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

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDINGS

Overview. The United States brought this lawsuit against Defendant National Association of Realtors® ("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 the Internet to deliver real estate brokerage services. NAR's policies singled out these innovative brokers and denied them equal access to the for-sale listings that are the lifeblood of competition in real estate markets. The settlement will eliminate NAR's discriminatory policies and restore even-handed treatment for all brokers, including those who use the Internet in innovative ways.

Virtual Office Websites ("VOWs"). The brokers who have been restrained by NAR's policies operate password-protected websites through which they deliver brokerage services to consumers. NAR has referred to these websites as "virtual office websites" or "VOWs." As discussed below and in the United States' October 4, 2005, Amended Complaint, brokers who use VOWs ("VOW brokers") can operate more productively than other brokers, providing high-quality brokerage services efficiently to consumers.

Defendant NAR and MLSs. NAR is a trade association whose membership includes both traditional, bricks-and-mortar real estate brokers and innovative brokers, such as those who operate VOWs. NAR promulgates rules for the operation of the approximately 800 multiple listing services ("MLSs") affiliated with NAR. MLSs are joint ventures of virtually all real estate brokers in each local or regional area. MLSs aggregate information about all properties in the areas they serve that are offered for sale through brokers.

NAR's Challenged Policies. On May 17, 2003, NAR adopted its "VOW Policy," which contained rules that obstructed brokers' abilities to use VOWs to serve their customers, as described below in Section II. After an investigation, the United States prepared to file a complaint challenging this Policy.

On September 8, 2005, NAR repealed its VOW Policy and replaced it with its Internet Listings Display Policy ("ILD Policy"). NAR hoped that this change would forestall the United States' challenge to its policies. NAR's ILD Policy, however, continued to discriminate against VOW brokers. As part of its adoption of the ILD Policy, NAR also revised and reinterpreted its MLS membership rule, which would have excluded some brokers who used VOWs, as detailed below in Section II. (NAR's VOW and ILD Policies, including its membership rule revision and

reinterpretation, are referred to collectively in this Competitive Impact Statement as NAR's "Challenged Policies.")

As an association of competitors with market power, NAR's adoption of policies that suppress new and efficient competition to the detriment of consumers violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint. On September 8, 2005, the day NAR adopted its ILD Policy, the United States filed its Complaint. The United States filed an Amended Complaint on October, 4, 2005, that explicitly addressed the ILD Policy and membership rule revision and reinterpretation. The Amended Complaint alleges that NAR's adoption of the Challenged Policies constitutes a contract, combination, and conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In the Amended Complaint, the United States asks the Court to order NAR to stop violating the law. The United States did not seek monetary damages or fines; the law does not provide for these remedies in a case of this nature.

Motion to Dismiss. NAR filed a motion to dismiss the case, claiming that, because NAR did not restrain brokers by compelling them to use the "opt-out" provisions of the Challenged Policies (discussed below in Section II.C), those provisions did not constitute actionable restraints of trade. NAR also sought dismissal on two procedural grounds. On November 27, 2006, the Court issued an opinion denying NAR's motion. The Court found that the appropriate

analysis under Section 1 is not whether individual market actors are restrained but instead whether competition is restrained.[1] The Court also rejected NAR's procedural arguments.[2]

Course of the Litigation. Discovery began in December 2005 and continued through 2006 and 2007. The case was scheduled for trial on July 7, 2008.

Proposed Settlement. On May 27, 2008, six weeks before trial was scheduled to begin, the United States and NAR reached a settlement. The United States filed a Stipulation and proposed Final Judgment that are designed to eliminate the likely anticompetitive effects of NAR's Challenged Policies. The proposed Final Judgment, which is explained more fully below, requires NAR to repeal its VOW Policy and its ILD Policy and to adopt and apply new rules that do not discriminate against brokers who use VOWs to provide brokerage services to their customers.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

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[1] *See United States v. NAR*, No. 05-C-5140, 2006-2 Trade Cas. ¶ 75,499, 2006 WL 3434263, at *12-14 (N.D. Ill. Nov. 27, 2006).

