



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

April 20, 2005

Loretta R. DeHay
General Counsel
Texas Real Estate Commission
P.O. Box 12188
Austin, TX 78711-2188

Re: **Proposed Amendments to 22 TEX. ADMIN. CODE § 535.2**

Dear Ms. DeHay:

On February 22, 2005 the Texas Real Estate Commission ("TREC") proposed a revision to its current rules concerning a real estate broker's responsibilities.¹ According to TREC, the revisions are necessary to clarify an ambiguity in the current rules governing real estate brokerage that create some uncertainty for buyers' agents and home-sellers with respect to the role of buyers' agents and limited-service brokers ("LSBs") in real estate transactions involving limited-service brokerage.

The Federal Trade Commission ("FTC" or "Commission") and the United States Department of Justice believe that by prohibiting core limited-service brokerage options and therefore requiring some home-sellers to purchase services that they otherwise would choose to perform themselves, TREC's proposed amendments to 22 TEX. ADMIN. CODE § 535.2 are likely to harm Texas consumers by reducing their choices and likely raising prices without providing any countervailing benefits. Competition between full-service brokers ("FSBs") and LSBs is likely to provide benefits to Texas consumers and there is no evidence that LSBs have caused any consumer harm. If TREC nevertheless is concerned about potential confusion with regard to the services LSBs provide to their clients or LSBs imposing additional costs on buyers' agents, it should consider less restrictive alternatives to protect consumers than the current proposal, which would deprive Texas consumers of core limited-service brokerage options. Accordingly, we urge TREC not to adopt the proposed amendments.

¹See Broker's Responsibility, 30 Tex. Reg. 1400 (proposed Mar. 11, 2005).

I. Interest and Experience of the FTC and the Department of Justice

Congress has charged the FTC with enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² Pursuant to this statutory mandate, the Commission encourages competition in the licensed professions, including real estate brokerage, to the maximum extent compatible with state and federal goals. The FTC has experience in analyzing aspects of the real estate transaction. For example, the FTC and the Department of Justice have commented on numerous occasions in support of allowing non-attorneys to compete with attorneys in the provision of certain real estate settlement tasks.³ Further, in 2002 the Commission held a public workshop on barriers to electronic commerce in many industries, and gathered testimony on state restrictions that may impede competition from online real estate service providers.⁴

The Department of Justice is also entrusted with enforcing this nation's antitrust laws. For more than 100 years, since the passage of the Sherman Antitrust Act, the Department of Justice has worked to promote free and unfettered competition in all sectors of the American economy through its civil and criminal enforcement programs. In particular, the Justice Department has a long history of enforcement efforts in the real estate area that includes several cases involving restrictions on access to multiple listing services and other restraints limiting competition among real estate brokers. Recently, for example, the Justice Department filed a civil antitrust lawsuit against the Kentucky Real Estate Commission.⁵ The suit alleges that the Kentucky Real Estate Commission violated Section 1 of the Sherman Act by promulgating and enforcing a regulation that prohibits Kentucky real estate brokers and sales associates from offering rebates and other inducements to attract customers. The Department also recently sent a

²Federal Trade Commission Act, 15 U.S.C. § 45.

³Letter from FTC and the Justice Department to Massachusetts State Representative Paul Kujawski (Oct. 6, 2004); letter from FTC and the Justice Department to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); letter from the FTC and the Justice Department to President of the North Carolina State Bar (July 11, 2002); letter from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the FTC and the Justice Department to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the FTC and the Justice Department to the Supreme Court of Virginia (Jan. 3, 1997); letter from the FTC and the Justice Department to the Virginia State Bar (Sept. 20, 1996). These letters can be found at <http://www.ftc.gov/be/advofile.htm>. See also Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, 607 S.E. 2d 519 (W. Va. 2004) (filed May 25, 2004), at <http://www.ftc.gov/be/V040017.pdf>; Brief *Amicus Curiae* of the Federal Trade Commission and the United States of America in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), at <http://www.ftc.gov/os/2003/07/georgiabrief.pdf>.

⁴FTC Workshop, POSSIBLE ANTICOMPETITIVE EFFORTS TO RESTRICT COMPETITION ON THE INTERNET (Oct. 10, 2002), written statements and transcript available at, <http://www.ftc.gov/opp/e-commerce/anticompetitive/agenda.htm>.

