



November 28, 2005

Albert Hepp of FlatFeeMLSListing.com BuySelf Realty's comments on Competition in Real Estate

The 14 Point Multiple Listing Policy adopted in 1971 by the National Association of Realtors (NAR) has served the real estate community well but is badly in need of an update. Numerous minor updates are needed to reflect the evolutionary and revolutionary changes that have occurred in the marketplace for real estate services since 1971. Consumer choice is the true measure of competition. Updating the policy can insure all variety of consumers will be served with the option of their choosing. As history shows with the 14 Point Policy that occurred as the result of the DOJ anti-trust lawsuit thirty-some years ago, the NAR and local MLSs need federal government involvement to maintain a level playing field for innovators.

The nine points listed below will bring needed competition to MLS systems (hereafter MLSs) into the year 2005 and beyond. Some MLSs are already where they need to be on the critical MLS competitive issues listed below. Some MLSs already operate with these rules. The fact that some MLSs already have pro-competitive rules shows that the proposed rules below are not extreme or problematic. Furthermore, the fact that some MLSs have some best practices and worst practices, such as the MARIS MLS in Missouri and Regional MLS of Minnesota, shows that the existing system and players can work, they just need to implement/tweak their rules to ensure fair competition and eliminate discrimination against innovators.

#### Recommended Solution

"The Next 8 Points"-MLS Rules needed to end recent discrimination against innovators and bring the 1971 era agreement into a new century:

**15. MLS shall not enable or facilitate discrimination against non-traditional listings.** Do not allow MLS users to search on the field "listing type" or "listing broker" and therefore eliminate non-traditional property listings from the property search results display. Enabling such a search just helps agents who want to discriminate against non-traditional listings. Allowing agents/brokers to screen out non-traditional listings enables and encourages them to violate the law (fiduciary duties to the buyer, anti-trust prohibition on group boycotting, etc.) When an MLS enables this behavior, it is akin to having a "neighborhood racial composition" field that enables buyers/agents who want to discriminate on this basis (which is also against State and Federal law). Worst practice: Realcomp MLS, Michigan property viewing **automatically** excludes non-traditional listings unless the searching agent manually selects to include them on every search they do. This rule should also apply to MLSs that allow the agent to set criteria for listings to be automatically emailed to their buyers. Best practice: Regional MLS of Minnesota, which does not allow an MLS user eliminate non-traditional listings from MLS property search results for both viewing properties and automatic emailing of listings to their buyers.

**16. MLS shall not redefine the Exclusive Right to Sell (ERS) listing category to create a substandard listing category in the MLS.** Some MLSs have recently redefined ERS into something it has never been. ERS only has to do with the conditions for the payment of commission, nothing else. Some MLSs have changed the definition of ERS as a way to reduce or eliminate exposure of non-traditional listings by creating a new category of listing that is substandard. Worst practice (NORMLS, Ohio) ERS "redefined" to exclude any property that has

been advertised as "By Owner." Best practice: most MLSs have kept the definition of ERS listings consistent with its long time, established definition that simply relates to the conditions under which a seller is required to pay a commission to the broker.

**17. MLS shall not discriminate in the sharing of listing data with Realtor.com** Many MLSs only share listings defined as Exclusive Right to Sell through upload to Realtor.com as a way to reduce the exposure of non-traditional listings. Worst practice: IRES in Colorado, many others do not share exclusive agency listings or any category other than ERS. Best practice: Regional MLS of Minnesota shares all listing types, even a catch-all "service agreement" listing type to Realtor.com.

**18. MLS shall not discriminate in the sharing of listing data with Broker Reciprocity.** Many MLSs only share listings defined as Exclusive Right to Sell through broker reciprocity (individual broker's website display of MLS listings on their own website). Worst practice: IRES in Colorado, many others do not share exclusive agency listings or any category other than ERS. Best practice: Regional MLS of Minnesota shares all listing types, even a catch-all "service agreement" listing type through broker reciprocity.