[2] *Id*. at *6-11 & 15.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Description of Competition and Innovation Enabled by VOWs

In many respects, most VOW brokers operate just like their more traditional competitors. They hold brokers' licenses in the states in which they operate, they ordinarily are Realtor members of NAR, they participate in their local MLS, they tour homes with potential buyer customers and guide those customers through the negotiating, contracting, and closing process, and they derive revenues from commissions earned in connection with real estate transactions.[3]

These VOW brokers differ from other brokers in how they use the Internet to provide brokerage services. VOW brokers use primarily their websites, rather than the efforts of their agents, to educate potential buyers about the market. This service necessarily involves – as it does with brokers who operate in a more traditional fashion – providing those MLS listings to buyer customers that meet their expressed needs and interests. NAR's MLS rules permit brokers to "reproduce from the MLS compilation and distribute to prospective purchasers" information about properties in which the purchaser might have an interest. *See* NAR, *Handbook on Multiple Listing Policy*, "Model Rules & Regulations for an MLS Operated as a Committee of an Association of Realtors®," § 12.2 (21st ed. 2008). Rather than providing this information to

[3] The real estate licensing laws of most states allow real estate professionals to be licensed as either brokers or as agents or sales associates. To offer real estate brokerage services, a person licensed as an agent or sales associate must affiliate with and be subject to the supervision of a person who holds a broker's license. *See, e.g.*, 225 ILCS 454/1-5.

prospective buyers by hand delivery, mail, fax, or e-mail – the delivery methods historically used by brokers – VOW brokers deliver listings over the Internet.[4]

VOWs help brokers operate more efficiently and increase the quality of services they provide. By enabling consumers to search for and retrieve relevant MLS listings, VOW brokers can operate more efficiently than other brokers. Because customers are educating themselves without the broker's expenditure of time, a VOW broker can expend less time, energy, and resources educating his or her customers. Operating a VOW can also enhance broker competitiveness in working with home seller clients by allowing the broker to provide detailed information to both potential and active seller clients about the apparent interests of buyers who are searching for homes in the seller's neighborhood. A study conducted in connection with this case showed that one sizeable VOW broker, for example, was able to generate many more transactions per agent (controlling for years of agent experience) than the traditional brokers it competed against.

[4] As the court found in *Austin Board of Realtors v. E-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000), "all . . . methods of distribution" of listings, including the Internet, "are equivalent" and should be treated equally under MLS rules. Until it began developing its VOW Policy, NAR agreed with this position. For instance, on January 29, 2001, a top NAR official stated in a letter to the president of eRealty (a VOW broker) that eRealty's distribution of MLS listings through its VOW was "in compliance with" MLS rules governing the provision of MLS listings to prospective buyers. NAR also published a white paper in December 2001 in which it described VOWs as an "emerging, authorized use of MLS current listing data," and stated that brokers using VOWs are subject to the same MLS rules governing the dissemination of listings to potential buyers that are applicable to all other brokers. The same official reiterated the point in a March 8, 2002, interview, stating that NAR's rules "don't discriminate between methods of delivery."

With lower costs and increased productivity, some VOW brokers have offered discounted commission rates to their seller clients and rebates to their buyer customers.[5] VOW brokers have already delivered tens of millions of dollars in financial benefits directly to their customers. Another study conducted in connection with this case revealed evidence consistent with a finding that the growth of a VOW broker that offered discounts led a sizeable traditional competitor to reduce its commissions to consumers.

Innovative brokers with VOWs have enhanced the consumer experience by offering tools and information that allow consumers to approach the purchase of a home well informed about all aspects of the markets they are considering. VOW brokers not only provide their customers access to up-to-date MLS listings information, but also offer mapping and property-comparison tools and provide school district information, crime statistics, and other neighborhood information for consumers to consider as they educate themselves regarding the most important purchase in the lives of most Americans. 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.

Of course, many traditional brokers provide neighborhood and other similar information to their customers, and some even provide such information on Internet websites. VOWs can differ, however, in the quantity and quality of information that they provide. VOW brokers offer their customers complete and up-to-date information and often focus on information most valuable to prospective buyers, identifying price reductions and the number of days a property

[5] Prospective buyers frequently do not enter contractual relationships with the broker from whom they receive brokerage services and, as such, are considered "customers," rather than "clients," of the broker.

has been on the market and providing information about comparable recent sales. Customers of VOW brokers can obtain information at their own pace, on their own time, and in the form in which they are most interested in receiving it.

