an expert regarding every MLS listing in every community.

In commenting on the settlement, the General Counsel of the National Association of Realtors® recently suggested that this requirement must be read in light of the reality that a broker cannot be expected to have the answer to every question:

> I would think that brokers and associates know when they get inquiries from consumers, you can't always be expected to have the answer right there. In many instances, you may know the answer but in some instances, you may actually have to say, "I'll find that information out and I'll get back to you." That would be responding knowledgeably.

Laurene K. Janik, General Counsel, National Association of Realtors®, Webinar, June 16, 2008.

Unfortunately, the Modified VOW Rules themselves do not elaborate on the phrase "able to respond knowledgeably" so as to ensure a construction grounded in the reality of how brokers respond to inquiries from customers. In light of the history of MLS discrimination against online brokers, there is a danger that a MLS could (a) exploit the vagueness of this language to enforce a stringent knowledge requirement that does not reflect how any brokers actually do business, and (b) selectively enforce that requirement exclusively against online brokers. In so doing, the MLS could drive online brokers out of the market under the guise of "merely enforcing" the Modified VOW Rules.

The Department should guard against the dangers posed by this vague requirement by confirming that it must be read in light of the general nondiscrimination principles, which prevent MLSs from creating and enforcing "knowledge" requirements for online brokers that are not evenhandedly applied to and enforced upon traditional brokers.

F. *MLSs are not permitted to discriminate against online brokers and their customers by imposing limits on the number of listings a Registrant may view on a VOW that are "unreasonable" because they subject online brokers to an arbitrary disadvantage as compared to other websites displaying the same MLS listings.*

The Modified VOW Policy provides that an MLS may limit the number of listings that Registrants may view, retrieve or download from a VOW in response to an inquiry to a "reasonable" number.[17] However, the Modified VOW Policy does not define "reasonable" or provide guidance as to how to evaluate the reasonableness of any particular limitation.

This vagueness creates a very real danger that a MLS could use an arbitrary limitation on the number of listings that can be viewed or retrieved on a VOW to discourage consumers from using the VOW. For example, MLSs frequently display listings on their own public websites where they seek to attract prospective home buyers who might otherwise look for listings on a VOW. The MLS can "load the deck" in its favor by permitting consumers to view an unlimited number of listings on its own website while imposing the minimum 100 listing limit[18] on VOWs. Such a disparity naturally drives the consumer to the website where the consumer can view the greater number of listings.

Although the Modified VOW Policy does include a modest "equivalent requirement" condition on MLSs that impose such a numerical limitation, that condition is ineffectual because it applies only to requirements "imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms."[19] Consequently, this condition would not prevent MLSs from exempting MLS websites, IDX sites and other non-brokerage websites from limitations imposed on VOWs, thereby focusing the anticompetitive harm on VOWs alone.[20]

III. The Department's Confirmation That These Anticompetitive Practices Are Prohibited Is Necessary to Establish that the Settlement Is "In the Public Interest"

The Clayton Act, as amended by the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). The statute directs the court to consider, among other things, whether the terms of the final judgment are ambiguous:

1. the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief

[17] *Id.* at 47622. The Modified VOW Policy also provides that "in no event may the limit be fewer than 100 listings or 5% of the listings in the MLS, whichever is less." *Id.* at 47623.
[18] *See* note 17.
[19] *Id.* at 47622.
[20] Furthermore, notwithstanding the "equivalent requirement" condition, VOWs would likely be alone in their opposition to such limitations because traditional bricks-and-mortar brokers, who are theoretically subject to the same rule, do not rely on the online display of listings to consumers. Thus, such traditional brokers would not care about a rule limiting the number of listings that can be viewed to the 100 listing minimum.

> sought, anticipated effects of alternative remedies actually considered, ***whether its terms are ambiguous***, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> 2. the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A), (B) (emphasis added).

The portion of the Tunney Act directing Courts to consider whether the terms of a settlement are ambiguous was added by legislation enacted in 2004 to strengthen the role of the Courts in scrutinizing consent decrees negotiated by the Department of Justice. The amendments accomplished this objective by: (1) including a clear statement of congressional findings and purposes expressly overruling a lax standard of review used in recent D.C. Circuit decisions;[21] (2) requiring, rather than permitting, judicial review of a list of enumerated factors to determine whether a consent decree is in the public interest;[22] and (3) enhancing the list of factors that the court currently had to review to include, among other things, whether the terms of the settlement are ambiguous.[23]

The portion of the legislation directing courts to consider whether the terms of a settlement are ambiguous reflects a recognition that ambiguity can undermine the effectiveness of a settlement by creating loopholes that open the door to a resumption of anticompetitive practices. As one Senator explained, "[w]hile complete precision when dealing with future conduct may be impossible to achieve, an overly ambiguous decree is incapable of being enforced and is therefore ineffective."[24]

The Department commenced this lawsuit to challenge NAR and MLS policies that discriminate against online brokers and to end the harm caused by anticompetitive practices implemented under those policies. A consent judgment is not "in the public interest" if it includes ambiguities that open the door for a continuation of the anticompetitive practices this lawsuit was intended to stop. Consequently, under the "public interest" standard, it is essential that the Department confirm that the anticompetitive practices identified above are prohibited.

---

[21] The congressional findings expressly state that for a court to limit its review of antitrust consent judgments to the lesser standard of determining whether entry of the consent judgments would make a "mockery of the judicial function" misconstrues the meaning and intent in enacting the Tunney Act. 150 Cong. Rec. S3610, S3618.

[22] The 2004 amendment modified the law by stating that, in determining whether the consent judgment was in the public interest, the court "shall," instead of "may," look at a number of enumerated factors bearing on the competitive impact of the settlement. *Id.*

[23] *Id.*

[24] *Id.* at S3618 (Remarks of Senator Kohl).

Respectfully submitted,

LEONARD, STREET AND DEINARD

William L. Greene
Counsel for Home Buyers Marketing II, Inc.

WLG:krj

naeba
NATIONAL ASSOCIATION OF EXCLUSIVE BUYER AGENTS

June 27, 2008

John R. Read, Chief
Litigation III Section - Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW
Washington, DC 20530

Re: United States of America v. National Association of Realtors

Comment on Proposed Final Judgment

Dear Mr. Read,

I am writing to you as President of the National Association of Exclusive Buyer Agents (NAEBA), a national trade association of real estate licensees who represent buyers only and who never list property for sale or represent sellers. While I commend you for your efforts on behalf of the nation's consumers to address the some of the anti-competitive practices in the real estate marketplace today, I am compelled to comment on two very critical items contained in the Proposed Final Judgment which we have identified as being potentially damaging to both consumers and competition in the real estate industry."

We are deeply concerned by the definition of "MLS Participant" as contained in Exhibit B to the Proposed Final Judgment. In our opinion, this entire case shall have been for naught if this definition is incorporated in the Final Judgment.

As buyers' brokers, we offer consumers who are interested in purchasing a home a choice to be represented by an agent who owes them the fiduciary duties of obedience, loyalty, confidentiality, disclosure, accounting and reasonable care, rather than by a salesperson who represents the seller. We also offer consumers the ability to negotiate their own compensation agreement with us, their buyer broker, rather than simply accepting whatever commission happens to be offered to a cooperating broker through the MLS.

Our understanding is that the definition of MLS Participant as proposed in Exhibit B to the final judgment includes broker members who actually "offer or accept cooperation and compensation". We believe that NAR's previous definition of MLS Participant required only

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that a broker member be "capable of offering and accepting cooperation and compensation". We seriously question the rationale underlying this proposed change. As proposed, we believe that an attempt could be made to force buyer agents to accept the compensation offered by other MLS Participants if they wish to display other participants' listings on their VOWs. We would consider any such attempt to be anti-competitive, anti-consumer, and not in the public interest. Such action would also constitute interference with the existing contractual relationships we have with our buying clients.

In some MLS systems across the country, MLS participants have offered cooperating buyer brokers 0% as compensation. Under the definition of MLS Participant as contained in Exhibit B, it could be argued that a buyer agent must accept nothing as compensation, or whatever other arbitrary amount agreed to by a seller and their broker, in order to display MLS listings on their VOW. Such outrageous and anti-competitive behavior should be proscribed, which the current definition of MLS Participant as contained in Exhibit B does not specifically do.

Only by leveling the playing field and allowing buyers to hire their own agents to represent them according to their own terms, will the United States real estate market be truly competitive. To allow listing brokers to continue to dictate commission terms to buyer brokers under threat of anti-competitive sanctions is to continue to perpetuate the anachronistic MLS policies that have stifled innovation and competition in the United States real estate market. We would strongly urge the United States to insist upon a definition of an MLS Participant that would include MLS broker members who are capable of either offering and/or accepting cooperation or compensation.

In Exhibit A we are also extremely concerned about the potential limitation an MLS system may place on our VOWs' individual property listing displays that would require the listing firms' and individual listing agents' names as part of that display. As independent businesses, our members are very concerned that such a requirement undermines the value and benefit of having a VOW. If we must also essentially advertise the competition in the process of promoting our services to our customers and clients than the purpose of this case to break down the barriers to innovation and competition has not been served. We believe such a policy to be anti-competitive, anti-consumer, and not in the public interest. We would strongly urge the United States to insist that a potential requirement that individual property listing displays could require the listing firms' and individual listing agents' names as part of that display be stricken from this Settlement.

