COMPETITION
IN THE
RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY

A Common Sense Perspective on the Lack of Need for Legal or Regulatory Intervention by the Federal Government

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INTRODUCTION

Competition is alive and well in the residential real estate brokerage industry. Make no mistake about it. RE/MAX International, Inc. knows about competition in our industry. Dave and Gail Liniger started RE/MAX 33 years ago with a revolutionary new business model: let the agent keep all of his or her commissions and give them the freedom to run their business as they see fit. This came at a time when the "traditional industry" kept up to 50% of the agents' commissions and exercised tight control over how they operated. Not surprisingly, the established companies fought hard to keep RE/MAX from succeeding. Today, RE/MAX is the most successful real estate brand in the world. We have 5,800 franchises and 113,000 agents in 57 countries. RE/MAX was the first national real estate brand to have 1,000,000 transaction sides in a year and we will soon be the first to reach 2,000,000. Nobody in the world sells more real estate than RE/MAX.

How did RE/MAX overcome our competition and reach the pinnacle of our industry? Well, one thing is for sure, we did it without the intervention of the Federal government. We did it because we had a better business model and we made it successful the old fashioned way: hard work and customer service. The marketplace recognized the value of the RE/MAX business model and rewarded it. Where we encountered illegal efforts to keep us down, we filed suit against the competitors who unlawfully conspired against us and we won. Today, as always, RE/MAX welcomes competition from any legitimate business that can stand on its own merits and its own resources. We know that worthy competitors will force us to constantly improve and provide more value to our sales associates and to their customers. The RE/MAX business model has always been one where "everybody wins."

EXECUTIVE SUMMARY

RE/MAX believes there is no need for Federal legal or regulatory intervention into the residential real estate brokerage industry. The barriers to entry into our industry are insignificant and there is no reason to believe that free market forces are being impeded in any way.

COMPETITION IN THE INDUSTRY

- Competition in the residential real estate brokerage industry is tremendous. Consumers are bombarded with choices ranging from flat fees, discount commissions, rebates, etc. Discounters have been around for decades and are flourishing. Traditional companies such as Coldwell Banker and Prudential have started or acquired a discount brokerage and an Internet realty company. The Internet is empowering customers and increasing their expectations for service and pricing.

COMMISSION RATES

- Commission rates have been trending down over the past two decades. They have gone from 7% to the current rate of 5.1%. Under the RE/MAX model, 86,000 individual agents in the United States are empowered to set their own commissions. Agents compete fiercely with other agents for customers. Commissions are being determined by a free and active marketplace.
- Notwithstanding the rapid rise in housing prices, agent income is not rising correspondingly. The median gross income for real estate professionals in 2004 was $49,300 (prior to business expenses and without health or retirement benefits). This is down 6% from 2002 levels. The lack of increase in agent income can be explained by the dramatic increase in the number of agents entering the industry in recent years. These agents are being drawn in by the increase in house selling prices. As a result, the average number of transactions per agent is decreasing.
- Comparisons between commissions in the United States versus foreign countries are invalid because a higher level of services are offered in the U.S. and significant costs in foreign countries such as attorney fees are not included.

ONLINE COMPANIES/NEW BUSINESS MODELS

- There is little difference between "traditional" companies and "online" companies because traditional companies all embraced the Internet years ago and have a significant online presence. Virtually every broker and most agents have a web site that allows consumers to search all MLS listings in the local market.
- The Internet has not impacted the cost and pricing structure in the real estate industry the way it has in other industries because houses are unique properties and cannot be sold online the same way as books, stocks or airline tickets.