**19. MLS shall not allow brokers to remove other broker's listings from Broker Reciprocity data.** They either show all of it or only their own. (MARIS MLS in Missouri) Coldwell Banker Gundaker website says at bottom of search results page: "Your search results may not reflect the entire IDX database of Mid America Regional Information Systems, Inc (MARIS MLS). Property listings of some REALTOR brokerage firms may have been excluded" At a minimum, Brokers who do discriminate must put a click through notice on their website stating that the Broker has removed some listings from the database.

**20. MLS shall not enforce their own interpretation of laws.** MLSs should not be the enforcers of their own interpretation of the laws. They should refer complaints to the State Real Estate Department or other regulatory agencies. Worst practice: Northeast Oklahoma Real Estate Services (NORES) MLS wildly interprets a state law change in an extreme way, and then removes a broker's listings from MLS because NORES doesn't believe they comply with their interpretation of the state law. Best Practice: Massachusetts PIN MLS refers all complaints about listings to Attorney General or State Real Estate Commission.

**21. MLS shall not orchestrate Kangaroo Courts of Arbitration.** Local associations may require arbitration of commission disputes but must make impartial and representative arbitrators available. If an alternative broker is involved in an arbitration, MLSs must provide that the arbitrators will be selected so that traditional broker arbitrators are not the majority of the arbitration panel. Arbitrators practicing exclusive buyer brokerage, or non-traditional seller/transaction brokerage must make up a majority of the panel. For example, if the arbitration panel has 3 arbitrators and a non-traditional broker is involved in the arbitration, that non-traditional broker may require that one arbitrator be a non-traditional seller/transaction broker, an exclusive buyer broker, and a traditional broker. The current arbitration system is analogous to the all white Southern juries that quickly sentenced minority defendants to death with little or no evidence in the early 1900s. Non-traditional brokerage is a disruptive presence in the marketplace that traditional brokers resent and wish would go away. Consider the comments posted on the FTC website by the 2006 Professional Standards Committee Chair for the Kansas Association of REALTORS, Larry Kennett, also a 32 year industry veteran: "Limited service brokers...should not be allowed to post listings in the MLS." Give Mr. Kennett credit for speaking honestly what many traditional agents believe and seek to implement in their positions as arbitrator. (Comment Number: 518795-00254, full comments listed below). Could a limited service broker expect an impartial hearing from such an agent? Arbitration panelists frequently assess commission penalties against brokers of more than \$20,000, so the stakes are high and any abuse by traditional agents towards new business models is difficult or impossible to appeal.

22. **The NAR and all MLSs must agree that most non-traditional listings fit the definition of Exclusive Right to Sell** and therefore have the right to be in that category. A listing where the seller pays an upfront listing fee has paid a commission regardless of how the property is sold, so it is therefore an Exclusive Right to Sell listing by definition. Some MLSs have attempted to argue this type of listing is Exclusive Agency since the seller may not pay an additional commission over and above the initial listing fee. The MLSs have already established a definition and description of this type of listing that has worked well for years, called the Variable Rate Commission, which simply tells a potential buyer agent that the seller may pay a different total commission depending on how the buyer is procured.

23. **MLS shall offer a "transaction brokerage" or "service agreement" type of listing that gets full sharing through broker reciprocity and on Realtor.com.** This category of listing would not require an exclusive relationship between seller and the listing broker, only require (1) that a buyer commission be offered through the MLS and (2) that only one broker may be used to place a listing in a given MLS. This rule change would substantially reduce the anti-competitive effects of minimum service legislation, which covers only exclusive brokerage agreements. Many MLSs refuse to accept non-exclusive listings, which combined with minimum services legislation eliminates business model competition from the MLS. As many industry practitioners admit, non-MLS listings are "not viable." (Stephen J. Bochenek, general counsel for the Illinois Association of REALTORS®, "Play safe, disclose" October 2005, Realtor Magazine) Best practice: Regional MLS of Minnesota shares all listing types, even a catch-all "service agreement" listing type to Realtor.com and broker reciprocity.