Some VOW brokers have established brokerage businesses that focus solely on the high-technology aspects of brokerage services that can be delivered over the Internet. Like other VOW brokers, these "referral VOWs" educate prospective buyers about the market in which they are considering a purchase by providing buyers MLS listings and other information on a VOW. When the buyer is ready to tour a home, the referral VOW broker can direct the buyer to brokers or agents who specialize in guiding the buyer on tours of homes and advising them during the negotiating, contracting, and closing process. In some instances, referral VOW brokers have obtained a referral fee (contingent on closing) for delivering educated buyer customers to the brokers or agents who received the referrals. Some referral VOW brokers have offered commission rebates or other financial benefits to their customers.

B. Description of the Defendant and Its Activities

Chicago-based NAR is a trade association that establishes and enforces policies and professional standards for its over one million real estate professional members and 1,400 local and state Boards or Associations of Realtors® ("Member Boards"). NAR promulgates rules governing the operation of the approximately 800 MLSs that are affiliated with NAR through their ownership or operation by NAR's Member Boards.[6] In order to encourage adherence to its

[6] There are approximately 1,000 MLSs in the United States, approximately 800 of which are affiliated with NAR and subject to NAR's rules. The rules of the remaining approximately 200 MLSs are not at issue in this lawsuit, although, as a practical matter, many MLSs that are not affiliated with NAR adopt rules that conform substantially to NAR's. Some non-NAR MLSs, such as the MLS serving the Columbia, South Carolina, area and the MLS serving the

policies, NAR can deny coverage under its errors and omissions insurance (*i.e.*, professional liability insurance) policy to any Member Board that maintains MLS rules not in compliance with NAR's policies.

MLSs are joint ventures among virtually all real estate brokers operating in local or regional areas.[7] NAR's MLS rules require its members to submit to the MLS, generally within two to three days of obtaining a listing, information about each property listed for sale through a broker member. By doing so, the broker promotes his or her seller client's listing to all other brokers in the MLS, who can provide information about the listing to their buyer customers. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting with each new listing an "offer of cooperation and compensation,"

Hilton Head, South Carolina, area, adopted and maintained rules that have been the subject of antitrust enforcement. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia 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.

[7] Many MLSs draw brokers and their listed properties from a single local community. Others are substantially larger, with some covering entire states and others – such as Metropolitan Regional Information Systems, Inc., which serves the District of Columbia, and parts of the states of Maryland, Virginia, West Virginia, and Pennsylvania – serving multi-state regions. As the Amended Complaint alleges, the relevant geographic markets in which brokers compete are local and normally no larger than the service area of the MLS or MLSs in which they participate.

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.

Brokers regard participation in their local MLS to be critical to their ability to compete with other brokers for home sellers and buyers. By participating in the MLS, brokers can promise their seller clients that the information about the seller's property can be immediately made available to virtually all other brokers in the area. Brokers who work with buyers can likewise promise their buyer customers access to the widest possible array of properties listed for sale through brokers. An MLS is thus a market-wide joint venture of competitors that possesses substantial market power: to compete successfully, a broker must be a member; and to be a member, a broker must adhere to any restrictions that the MLS imposes.

C. Description of the Alleged Violation

1. The Challenged Policies

NAR's Challenged Policies discriminate against and restrain competition from brokers who use VOWs. In its Challenged Policies, NAR 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. NAR did so by allowing a listing broker to "opt out" and keep his or her client's listings from being displayed on a competitor's VOW.

On May 17, 2003, NAR adopted its "VOW Policy." As the Amended Complaint alleges, the VOW Policy, most significantly, allowed brokers to opt out of VOWs, withholding their seller-clients' listings from display on VOWs. The opt-out provisions discriminated against VOW brokers because NAR's rules do not otherwise permit one broker to dictate how

competitors can convey his or her listings to customers. The VOW Policy permitted opt out either against all VOW brokers ("blanket") or against a particular VOW broker ("selective").

The Amended Complaint also alleges that the VOW Policy's "anti-referral" rule restrained competition by prohibiting VOW brokers from receiving any payment for referring prospective buyer customers to other brokers. The prospect that brokers could use VOWs to support referral-based businesses was a source of industry antipathy to VOWs, and NAR's rules singled out VOW brokers for a ban on referring customers for a fee.