INTERNET LISTING DISPLAY

- The new ILD policy adopted by NAR is lawful and is not anti-competitive. Brokers have the right under State law to control their listings and to take unilateral action with respect to those listings.
- Despite misrepresentations to the contrary, the ILD policy does not allow a broker to withhold his listings from the MLS. Every broker in the MLS has the right to receive the listings of all other brokers.
- The ILD policy facilitates the Internet display of all listings. The starting point of the ILD policy is that each broker will provide all of his listings to all other brokers for Internet display. Although the ILD policy contains a blanket opt-out provision (in recognition of the broker's right to do so), the ILD policy imposes severe consequences on a broker who opts out such that it is extremely unlikely that any broker will do so.
- Because regional markets are fragmented into micro-markets, it is doubtful that any broker would feel it had enough market power to opt out of ILD and thereby limit the exposure of its clients' listings.
- If the DOJ or any private party feels that a broker with a dominant position in a particular market is acting illegally, they can pursue an action against that broker. The DOJ is off-base in challenging the ILD policy. The DOJ or potential private litigants should wait to see if any particular party acts unlawfully and then take action against that party.

- Brokers and third-parties do not have an absolute right to display the listings of other brokers in order to advertise them in an effort to attract customers.
- The provision restricting non-brokers from Internet display of listings is lawful and is consistent with State laws and with the purpose of the MLS and the permitted use of MLS content.

STATE LAW RESTRICTIONS ON LIMITED SERVICE PROVIDERS

- RE/MAX does not have an official position on this subject. We believe this is a matter best left to the determination of individual State legislatures.
- We believe there are legitimate issues of consumer protection and fairness at stake here and that those issues should be addressed by States that allow limited service realty companies.

STATE LAW RESTRICTIONS ON REBATES

- RE/MAX believes that brokers and agents should be allowed the ability to negotiate transaction service pricing with their customers.

ENTRY OF BANKS INTO THE REAL ESTATE BROKERAGE INDUSTRY

- RE/MAX feels there is more than adequate competition in our industry without banks. Nonetheless, we are not opposed to changes in law that would allow federal and state chartered banks to enter the real estate brokerage industry.

COMPETITION IN THE INDUSTRY

Those who decry the lack of competition and complain of "high" commissions in the residential real estate brokerage market would be prudent to follow the common sense rule applicable to every weatherman: before you broadcast current weather conditions, stick your head out the window to see what is actually going on. In today's real estate market, consumers are being bombarded with choices on television, radio, newspapers, the Internet, billboards, flyers, mailers and various other media. They are being enticed by offers of flat fees, low commissions, flexible commissions, rebates, credit cards, home warranties, moving trucks and the like. Don't believe it? Stick your head out the window: turn on the TV, listen to the radio, log on to the Internet, go to Costco, and open your mailbox. It seems today there is a real estate agent on every corner vying for your business with a wide range of offers and pricing.

A recent 62 page study by Steve Sawyer, Associate Professor at The Pennsylvania State University, concluded that there is "tremendous" competition in each local real estate market.[1] Thanks Mr. Sawyer. But we already knew that from looking out the window.

The Sawyer study states that: "competition among agents (even those affiliated with the same firm) for a listing is fierce. Because of the increased access to information, potential

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[1] Sawyer, Steve. 17 August 2005. "Local Real Estate Market Competition: Evidence and Insight From an Analysis of 12 Local Markets." The Pennsylvania State University, p. 8.

sellers are more knowledgeable about house prices, alternatives, and low-cost agency options . . . these consumers have increased expectations of services to be provided by real estate agents." Sawyer goes on to state that there has been a "dramatic increase in information on houses, house prices, and real estate via the many online sources. In all of these, it may be that the MLS access via the Internet enables buyers and sellers to be better consumers, demand more of their real estate agents and other value-adding service providers."[2] And just who is providing this information to consumers? It is the real estate companies and agents themselves. That doesn't sound like anti-competitive behavior to us.

COMMISSION RATES

A common complaint in the media is that commissions are too high and that they have remained fixed at current levels notwithstanding the dramatic increase in housing values. Critics making these charges constantly refer to commissions as being in the 6-7% range. Again, we urge these critics to look out the window. Real Trends, a respected industry publication, reports that the current average commission rate is 5.1%. Real Trends says that average commission rates have declined from 6.1% in 1991 to 5.1% in 2004. That is not a decline of 1% as some would have you believe, it is a decline of 16%. It is a decrease of 27% from two decades ago when the average rate was around 7%. How many industries have seen a decline in pricing over the past decade of 16%?