Thank you.  
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<http://www.ftc.gov/os/comments/realestatecompetition/518795-00254.htm>

**Comment Number:** 518795-00254

**Commenter:** Larry Kennett

**State:** KS

**Agency:** Federal Trade Commission

**Rule:** Notice of Workshop and Request for Comment

**Docket ID:** To Be Added

No Attachments

**Comments:**

Gentlemen: I have been a licensed real estate practitioner for over 32 years. I have owned both a "traditional" real estate company and now a "fee for service" company. I can tell you that there is not another industry that is more competitive. We have elected to be a "full service" broker. In considering being a "limited service" or "no service" broker, we realized that although consumers will select the "limited service" programs to save money, the reality was that they then expect "full service" and they were upset when it was not provided. "Limited service" brokers may have a place in the market, however, they should not be allowed to post listings in the MLS. They should be posted as a FSBO service on a FSBO site especially designed for these types of services. I am the chairman of the Professional Standards Committee for the Kansas Association of REALTORS for 2006. It is not appropriate for agents to be placed in a position where they be asked by a seller who hired a "limited service" broker for help or advice, putting the "traditional" agent at risk to create an "agency" relationship with the seller and thereby creating an "agency" breach with their buyer. Before you call foul, please understand that the consumer can not get something for nothing. If they do not want to pay for professional agent

services, they should remain FSBO. On a separate subject. To even consider that consumers do not have enough access to REALTOR listings is ludicrous. "Aggregators" give no additional access to these listings which can be found on multiple REALTOR based web sites. "Aggregators" add no value to the listing system. Yet they feed off our hard work and expense to charge us back for the leads that were created from our own work. If you are going to make rules that affect me and other hard working REALTORS, please make some attempt to understand how the business actually works. Respectfully, Larry Kennett, ABR, ABRM, C-CREC, CRB, CRS, GRI

## ***14 Point Multiple Listing Policy***

Adopted November 15, 1971, By National Association

The purpose of the Multiple Listing Service is the orderly correlation and dissemination of listing information to its Members so that Realtors may better serve the buying and selling public.\* (\*Relates to Official Interpretation No. 6)

A Multiple Listing Service shall not enact or enforce any rules which restrict, limit or interfere with the actions of its Members in their relations with each other or in their Realtor/client relationship or in the conduct of their business including, but not limited to, the following:

1. MLS shall not: Fix, control, recommend, suggest or maintain commission rates or fees for services to be rendered by Members (Interpretation No. 14).
2. MLS shall not: Fix, control, recommend, suggest or maintain any percentage division of commissions or fees between cooperating Members and between Members and nonmembers.
3. MLS shall not: Require financial support of Multiple Listing Service operations by any formula based on commission or sales price.
4. MLS shall not: Require or use any form which establishes or implies the existence of any contractual relationship between the Multiple Listing Service and the client (buyer or seller).
5. MLS shall not: Make any rule relating to the posting or use of signs (Interpretation No. 26).
6. MLS shall not: Make any rule prohibiting or discouraging cooperation with nonmembers.
7. MLS shall not: Limit or interfere with the terms of the relationship between a Member and his salesmen (Interpretations No. 16 and No. 17).
8. MLS shall not: Prohibit or discourage any Members from political participation or activity (Interpretation No. 15).
9. MLS shall not: Make any rule granting blanket consent to a selling Member to negotiate directly with the seller (owner) (Interpretation No. 10).
10. MLS shall not: Make any rule regulating the advertising or promotion of any listing (Interpretations No. 6 and No. 26).
11. MLS shall not: Prohibit, or discourage a Member from accepting a listing from a seller (owner) preferring to give "office exclusive."
12. MLS shall not: Adopt any rule denying a listing Member from controlling the posting of "sold" signs.

