



U.S. Department of Justice

Antitrust Division

*RFK Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001*

February 13, 2009

The Honorable Mark Boitano
New Mexico Senate
State Capitol
Santa Fe, New Mexico 87501

Re: Senate Bill 398--Proposed Amendments to Section 61-29-10.2, New Mexico Statutes, Annotated

Dear Senator Boitano:

I write on behalf of the Department of Justice, Antitrust Division to provide the Department's views concerning the effect of Senate Bill 398 on competition and consumers. This measure (often referred to as "minimum service laws") would harm New Mexico consumers of real estate brokerage services by increasing fees, limiting choice, and impeding the innovation spurred by unrestrained competition among real estate brokers. Permitting New Mexicans to waive brokerage services they do not want – as they are now allowed under New Mexico Administrative Code § 16.61.19.8(D) – would preserve choice and maintain competition.

Today, New Mexico stands with the vast majority of states that allow consumers to select and purchase only those real estate brokerage services they want. As a result, many New Mexico 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. Senate Bill 398 would reverse the law and put New Mexico 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.

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: 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 a refrigerator that has fewer options; if every consumer had to buy every option the manufacturer offers, most would pay more.

To illustrate how consumers can save money with fee-for-service options, consider the following example set forth in the table below. It is based on a home with a selling price of \$184,000, the approximate median sale price of a single-family home in Albuquerque according to the National Association of Realtors. Some consumers will choose Option 1, in which the home seller hires a full service broker who charges a 5% commission (with half of that amount going to the buyer's broker). Others may choose Option 2, in which the home seller pays \$400 to a broker to list his home in the Multiple Listing Service and does all the other tasks himself. The consumers who choose Option 2 can save thousands of dollars by engaging a fee-for-service broker:

	Home Price	Payment to Listing Agent	Consumer Savings
Option 1 (Traditional Full Service)	\$184,000	\$4,600 (2.5% of sales price)	\$0
Option 2 (Fee for Service – MLS only)	\$184,000	\$400	\$4,200

These savings are real. There are many fee-for-service brokers operating in New Mexico, and growing numbers of consumers in New Mexico are choosing fee-for-service options. If Senate Bill 398 passes, New Mexico consumers will no longer have the ability to choose Option 2, and their savings will disappear.

Competition from fee-for-service brokers also benefits the many New Mexico consumers who value the full array of services that traditional brokers offer and thus continue to choose Option 1 – traditional full service brokerage – even though fee-for-service options are available. 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.

The Department's experience has shown that minimum service requirements like Senate Bill 398 harm consumers in two important ways:

- First, consumers who want to perform some of the tasks involved in selling a home themselves (i.e., consumers who would choose Option 2 above) will pay real estate brokers much more than they do today, because they will have no choice but to pay for more services than they want.

- Second, Senate Bill 398 would also protect full-service brokers from having to respond to competition from non-traditional brokers. They would no longer have to offer increased quality or reduced prices in order to prevent consumers from choosing non-traditional options. As a result, even those consumers who prefer to purchase the full range of services from traditional real estate service professionals will likely pay higher prices and receive poorer quality services.

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

Permitting consumers to waive the required services proposed in Senate Bill 398 preserves choice and maintains competition. New Mexico Administrative Code § 16.61.19.8(D) already achieves this goal by allowing a consumer to waive in writing the minimum service requirements. Simply put, there is no need to alter the current state of the law in New Mexico.

Some who support minimum service legislation argue that these measures ensure that consumers will receive better quality services, or that they will not be taken advantage of by unscrupulous brokers who fail to disclose the limited nature of their services. But the evidence does not support these claims. Minimum service laws 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 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.

In addition, states wishing to safeguard consumers from making uninformed purchasing decisions can do so in other ways less damaging to competition than minimum service laws. For example, instead of barring competition from fee-for-service brokers, states could merely require all brokers – traditional or fee-for-service – to disclose to consumers precisely what services they will and will not be providing.

Competition among real estate brokers has brought significant benefits to New Mexico consumers. The availability of fee-for-service brokerage options is good for consumers, whether or not they choose those options. Enacting Senate Bill 398 would take away those options, resulting in reduced competition, less innovation, and higher prices for the majority of home buyers and sellers in New Mexico.

We would be happy to answer any questions you or other members of the committee may have. Please contact Matthew Bester (202-353-3491) or Chris Reed (202-514-0550) of my staff with any questions. We urge you to consider these significant adverse effects in evaluating the proposed legislation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Robert Kramer II". The signature is stylized with a large, sweeping flourish at the end.

J. Robert Kramer II
Director of Operations

cc: The New Mexico Senate Public Affairs Committee