RE/MAX has 86,000 individual sales associates in 5,000 offices across the United States who are each empowered to price and advertise their services. Since RE/MAX sales associates do not split their commissions with their broker, they do not need the broker's approval to set their commission rates. Each sales associate can negotiate a commission rate with a customer based on the individual facts and circumstances of the potential transaction. RE/MAX sales associates compete fiercely against agents from traditional brokers, discount brokers, Internet firms, other RE/MAX offices and even colleagues from their own office. Our agents will tell you that in the majority of cases, they are competing in listing presentations with one or more other agents. Commission levels are being determined by a very competitive marketplace.

When we look out the window do we see real estate agents getting rich? A few of them are. But that is true for those at the top of any profession. However, the National Association of Realtors (NAR) reports that the median income of a real estate professional in 2004 was $49,300. The median gross income of all real estate professionals declined 5.6% between 2002 and 2004.[3] Few of these receive health or retirement benefits because they work as independent contractors. None of them receives a paycheck just for showing up on the job. They work entirely on commission. And what kind of working hours go along with those incomes? Real estate agents are on call 24 hours per day, seven days per week, with heavy emphasis on nights and weekends. Agents need to earn a decent living. They can go into other professions.

[2] *Id*, at 9.
[3] National Association of Realtors. 17 August 2005, Press Release. "NAR Member Survey Shows Income Disparity With Rising Ranks."

How does real estate agent income compare with other professions? We often hear complaints about how poorly school teachers are paid in the United States. The 2004 median gross income for all real estate professionals of $49,300[4] compares with 2002-03 average teacher salary of $45,771.[5] This gross income amount for real estate professionals is before deduction of significant personal advertising costs and the other business expenses discussed below. Furthermore, teachers receive health and retirement benefits. Real estate agents don't! Teachers get three-month summer vacations. Need we say more?

How do we explain the lack of significant increase in real estate agent income given the upward spiraling of home prices? NAR statistics provide the best answer. The buoyant housing market has attracted new agents in droves. From 2002 to 2004, NAR membership increased 26.6 percent to 1.1 million.[6] Over the last five years, the number has increased approximately 40%. Simply put, because of high housing prices, there are many more agents chasing the available commission dollars. As a result, the average number of transactions per agent is decreasing.[7]

In addition, costs are increasing dramatically. Today, every broker and every agent needs a computer and a Web site to be competitive. That is an expense that did not exist in the past. The cost of errors and omissions insurance has skyrocketed. In the litigation happy world in which we live, real estate professionals are increasingly being sued anytime a customer is unhappy with a transaction or feels some flaw in a property was not adequately disclosed. Finally, the cost of gasoline is a significant expense for a real estate professional who spends her day driving around. Gas prices have well outpaced inflation over the last decade.

Critics also fail to consider that the full service real estate agent bears the marketing costs of selling a home up-front and his fee is contingent upon completing a successful transaction. If the home does not sell, the agent eats his expenses. The same is true if a buyer turns out not to be serious about buying a home. Failure to complete a transaction is a common occurrence. These costs then have to be factored into the successful transactions. The alternative for the buyer or seller is to pay the agent up front whether or not a sale occurs. Some consumers may prefer to pay up front but most would rather pay on the back end only if a transaction is completed. Remember, it is ultimately the buyer who pays the commission because it is built into the price of the house. In the full service model, the buyer can finance 90% or more of the commission over 30 years.