Thank you for your consideration and for your efforts to increase competition in the United States real estate market.

Very truly yours,

Barry L. Nystedt

Barry L. Nystedt
2008 President, NAEBA

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Of Northern Michigan, LLC™

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Phone: (231) 347-9600 - Fax: (231) 347-3841
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June 9, 2008

John R. Read, Chief
Litigation III Section - Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW
Washington, DC 20530

Re: United States of America v. National Association of Realtors
Comment of Proposed Final Judgment

Dear Mr. Read,

As both a member of the National Association of Realtors (NAR) and the National Association of Exclusive Buyer Agents (NAEBA)(real estate licensees who represent buyers only and who never list property for sale or represent sellers), I am writing to comment on the Proposed Final Judgment which has been circulated for comment.

I am deeply concerned by the definition of "MLS Participant" as contained in Exhibit B to the Proposed Final Judgment. In my opinion, this entire case shall have been for naught if this definition is incorporated in the Final Judgment.

As a buyer's broker, I offer consumers who are interested in purchasing a home a choice to be represented by an agent who owes them the fiduciary duties of obedience, loyalty, confidentiality, accounting and reasonable care, rather than by a salesperson who represents the seller. I also offer consumers the ability to negotiate their own compensation agreement with me, their buyer broker, rather than simply accepting whatever commission happens to be offered to a cooperating buyer broker through the MLS.

In my MLS, there are MLS participants who offer cooperating buyer brokers 0% as compensation. Under the definition of MLS Participant as contained in Exhibit B, can I be required to accept nothing as compensation, or whatever other arbitrary amount agreed to by a seller and their broker, in order to display MLS listings on my VOW? Is it in the public interest for the United States to be a party to such outrageous and/or anti-competitive behavior by allowing the current definition of MLS Participant as contained in Exhibit B to stand?

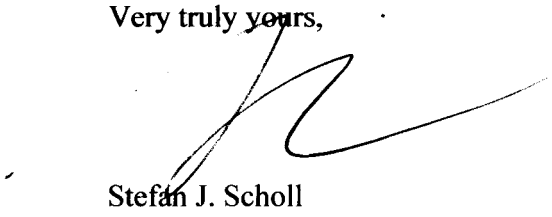
My understanding is that the definition of MLS Participant as proposed in Exhibit B to the final judgment includes broker members who actually "offer or accept cooperation and compensation". I believe that NAR's previous definition of MLS Participant required only that a

broker member be "capable of offering and accepting cooperation and compensation". I seriously question the rationale underlying this proposed change. As proposed, I believe that I can be forced to accept the compensation offered by other MLS Participants if I wish to display other participants listings on my VOW. I believe such a policy to be anti-competitive, anti-consumer, and not in the public interest.

Only by leveling the playing field, and allowing buyers to hire their own agents to represent them according to their own terms, will the United States real estate market be truly competitive. To allow listing brokers to continue to dictate commission terms to buyer brokers under threat of anti-competitive sanctions is to continue to perpetuate the anachronistic MLS policies which have stifled innovation and competition in the United States real estate market. I would strongly urge the United States to insist upon a definition of MLS Participant which would include MLS broker members who are capable of either offering and/or accepting cooperation or compensation.

Thank you for your consideration and for your efforts to increase competition in the United States real estate market.

Very truly yours,



Stefan J. Scholl

August 4, 2008

John R. Read
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW #4000
Washington DC 20530

We OBJECT to the Proposed Final Judgment of United States (DOJ) v. National Association of Realtors® (NAR) as written. Specifically, Paragraph 3 is not only irrelevant but also contrary to the rest of the document, and should be stricken.

MLS4owners.com is a licensed real estate brokerage in the state of Washington and a member of the National Association of REALTORS®. Our company is a flat-fee, limited-service brokerage using an exclusive agency agreement in which our home selling customers set the level of compensation they're willing to pay a selling broker/agent. We have an eight-year track record of success with customers (more than $800 million in sales), multiple-listing services (no disciplinary actions since inception despite serving more than 4,000 Washington families in five different multiple listing services), Realtor® Associations (no disciplinary actions) and the Department of Licensing (no disciplinary actions and two clean audits). Within the "non-traditional" real estate industry, we have served more homesellers than any brokerage in the state of Washington. Our broker is a member of the Northwest Multiple Listing Service By-Laws Committee and US Congressman Adam Smith's Technology Advisory Council, and served on the Washington State Department of Licensing Task Force that recently reviewed and suggested updates to the real estate licensing law.

Paragraph 3 of the Proposed Final Judgment reads, "Whereas, the United States does not allege that Defendant's Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws." To the contrary, the IDX policy and the VOW policy are two sides of the same coin. This document explains in detail our belief that the Final Judgment would be significantly weakened by the inclusion of paragraph 3, and has already been violated by NAR's recent amendment of Section 18.2.4 of the NAR MLS Policy Handbook.

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1. **IDX Policy not the subject of study.** To our knowledge, the IDX Policy was NOT the subject of the DOJ's pre-complaint investigation, complaint, amended complaint or discovery. There is no basis for Paragraph 3's inclusion.

2. **Paragraph not Necessary to Effectuate Settlement**. Paragraph 3 is not necessary to effectuate the parties' settlement relating to VOWs. Why would an affirmation of the IDX policy be included at all, much less placed at the beginning of the judgment?

3. **Paragraph 3 may not be true.** To our knowledge, DOJ has not recently investigated the IDX policy. How can DOJ essentially affirm a detailed policy without an investigation?

4. **DOJ's Announced Intentions are in Conflict with NAR's Intentions.** According to the DOJ press release regarding the settlement, "NAR will enact a new policy that guarantees that Internet-based brokerage companies will not be treated differently than traditional brokers." Further, Point 1 of the Amended Complaint states, **"The United States brings this action to enjoin the defendant a national association of real estate brokers—from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules."** We believe, based on their words and deeds, that NAR KNOWS that the Proposed Final Judgment does not meet these objectives. This document clearly explains the problem and proposed resolution.

5. **VOW Policy Harmed Buyers.** The crux of the VOW dispute was whether multiple listing services (MLSs) could have policies allowing member brokers to withhold their real estate listings from display on the websites of specifically selected competing brokers. DOJ contended that "traditional" brokers have tried and would try to exclude non-traditional brokers from the marketplace by restricting them from displaying the entire available inventory. This hinders those brokers from attracting buyers to whom they could provide services in the **PURCHASE** of residential real estate. For the purposes of this discussion,

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licensees who provide services to buyers are known as “selling brokers”, and those who provide services to sellers are known as “listing brokers”.

6. **IDX Policy Will Harm Sellers.** The IDX policy covers, among other things, whether brokers can selectively exclude listings from their own websites based on which brokerage lists the property. By discriminatorily excluding the listings of another broker from their websites, traditional brokers hinder other brokers from attracting property owners to whom they could provide services in the **SALE** of their real estate.

   According to a 2006 NAR Study, “listing on the Internet” is the #1 marketing tool used by its members. The same study says that 87% of buyers who use the Internet to search for homes also use a real estate agent in their purchase. As stated in the Amended Complaint, “By virtue of industry-wide participation and control over a critically important input, the MLS (a joint venture of competing brokers) has market power in almost every relevant market.” By denying non-traditional brokerages equal access to Internet advertising , NAR-affiliated MLSs can use that market power to stunt the growth of those brokerages and harm the sellers who wish to use them.

7. **How IDX Works.** Historically, brokers have had a choice about whether to display the listings of other brokers on their websites. Brokers typically displayed either all of the relevant listings of other brokers, or none of the listings of other brokers. The relevancy of a listing was based on its physical qualities such as whether it was in the broker’s geographic market, or was for the type of property in which the broker specialized (such as waterfront, condominiums, multi-family or other physical characteristics). This business decision was also based on a number of issues including whether the broker wanted to emphasize his or her own listings (in which case only those listings would be displayed), or whether the broker wanted to attract as many potential buyer clients as possible (in which case all of the listings of all the brokers were displayed in hopes of being selected to represent the buyer in their purchase).

8. **NAR Research On How IDX Affects Buyers and Sellers.** At least 80% of home buyers use the Internet in their home searches. According to the 2006 National Association of Realtors® Profile of Home Buyers and Sellers (Page 34, Exhibit 3-4) the figure was 80%, up from 71% in 2003. Based on continuing growth in the use of the Internet, one would expect that today more than 80% of home buyers use the Internet in their home searches. The vast majority of those buyers hire an NAR member to assist with the purchase. Further, the NAR Study (Page 38, Exhibit 3-11) states that 24% of buyers found the home they purchased on the Internet, up from 2% in 1997. Clearly, any home that is excluded from Internet display is at a disadvantage, based on NAR’s own research. When sellers are choosing their listing brokerage, they want to know that their home will be exposed through all methods available to other sellers.

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They will be unlikely to choose a broker whose listings are blocked from Internet display, effectively limiting their free choice.

9. **NAR's MLS Policy Handbook Section 18.2.4.** With MLS Policy Handbook Section 18.2.4 (amended November 2006, after DOJ filed its compliant), NAR seeks to enable MLS members to deny the display of listings based on the "type of listing (e.g. exclusive right-to-sell, or exclusive agency), or the level of service being provided by the listing firm." This is in conflict with Paragraph 1 of DOJ's Amended Complaint, which says the United States brings this action to enjoin the defendant "from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other anticompetitive rules."