NAR's VOW Policy, as alleged in the Amended Complaint, also restrained competition from VOW brokers by prohibiting them from selling advertising on pages of their VOWs on which the VOW broker displayed any listings, and by permitting MLSs to degrade the data they provide to VOWs, thus preventing the use of popular technological features offered by many VOW brokers.

NAR repealed its VOW Policy and replaced it with its ILD Policy on September 8, 2005, the day the United States filed its initial Complaint. As alleged in the Amended Complaint, NAR's ILD Policy continued to discriminate against VOW brokers by permitting their competitors a blanket opt out where they could withhold their listings from display on all VOWs.[8] Although the ILD Policy did not include an explicit anti-referral rule, NAR revised and reinterpreted its rule on MLS membership to prevent brokers who operate referral VOWs from becoming members of the MLS and obtaining access to MLS listings. The Amended Complaint

[8] NAR did delete from its ILD Policy its rule allowing brokers to selectively opt out against particular VOW brokers.

also alleges that the ILD Policy continued to permit MLSs to downgrade the data they provide to VOWs and to restrict VOW brokers' co-branding or advertising relationships with third parties.

2. Effects of the Challenged Policies

As discussed above, NAR's rules permit brokers to show prospective buyers all MLS listings in which the buyers might have an interest. For most brokers, this means that they can respond to a request from a buyer customer by delivering responsive listings by whatever delivery method the broker and customer choose. NAR's opt-out provisions deny this right only if the method of delivery selected by the broker and the customer is a VOW. Thus, NAR's rules restrain VOW-operating brokers from competing in a way that is efficient and desired by many customers.

Even if no broker uses the opt-out device, its existence renders a VOW broker unable to promise customers access to all relevant MLS listings, materially disadvantaging brokers who use a VOW to compete. When opt out occurs, a VOW broker is further disadvantaged because it cannot deliver complete MLS listings to customers through its VOW. Finally, with the threat of opt outs constantly hanging over it, any VOW broker contemplating a pro-consumer initiative would have to weigh the prospect of an angry response from its incumbent competitors.

Opt outs were an empirical reality. Although the United States' investigation became public just a few months after NAR adopted its VOW Policy, the United States discovered over fifty instances of broker opt outs under a wide variety of circumstances in fourteen diverse markets. Brokers opted out of VOWs in large markets (*e.g.*, Detroit and Cleveland), medium markets (*e.g.*, Des Moines), and small markets (*e.g.*, Emporia (Kansas), Hays (Kansas), and York (Pennsylvania)). In some markets (Emporia and Hays), virtually all brokers opted out. In

others, only one or a few opted out (*e.g.*, Detroit, York, Maine). Opt outs occurred in a market with one dominant broker (Des Moines), in markets with only a small number of broker competitors (Emporia and Hays), and in markets with hundreds of brokers (Detroit). In some markets (*e.g.*, Des Moines, Detroit, Cleveland, York, and Jackson (Wyoming)), large brokers opted out. In others (*e.g.*, Marathon (Florida) and Hudson (New York)), only relatively small brokers opted out. Brokers opted out in markets in which price competition is highly restricted by the state (Kansas, which prohibits brokers from providing commission rebates to home buyers), as well as in markets in which the state does not restrict such price competition (Michigan). Opt outs occurred in circumstances that imply they were independent business decisions by the opting-out brokers (*e.g.*, Detroit) and in circumstances in which opt-out forms were filled out by almost all brokers in the same room at the same time (Emporia).

NAR's Challenged Policies also obstruct the operation of referral VOWs. NAR's VOW Policy prohibited referral fees explicitly and directly. NAR's 2005 modification to the requirements of MLS membership denied MLS membership and – of greatest significance to a referral VOW – access to MLS data to any broker whose business focused exclusively on educating customers on a VOW and referring those customers to other brokers to receive other in-person brokerage services. Each of these policies prevents 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.