⁵See Complaint, *United States v. Kentucky Real Estate Comm'n*, Civ. Act. No. 3:05CV188-H (filed Mar. 31, 2005), at <http://www.usdoj.gov/atr/cases/f208300/208393.htm>.

letter to the Oklahoma State Legislature opposing pending legislation in Oklahoma that is similar to the proposed amendment at issue here.⁶

II. Background

Broadly, the tasks involved with selling a house include marketing it and negotiating with buyers. Traditional FSBs bundle these tasks together; for a fixed commission – typically split with the buyer’s agent – an FSB will list a house in the local MLS, place advertisements for it in the local paper and on the Internet, conduct open houses, and coordinate other showings. Additionally, an FSB provides advice on pricing and assists the seller in negotiating and closing the transaction.

Some consumers may want to sell their house without the assistance of a broker but desire the additional exposure of listing their home in the local MLS. Such consumers, however, cannot list their house in the MLS on their own; only a licensed real estate agent who is a member of the local MLS can list a house in the local MLS.⁷ LSBs serve these consumers by unbundling MLS listing from the menu of tasks an FSB typically performs, thus providing their clients with fewer services at lower prices. A seller contracting with an LSB typically pays a flat fee in exchange for the LSB listing the house in the local MLS and providing additional selling aids, such as yard signs, online advertisements, and a lock-box to allow buyers’ agents to show the home when the seller is not present. Limited-service brokerage contracts also typically require the seller to agree to pay a commission to a buyer’s broker who supplies the ultimate buyer of the home.⁸ A seller who finds a buyer without the help of a buyer’s broker does not incur this fee. Importantly, a seller might elect not to use an LSB in marketing the house or in

⁶See Letter from R. Hewitt Pate, Assistant Att’y Gen. to Oklahoma State Representative Todd Heitt (Apr. 8, 2005), at http://www.usdoj.gov/atr/public/press_releases/2005/208486.htm#letter.

⁷See, e.g., *Rules and Regulations of North Texas Real Estate Information Systems, Inc.* §§ 5.01-5.02 (Feb. 18, 2004) (“NTRDIS”), at <http://www.ntreis.net/FormsAndDocs/rulesregs.htm>.

⁸See, e.g., American Home Market.com (3 percent commission for a broker that finds a buyer), at <http://www.mlslistingnetwork.com/Nav.aspx/Page=http://MLSListingNetwork.com/PageManager/Default.aspx?PageID=241757>; ForSaleByOwner.com (allowing consumers to offer buyers’ agents any commission rate, but noting that “owners should consider that offering less than the traditional 3% could affect these Buyers Agent Realtors [sic] ‘degree’ of interest in showing your property to their customers”), at [http://www.forsalebyowner.com/perl-bin/showPage.cgi?szNextPage=placead.html&szAction=NEW&szURL=MLS](http://www.forsalebyowner.com/perl-bin/showPage.cgi?szNextPage=placead.html&szAction=NEW&szURL=MLS;); FSBOAdvertisingService.com (2-3 percent commission for broker that finds a buyer), at <http://www.fsboadvertisingservice.com/flat-fee-mls-MLSTX3.asp>; ifoundahome.net (allowing home-sellers to offer “a 3% commission or more” to buyers’ brokers), at <http://www.ifoundahome.net/Listingwork/SBasicListing.htm>; Texas Discount Realty (3 percent commission for a broker that finds a buyer), at <http://www.texasdiscountrealty.com/flatfee.htm>. See also Roy T. Black & Hugh O. Nourse, *The Effect of Different Brokerage Modes on Closing Costs and Housing Prices*, 10 J. RES. REAL ESTATE 87, 91 (1995) (reporting that for a sample of real estate transactions in Atlanta, when the transaction involved only a buyer’s broker, the buyer’s broker received between 3 - 3.5 percent commission).

negotiating with buyers; under a limited-service brokerage contract, the seller often agrees to negotiate directly with buyers or their agents.⁹

III. The Proposed Rule

Section 535.2 of the Texas Administrative Code sets forth a real estate broker's responsibilities. The pertinent portion of these rules currently reads:

A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obligated to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision. A broker is obligated under a listing contract *to negotiate* the best possible transaction for the principal, the person the broker has agreed to represent.¹⁰

Although the current rule obligates both FSBs and LSBs to "negotiate" for their clients, it does not set out what "negotiation" requires. TREC's proposal would set forth the "minimum level of service" that "negotiation" entails. Specifically, the proposal states:

In negotiating for his or her principal the broker shall provide the following services:

- (1) accept and present to the principal offers and counter-offers to buy, sell, or lease the principal's property or property the principal seeks to buy or lease;
- (2) assist the principal in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and
- (3) answer the principal's questions relating to offers, counter-offers, and notices.¹¹

The proposal also would make it a violation of TEX. OCC. CODE ANN. § § 1101.652(b)(22), (27) for a "broker who represents a principal under a listing contract that grants an exclusive agency to the broker . . . [to] instruct or authorize another broker who

⁹As TREC noted in its 2002 proposal of almost identical amendments to those currently under consideration:

In many cases under [a limited-service brokerage contract], a real estate broker may provide no service to the seller except to place the listing in a Multiple Listing Service. Typically, the listing broker instructs the cooperating broker to contact the seller directly for all purposes (showings, presentations of offers, and negotiations.)