10. **Difference between Exclusive Right-To-Sell and Exclusive Agency.** A typical "Exclusive Right to Sell" Agreement says that the listing broker gets paid a commission regardless of how the home sells. In an "Exclusive Agency" agreement, the seller lists with a brokerage and also retains the right to sell the property commission-free to an unrepresented buyer. Both of these types of agreements are in wide use. Our customers in the state of Washington who use Exclusive Agency have closed more than $800 million in sales. More than 300 different real estate brokerages have represented buyers in these sales, and they have earned at least $15 million in commissions. The former president of the Northwest Multiple Listing Service (NWMLS – one of the largest multiple listing services in the country, it is not REALTOR®-owned) has said, "Anyone who believes that the Exclusive Agency agreement affects the marketability of a listing has a fundamental misunderstanding of the form and its role in current real estate practice."

11. **What is "Level of Service?"** The "level of service provided by the listing firm" varies for every agent in every brokerage in the country, yet Section 18.2.4 assumes there is no difference within firms. There are many theories and practices in the use of open houses, signage, keyboxes, newspaper advertising, internet promotion, hours of service, and the nature and frequency of communication. This section of the IDX policy is clearly not intended to block the listings of agents within major traditional brokerages who offer a menu of services or have a variety of property marketing strategies. Instead, it will be used to block the listings of non-traditional brokerages such as MLS4owners.com.

12. **NAR's Response to Complaint about Section 18.2.4.** Laurene K. Janik, General Counsel of the National Association of Realtors®, has defended 18.2.4 by saying to us that brokers may not want to advertise Exclusive Agency listings or other listings for which the listing broker is offering limited service because, "the broker does not want to assume the additional liability and workload that comes from completing the entire transaction with no assistance from the listing broker." This is a specious claim. While state laws may vary, in Washington the "selling licensee does not have any more duties to the seller in a

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limited service listing than in other listings where the seller is fully represented", according to NWMLS Legal Bulletin 169. Legal Bulletin 169 also states that limited service listings are lawful in Washington under the Agency Reform Act (RCW Chapter 18.86) and the rules and regulations created by the Department of Licensing. RCW 18.86.020 states that a licensee who performs real estate brokerage services for a buyer is a buyer's agent unless the licensee has entered in a written agency agreement with the seller. RCW 18.86.060 states, "a licensee may act as a dual agent only with the written consent of both parties to the transaction." Finally, the legal counsel for the Washington Association of REALTORS® (WAR) addressed this question on WAR's Legal Hotline: "If seller asks selling agent to explain the terms of the purchase agreement, is it the selling agent's job to do that?" She answered: "It is never the job of any real estate licensee to explain the terms of the purchase agreement to either party. This answer is true regardless of agency representation. To explain the terms of a purchase agreement to a party is to practice law." Buyer agents should not be attempting to provide real estate advice to sellers or to provide legal advice to any party, and in our state they cannot create dual agency without the written consent of both parties. Rather than simply recommending that its members adhere to the real estate laws of the states in which it operates, NAR has attempted through 18.2.4 to stifle competition, limit consumer choice and increase the cost of real estate services.

13. **Explanation of Proposed Final Judgment is in conflict with Section 18.2.4.** The Explanation of Proposed Final Judgment (Pages 36116-36117 of Federal Register / Vol. 73, No. 123) states, "The proposed Final Judgment also broadly prohibits NAR from adopting any other rules that impede the operation of VOWs or that discriminate against VOW brokers in the operation of their VOWs." In essence, NAR has agreed to forbid members from withholding their MLS listings from virtual office websites maintained by its members. However, Section 18.2.4 enables NAR members to selectively and broadly BAN from their websites the listings of VOW brokers if those brokers offer exclusive agency listings or a menu of services. As a result, those brokers will be damaged in their ability to attract new listings. Section 18.2.4 enables brokers to deny website display of listings based solely on the characteristics of the listing brokerage rather than the characteristics of the real estate.

14. **Modified VOW Policy is in Conflict with Section 18.2.4.** The "Policy Governing Use of MLS Data in Connection With Internet Brokerage Services Offered by MLS Participants" (Page 36110 of Federal Register / Vol. 73, No. 123, Paragraph II.5.h) states, "VOW may exclude listings from display based only on objective criteria, including, but not limited to, factors such as geography, list price, type of property, cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®". One would therefore infer that VOWs are prohibited from excluding listings from display based on vague level-of-service criteria. Yet the IDX Policy adds the type-of-listing and level-of-service restrictions, which have nothing to do with the real estate being marketed or the

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Realtor's® ability to earn a commission. This is in conflict with Paragraph IV-E of the Proposed Final Judgment, which mandates that "NAR shall not adopt, maintain, or enforce any Rule, or enter into any agreement or practice, that directly or indirectly …is inconsistent with the Modified VOW Policy."

15. **Statement of MLS Policy is Conflict with Section 18.2.4.** The Definition of MLS "Participant" (Page 36112 of Federal Register / Vol. 73, No. 123, Exhibit B – Model MLS Rules – Section 3 –Note) says, "Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law." However, Section 18.2.4 effectively limits participation based on those very factors. We and other Internet-based brokerage companies can join multiple listing services, and we satisfy all state laws, yet the IDX Policy seeks to limit our participation in the marketplace by enabling our listings to be banished from display on the websites of other MLS participants.

16. **Opt-out Policy has Proven Anticompetitive Results.** Paragraph 34 of the Amended Complaint and Section II.C.2 of the Competitive Impact Statement show what happened in markets in which NAR's member boards implemented the Initial VOW Policy. Brokers withheld their listings from VOW sites, and "in one such instance an innovative broker discontinued operation of his Web site because all of his competitor brokers had opted out, making him unable to effectively serve his customers through operation of his site." Paragraph 7 further states the "working group that formulated defendant's Initial VOW Policy understood that the opt-out right was fundamentally anticompetitive and harmful to consumers." If NAR knew the VOW Policy was fundamentally anti-competitive, why did they respond to DOJ's Antitrust Complaint with a replacement policy that is just as anticompetitive?

17. **NAR Does Not Intend to Change its Practices.** Rather than pledging to clean up its act in the wake of settlement, NAR is claiming victory and spinning DOJ's enforcement action as pointless. In an interview with the New York Times published 28 May 2008, NAR General Counsel Laurie Janik said "This was a five-year education of the Department of Justice, unfortunately, and the real estate industry had to pay for that education." She also stated that settlement would have no real impact on home buyers or sellers. "I don't think they'll see anything different," she said. "This lawsuit never had anything to do with commission rates, or discount brokerages." On 28 May 2008, NAR issued through its website Realtor.org an announcement of its "favorable settlement with the U.S. Department of Justice", noting that "the revised policy comes at a time when brokers appear to be moving away from the VOW business model. "The response to VOWs hasn't been great because consumers can find sites throughout the Internet on which to gather information without having to register their name and contact information," says Mark Lesswing, NAR's chief technology officer." The chair of NAR's Professional Standards Committee says, "People are losing their homes, and here we've been dealing with a lawsuit about a technology the

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industry had already moved past." (REALTOR® Magazine, July 2008, Page 10) Exactly! Consumers use broker IDX sites, and NAR seeks to simply transfer its anticompetitive policies from VOW to IDX. The affirmation of the IDX Policy in the Proposed Final Judgment undermines everything DOJ has worked for since 2003.

18. **Local Realtor® Associations Bound by NAR MLS Policy.** Some MLSs appear to be relying on NAR advice to delay adoption of new IDX and VOW rules until the DOJ matter has been settled. We are members of 4 Realtor®-owned MLSs. One of these, the Tri-City Association of Realtors® (TCAR), adopted Section 18.2.4. When we expressed our concern to the TCAR, they referred the matter to NAR. General Counsel Janik wrote to us that she was responding because the Tri-City Association was relying on a policy developed by NAR. TCAR's Executive VP told us there was nothing they could change at the local level because they were bound by the NAR MLS Policy handbook. Tri-City MLS told us they will lose their Errors and Omissions Insurance if they deviate from the NAR handbook. The limitations of 18.2.4 are not designed to reasonably protect the integrity of TCAR or NAT; nor are they narrowly tailored to accomplish any legitimate ends. These limitations serve no purpose except to drive certain competitors from the market. The only thing these limitations do is empower members to wrongfully conspire to discriminate against their competitors, which in our opinion is a clear violation of the Sherman Antitrust Act.

19. **Effect of Implementation of NAR Policy.** We understand that this case is not about whether individual market actors are restrained but instead whether competition is restrained (Page 36113 of Federal Register / Vol. 73, No. 123, Competitive Impact Statement-I-Motion to Dismiss). We see how competition is restrained, because we experience it every day. Under implementation of 18.2.4, we would be precluded from the market by any member(s) who didn't like us personally and/or our business model. Any broker doing so in the Tri-City real estate market or any other would be doing so not for any legitimate reason of their customers or clients; but instead would be doing so for the illegal purpose of limiting their competition.