As discussed above, NAR's Challenged Policies also permit MLSs to downgrade the MLS data feed provided to VOW brokers, which limits the consumer-friendly features VOW

brokers could provide through their VOWs. The Challenged Policies also allow MLSs to prohibit VOW brokers from establishing some advertising or co-branding relationships with third parties, limiting the freedom of VOW brokers to operate their businesses as they desire and enabling MLSs (which are controlled by a VOW broker's competitors) to micromanage the appearance of brokers' VOWs.

3. The Challenged Policies Violate the Antitrust Laws

NAR's Challenged Policies violate Section 1 of the Sherman Act, which prohibits unreasonable restraints on competition. The Challenged Policies were the product of an agreement among a group of competitors (the members of NAR) mandating how brokers could use VOWs to compete and unreasonably restraining competition from VOW brokers. Competition from VOW brokers had posed a threat to the established order in the real estate industry. Yet it was clear from prior litigation that antitrust law would not allow incumbent brokers simply to prevent VOW brokers from providing any listings to customers through their VOWs. *See Austin Board of Realtors v. e-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000). Instead, NAR's Challenged Policies restrained competition from VOW brokers by denying them full access to MLS listings and restricting how VOW brokers could do business.

While an MLS, like other joint ventures with market power, can have reasonable membership restrictions related to a legitimate, procompetitive purpose, it cannot create rules that unreasonably impede competition among brokers and harm consumers. *See United States v. Realty Multi-List*, 629 F.2d 1351, 1371 (5th Cir. 1980). NAR's Challenged Policies restrain competition because they dictate how the MLS's broker-members could compete – specifically,

restricting how they could compete using a VOW. *See id*. at 1383-85 (finding MLS rule precluding part-time brokerage to be unlawful); *Cantor v. Multiple Listing Serv. of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (S.D.N.Y. 1983) (finding that MLS yard sign restriction violated Section 1 of the Sherman Act because it "substantially impair[ed] [the plaintiffs'] freedom to conduct their businesses as they see fit" and "vitiated any competitive advantage which plaintiffs endeavored to obtain" through association with a national franchisor); *see also National Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 695 (1978) (condemning trade association ban on competitive bidding by members). Similarly, NAR's Challenged Policies restrain competition because they impede the operations of a particularly efficient class of competitors: VOW brokers. *See Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (upholding verdict against railroads that "block[ed] the entry of low cost competitors"); *see also RE/MAX v. Realty One, Inc.*, 173 F.3d 995, 1014 (6th Cir. 1999) (upholding Sherman Act § 1 claim where competitors "impose[d] additional costs" on innovative entrant). NAR's Challenged Policies also restrain competition by denying consumers the full MLS listings information (including valuable information such as sold data and data fields such as days on market) that consumers want. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457, 462 (1986) ("The Federation's collective activities resulted in the denial of the information the customers requested in the form they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. . . . The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.")

Moreover, NAR's Challenged Policies constitute an unreasonable restraint on competition because they produced no procompetitive benefits that justified the restraints. Although NAR claimed that the Challenged Policies were essential to the continued existence of MLSs, those MLSs without the Challenged Policies functioned just as well without them. Given the market power of the MLS, brokers believe it would amount to economic suicide for them to leave the MLS.

D. Harm from the Alleged Violation

Taken together, NAR's Challenged Policies obstruct innovative brokers' use of efficient, Internet-based tools to provide brokerage services to customers and clients. The Challenged Policies inhibit VOW brokers from achieving the operating efficiencies that VOWs can make available and likely diminish the high-quality and low-priced services offered to consumers by VOW brokers. The result is that the Challenged Policies, products of agreements among competitor brokers, likely would deter, delay, or prevent the benefits of innovation and competition from reaching consumers, and thus violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment embodies the fundamental principle that an association of competing brokers, operating an MLS, cannot use the aggregated power of the MLS to discriminate against a particular method of competition (in this case, VOWs). The proposed Final Judgment will end the competitive harm resulting from NAR's Challenged Policies and will allow consumers to benefit from the enhanced competition that VOW brokers can provide. The proposed Final Judgment requires NAR to repeal its VOW and ILD 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.[9] With 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]

The Modified VOW Policy does not allow brokers to opt out and withhold their clients' listings from VOW brokers.[11] This change eliminates entirely the most egregious impediment to VOWs that was contained in the Challenged Policies.[12] Under the Modified VOW Policy, the

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[9] *See* proposed Final Judgment, ¶¶ V.A-V.D. Under the Modified VOW Policy, with the consent of their supervising broker, agents and sales associates are also expressly permitted to operate VOWs. Brokers cannot agree, by MLS rule or otherwise, to ban VOWs operated by agents or sales associates. *See* Modified VOW Policy, ¶ I.1.b.