It is worth exploring the assertion that it is ultimately the buyer who pays the commission because it is built into the price of the house. If you take away the commission, would a buyer be willing to pay the same price for the house? Of course not. A house does not magically increase in value just because a seller is paying less than a "standard commission." Assume you have two identical houses side by side each listed for $400,000. In the first case,

[4] The median gross income for sales agents was $37,600 and for brokers it was $52,800. National Association of Realtors. 17 August 2005, Press Release. "NAR Member Survey Shows Income Disparity With Rising Ranks."

[5] American Federation of Teachers. 15 July 2004, Press Release. **"**Teacher Salaries Remain Stagnant but Health Insurance Costs Soar AFT Releases Annual State-by-State Teacher Salary Survey."

[6] National Association of Realtors. 17 August 2005, Press Release.

[7] REAL *Trends*. April 2005. "Results of the 2005 REAL *Trends* 500 Survey." Vol. XIV, No. 4, p. 9.

the seller sells the house for $400,000 and pays a 5% commission of $20,000. His net will be $380,000. In the second case, the seller lists the house for a 2% commission. If he sells for $400,000, his net will be $392,000. Is the second house worth $12,000 (or 3%) more? No, it is not. The second seller is trying to capture a benefit by selling with a discounted commission. In a stable marketplace, the buyer will not allow this to happen. The buyer will insist on splitting the "benefit" with the seller by offering a reduced price for the house.

A recent widely quoted study says commissions are 1.5% lower in foreign countries. Critics have seized upon this to claim that U.S. consumers are overpaying commissions by billions of dollars. However, the study buries the following important information in a footnote: "Naturally, commission rates in other countries alone will not be sufficient evidence of long term equilibrium *unless we also control for differences in the services provided. Such a study is beyond the scope of this paper* (emphasis added)."[8] The report goes on to state that U.S. firms provide more services and face greater liability.[9] Other costs in foreign transactions such as attorney fees, which can be significant, are not added to the foreign commission rates for purposes of the comparison. In other words, the authors acknowledge that they are comparing apples and oranges. Their comparison is therefore meaningless.

Finally, we will discuss below generally the impact on the industry of online companies and new business models. It is important to note in the context of a discussion on commission rates that a recent study by the Government Accountability Office (GAO) stated that "some brokers and industry analysts noted that the growth of firms offering lower commissions or flat fees has made an increasing number of consumers aware that there are alternatives to traditional pricing structures and that commission rates are negotiable."[10]

ONLINE COMPANIES / NEW BUSINESS MODELS

Critics attempt to paint our industry as being afraid of the Internet and anti-competitive. Nothing could be further from the truth. RE/MAX was the first national real estate company to launch a Web site. We did that 10 years ago and we displayed all of our listings. A glance out the window today will reveal that the vast majority of brokers and agents have Web sites that allow a customer to search all of the property listings of *every broker* on the local MLS. Tens of thousands of these Web sites exist.[11] This has been true for many years. Name one other industry where every company displays on its Web site the entire inventory of each one of its competitors. Could it be that the line between Internet-based and traditional brokers simply doesn't exist and that our industry has fully embraced the Internet? RE/MAX thinks so.

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[8] Delcoure, Natalya and Norm G. Miller. 2002. "International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry." *International Real Estate Review,* 5:1, pp. 14, note 5.
[9] *Id.* at 28.
[10] United States Government Accountability Office. August 2005, Report to the Committee on Financial Services, House of Representatives. "REAL ESTATE BROKERAGE: Factors That May Affect Price Competition,"p. 14-15.
[11] If merely 20% of NAR's current membership of 1.1 million has such a Web site, the number would be in the hundreds of thousands.

It is easy to say the Internet has brought down costs in other industries so it should do the same for real estate. But not all industries are the same. The Internet has not significantly affected prices for professional services (doctors, attorneys and accountants), newspaper advertising rates, landscapers, etc. Not every industry is going to be impacted by the Internet the same as airline ticket vendors, stockbrokers or booksellers. After all, these industries are selling commodities. Real estate agents are selling unique properties and providing individualized services. Even homes in the same neighborhood can have important differences such as square footage, floor plan, view, landscaping, colors, floor coverings and items in need of repair. Sellers and buyers cannot always appreciate these differences. An experienced real estate professional provides a value added service that assists sellers to obtain the best price for their homes and buyers to find the best home at the lowest price.