20. **NAR-controlled MLS v. Broker-controlled MLS.** Of the five MLSs in which we participate, the largest by far is the Northwest Multiple Listing Service (NWMLS), which is owned by the member brokers instead of the local Realtor® associations. NWMLS serves most of Washington including the Greater Seattle area, and it is not bound by NAR's anticompetitive mandates. The NWMLS is committed to equal access for all brokers who comply with state licensing law, without discrimination against any legal business model. As a result, competition is thriving, consumers have many choices, and western Washington has become the birthplace and incubator of a variety of non-traditional business models. There are also many licensees offering outstanding traditional real estate services.

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21. **Why Would An NAR Member Object To A Pro-NAR Settlement?**
We support most of what NAR does, particularly in member education and its advocacy on housing issues. However, we disagree with NAR's efforts to suppress competition through the pattern of behavior described in this document and the Amended Complaint. We believe in the value of full service representation for those who want it (both buyers and sellers). We also believe consumers should have choices about the services they want and the nature of the fees they will pay, and there are many good options available. NAR MLS Policy Handbook Section 18.2.4 is an effort to block those options, and American consumers will be hurt if the Proposed Final Judgment affirmation of the IDX Policy is allowed to stand. Section 18.2.4 seeks to cripple the marketing efforts of non-traditional real estate brokers to attract SELLERS, just as the original VOW Policy sought to cripple the efforts of non-traditional real estate brokers to attract BUYERS. We have attempted to work this issue inside the organization at the national and regional levels, and have been rebuffed. If this issue is allowed to slide now, it will continue to be battled for years to come. This is a cat and mouse game at taxpayer expense and it is time for it to stop.

In summary, NAR MLS Policy Handbook Section 18.2.4 is just one reason the objectionable sentence of Paragraph 3 should not be included in the final judgment. The Paragraph is not necessary and is counter-productive to the VOW Policy settlement. Paragraph IV-E of the Proposed Final Judgment mandates that "NAR shall not adopt, maintain, or enforce any Rule, or enter into any agreement or practice, that directly or indirectly …is inconsistent with the Modified VOW Policy."

We urge the Court not to adopt paragraph 3 of the Proposed Settlement and to support the Department of Justice's effort to prevent NAR from using the aggregated power of the MLS to discriminate against a particular method of competition.

Respectfully submitted,

MLS4owners.com, Inc.
Christopher C Nye, President, REALTOR® - Email Chris@MLS4owners.com
Kenneth R Whitney, General Manager, REALTOR® - Email Ken@MLS4owners.com

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June 23, 2008

John R. Read
Chief, Litigation III Section,
Antitrust Division, U.S.
Department of Justice
450 Fifth Street, NW,
Washington, DC 20530

Certified Mail

Ref: Comments Regarding:
JUSTICE DEPARTMENT ANNOUNCES SETTLEMENT WITH THE NATIONAL ASSOCIATION OF REALTORS

Dear Mr. Read:

I have review some of the seventy three (73) pages of the COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY, hereinafter called, Report .

My belief is that on page six (6) of the Report it states" Brokers and agents (hereinafter," brokers") is misleading to the general public and therefore give the general public a false sense of security.

That would be like saying (Lawyers and paria a legal, hereinafter called attorneys).

Regarding "listings"; "Whose listing is it? All listings belong to the designated broker. (Remember above the report said Brokers and agents (hereinafter, "brokers")) The listings are not the affiliated licensee's (agents) listings! According to the Nebraska law and probably other States the listings remain with the designated Broker even though the affiliated licensee may transfer away from the designated broker.

When the Consumer hires a person to sell their property they call a Company Sales person which in most cases is a "licensed person with a state" who gathers listings for a Company Broker known as a designated Company Broker. This the Consumer is not aware of as to who controls the listing after the salesperson (agent) signs for the Company. The above is much the same for the Buyer's or Transaction (agent) - not Broker.

The NAR with its' MLS does lock out all new start up real estate companies from providing low cost services to the general public by not making available access keys to show an MLS houses for sale - unless that or all startups join the NAR and MLS first.

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A private survey was conducted by me in the late 1980's and it revealed that the general consumer or public did not know that "All Licensees are not Realtors but that all Realtors are Licensees".

The NAR with its MLS has created an organizational monopoly to control the Real Estate Industry of selling home.

When certain Licensee cause harm to the general public or consumer the general public or consumer is never aware of the Companies practices that lead the Licensee to conduct themselves as they have. Most states licensing laws shelter Companies and their designated Brokers from the (agent) Licensee who failed to provide competitive services to the public or individual consumer.

I have attached the Nebraska Real Estate commission's Comments for review dated Summer 2008.

Should you have any questions I can be contacted at the above address and number.

Respectfully yours,

IOC® Realty Specialist Inc.

Bernard M. Tompkins
Broker

BT:jm:

cc: To file

Attachment 1 for IOC Reply Letter

Nebraska Real Estate Commission

COMMISSION COMMENT

Summer 2008

What Can I Do . . . ?

[Editor's note: In the last issue, Spring 2008, of the Commission Comment *an article entitled "License Transfer From Broker to Broker Process" defined when a transfer is complete. This information is pertinent to the following article. Past issues of the* Commission Comment *may be accessed on our website homepage at: www.nrec.state.ne.us.]*

Due to a recent disciplinary hearing and the fact that we receive inquires on this issue throughout the year, the Commission determined it would be an opportune time to remind real estate licensees of the appropriate manner in which to handle listings and the listing process at, or about, the time of transferring a license from one broker to another.

Whose listing is it? All listings belong to the designated broker. They are not the affiliated licensee's listing! By law, the listings remain with the designated broker, even though the affiliated licensee transfers away from the designated broker, unless the seller and the designated broker terminate the listing agreement by mutual agreement.

Commission Meeting Schedule

June 26-27 . . . . . Lincoln
August 28-29 . . . . . Lincoln
September 26 . . . . . Lincoln

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Affiliated licensees, when confronted with this situation, often indicate that the sellers want them to continue to handle the sale of the property and ask what they can do. There are two provisions of the License Act which affect what the affiliated licensee can do.

The following two sections of the License Act set out actions, which if taken by a licensee, would be violations of the License Act and could result in disciplinary action:

- NEB. REV. STAT. § 81-885.24 (14) – Negotiating a sale, exchange, listing, or lease of real estate directly with an owner or lessor if he or she knows that such owner has a written outstanding listing contract in connection with such property granting an exclusive agency or an exclusive right to sell to another broker or negotiating directly with an owner to withdraw from or break such a listing contract for the purpose of substituting, in lieu thereof, a new listing contract; and
- NEB. REV. STAT. § 81-885.24 (15) - Discussing or soliciting a discussion of, with an owner of a property which is exclusively listed with another broker, the terms upon which the broker would accept a future listing upon the expiration of the present listing unless the owner initiates the discussion.

Licensees ask, "Can I tell the sellers of the properties I have listed that I am transferring?" The answer is yes. But the licensee must be careful not to violate the law by trying to talk the seller into, or assisting the seller in, cancelling the listing and then listing with the licensee's new broker. Dependant on the conversation, either one, or both, of the License Act provisions set out above could be violated in attempting to assist the seller at this point in time. Do not do anything which could be construed as an attempt to get the seller to terminate the listing.

It is best to limit the discussion with the seller to the fact that you are transferring to a new broker and wish the seller well. Most, if not all, designated brokers have a policy of how a listing will be handled when the licensee servicing the listing leaves. **A licensee should confirm with his or her designated broker what the broker's policy is regarding this issue.** The transferring licensee could inform the seller of that policy. If the licensee is asked any questions regarding cancelling or "transferring" the listing with the licensee to the new broker, the licensee should refer them to the designated broker or the appropriate designee of the broker and NOTHING MORE. It is not unheard of that a transferring licensee will go beyond this advice and travel down the "slippery slope" of giving too much advice. And in so doing, breaches one, or both, of the License Act provisions set out above.

The transferring licensee should not make any assumptions. If asked if the listing can be cancelled or if the transferring licensee can take the seller with him or her, the transferring licensee should refer the seller to the designated broker or appropriate designee of the broker.

Can a licensee when he or she knows he or she will be transferring to a new broker, give potential seller-clients the option of listing with the current broker or the broker to whom the licensee is transferring? The answer is NO. The transferring licensee is still under the supervision of the current broker and all his or her allegiance is to that current broker. Any actions which could be interpreted as representing the desig-

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Nebraska Real Estate Commission

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Director's Desk

Recently, I was asked what happens when the listing agent is out-of-town and there is another affiliated licensee "covering" for the out-of-town licensee and an offer is received on the listed property? Can the "covering" licensee present the offer to the seller?

In this scenario, the designated broker's agency policy was that only the affiliated licensee acquiring the listing on behalf of the designated broker was representing the seller and all other affiliated licensees were limited buyer's agents on the property. This designated broker was using the appointment authority set forth in the Agency Relationships statute, specifically Neb. Rev. Stat. § 76-2427.

The broker, in the situation described, has some options. The designated broker could act as a limited seller's agent, and present the offer. The designated broker could appoint the "covering" licensee as a limited seller's agent and have the "covering" licensee present the offer. The designated broker could also appoint any other affiliated licensee to be a limited seller's agent and present the offer. Appropriate agency disclosures would need to be made to the seller dependent on the decision made.