[10] *See* proposed Final Judgment, ¶¶ IV.A, IV.B, & IV.C; *see also id.*, ¶ V.F (requiring NAR to deny insurance coverage to any Member Board that maintains rules at odds with ¶ IV of the proposed Final Judgment).

[11] *See* Modified VOW Policy, ¶ I.4.

[12] The Modified VOW Policy does allow an individual home seller to direct that information about his or her own home not appear on *any* Internet websites, *id.*, ¶ II.5.a, recognizing the legitimate interests of a seller to protect his or her privacy and not to expose information about his or her property or the fact that it is on the market to the public on the Internet. It also allows a home seller to request that a VOW broker who permits customers to provide written reviews of properties disable that feature as to the seller's listing. *Id.*, ¶ II.5.c. Such comments – which can be anonymous – have no exact analogue in the bricks-and-mortar world. Unlike books, music, or other consumer goods, reviews of which can provide useful information to other potential purchasers of the same items, the uniqueness of each individual home creates an opportunity for an interested buyer (or his or her broker) to attempt to manipulate the market by providing a negative review in hopes of deterring other buyers from visiting or making an offer on the home. An individual home seller is also permitted under the Modified VOW Policy to request that an automated home valuation feature provided by a VOW broker be disabled as to the seller's individual property, although the VOW broker is permitted to state on the VOW that the seller requested that this type of information not be presented on the VOW about his or her property. *See id.* Though such valuations might be provided in a bricks-and-mortar environment, they would not likely be provided without evaluation, comment, or

MLS must provide to a VOW broker for display on the VOW all MLS listings information that brokers are permitted to provide to customers by all other methods of delivery.[13]

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. It expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.[14] It also provides two avenues by which a broker desiring to serve customers through a referral VOW may do so: as an "Affiliated VOW Partner" ("AVP") and as a member who directly serves some customers.

Under the Modified VOW Policy, a broker who desires to operate a referral business can partner as an AVP with a network of brokers and agents to whom the AVP will ultimately refer educated buyer customers who are ready to tour homes and receive in-person brokerage services.[15] The Modified VOW Policy requires MLSs to provide complete MLS listings

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input from an agent or sales associate. The Modified VOW Policy also provides a mechanism for sellers to correct any false information about their property that a VOW adds, *id.*, ¶ II.5.d, consistent with the general responsibility of any broker (VOW or otherwise) to present accurate information.

[13] *See id.*, ¶ III.2. The information that MLSs must provide to VOW brokers for display on their VOWs includes information about properties that have sold (except in areas where the actual sales prices of homes is not accessible from public records) and all other information that brokers can provide to customers by any method, including by oral communications. *Id.*

[14] *Id.*, ¶ III.11.

[15] Nothing in the Modified VOW Policy requires an AVP to hold a broker's license. An unlicensed technology company would be permitted under the Modified VOW Policy to host a VOW for a broker or brokers (or for one or more agents or sales associates, with the consent of their supervising brokers). When a licensed broker operates VOWs as an AVP in conjunction with other brokers (or their agents or sales associates), the AVP can perform services for which a broker's license may be required, including answering questions for customers who register on the VOW and referring customers to the brokers and agents or sales associates for whom the AVP operates the VOWs. *See, e.g.*, 225 ILCS 454/1-10 (describing the activities for which a broker's license is required in Illinois, including "assist[ing] or direct[ing] in procuring or referring of prospects").

information to any broker designated by another broker to be an AVP that will operate a VOW on the designating broker's behalf.[16] The MLS must provide listings information to the AVP on the same terms and conditions on which the MLS would provide listings to the broker who designated the AVP to operate the VOW.[17] This provision will allow referral VOWs to partner with brokers or agents, obtain access to MLS data to operate their referral VOWs, and provide the efficiencies that come from operating a VOW to the brokers and agents with whom they partner.