Critics who know nothing of our industry would have you believe that discount brokers are a recent phenomenon. In reality, they have been on the landscape for decades and, as noted by the GAO report, many are doing very well.[12] They belong to and have full access to the MLS. Assist-2-Sell, which bills itself as North America's largest discount real estate company, reports on its Web site that it is growing at a 50% annual rate. The Chairman of Help-U-Sell recently stated that, "the public's overwhelming acceptance of the Help-U-Sell set-fee real estate model has accelerated well beyond our original projections. Our success is confirmed by our strong financial position and the sale of our 825th franchise, which represents growth of 900 percent since 1999."[13] Do these companies sound like they are in need of Federal intervention? Hardly.

New companies with new business models are free to advertise and promote their services to potential customers as much as they want. The marketplace will prove whether they offer value. If these companies are members of the MLS, they will have access to all listing data and should be able to display it on their Internet sites. If they are not engaged in real estate brokerage and, therefore, do not have access to the MLS, they are not entitled to demand subsidies in the form of sharing of proprietary information so they can advertise that information in order to attract customers. These new business models should be subsidized to profitability by their investors and ultimately sustained by the marketplace based on their own merits.

The ultimate indication that new business models have gained acceptance in the marketplace is their adoption by established members of the industry. We see this in the airline industry where United and Delta responded to the success of discount airlines like Southwest and jetBlue by starting up their own discount carriers, Ted and Song. We are now seeing the same phenomenon in the real estate industry. Coldwell Banker has started a discount broker called Blue Edge Realty that offers to list properties for a 2% commission. Prudential Realty has acquired Internet based eRealty.

[12] United States Government Accountability Office, p. 20.

[13] Help-U-Sell. 1 September 2005, Press Release. "Help-U-Sell Real Estate Restructures Management Team."

RE/MAX views the success of discount brokers and Internet realty firms as evidence that there are virtually no barriers to entry for new business models in our industry[14] and that free market forces are unrestrained in real estate brokerage. As stated in the GAO report, "the

Internet has made different service and pricing options more widely available to consumers."[15] As a result, there is no need for legal or regulatory intervention by the Federal government.

INTERNET LISTING DISPLAY

Purpose of MLS

The Multiple Listing Service (MLS) was designed as a mutual sharing of information by industry peers to facilitate the sale of and search for properties by customers. A broker or agent who works to obtain a listing then enters that listing in the MLS for all other brokers to see. The broker has a contract with her seller that gives the broker ownership and control of the listing information. The idea was that brokers and agents would work to earn their own customers using their own assets. Once having earned a seller or a buyer as a customer through her own goodwill, experience, reputation, listings, advertising, etc., the broker can then enter a seller's listing information into the MLS and share all MLS listings with a buyer. The concept is simple: you earn a customer, you get to use the MLS with the customer. The concept is not: you get the MLS and then you advertise it in order to get customers.

The MLS would never have come about if a broker with no customers could have used the MLS to advertise listings of other brokers in order to get customers. The MLS would never have come about if any third party could use the MLS data for advertising purposes. The concept of the MLS is that there is a mutual win for brokers and customers when all listing data is shared within the industry. The MLS is as American as hot dogs and apple pie. There is no MLS in most foreign countries. If we were in Great Britain, we would not be having the following discussion about Internet Listing Display of MLS information.

NAR ILD Policy

The MLS was formerly published in book form and provided only to brokers who belonged to the MLS. With the advent of the Internet and its ability to freely disseminate information, NAR recognized two important needs: the need to protect the right of the broker to control his listings and the need to control publication of sensitive aspects of MLS data (such as names of sellers, mortgage information, tax information, etc). As a result, NAR developed two policies relating to display on the Internet of listing information. The first, dubbed the IDX (Information Data Exchange) policy, dealt with the display of basic, non-sensitive listing data. The second, called the VOW (Virtual Office Website) policy, dealt with the display of complete MLS data in a virtual office environment.