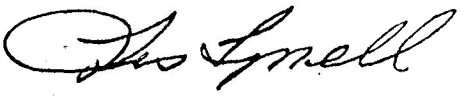
Whichever licensee becomes the limited seller's agent and presents the offer, that licensee will remain a limited seller's agent for the duration of the listing. If, during the period of time the property remains listed with the designated broker, a buyer, who the "appointed" licensee represents as a limited buyer's agent, becomes interested in the property, the "appointed" licensee would become a limited dual agent and would need to make all applicable disclosures and act in the appropriate manner.

FORMS FORMAT CHANGES

In the "Ask the Commission" session at the recent Nebraska Realtors Association meeting, a licensee asked if we would be able to put the forms that were available to download from the Nebraska Real Estate Commission's website into a PDF format rather than the html format in which they appeared. One benefit of having the forms in a PDF format would be that the pages could be viewed as they are laid out for printing. Another benefit would be that the forms could be viewed and printed by virtually anyone, regardless of software or operating system used on their computer. I would like to report, as a result of that request, all downloadable forms on the Commission's website are now in PDF format. The forms require a PDF viewer such as Adobe Acrobat Reader. The Acrobat Reader software can be downloaded for free from Adobe's website at www.adobe.com/acrobat. You can also access Adobe Acrobat Reader through a link which is available on the homepage of the Nebraska Real Estate Commission's website at www.nrec.state.ne.us.

NEW E-MAIL ADDRESSES

Beginning June 13, 2008, Commission staff will have new e-mail addresses. The new e-mail addresses are reflected in the Communications Guide on page 3. While the old e-mail addresses will continue to be functional for some time, we encourage you to make note of these new addresses and start using them today!



Meet the Real Estate Commission Staff

The Real Estate Commission Staff is here to serve the public and the licensee population. It is our goal to be helpful and forthright in a courteous and professional manner. We hope that when you contact our office, you always receive useful, accurate information and/or are referred to the proper authority.

Following is a communication resource to assist you when contacting our office. If the indicated person is unavailable to take your call, please share the purpose for the call and your call will be routed to someone else who can help you.

We take pride in having a skilled staff, if you have comments or suggestions as to how we may better serve you, please contact our office.

Communications Guide

Ask for person indicated if you have questions in the following areas.

Commission Meeting Information . . . . . *Monica Rut*
monica.rut@nebraska.gov

Complaint Procedures. . . . . *Terry Mayrose*
terry.mayrose@nebraska.gov

Continuing Education History or Inquiries . . . . . *Melanie Patrick-Heather*
melanie.patrick-heather@nebraska.gov

Curriculum Design (Education & Instructor Approval) . . . . . *Teresa Hoffman*
teresa.hoffman@nebraska.gov

Errors and Omissions Insurance Inquiries . . . . . *Teresa Hoffman*
teresa.hoffman@nebraska.gov

Financial Officer . . . . . *Rebecca Hallgren*
rebecca.hallgren@nebraska.gov

License Applications Packet Requests. . . . . *General Staff*

License Applications Process. . . . . *Marilyn Masters*
marilyn.masters@nebraska.gov

Licensing and Education Requirements. . . . . *Teresa Hoffman*
teresa.hoffman@nebraska.gov

New Licenses in Process . . . . . *Marilyn Masters*
marilyn.masters@nebraska.gov

Specialized Registrations . . . . . *Monica Rut*
monica.rut@nebraska.gov

Transfer of License . . . . . *Tawny Snider*
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Trust Account Matters . . . . . *Terry Mayrose*
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Disciplinary Actions Taken by the Real Estate Commission

(Does Not Include Cases on Appeal)

2007-030 James L. Murphy vs Jeffrey Nelson Searcy, Salesperson and Mary C. Searcy, Salesperson. Stipulation and Consent Order. ***Jeffrey Nelson Searcy:*** License Censured; plus an additional six (6) hours of continuing education with three (3) hours in the area of license law and three (3) hours in the area of agency to be completed by September 3, 2008. [Violated Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence to act as a salesperson because he allowed Mary C. Searcy to participate in the pre-listing discussion during which time he failed to disclose to Murphy that Mary C. Searcy and other members of the "Searcy Team" would not be acting as limited Seller's Agents and representing Murphy in the transaction but instead would be acting as limited Buyer's Agents, as Mary C. Searcy did.] ***Mary C. Searcy:*** License Censured; plus an additional six (6) hours of continuing education with three (3) hours in the are of license law and three (3) hours in the area of agency to be completed by September 3, 2008. [Violated Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence to act as a salesperson because she failed to disclose to Murphy that she and other members of the "Searcy Team" would not be limited Seller's Agents and would not be representing Murphy in the transaction, but instead would be acting as limited Buyer's Agents in the event a suitable buyer was located by her or any other "Searcy Team" member.] March 7, 2008

2007-034 Geri Tanderup vs Marlene K. Jussel, Broker. Stipulation and Consent Order. License suspended for a period of one (1) year commencing on March 6, 2008, continuing through March 5, 2009, with the entire suspension period served on probation; plus an additional six (6) hours of continuing education with three (3) hours in the area of license law and three (3) hours in the area of contracts to be completed by September 2, 2008. [Violated Neb. Rev. Stat. § 81-885.24 (12) Offering real estate for sale or lease without the knowledge and consent of the owner or his or her authorized agent or on terms other than those authorized by the owner or his or her authorized agent; and Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as an associate broker. Because Jussel failed to have Geri Tanderup sign the Listing Agreement and offered the real estate for sale without the knowledge and consent of one of the owners.]

March 6, 2008

2007-012 Commission vs Kevin Dean Irish, Broker. Hearing held March 6, 2008. License suspended for two (2) years, with the entire suspension period stayed and served on probation to commence April 18, 2008, and continue through April 17, 2010. Kevin Dean Irish must abstain from alcohol; attend Alcoholics Anonymous meetings on a regular basis and provide documentary proof of such regular attendance on at least a monthly basis to the Commission; obtain a sponsor and provide documentary proof of such sponsorship to the Commission; and if charged with another criminal offense during the two (2) year period, Irish must report such charge to the Commission within seven (7) days of such charge. [Violated Neb. Rev. Stat. § 81-885.24 (29) by demonstrating unworthiness to act as a broker for having been convicted of four (4) Driving Under the Influence charges and for failing to report the Driving Under the Influence conviction relating to the June 2005 incident to the Nebraska Real Estate Commission on his real estate renewal application for 2006.]

March 6, 2008

2007-011 Kathryn Adkisson and Linda Vogt vs Michael Ray Holroyd, Broker. Stipulation and Consent Order. License suspended for two (2) years with the entire suspension period stayed and served on probation to commence on a mutually acceptable date within 30 days from the date of receipt of the Order; plus an additional twelve (12) hours of continuing education with three (3) hours in the area of agency, three (3) hours in the area of contracts, three (3) hours in the area of license law and three (3) hours in the area

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Considerations When Operating As A "TEAM" In Real Estate

Operating as a "team" can lead to problems for licensees when working with the public in a real estate transaction. This article is intended to point out areas where problems can arise and to, hopefully, give guidance to licensees who are working as part of a "team" so that situations do not occur which may result in disciplinary actions.

What is a "team"?

The term "team" is not defined in the License Act. Licenses are issued, under the Act, only to individuals. Licenses are not issued to "teams". The "team" concept is no more than a marketing device. Over the years, "teams" of two or more individual licensees, working under the supervision of the same designated broker, joining together to offer licensed real estate services to the public on behalf of that designated broker, have become more common. Historically, a common configuration of a "team" consisted of a husband and wife. In some instances adult children have been added to the "team", as have siblings of either or both spouses. More recently, two or more licensees, none of whom are related, have joined together to offer licensed real estate services to the public. There is nothing illegal or unethical in forming a "team" for such purposes. A "team", as used in this article, should not be confused with a real estate firm which has been formed by a designated broker under the License Act.

Most "teams" have a "team" leader. It must be understood that this "'team' leader" is not the equivalent of the designated broker for the real estate company. The "'team' leader", if there is one, and all licensed members of the "team" are affiliated licensees of the designated broker for the real estate firm. The "team" is under the supervision, and must abide by all policies, of the designated broker, just like all other affiliated licensees conducting licensed activities under the designated broker. Any unlicensed assistants, who may assist licensed "team" members, are also subject to the supervision and policies of the designated broker, just like other unlicensed persons employed by the real estate firm.

Advertising

A "team" must advertise, just as an individual affiliated licensee, in the name under which the designated broker conducts business. Advertising is conducted under the direct supervision of the broker. When advertising a "team" on a sign, in an advertisement, on a business card or any other means of communication to the public, it must be clear to the public which real estate company/broker the "team" is representing. Advertising which is misleading or inaccurate or which would be confusing to the public in this area could lead to disciplinary action being initiated against members of the team and their designated broker.

Brokerage Relationships Issues

[Note: The information presented in the "Brokerage Relationship Issues" section of this article only applies to real estate firms where the designated broker utilizes "designated agency", i.e. not all affiliated licensees of the broker have the same agency relationship with all buyers, tenants, sellers and landlords as they would in firms which do not utilize designated agency. In real estate firms which do not utilize "designated agency", all affiliated licensees in the firm have the same ageny relationship with all the clients of the designated broker.] Another area which can lead to problems for the members of the "team", as well as the designated broker, is how the services of the "team" are advertised in pamphlets, brochures, etc. and in person by the "team" members. A "team" advertises that, "The 'team' will work for you if you hire us to sell or lease your property or assist you in buying or renting a property." Such a statement may lead members of the public to believe that all members of the "team" would be working for the consumer in an agency-client capacity, if the consumer decided to be represented by the "team".

