



U.S. Department of Justice

Antitrust Division

*450 Fifth Street, NW
Suite 4000
Washington, DC 20530-0001*

March 9, 2009

The Honorable Iris Y. Martinez
Chairperson, Licensed Activities Committee
Illinois Senate
413A Capitol Building
Springfield, Illinois 62706

Re: Senate Bill 1894 --Proposed Amendment to Illinois Real Estate Licence Act of 2000, 5 ILCS 80/4.30

Dear Senator Martinez:

I write on behalf of the Department of Justice, Antitrust Division to provide the Department's views concerning the effect of Senate Bill 1894 on competition and consumers. The Justice Department has concerns with the portion of that bill that would extend the life of the minimum service provisions contained in 225 ILCS 454/15-75 for another 10 years, to the detriment of Illinois home buyers and sellers. Extending Section 15-75 would lead to continued harm to Illinois consumers of real estate brokerage services by restricting competition by fee-for-service brokers. Since Section 15-75 was added to the Real Estate Licensing Act in 2004, Illinois consumers have been denied the benefits of full and open competition among real estate brokers – benefits that residents of many other states continue to enjoy. Allowing this provision to expire on January 1, 2010, as currently scheduled, would expand consumer choice, increase competition, and likely make it easier and less expensive to buy or sell a home in Illinois. Alternatively, the Department would support the addition of a provision that would allow consumers to waive the requirement that they purchase these services.

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.

In Illinois, however, consumers' choices are restricted by the minimum service requirement in the current law. As a result, consumers are forced to buy services, such as negotiation services, that they may prefer to perform themselves. The current law increases the costs of fee-for-service brokers and prevents them from offering the full range of choices that consumers may desire – such as MLS-only listings that allow the home seller to negotiate with buyers on his or her own behalf.

In the course of our work on minimum service laws, we have spoken to numerous fee-for-service brokers in Illinois and elsewhere. They have told us that these requirements harm competition in Illinois in several ways. First, they restrict consumer choice. Absent the minimum service requirement, brokers have told us they would be able to offer a broader range of fee-for-service packages. For instance, they could offer experienced real estate sellers who prefer to negotiate for themselves an MLS-only option. If consumers wanted to purchase other services, such as negotiation services, they could be offered for an hourly fee or a flat fee. Today, Illinois law prevents brokers from offering these types of creative products. Second, the minimum service requirements increase the costs of doing business. This means that brokers must build the costs of complying with the minimum service law into the prices they charge. Absent the minimum service law, these brokers would be able to pass the savings along to consumers. Third, minimum service laws create barriers to entry for new competitors. We have been told that some fee-for-service brokers have been deterred from entering Illinois due to the existence of minimum service requirements that do not exist in other states. This lost competition ends up hurting all consumers.

Full and open competition from fee-for service brokers also benefits the many Illinois consumers who value the full array of services that traditional brokers offer and thus continue to choose traditional full service brokerage, even though fee-for-service options are available. Full-service brokers who face competition from a broad array of fee-for-service options 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 need. Today, Illinois stands as one of only twelve states to have some form of mandatory, non-waivable minimum service law. The collective experience of the majority of states shows that there is no adverse effect on consumers from allowing them to freely choose the level of brokerage services they would like to purchase.

Some who support minimum service laws argue that these measures ensure that consumers will receive better quality services, or that they will protect consumers from 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 compete for 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 limiting 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.

The restoration of full and open competition among all types of real estate brokerage models would bring significant benefits to Illinois consumers. The freedom to choose fee-for-service brokerage options is good for consumers, whether or not they choose those options. Extending Section 15-75 would deny consumers those options for another 10 years, resulting in reduced competition, less innovation, and higher prices for home buyers and sellers in Illinois. Accordingly, the General Assembly should allow this portion of the law to expire, as it is currently set to do on January 1, 2010. Alternatively, we would support the addition of a waiver provision to the statute – a route several other states have chosen to follow to preserve the maximum flexibility for consumers.¹

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 Ben Matelson (202-616-5871) of my staff with any questions. You can also learn more about the impact of minimum service laws, and the Justice Department's past work on this issue, at our website: Competition and Real Estate (www.usdoj.gov/atr/public/real_estate/index.htm). We urge you to consider these significant adverse effects in evaluating Senate Bill 1894.

Respectfully submitted,

John R. Read
Chief, Litigation III Section

cc: Members of the Licensed Activities Committee
Ms. Natalie Stegall, Senate Democrats Legal Review Staff

¹ We would be happy to provide the Committee with sample waiver language used by other states.