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14 United States Government Accountability Office, p. 8.
15 *Id.* at 19.

The United States Department of Justice (DOJ) objected to certain provisions of the VOW policy on antitrust grounds so NAR never implemented it. After two years of unsuccessful attempts at compromise with the DOJ, on September 8, 2005, NAR unilaterally implemented a new policy called the ILD (Internet Listing Display) policy. The ILD policy replaces both the IDX and VOW policies and eliminates the provisions of the VOW policy to which the DOJ had objected. The DOJ nonetheless went forward the same day and filed a lawsuit against NAR challenging the then defunct VOW policy on antitrust grounds. A month later, the DOJ amended its complaint to attack the ILD policy on vaguely asserted grounds that it also was anti-competitive.

Despite incorrect media reports and an incorrect finding by the GAO[16] to the contrary, the ILD policy in no way limits the right of every broker who participates in the MLS to have complete and unrestricted access to MLS data. No matter whether a participating broker has a traditional business model or a discount or an Internet model, he has full access to the MLS data and can share it with his customers.

The purpose of NAR's ILD policy is to facilitate the display on the Internet of basic MLS listing information for all properties in the MLS. The ILD does this by starting from the position that all listings from every broker will be available to every other broker for display on each broker's Web site. In the event a broker determines that he does not want his listings displayed on other brokers' Web sites, he may "opt out" of the Internet display regime. His opt-out will affect *only* the display of his listings *on the Internet*. He may not opt out of having his listings included in the MLS. All other brokers will still have access to his listings in the MLS. This is an important point that has been mischaracterized.

This ability of a broker to opt out of ILD is referred to as a "blanket opt-out." The ILD policy is designed to discourage brokers from opting out. The disclosure requirements and other disincentives imposed by the new ILD policy on a broker who does opt out make it highly unlikely, if not virtually certain, that it will not occur. The first penalty is that an opt-out must be on a blanket basis. The broker cannot selectively prevent his listings from being displayed by certain brokers. He has to withdraw them from *all* brokers. The adverse consequence of him doing this is that he, in turn, loses the right to display the listings of all other brokers. A broker who opts out cannot opt back in for a period of 90 days. A broker who opts out is required to disclose to a prospective seller that he has opted out and that the seller's listing will not receive maximum exposure by being displayed on other brokers' Web sites. The broker has to make this disclosure on a new form that must be attached to the listing contract and signed by the seller. Finally, the ILD policy empowers a seller to override a broker's decision to opt out by requiring the broker to provide the seller's listing to all other brokers for display on the Internet.

Given the negative consequences associated with a broker's decision to opt out, it is highly unlikely that it will happen. Nonetheless, it is important to recognize the right of a broker to control his listings. Not having an opt-out option would leave brokers who do not want to see their listings posted on the Web sites of their competitors no choice but to pull out of the MLS. That would threaten the vitality and pro-competitive benefits offered by the MLS.

[16] *Id.* at 4.

RE/MAX concurs with NAR's position that the blanket opt-out provision does not violate the law. The DOJ asserts that any limitation on the opportunity of brokers to display all listings on their Web sites has an adverse affect on the brokers operating such sites, and is therefore unlawful. The DOJ overlooks--or ignores--the reality that the broker must exercise the opt-out right individually and unilaterally and face the consequences outlined above. A broker does and should have the right to choose not to assist his competitors by being forced to let them display his listings on their sites.