If only certain members of the "team" will be representing consumers, who are offered brokerage services, that should be explained in all written materials and again emphasized at the initial meeting with the consumer. It should also be included in any written agreements. For example, the listing agreement should set out which licensee or licensees will be specifically representing the consumer, as known at the time. These names must also be set forth on the "Acknowledgment of Disclosure" page of the "Brokerage Relationships in Real Estate Transactions" brochure.

It is extremely important that both the consumer(s) and the licensee(s) involved know who is representing the consumer. The licensee(s), specifically representing the consumer, needs to know so that confidential information is not disclosed to members of the "team", and others, who are not representing the consumer or may represent the other party to a possible transaction. An example of when this would be an issue includes routine matters, such as attendance at a listing presentation or other situations at which licensees not representing the consumer would normally not be in attendance. Specifically, a seller should be made aware if the licensee who arrives at the listing presentation with the listing agent, simply to measure the house, will or will not be representing the consumer. The consumer needs to know so that he or she does not discuss confidential information in front of a licensee he or she thinks is representing him or her when, actually, the licensee may already, or may in the future, represent a different party to a possible transaction. ***Every effort should be made so that licensees, who are members of a "team", do not leave the impression that the entire "team" is representing the consumer when, in fact, that is not the case.***

There may be occasions when the "identified" limited agent(s) of the client(s) is/are unavailable, perhaps out-of-town or ill and: the buyer or tenant wants to look at a specific property or properties that has/have become available; or the buyer or tenant want to make an offer or enter into a lease immediately; or another licensee presents an offer for consideration which expires prior to the return of the identified agent(s); or her similar situations. In the situation where

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Operating A Team . . . (Cont'd)

only a certain member or certain members of a "team" is/are representing a client, and it becomes necessary that another member of the "team", not representing the client, needs to become a limited agent for the client, certain actions need to be taken. In the case where a written buyer or tenant agency agreement, a written seller or landlord agency agreement (normally the agency relationship is established in the listing or management agreement), or a written dual agency has been entered into with the client(s), the name of the "team" member who needs to become a limited agent of the client(s) should be added to the agreement. (Usually, the listing/management agreement of designated brokers utilizing "designated agency" give the broker the authority to appoint additional affiliated licensees as limited agents of the client.) If the appointment authority is applicable, the client should be timely notified, in writing, that the new "team" member is representing the client. Notification to the client could also be done by having the client sign a new "Acknowledgement of Disclosure" page with the new "team" member's name and the appropriate blanks checked.

In the case where a "team" member or certain "team" members is/are representing a buyer or tenant under the statutory limited buyer/tenant agency provision and a new "team" member must become a limited agent for that buyer or tenant, the new "team" member must complete the "Acknowledgement of Disclosure" page appropriately and have the buyer(s) or tenant(s) sign the "Disclosure" prior to performing any duties on behalf of the buyer or tenant.

Shadowing or Mentoring Programs

Although not exactly the same, licensees taking part in mentoring or "shadowing" training programs also need to use caution that appropriate disclosures are made regarding the licensees involved. Consumers, whose transactions are the focus of these programs, need to have their confidential information and best interests protected. It is important that those licensees who are involved in these programs clearly disclose their agency relationship to the consumer at the time of meeting with the consumer. It is recommended that the trainee and the trainer/shadower/mentor establish the identical agency relationship with the consumer, in order to allow the consumer-client to speak freely and provide the most true-to-life situation for a trainee. The same considerations would apply to peer review situations.

Licensees who are considering the formation of a "team" should discuss the matter with their designated broker prior to formation of the "team". The designated broker may have certain restrictions or additional conditions regarding operating as a "team". ■

Required Nonresident Class Becomes a Pre-License Requirement

(Effective July 18, 2008)

New legislation has passed that will change provisions of the Nebraska Real Estate License Act. The changes to Nebraska Revised Statutes § 81-885.17 institute a pre-license education requirement for all those seeking licensure in the State of Nebraska through recognition of a current license from another jurisdiction. **This requirement applies only to those seeking a nonresident license based upon their license in their jurisdiction of residence OR those who are moving or have recently moved to Nebraska and are seeking licensure based upon their license in their jurisdiction of immediate preceding residence**. The new language requires these applicants to complete a three-clock hour course in license law and agency.

Applications through license recognition received **on or after** July 18, 2008, must provide adequate proof of completion of the three-clock hour class approved by the Commission specific to the Nebraska Real Estate License Act and Nebraska Revised Statutes sections 76-2401 to 76-2430 **prior to the issuance date** of the license.

Nonresident applications received **before** July18, 2008, must comply with the existing law and, therefore, must provide adequate proof of completion of a three-clock hour class approved by the Commission specific to the Nebraska Real Estate License Act and Nebraska Revised Statutes sections 76-2401 to 76-2430 **within 90 days after the issuance date** of the nonresident license. Failure to meet this deadline will result in the license being placed on inactive status immediately and the licensee will be required to show cause why the license should not be revoked. Those who are moving or have recently moved to Nebraska and who, **before** July 18, 2008, apply for licensure based on their license in their jurisdiction of immediate preceding residence do not need to complete the class at all.

The providers and courses which meet the provisions in Neb. Rev. Stat. § 81-885.17 are:

Randall School of Real Estate 11224 Elm St Omaha, NE 68144 Phone (402) 333-3004	0604R (Live Classroom) Questions & Answers: A License Law and Agency Overview 3 clock hours 0604R (Correspondence) Questions & Answers: A License Law and Agency Overview 3 clock hours
Northeast Community College Box 469, 801 E. Benjamin Ave Norfolk, NE 68702-0469 Phone (402) 844-7292 Phone (800) 348-9033	0604R (Live Classroom) Nebraska Real Estate License Law & Agency Relationship Law 3 clock hours

Do You Know Who's Looking at Your Client Files?

[Editor's note: This article is reprinted, with permission, from the Spring 2008 ALQ/Real Estate Intelligence Report.]

Brokers who wonder what the next big headache in real estate will be may not have to look far to find the answer. In fact, it may be lurking in the file drawers where they keep their closed transactions.

With identity theft all over the headlines and bad guys increasingly finding ingenious ways of coming up with names, addresses, and bank account, Social Security and credit card numbers, the truth is that a lot of sensitive data is routinely being stored in real estate offices and it wouldn't take a computer mastermind to extract it.

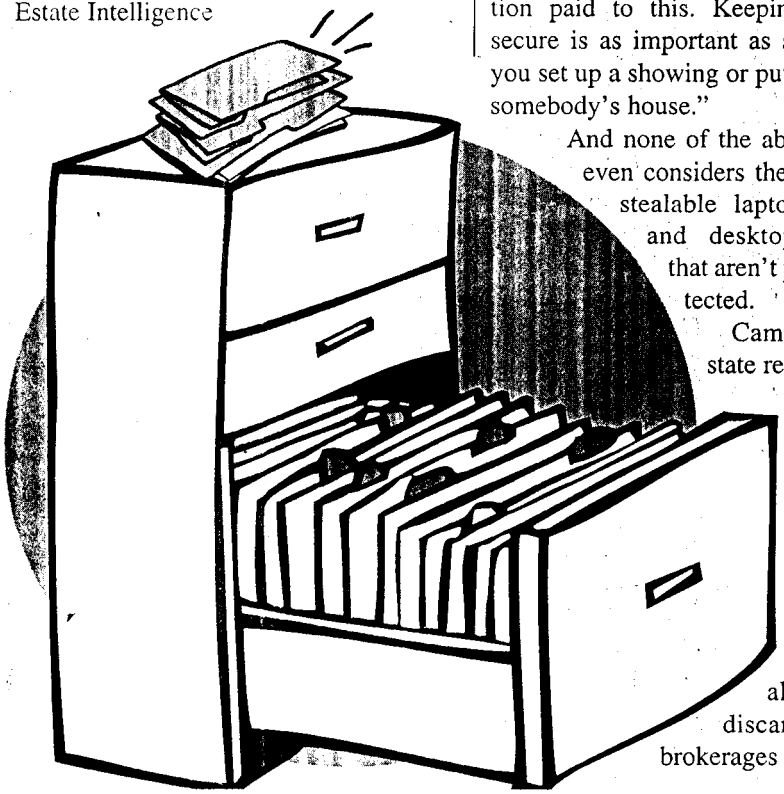
In Florida last year, a rash of identity thefts was traced back to a man who worked nights as a janitor at a real estate office. He used his spare time to comb through files that sometimes were left sitting on agents' desks.

More recently, authorities in the Midwest found thousands of transaction records from a defunct mortgage broker unceremoniously discarded in a dumpster. No effort had been made to shred sensitive client information.

A quick snapshot survey by Real Estate Intelligence Report found brokerages keep files:

- In unlocked file drawers "in the basement."
- "In boxes on the floor of the (unlocked) storage room" until they are moved upstairs.
- "In folders on (open) shelves in the conference room."