Broker's Responsibility, 27 Tex. Reg. 9255, 9256 (proposed Oct. 4, 2002).

¹⁰22 TEX. ADMIN. CODE § 535.2(b) (emphasis added).

¹¹30 Tex. Reg. at 1401 (proposed 22 TEX. ADMIN. CODE §§ 535.2(d)(1)-(3)).

represents another party in the transaction to negotiate directly with the principal.”¹² Because a local MLS will not accept “non-agency” listings,¹³ LSBs must enter into “exclusive agency” relationships with their clients.¹⁴ Thus, the proposed amendments would require LSBs to provide home-sellers with certain services in addition to MLS listing, and would prohibit LSBs from instructing buyers’ agents to negotiate directly with their clients.¹⁵

Finally, the proposal also would add the following exception:

When a broker delivers an offer or counter-offer to another broker, the broker is not negotiating or attempting to negotiate with a principal he or she does not represent by delivering a copy of the offer or counter-offer to the principal he or she does not represent so long as the broker representing the principal consents to the delivery and the broker who makes the delivery does not discuss or attempt to discuss the terms or conditions of the offer or counter-offer with the principal he or she does not represent.¹⁶

Because the proposed rule states that brokers “shall provide” the enumerated services, we interpret the proposed rule to prohibit a broker from contracting to provide less than those enumerated services – for example, contracting solely to list a property in the multiple listing service (“MLS”). TREC now has told us that it believes that the proposed rule would not prohibit brokers from contracting to provide fewer than the enumerated services. Specifically, TREC has stated that the proposal would allow an LSB to enter into a contract to provide only MLS listing as long as the agreement contained a proviso allowing the home-seller to request the LSB to provide the additional enumerated services. As discussed below, if that is the case, then we urge it to revise the proposed rule to allow explicitly these types of limited service agreements. We caution, however, that while this revision would reduce our concerns about the

¹²*Id.* (proposed 22 TEX. ADMIN. CODE § 535.2(e)).

¹³*See* NTREIS, *supra* note 7, at § 7.01 (“Each property listing filed with the MLS must be ‘an exclusive right-to-sell (or lease)’ or an ‘exclusive agency’ listing. . . . Open listings, net listings, and non-agency listings will not be accepted for filing with the MLS.”).

¹⁴*See* Letter from Greg Abbott, Attorney General of Texas, to Wayne Thornburn, Administrator, TREC, at 3 (Dec. 14, 2004) (“Abbott Opinion”) (citing North Texas Real Estate Information System, Inc., MLS Listing Rule § 7.01 & West Texas Regional MLS, art. 5 Listing Procedures), at <http://www.oag.state.tx.us/opinions/ga/ga0282.pdf>. An “exclusive agency” relationship preserves the right of an owner “to sell the property on an unlimited or restrictive basis.” *See* NTREIS, *supra* note 7, at § 7.01. A home-seller also may enter into an “exclusive right-to-sell” relationship, which is an agency relationship that does not preserve the right of the home-seller to find buyers on his or her own. *Id.*

¹⁵Although TREC’s general counsel notes that those brokers “whose business models are inconsistent with the proposed amendments” may avoid the rule by establishing a “non-agency relationship,” it appears that given MLS rules, an LSB could not enter into a non-agency relationship and still be able to offer a service that included listing in the local MLS. *See* 30 Tex. Reg. at 1401.

¹⁶*Id.* (proposed 22 TEX. ADMIN. CODE § 535.2(f)).

rule's restrictions on competition, it would not alleviate them completely. As we understand it, such a revised rule still would eliminate competition from LSBs who provide only MLS listing.

IV. Competitive Effects of the Proposed Rule

Competition provides substantial benefits to consumers. As the Supreme Court has observed, “ultimately competition will produce not only lower prices, but also better goods and services.”¹⁷ Indeed,

[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.¹⁸

Regulations that limit forms of competition may be useful when they address specific market failures that have been shown to harm consumers.¹⁹ In these instances, however, restraints on competition should be drawn narrowly to avoid depriving consumers of the benefits of competition beyond the level necessary to achieve the regulatory goal.

