



U.S. Department of Justice

Antitrust Division

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September 4, 2008

BY ELECTRONIC MAIL AND REGULAR MAIL

Grace Berger
Executive Director
Board of Realty Regulation
301 South Park Avenue
P.O. Box 200513
Helena, MT 59620
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Re: Proposed Amendment and Adoption of ARM § 24.210.641

Dear Ms. Berger:

I write on behalf of the Department of Justice, Antitrust Division to provide the Department's views concerning the effect of proposed ARM § 24.210.641 on competition and consumers. The version of the regulation proposed in the Notice ("the listed proposal") would harm Montana consumers of real estate brokerage services by increasing fees, limiting choice, and impeding the innovation spurred by unrestrained competition among real estate brokers. The Department had previously communicated its concerns to the Board, through Board counsel Gene Allison, and had been informed that the Board would address those concerns by proposing language that would allow consumers to waive the minimum service requirements of the rule. We were specifically informed that the Notice posted August 7, 2008 would propose an alternative version of proposed ARM § 24.210.641(m) and (o) that included language allowing consumers to waive otherwise mandated services ("the waiver proposal"), but such language did not appear due to a clerical error. Such a waiver option, discussed in detail below, would overcome the Department's concerns about the adverse impact of the listed proposal on competition and consumers.

Unless modified to allow consumers to waive the proposal's minimum service requirements, however, the listed proposal would harm Montana consumers. Today, the vast majority of states allow consumers to select and purchase only those real estate brokerage services they want. As a result, many consumers have been able to save thousands of dollars when selling their homes. In addition, competition by brokers offering non-traditional options has forced traditional brokers to compete harder, putting downward pressure on the prices paid by consumers who choose to buy full-service brokerage services. The listed proposal would put Montana among the small handful of states that require consumers to purchase services they do

not necessarily want or need, thereby restricting choice and raising the fees that consumers pay. In addition, the listed proposal raises concerns under the federal antitrust laws by implementing an agreement among competitors to restrict trade unreasonably.

Competition in the real estate brokerage industry has opened up new options for consumers. Traditionally, real estate brokers performed virtually all services related to buying and selling a home, including listing the home in the local Multiple Listing Service, marketing the house to prospective buyers, hosting open houses, negotiating the sales contract and other forms, and assisting with closing. Home sellers had only two options: to engage a broker for the full range of services or not use a broker at all.

In recent years, however, traditional brokers have faced increasing competition from fee-for-service brokers who charge only for those services the consumer chooses to buy. These fee-for-service brokers “unbundle” the package of real estate services offered by traditional real estate brokers and charge a fixed or hourly fee for specific services, such as listing the home in the Multiple Listing Service, negotiating or closing contracts, or providing advice on matters such as pricing the home. Consumers who are willing to do some of the work themselves can negotiate a customized package of services from a fee-for-service broker. These new brokerage models enable consumers to save thousands of dollars by allowing them to purchase only those services they want. Those savings are similar to the savings some consumers realize when they choose to purchase cars that have fewer options; if every consumer had to buy every option the manufacturer offers, most would pay more.

In the listed proposal, set forth below, ARM § 24.210.641(m) and (o) would require brokers to participate in all aspects of negotiating and buying a home, including negotiating contracts, completing forms and presenting offers and counter offers.¹ As a result, under the listed proposal buyers and sellers would be required to purchase services they may prefer to handle on their own. Also, brokers who seek to serve buyers and sellers by offering less than full services for a lower price would be shut out of Montana.

The listed proposal is as follows:

~~24.210.641 (m) failing, as a seller’s agent, to continue to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing agreement terminates; unless the seller has waived this participate in negotiations as defined in 37-51-102, MCA. A licensee may not abrogate this obligation in writing;~~

(n) failing, as a seller’s agent, to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing

¹ It also appears that the listed proposal would be internally inconsistent: subsections (m) and (o) require brokers to provide negotiation services (defined in 37-51-102(15), MCA), some of which may be waived under subsections (n) and (p). The way to resolve this is to adopt the waiver proposal, where consumers may waive any of these services.

agreement terminates unless the seller waives these obligations in writing. Seller agents are not obligated to continue to actively market the property after an offer has been accepted by the seller unless directed in writing to do so by the seller.

(o) failing, as a buyer agent, to participate in negotiations as defined in 37-51-102, MCA. A licensee may not abrogate this obligation;

~~(m) (p) failing, as a buyer agent, to submit to the buyer all offers and counter offers until an offer as been accepted or the buyer broker agreement terminates unless the buyer waives these obligations in writing~~ Buyer agents ~~have no obligation to continue~~ are not obligated to show properties to their ~~clients~~ buyer after an offer has been accepted unless ~~otherwise~~ directed in writing to do so by the buyer.

The way to preserve consumer choice and enhance competition between real estate brokers is to permit consumers to waive these otherwise-mandated services. The waiver proposal set forth below would allow consumers to save money on real estate brokerage services by waiving those services for which they do not wish to pay.

We urge the Board to adopt the following version of the rule's subsections, which would make clear that consumers can waive the minimum service provisions of the rule. This language was represented by the Board's counsel to be the version of the rule that the Board would propose for adoption in order to address the Department's competitive concerns. *See* June 11 email from Gene Allison to Bennett Matelson.

24.210.641 (m) Failing, as a seller's agent, to participate in negotiations as defined in 37-51-102(15).~~continue to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing agreement terminates unless the seller has waived these obligations in writing.~~

(n) Failing, as a Seller's agents to submit to the seller all offers and counter offers received by the licensee until such time as a pending transaction has been closed or the listing agreement terminates, unless the seller waives these obligations in writing. Seller agents are not obligated to continue to actively market the property after an offer has been accepted by the seller unless directed in writing to do so by the seller.

(o) Failing, as a buyer agent, to participate in negotiations as defined in 37-51-102(15), MCA unless the buyer has waived these obligations in writing.

(p) Failing, as a buyer agent, to submit to the buyer all offers and counter offers until an offer as been accepted or the buyer broker agreement terminates, unless the buyer waives these obligations in writing Buyer agents are not obligated ~~They have no obligation to continue~~ to show properties to their ~~clients~~ buyer after an offer has been accepted unless ~~otherwise~~ directed in writing to do so by the buyer.

The waiver option embodied in this proposal would preserve choice and competition for real estate services. Consumers who would opt to obtain a subset of brokerage services from a fee-for-service broker would save money. In addition, competition from fee-for-service brokers would also benefit the many Montana consumers who value the full array of services that traditional brokers offer and thus would continue to choose traditional full service brokerage even when fee-for-service options are available. This is because full-service brokers who face competition from low-cost fee-for-service rivals must work hard to encourage consumers to pay for their full-service offerings, rather than choosing a lower-cost fee-for-service option. Traditional brokers do this by offering higher-quality service and lower prices—exactly the kinds of benefits that competition brings to so many other industries.

For these reasons, the great majority of states have rejected the notion that consumers must be forced to buy services they do not want. Today, only nine states have some form of mandatory minimum service law.

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

Competition among real estate brokers has brought significant benefits to Montana consumers. The ability of consumers to waive the brokerage services they do not want is good for consumers, whether or not they choose that option. The listed proposal without the addition of a waiver would take away those options, resulting in reduced competition, less innovation, and higher prices for the majority of home buyers and sellers in Montana. We urge you to consider these significant adverse effects in evaluating the proposed rule and pass the version submitted in this comment.

Respectfully submitted,



John R. Read
Chief, Litigation III Section

cc: Gene Allison, Esq.