And then there are those records – who knows how many – that are kept in the trunks of agents' cars or stacked on desks in their home offices.



ARELLO aware

Debbie Campagnola, CEO of the Association of Real Estate License Law Officials (ARELLO), says she is personally aware of many offices where transaction documents are just stacked in boxes in a corner.

"Documents aren't usually very well protected," she says. "I imagine there are many brokerages that don't even have a policy with respect to privacy. A lot of brokers have mortgage brokers sitting in their offices. A lot of agents are doing loan originations. They're collecting Social Security numbers and bank account numbers."

"There hasn't been very much attention paid to this. Keeping documents secure is as important as security when you set up a showing or put a lockbox on somebody's house."

And none of the above scenarios even considers the data kept on stealable laptop computers and desktop computers that aren't password protected.

Campagnola said state real estate commissions typically require brokers to keep all the paperwork from transactions for several years before being allowed to discard it. Many brokerages keep it longer than necessary "just to be on the safe side."

In some cases, supervising brokers may not even know what documents are held in transaction folders and even sales associates may not know what they've got as they sweep all the pieces of paper off the closing table and into a file when the deal is done.

"That's just not adequate," says Brian Lapidus, COO of the global security firm Kroll International headquartered in New York. "That doesn't even look at the problem from an Internet security viewpoint."

"The idea of agents and mortgage brokers keeping data in their cars as they move from place to place is frightening," he said.

"From an IT standpoint, we worry about people who have stored information electronically on unsecured WiFi networks that can be easily accessed. (Stealing) paper documents is even easier."

What can happen

And what can thieves – either the common variety or the electronic version – do once they have real estate client information?

"If you have a name, an address and a Social Security number, the prospects are endless," Lapidus said.

"Someone can open credit cards in (your client's) name and run up the charges. They can take out loans and second mortgages. With enough information, they could even sell your home out from under you."

Credit card companies historically have written off bad debts once a claim has been submitted, but that doesn't resolve the issue of destroyed credit and the months, and sometimes years, it can take for individuals to restore their good credit, to say nothing of their reputations.

And consumers increasingly are not being very forgiving of companies that lose their data. Earlier this year when the Hannaford Brothers and Sweetbay grocery groups lost track of 4.7 million customer credit card numbers – resulting

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Lookiing at Client Files . . . (Cont'd)

in an estimated 1,800 cases of fraud – irate consumers filed a class action lawsuit against the supermarkets.

"I'd think that sort of publicity would be terrible for a real estate company," Lapidus said. "Real estate agents build their relationships on trust. If you lose a client's data, how do they ever work with you again? Or your company?"

The security expert says keeping private information secure is becoming an ever greater challenge but there are things that can be done.

First, he says, "don't collect the information you don't really need. A lot of businesses collect data because they think they need it. A lot of times they don't."

And second, "get rid of anything you don't need after the transaction is done. If you're a real estate agent, you don't need a lot of information after the deal is closed. You don't need to keep bank statements, tax forms and Social Security numbers. Get rid of them."

A decent shredder costs less than $50.

Lapidus also says hiring brokers need to be careful about who they bring into their offices as employees – whether as agents, clerical staff or even cleanup crews.

"Do background checks," he said. "Do your due diligence. Make sure your employees are who they say they are. And make sure everyone knows the office policy and what you expect from them. Make sure they understand what your procedures are for handling documents."

Real estate educators also need to join in this battle.

"Agents should be getting training about what kind of data is sensitive and what isn't," Lapidus said.

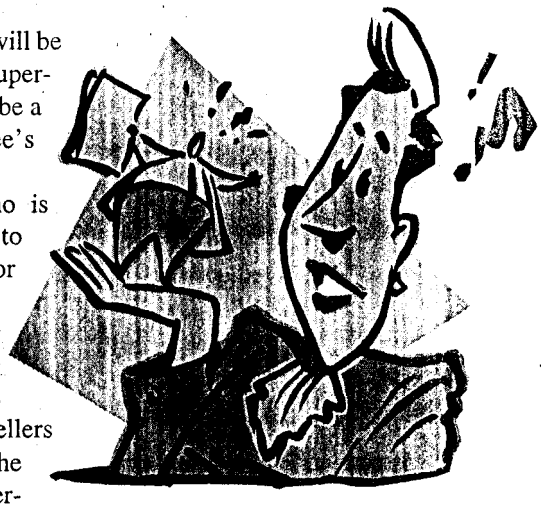
Finally, he said, brokers need to have a policy in place in case there is a data breach.

"You need to know what to do; how to handle it," he said. "What is your procedure going to be?"

A company's ability to guard information could even be a sales tool, Lapidus said. "When you're marketing yourself and differentiating yourself, this could be one way to do it. You can show your clients you're aware that problems exist and you're doing what you can to prevent it." ■

(Continued from page 1)

What Can I Do . . . (Cont'd)



nated broker to whom the licensee will be transferring, while still under the supervision of the current broker, would be a serious violation of the licensee's duties and responsibilities.

Can an affiliated licensee, who is transferring, refer potential clients to the designated broker to whom he or she is transferring while the licensee is still under the supervision of the current broker so that the licensee can service the listings after the transfer? NO! These sellers would need to be listed with the current broker either by the transferring licensee or another licensee affiliated with the current broker. Referring them to the broker to whom the licensee is transferring without the current broker's knowledge would be a serious violation of the licensee's duties and responsibilities. Usually, brokers have definite policies regarding referrals and affiliated licensees must adhere to those policies. Remember referrals and the resulting fees are between the designated brokers not between affiliated licensees and other licensees. *(See, NEB. REV. STAT. § 81-885.24 (8) and Title 299, Chapter 2, Section 010.)*

Another question often asked by transferring licensees is - "A listing will be closing shortly after I transfer to the new broker, can I attend closing with the sellers since I was there when they entered into the contract?" Not without the written consent of the transferred licensee's designated broker at the time of closing. Yet another related question is - "One of my listed sellers is in the middle of negotiations on the sale of their home, can I continue to negotiate on their behalf even after I transfer?" Not without the written consent of the new, transferred to designated broker. In both of these situations, the written consent to represent the previous broker is required under Neb. Rev. Stat. § 81-885.24 (7) and Title 299, Chapter 2, Section 010 of the Commission's Rules and Regulations. The previous designated broker would also have to agree, since it is that designated broker's listing that is closing or is in the process of negotiations, respectively. It can be readily assumed, in both of these situations, the previous designated broker probably appointed another affiliated licensee to represent the sellers after the transferring licensee left.

Another question that is asked by transferring licensees is - "Can I be paid a commission for any listings which are under contract and will close after I transfer and for any other licensed activity I conducted before I transferred from that broker?" The Real Estate Commission does not get involved in commission "splits", but there is nothing in the License Act or Rules and Regulations administered by the Commission which would prohibit payment by the previous broker to the transferred licensee for licensed activity conducted by the licensee while under the supervision of the previous broker. The payment can be paid directly to the transferred licensee by the previous broker, since the payment is for licensed activity conducted while under the supervision of that broker. The payment would not need to go through the broker to whom the licensee has transferred. That being said, the truly controlling document to determine if, how and how much will be paid in this situation is the independent contractor agreement between the designated broker and the transferred licensee when he or she was affiliated with that designated broker.

What about written buyer agency agreements? These written agreements are between the buyer and the designated broker and are to be handled in the same manner as listing agreements when an affiliated licensee is transferring to a new designated broker. ■

(Continued from page 3)

Disciplinary Action (Cont'd)

of ethics, to be completed and proof of completion submitted to the Commission by October 1, 2008. [Violated Neb. Rev. Stat. § 81-885.24 (3) Failing to account for and remit any money coming into his or her possession belonging to others, for failing to transmit January 2007 rents to the Corporation's new property manager; and Neb. Rev. Stat. § 81-885.24 (29) demonstrating negligence, incompetency, or unworthiness to act as a broker, by overcharging and duplicating charges to the Corporation for hall cleaning; for failing to stop the lawn mowing service; for failing to obtain prior authorization from a member of the Corporation for an expense over $1,000.00; for failing to ensure tenants properly transferred utilities into their name; for allowing tenants to remain in a property without paying monthly rent; for improperly charging a tenant late fees; and for failing to transmit January 2007 rents to the Corporation's new property manager.]

April 4, 2008

2007-036 David L. and Shelley M. Pokorny vs James Wilbur Muller, Salesperson. Stipulation and Consent Order. License Censured; plus an additional six (6) hours of continuing education with three (3) hours in the area of agency and three (3) hours in the area of license law to be completed by October 1, 2008.' [Violated Neb. Rev. Stat. § 76-2418 (1) A licensee representing a buyer or tenant as a buyer's or tenant's agent shall be a limited agent with the following duties and obligations: (b) To exercise reasonable skill and care for the client and (c) To promote the interests of the client with the utmost good faith, loyalty, and fidelity and Neb. Rev. Stat. § 81-885.24 (29) demonstrating negligence to act as a broker, associate broker, or salesperson. Muller failed to advise the client to have a whole-house inspection.]