Some special interests still see the blanket opt-out as a threat. They fear that if one or more major firms in a local market opted out from sharing data with rival Web sites, consumers would find they could get more information by going to a bricks and mortar real-estate office to meet an agent face-to-face than they could get by dealing with a Web-based agent. RE/MAX believes these parties are tilting at windmills. In order to be competitive, a broker needs to be able to (a) assure her sellers that their listing will receive maximum exposure by being displayed on all brokers' Web sites and (b) have all other brokers' listings displayed on her Web site. It would be extremely rare to find a geographic market where a single firm has large enough market share that it might feel it does not need to share or receive Internet display of listings. Even if such market share exists, the Sawyer study found that a regionally dominant firm still competes in micro-markets within its region where there will be one or two other firms who have substantial percentages of that micro-market although they are not a factor in the regional market.[17] This possibility further decreases the probability that even a dominant firm would exercise the blanket opt-out.

RE/MAX recently announced a new initiative for its Web site, www.remax.com, whereby it will provide home buyers and sellers the ability to search virtually all residential property listings, including those of its competitors, by creating links to a national collection of ILD broker Web sites. RE/MAX believes that NAR's new ILD policy and the upcoming RE/MAX Web site are designed to facilitate what consumers want: easy access to all property listings via the Internet. RE/MAX strongly encourages its brokers to continue to allow all of their listings to be displayed on the ILD sites of competing brokers and expects that competing brokers will also continue to share their listings. In fact, the new RE/MAX strategy depends upon RE/MAX brokers sharing all of their listings so they, in turn, can get all listings of other brokers to display on their Web sites and link those listings to the national RE/MAX ILD site.

As mentioned above, Cendant, through Coldwell Banker, now has a discount brokerage company and Prudential has an Internet realty company. We assume that these industry giants will not want their traditional brokers (which also include Century 21, ERA and Sotheby's) to opt out and withhold listings from the new business models in which they have invested.

No one should assume that just because a firm has the right to elect against sharing its listings that it will exercise that right unlawfully. The DOJ and interested private litigants should wait and see before judging and making their accusations. As the DOJ knows and

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[17] Sawyer, p. 8.

others should know, there can be no violation of the antitrust laws in the absence of a conspiracy or improper monopolistic behavior.

ILD is not a Right to Advertise

What some critics are really complaining about is being denied the ability to use listings from the MLS in order to advertise their competing business model. These critics ignore State brokerage/salesperson licensing rules that say the broker owns the listing and has the right to decide where the listings will be shown, including whether or not they will be shared with other broker's Web sites. Some brokers don't want their listings to be used as advertisements for competitors, which is a legitimate concern.

If a competitor or alternative business model is allowed to advertise the listings of a broker on the Internet without permission, should it also be allowed to advertise that listing in the newspaper or in a homes magazine? Should he be allowed to put his sign in the front yard next to the sign of the listing agent? Common sense dictates no.

So there is the conflict, should the MLS be treated as a public advertising utility or not? As stated above in *Purpose of MLS,* the MLS would never have come about if a broker with no customers could have used the MLS to advertise listings of other brokers in order to get customers. The MLS would never have come about if any third party could use the MLS data for advertising purposes.

Brokers Only

Another provision of the ILD policy receiving criticism by some Internet companies states that in order to participate in the MLS (and therefore in ILD), a "participant" must offer or accept cooperation and compensation to and from other participants. In other words, a participant must actually be engaged in the business of real estate brokerage. The purpose is to make sure the definition of a participant is consistent with the purpose of the MLS and the permitted uses of MLS content. The MLS is a vehicle whereby listing brokers make offers of cooperation and compensation to cooperating brokers to procure a buyer for the listing.

Dave Liniger, co-founder and Chairman of RE/MAX stated that he feels the DOJ is being prompted on this issue by Internet companies who have no intention of engaging in the real estate brokerage business. He feels these interlopers want access to brokers' listings so they can advertise them in order to attract referrals they can sell back to the very brokers who own the listings. These companies add no value to the transaction, only cost that is ultimately paid by the consumer. Mr. Liniger describes these would-be lead aggregators as being "like the guy who shows up at a pot-luck dinner bringing only a fork."[18]

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[18] RE/MAX International, Inc. 12 September 2005, Press Release. "RE/MAX Announces Support for NAR's New ILD Policy."