Under the proposed Final Judgment, a broker who works directly with some buyers and sellers, but who also wants to operate a VOW and focus on referrals, can become a member of the MLS and use MLS data as a member, including for its referral VOW. The Final Judgment permits NAR's Member Boards to implement the new requirements for MLS membership that NAR originally adopted with its ILD Policy,[18] but an interpretive Note (see Exhibit B to the proposed Final Judgment) explains that the new membership rule is not to be interpreted to restrain VOW competition.[19]

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[16] Modified VOW Policy, ¶¶ I.1.a & III.10. An AVP's rights to obtain listings information from the MLS is derivative of the rights of the brokers for whom the AVP is operating VOWs. *Id.*, ¶ III.10. The AVP would not itself be an MLS member entitled to MLS access directly.

[17] *Id.*, ¶ III.10.

[18] Proposed Final Judgment, ¶ VI.A.

[19] Under the interpretative Note included in Exhibit B to the proposed Final Judgment, if a VOW broker actively endeavors to obtain some seller clients for whom it will market properties or some buyer customers to whom it will offer in-person brokerage services, that VOW broker will be permitted to operate a referral VOW and refer to other brokers the educated customers he or she does not serve directly.

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers[20] and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.[21] VOW brokers, under the Modified VOW Policy, will be free from MLS interference in the appearance and features of their VOWs.[22]

NAR is required by the Final Judgment to direct its Member Boards to adopt rules implementing the Modified VOW Policy within ninety days of this Court's entry of the Final Judgment.[23] To ensure that its Member Boards adopt, maintain, and enforce rules implementing the Modified VOW Policy, NAR is required to deny errors and omissions insurance coverage to any Member Board that refuses to do so and forward to the United States any complaints it receives concerning the failure of any Member Board (or any MLS owned or operated by any Member Board) to abide by or enforce those rules.[24] 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.[25]

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[20] *See* Modified VOW Policy, ¶ III.2 ("For purposes of this Policy, 'downloading' means electronic transmission of data from MLS servers to a Participant's or AVP's server on a *persistent* basis" (emphasis added)).

[21] *See id.*, ¶ III.7.

[22] *See id.*, ¶¶ III.8 & III.9.

[23] Proposed Final Judgment, ¶ V.D.

[24] *Id.*, ¶¶ V.E & V.H.

[25] *Id.*, ¶¶ IV.A & IV.B.

Finally, the proposed Final Judgment, applicable for ten years after its entry by this Court,[26] establishes an antitrust compliance program under which NAR is required to review its Member Board's rules for compliance with the proposed Final Judgment, to provide materials to its Member Boards that explain the proposed Final Judgment and the Modified VOW Policy, and to hold an annual program for its Member Boards and their counsel discussing the proposed Final Judgment and the antitrust laws.[27] The proposed Final Judgment expressly places no limitation on the United States' ability to investigate or bring an antitrust enforcement action in the future to prevent harm to competition caused by any rule adopted or enforced by NAR or any of its Member Boards.[28]

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against NAR.

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[26] *Id.*, ¶ X.

[27] *Id.*, ¶ V.G.

[28] *Id.*, ¶ IX.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and NAR have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

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

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.[29]

VI. ALTERNATIVES TO THE PROPOSED AMENDED FINAL JUDGMENT

At several points during the litigation, the United States received from defendant NAR proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with the full trial on the merits against NAR that was scheduled to commence on July 7, 2008. The United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that consumers can benefit from the enhanced brokerage service competition brought by VOW brokers as effectively as any remedy the United States likely would have obtained after a successful trial.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, 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). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

[29] Proposed Final Judgment, ¶ VIII.

> (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
>
> (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)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[30]

As the United States 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. 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));

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[30] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

see also Microsoft, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). 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).[31] In determining whether a proposed settlement is in the public interest, 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." *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).

[31] *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'").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[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 court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and 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 United States 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 its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[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). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney 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). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[32]

[32] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

s/David C. Kully
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Dated: June 12, 2008

CERTIFICATE OF SERVICE

I, David C. Kully, hereby certify that on this 12th day of June, 2008, I caused a copy of the foregoing Competitive Impact Statement to be served by ECF on counsel for the defendant identified below.

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s/David C. Kully
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