April 4, 2008

TOMPKINS, BERNARD MICHAEL
IOC REALTY SPECIALIST INC
4811 S 24TH ST
OMAHA NE 68107-2704

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Wednesday, July 02, 2008

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW; Suite 4000
Washington, DC 20530

Wednesday, July 02, 2008

Reference:
UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ASSOCIATION OF REALTORS® Defendant. Civil Action No. 05 C 5140. Judge Kennelly 06/12/2008

Mr. Read,

In addition to what is proposed, please consider all opinion herein that the United States of America require Defendant to agree to certain procedures and prohibitions outlined herein for the purposes of:

1. preventing the loss of competition, and
2. better serving the public interest (i.e. improving liquidity of market for buyers and sellers alike).

Wall Street does a pretty good job of providing liquidity for both buyers and sellers of stock. Improvements to this "stock market" are made all the time and it's a wonder how efficiently buyers and sellers are matched in terms of free flow of information, speed, cost and trust. And. It's a testament to competition that allows for positive change. In the last 20 years the stock market has had tremendous advancements including:

1. stock discounters, which have saved consumers millions of dollars,
2. decimalization (stocks no longer trade in eighths) which has saved consumers millions of dollars, and
3. installation of circuit breaker curbs and collars, which has provided order and reduced risk.

The US residential real estate market is in the "Dark Ages" by comparison. This is a great time to consider how the National Association of Realtors® can lend a hand to better facilitate competition, transactional liquidity, free flow of information, reduced cost and improved public trust.

There are three National Association of Realtors® areas of opportunity to specifically facilitate competition, transactional liquidity, free flow of information, reduced cost and improved public trust, as follow:

1. **Referrals.** "Consumers" generally don't have professional agency/fiduciary representation in securing a loan/mortgage. Realtors who have "earned" the trust of the Consumer, via agency contract, perform as fiduciaries and are required to behave as such. However, Realtor-fiduciaries often violate their fiduciary obligations by introducing their client-Consumer, or referring them, to mortgage lenders who have no fiduciary obligation to the client-Consumer. In this regard, it is common industry practice that Realtors breach their fiduciary obligations. Industry-wide Realtor referral practices need change to protect public interest. Reform will improve trust, reduce cost, increase competition, and improve liquidity. The National Association of Realtors® has an opportunity here for positive change that's a real significant win for all related parties.

2. **Listing Exposure**. Home sellers need maximum exposure of their properties to get best pricing. Home buyers need maximum information and need to review the universe of alternative purchase opportunities for best decision-making. Realtors who have "earned" the trust of the Consumer, via agency contract, perform as fiduciaries and are required to behave as such. However, Realtor-fiduciaries violate their client-Consumer's trust by, willfully and as required by their association, not permitting maximum exposure of the client-Consumers' properties for sale. Also, as a result of Realtor association restrictions, Realtors do not maximize information for and exposure to home buyers. Generally unbeknownst to the Consumer, Realtors claim sale listing data as intellectual property or proprietary information. The data is restricted and conditioned and it limits property exposure. This can be of significant detriment to both buyers and sellers. Generally unbeknownst to the Consumer, Realtors, as required by their association, forbid the open and free sharing of information concerning homes listed for sale. Generally unbeknownst to the Consumer, Realtors, as required by their association, forbid other Realtors open and free sharing and use of information regarding homes available for sale to prospective buyers.

   Realtor listing agents, traditionally have a fiduciary/agency responsibility to the seller-owner. Realtors breach their fiduciary obligation and violate seller-owner trust when they willfully fail to maximize the property exposure and provide open and free information and use to the market. In this regard the common practice, limiting property exposure and limiting open and free information use to the market, violates trust, causes illiquidity and increases cost to Consumers. It also dampens competition. The National Association of Realtors® has an opportunity here for positive change that's a real significant win for all related parties.

   Example: Realtor lists a property and then tells seller "Oh by the way, my 1,000,000+ Realtor associates and I… we've agreed as an association to not maximize the exposure of your property." Not good.

   For comparison… imagine… a stock market where shares of a company were listed for sale but the listing information was not exposed openly and freely to the market. Not good.

3. **Realtor.com public listings.** An overwhelming number of the Realtor.com listings, guestimate 95% or more, do not show the address of the property for sale. This has many negative effects for Consumers. Translated to the stock market, it would be like finding out shares of stock in a company were available for sale but crucial information is missing and you would have to call a professional to get the data… and that professional, in concert with a professional association, designed the system where you would have to correspond with an associate to get the basic information and expose yourself to solicitation and expense by the association. That's not how the stock market works and it's not how the residential real estate market should work.

Taken together, the three primary negative behaviors above obstruct innovative brokers' and lender's and related parties ability to provide services and better deliver, transactional liquidity, free flow of information, reduced cost and improved public trust. Let's not deter, delay, or prevent change so that benefits can be realized and the National Association of Realtors® strengthened.

Specific procedures and prohibitions have not been provided herein based on time limitations but the concepts for change are as follow:

- Eliminate financial referrals. Or. Permit referrals but, provide notice to Consumers that lenders traditionally hold no fiduciary obligations to Consumers and that by referral, the referring party, exposes the Consumer to consequences that may be severely detrimental to the Consumer's financial wellbeing and the referring party disclaims any fiduciary obligations regarding the financial welfare of the Consumer with regard to the loan/mortgage.

- As a default listing matter defined in the listing agreement and as policy by the association, allow listings to be published freely and openly and information used freely and shared by others, unless opted out by seller, and along with all notices and consequences provided to seller regarding the benefits of maximum exposure.

- As a default listing matter defined in the listing agreement and as policy by the association, require that the property address be part of all Realtor.com listings, unless opted out by seller, and along with all notices and consequences to seller regarding the benefits of publishing the property address on Realtor.com.

In effort to avoid any possible retaliation, we present this to you Wednesday, July 02, 2008 signed,

Jane and or John Doe
"Unnamed Person(s)"
Montgomery County

Commonwealth of Pennsylvania

John R. Read, Chief
Litigation III Section, Antitrust Division
U.S. Department of Justice
450 Fifth Street NW,
Washington, DC 20530

Via: John.Read@USDOJ.gov cc: David.Kullly@USDOJ.gov

RE: Proposed Final Judgment US v NAR Civil Action No. 05 C 5140

Dear Mr. Read:

I respectfully request that in addition to the protection provided to VOW's in the proposed judgment that the Judgment be expanded such that any information a broker is allowed to publish in the mass media also be publishable to the Internet without qualification. It appears the proposed judgment will protect the large VOW's new and creative practices in an effort to provide the consumer with more choices and potentially better and/or cheaper services. Unfortunately, the proposed judgment doesn't appear to protect the creative practices of sole-proprietors and small independent brokerages that also utilize the Internet.

In many markets, these small brokerages provide service to consumers for 50+% of the transaction sides. These small brokerages often develop unique market services that utilize the Internet and benefit the consumer with an even wider choice of different, better and/or cheaper services. Technological and data feed costs required to establish and then operate a password protected VOW can be shared by each transaction. For large VOW brokerages addressed in this proposed judgment, these costs become insignificant. But for a sole proprietor and small brokerages, these same costs on a per transaction basis are significant and become prohibitively expensive. Consequently, most small brokerages do not and cannot operate a cost effective password protected VOW.

MLSlistings Inc., allows their subscribers to freely publish the median Sold Price in newspapers, but prohibits publication of that same information on the Internet. MLSlistings Inc.'s restriction has no MLS business reason and artificially restricts MLSlistings Inc's subscribers and consumers from fully benefiting from the use of the Internet. MLSlistings Inc.'s Internet restriction only applies to non-VOW sites that don't have a bulk download agreement.

I investigated the costs of providing a password protected VOW site and found them not economical. Subsequently, I decided to make some of my basic market information available via my public (non-password protected) web page. This allowed anyone to freely benefit from this market information and insight. I chose to reserve more frequent updates and additional information for people that find my public information useful and are willing to develop an agency relationship. This had worked well for me and the consumers without the need of a VOW.

This changed in early May 2008 when MLSlistings Inc, using MLS Rules that become effective on April 30, 2008 started citing me with violating the new MLS Rules. The new MLS Rules allow me to continue to provide the same market information (such as the County median sold price) to anyone that walks into my office. I can also email or fax this information to whoever I chose. I can even publish this market information in the mass media including the San Jose Mercury News. This market information is also available to any web savvy consumer via the MLS's own non-restricted public web site. Clearly, anyone without qualification has access to this market information. However, MLSlistings Inc claims the new MLS Rules specifically prohibit a subscriber from publishing this same market information on the Internet if the web page is accessible to public without any qualification and without a costly download agreement. NAR approved MLSlistings Inc.'s new MLS Rules that includes this restraint of trade provision that clearly favors large brokerages.

The amount of data needed using the 2000 methodology is equivalent to only eight current agent full listings. For a MLS, which restricts subscribers to 500 matching listings and currently has 19,500 active listings, to consider the data equivalent to 8 listings to require a bulk download agreement is ridiculous. Having learned a different methodology in 2000, the amount of data needed now is significantly less. Adding to the absurdity of this arbitrary rule, the data used to determine the market information isn't even in the bulk download data set.

I'm requesting the current proposed judgment be expanded such that any information a broker is allowed to publish in the mass media can also be published to the Internet without qualification. This would be similar to IDX/BLE that allows any brokerage to display certain basic listing information to the public without qualification. Basically, MLS rules shouldn't favor any particular type or size brokerage.

Should you have any questions, I can be reached at icare_dou@yahoo.com.