TREC’s proposal is likely to deprive Texas consumers of the benefits of robust competition between LSBs and FSBs without providing any countervailing benefits.

A. The Proposal is Likely to Reduce Competition

By mandating that all brokers provide home-sellers with a level of service beyond that provided by LSBs, and by prohibiting a seller who has entered into a limited-service brokerage contract from agreeing to negotiate a real estate transaction on his or her own behalf, TREC’s proposal will eliminate certain limited-service brokerage arrangements as an option for Texas

¹⁷*Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted).

¹⁸*Id.*; accord *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423 (1990).

¹⁹Importantly, this proposal is not the product of a TREC study, but rather appears to have originated with the Texas Association of Realtors (“TAR”), whose members stand to gain from the elimination of competition from limited-service brokers. See Letter from George Stephens, Chairman of the Board, TAR to The Hon. Mike Brodie, Chairman, TREC (Sept. 11, 2003) (“TAR Letter”) (asking TREC to consider amending 22 TEX. ADMIN. CODE § 535.2 to include minimum service requirements by including a definition of “to negotiate” that includes the same provisions that appear in the current proposal). Although TAR noted that it had “studied and debated the issue,” neither in that letter nor in its comments on the current proposal does TAR note any instances of consumer harm associated with LSBs.

consumers.²⁰ By limiting competition from LSBs, TREC's proposal likely will cause both consumers who prefer LSBs and those who prefer FSBs to pay higher prices.

First, TREC's proposal will harm those consumers who prefer the combination of price and service offered by LSBs. The proposed rule would force home-sellers who prefer to market their house and to negotiate a transaction on their own in exchange for lower brokerage fees to purchase extra services, which necessarily raises the price of brokerage.²¹ Clearly, some brokers in Texas think that there is a demand for a product that combines fewer brokerage services with a correspondingly lower price. Whether they are right or wrong ordinarily is a question that is left for competition to determine. By preventing consumers from having the option of certain, important limited-service brokerage arrangements, TREC is substituting its own judgment for the competitive process.

Consumer preferences are heterogeneous. Accordingly, although some home-sellers may prefer to pay lower prices for limited-service brokerage, others may prefer to pay higher prices for full service brokerage. But this does not justify the complete elimination of these important limited-service brokerage options for consumers. Consumers are better off when they are able to evaluate all elements of the bargain and to choose whether to hire an FSB or LSB. For example, an informal sample of Web sites offering limited-service brokerage in Texas suggests that a home-seller may pay from \$325 to \$699 for a limited-service brokerage contract that would include listing his or her house in the MLS but would leave marketing and negotiating to the home-seller.²² If a buyer pays \$136,000 for the seller's house, a seller who contracted with an LSB for \$699 and agreed to pay a three-percent commission to a buyer's agent would pay a total

²⁰As TREC's general counsel noted in the Texas Register notice for the proposed amendments, "Those licensees whose business models are inconsistent with the proposed amendments . . . will need to include the three services, at a minimum, in their menu of services if the licensee will be acting pursuant to an agency relationship." 30 Tex. Reg. at 1401.

²¹As TREC admits in its Texas Register notice, "[a]ny additional costs of providing the services [required under the proposal] may be offset by charging the individual client for the services provided." 30 Tex. Reg. at 1401.

²²See, e.g., American HomeMarket.com (MLS listing for \$499), at <http://www.mlslistingnetwork.com/Nav.aspx/Page=http://MLSListingNetwork.com/PageManager/Default.aspx?PageID=24175>; ForSaleByOwner.com (offering MLS listing for \$699), at <http://www.forsalebyowner.com/perl-bin/showPage.cgi?szNextPage=placead.html&szAction=NEW&szURL=MLS;FSBOAdvertisingService.com> (offering MLS listing for \$398), at <http://www.fsboadvertisingservice.com/flat-fee-mls-MLSTX3.asp>; ifoundahome.net (offering MLS listing for \$325), at <http://www.ifoundahome.net/Listingwork/SBasicListing.htm>; MyCastle.com (offering MLS listing for \$498), at http://www.mycastle.com/selling/selling_plans.aspx; Texas Discount Realty (offering MSL listing for \$495), at <http://www.texasdiscountrealty.com/flatfee.htm>. These services also offer various additional services beyond listing in the MLS (e.g., listing on Realtor.com, posting an advertisement on the LSB's Web site, providing yard signs and a lock box for keys so that buyers' agents can show the home when it is unattended). Further, many of these services also provide full-service brokerage options in exchange for a commission.