13. MLS shall not: Reject any exclusive listing submitted by a Member on the basis of the quality or price of the listing.

14. MLS shall not: Adopt rules authorizing the modification or change of any listing without the express written permission of the listing Member.

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As used herein, the word "rule" shall include "rules," "regulations," "procedures," "policies," and "practices."

As used herein, Multiple Listing Service shall mean a Multiple Listing Service Committee of a Board of Realtors and a separately incorporated Multiple Listing Service affiliated with and owned by a Board of Realtors .

Realtors who are Members of a Multiple Listing Service, which is not affiliated with or owned by a Board of Realtors, shall not recognize or adhere to any Multiple Listing Service rule which is contrary to this policy.

The foregoing policy prohibitions shall be subject to and limited by any applicable governmental statute, ordinance or regulation, to any agreement entered into by the Multiple Listing Service or Board of Realtors and an agency of Government, and to any final decree of court or administrative agency.

It shall be the duty and obligation of all Boards of Realtors and Multiple Listing Services owned by or affiliated with Boards of Realtors to examine their Rules and Regulations to assure that they conform to this policy. Boards failing to bring their rules into conformity with or failing to adhere to this policy shall be required to show cause why their charters shall not be revoked.

Reference to numbered interpretations are from the Official Interpretations, Article I, Section 2, of the National Association of Realtors Bylaws.

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## Section 6.2

Supplement No. 1 to Multiple Listing Policy Published December 21, 1971

Note: Keyed amendments in accordance with authority granted by the Board of Directors of the National Association of Realtors to allow proper wording by Counsel as, from time to time, amended. On November 15, 1971, the National Association adopted a Multiple Listing Policy, containing fourteen numbered items, together with other material. The National Association's Multiple Listing Policy was stating the National Association's considered judgment, based on many years of experience, of what ends a Multiple Listing Service ought to serve, particularly in the light of growth and development of experience and practices. Furthermore, the National Association has been examining the practices of Multiple Listing Services generally in view of recent interest to the subject of the United States Department of Justice.

Although the National Association disagrees sharply with the Department of Justice's

views of legality in many respects, the National Association has concluded that some practices are not of sufficient value to warrant argument and litigation. Therefore, the Statement in the National Association's Multiple Listing Policy that a particular type of rule or practice should be avoided was not intended to mean that it was believed to be illegal; it may mean either that the rule or practice is not prohibited by law, it is deemed an inequitable limitation on membership and therefore not permissible for a Member Board of the National Association to adopt or follow, or else that it is poor business or disruptive of proper relations that ought to exist between Realtors and between Realtors and their clients\* or that it unreasonably restricts the Realtor in the operation of his business.

(\*Amended by the National Association's Counsel - April 12, 1972)

The policy also stated that it shall be the duty and obligation of all Boards of Realtors and Multiple Listing Services owned by or affiliated with Boards of Realtors to examine their Rules and Regulations to assure that they conform to the National Association's policy and to submit copies of such Rules and Regulations to the National Association within six (6) months of official notification of this policy. This mandate should be observed. The policy also stated that "Boards of Realtors failing to bring their rules into conformity with or failing to adhere to this policy shall be required to show cause why their charters shall not be revoked." This statement does not mean that a Board of Realtors failing to bring its rules into full conformity will necessarily have its charter revoked. What is meant is that a Board of Realtors failing to bring its rules into conformity in respect to any of the 14 Points by conduct which is illegal under applicable law or inequitable within the meaning of the National Association's Bylaws will have its charter revoked. The nature of the rule to which any Board of Realtors fails to conform will be examined at the time the matter comes on for consideration. As to such of the rules as are not illegal or inequitable but which are contrary to the National Association's policy, all Boards of Realtors are advised that they will receive no support or assistance from the National Association if they continue to observe those rules and find themselves in controversy.