STATE LAW RESTRICTIONS ON LIMITED SERVICE PROVIDERS

RE/MAX does not have an official position on the issue of State law restrictions on limited service providers. We recognize that over the years, state legislatures have decided that consumers should be protected when dealing with their most valuable asset. That is a legitimate determination for them to make if they see fit. Legislatures have always been in the business of protecting consumers from quick buck artists who do not have the long term interests of consumers in mind. If States are going to regulate cosmetologists, they should have the right to regulate those who deal with the most valuable asset the consumer owns.

All 50 States require real estate professionals to be licensed. In order to obtain a license, would-be professionals must become knowledgeable about the intricacies of real estate transactions including: fiduciary obligations, sales contracts, escrow, title, appraisal, survey, property disclosure, environmental hazards, Megan's law, mortgages, deeds of trust, closing procedures and more. As a result, a State legislature may legitimately determine that the fiduciary duty of a broker or agent requires full representation of a client.

If a State legislature determines to allow limited service providers, RE/MAX believes that the State should require that such providers make a thorough disclosure to their client of *all* the steps involved in a real estate transaction and make it clear which aspects of the transaction where the client will be left on their own. Limited service providers and Internet firms must legitimately recognize that each side in the transaction has a job to do and some of it cannot be done by a computer or should not be done by a novice: holding an open house, writing a listing, writing an offer, determining relevant property disclosures, evaluating an offer, writing a counteroffer, attending an inspection, attending a closing, etc. While some consumers may be sophisticated enough to represent themselves in some or all of the steps of a transaction, most are not. Without proper disclosure, a consumer may believe he will receive more representation than he has contracted for from a limited service provider and may not be aware of the risks. The potential consequences could be disastrous.

Another area a State legislature should address if it determines to allow limited service providers is proper protection of and compensation to a full service agent involved in one side of the transaction. RE/MAX is increasingly hearing complaints from its agents who encounter parties in a transaction who expect the RE/MAX agent to pick up the responsibilities of the other side who has contracted for limited services. In addition to creating an unfair division of responsibilities, this puts the full-service agent in a difficult position with respect to his fiduciary duties.

The concept of a co-operative commission split assumes that each side will do its share of the work. One agent agrees to work for half the commission assuming the other side will do their job. If the other side does not do its job, the first agent should not have to perform increased work without being paid more. In any industry, a worker who is asked to perform the responsibilities of his co-worker would expect to be paid more. As such, full service brokers and agents should be allowed to inform their clients that they choose not to deal with limited service providers or that they will not do so without receiving additional compensation. A broker's unilateral decision to take this position should not be characterized as unlawful discrimination designed to suppress new business models. Rather, it is simply a lawful determination by that broker that they are unwilling to price their services below a certain level or to do work for which they are not paid.

STATE LAW RESTRICTIONS ON REBATES

The RE/MAX system empowers each agent to set his or her own commissions without obtaining approval from their broker or anyone else. RE/MAX has 86,000 individual sales associates in the United States who compete fiercely against agents from traditional brokers, discount brokers, other RE/MAX offices and even colleagues from their own office. RE/MAX believes that real estate professionals should be allowed the unrestricted ability to negotiate transaction service pricing with their customers on a case-by-case basis.

ENTRY OF BANKS INTO REAL ESTATE BROKERAGE INDUSTRY

As discussed above, RE/MAX feels there is more than adequate competition in our industry without the need for entry by banks. When RE/MAX expanded into Canada in 1980, the Canadian real estate market was dominated by banks and trust companies. Today, RE/MAX is the market leader in Canada and banks and trust companies have been reduced to fringe participants for the most part. RE/MAX feels that banks would not be effective competitors in our industry and therefore entry by them would be detrimental to their financial health. Nonetheless, RE/MAX is not opposed to changes in law that would allow federal and state chartered banks to enter the real estate brokerage industry.
