



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Competition

September 16, 1998

Ms. Karen W. O'Neal
Assistant Director
Virginia Real Estate Board
3600 W. Broad Street
Richmond, VA 23230

Dear Ms. O'Neal:

The staff of the Bureau of Competition of the Federal Trade Commission (FTC) welcomes the opportunity to present its views on the proposed Final Regulations of the Virginia Real Estate Board (Board).⁽¹⁾ We comment on the proposed changes to the real estate broker and salesperson licensing requirements to convey our concerns regarding a possible adverse impact from those changes on competition and consumer welfare.

The FTC is empowered and directed, under 15 U.S.C. §§ 41 et seq., to act against unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate, the FTC has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. The FTC has investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including real estate brokers, and taken enforcement action to prevent groups of real estate brokers from restraining competition and injuring consumers.⁽²⁾ The FTC's goal has been to identify and seek to remedy restrictions that impede competition, increase costs, or harm consumers without providing significant countervailing benefits. The Commission also has provided comments to state regulatory bodies, including to this Board, regarding restrictions on competition among real estate brokers.⁽³⁾

The proposed regulation changes the Board's definition of what it means for a real estate broker or salesperson to be "actively engaged" in the real estate business. Currently, Section 135-20-10 requires that real estate brokers or salespersons be engaged in the real estate activities for at least 20 hours per week to be considered "actively engaged." The proposed amendment would double this requirement to 40 hours per week, or essentially full-time employment.

This change, as we understand it, would effectively bar part-timers from becoming real estate brokers in Virginia, and may also limit licensure as real estate salespersons by reciprocity from another jurisdiction. To become a real estate broker, Section 135-20-40 requires applicants, among other qualifications, to have been "actively engaged" as a real estate salesperson for a period of at least 36 of the 48 months immediately preceding the application.⁽⁴⁾ Section 135-20-60 applies the same requirement to out-of-state applicants for real estate broker licenses.⁽⁵⁾ In addition, if an out-of-state person applies for a Virginia real estate salesperson license, Section 135-20-60 requires the applicant, among other things, to have been "actively engaged" in real estate for 12 or more of the preceding 36 months.⁽⁶⁾

Barring part-timers from becoming licensed real estate brokers and salespersons in Virginia would, by limiting entry into these professions, appear likely to restrict competition and harm consumers, who benefit from increased competition. Although we fully appreciate that the Board must act in the interest of consumers to prevent entry by persons who are not competent or are ethically deficient, there appears no basis for concluding that part-timer applicants as a class are less qualified in these respects. Indeed, other portions of the Regulations, requiring

particular educational attainments and the passage of competency examinations and restricting entry by those who have encountered disciplinary proceedings, appear to be directly targeted to address these concerns.⁽⁷⁾

The Commission and courts have struck down restrictions on competition from part-timers that multiple listing services (MLS) with market power have imposed. In *United States v. Realty Multi-List, Inc.*, the Fifth Circuit held unreasonable a requirement of an MLS with market power that its members maintain an office open "during customary hours of business."⁽⁸⁾ It stated that "[i]t may well be justified for [the MLS] to require that a prospective member be actively engaged in the business of a real estate broker in order that he contribute to [the MLS's] functioning. But a rule requiring that a broker be actively engaged in the business of brokering is a far cry from one requiring that he maintain an office open during customary hours of business," which the court noted effectively barred part-timers.⁽⁹⁾ The court specifically noted that it could not be argued persuasively that the "customary hours" requirement was justified "by reference to [the] need to insure the competence and responsibility of [MLS] members."⁽¹⁰⁾ The court also suggested that those doing business in the evenings and on weekends might well better serve the needs of customers.⁽¹¹⁾

The FTC has challenged an MLS requirement that its members be "primarily" engaged in industrial real estate. The FTC's complaint alleged that this rule "excluded brokers who were actively engaged in industrial real estate brokerage" but who also were engaged in other activities.⁽¹²⁾ The FTC's order bars the MLS from conditioning membership or use of the MLS on an applicant "being primarily engaged in industrial real estate brokerage."⁽¹³⁾ Proposed Section 135-20-10, which essentially mandates full-time work on real estate, is thus significantly more restrictive than the restraint the FTC challenged. The FTC also has challenged an MLS requirement that MLS members (and applicants during the year prior to their application) derive the major portion of earned income from full-time practice of real estate brokerage.⁽¹⁴⁾ The FTC issued a consent order barring the MLS from requiring that any applicant, prospective applicant, or member be engaged in real estate brokerage full time.⁽¹⁵⁾

The Board's proposed regulation apparently will exert a greater restraint on competition than those that the Realty Multi-List court and the FTC barred. The proposed regulation absolutely bars part-timer entry into the real estate industry throughout the Commonwealth, rather than preventing a real estate professional from using a particular multiple listing service.

For these reasons, we strongly believe that changing the definition of "actively engaged" in the real estate business as proposed is likely to hinder competition and harm consumers.

We appreciate the Board's willingness to consider our views. Should you have any questions concerning this issue, please contact Randall Marks at (202) 326-2571.

Sincerely,

William J Baer, Director
Randall David Marks, Attorney
Bureau of Competition
Federal Trade Commission

1. This comment represents the views of the staff of the Bureau of Competition of the FTC and does not necessarily represent the views of the Commission or any individual Commissioner.

2. *Port Washington Real Estate Board*, 120 F.T.C. 882 (1995) (consent order); *Industrial Multiple and American Industrial Real Estate Association*, 116 F.T.C. 704 (1993) (consent order); *United Real Estate Brokers of Rockland, Ltd. (Rockland County Multiple Listing System)*, 116 F.T.C. 972 (1993) (consent order); *Realty Computer Association, Inc. (d/b/a Computer Listing Service)*, 115 F.T.C. 968 (1992) (consent order); *Metro MLS, Inc.*, 113 F.T.C. 305 (1990)

(consent order); Bellingham-Whatcom County Multiple Listing Bureau, 113 F.T.C. 724 (1990) (consent order); Puget Sound Multiple Listing Association, 113 F.T.C. 733 (1990) (consent order); Florence Multiple Listing Service, Inc., 110 F.T.C. 493 (1988) (consent order); Multiple Listing Service Mid County, Inc., 110 F.T.C. 482 (1988) (consent order); Multiple Listing Service of the Greater Michigan City Area, Inc., 106 F.T.C. 95 (1985) (consent order); Orange County (N.Y.) Board of Realtors, Inc., et al. (Multiple Listing Service), 106 F.T.C. 88 (1985) (consent order).

3. See, e.g., Letter of the Staff of the Bureaus of Competition, Consumer Protection and Economics to Florence R. Brassler, Virginia Real Estate Board (Jan. 9, 1987).

4. Section 135-20-40.1. The Board may wish to assure itself that the time requirement to become a real estate broker (36 of the last 48 months to be actively engaged in the real estate business) is necessary to protect consumers. Such a lengthy requirement may have the unintended consequence of harming competition among brokers by excluding those persons who have been inactive for more than 12 of the past 48 months or who have moved recently into Virginia.

5. Section 135-20-60.D.

6. Section 135-20-60.B.6. In the alternative, a person who meets the educational requirements of Virginia may be eligible for reciprocity although the person may not have worked full time for 12 of the preceding 36 months.

7. E.g., Sections 135-20-30.2, 135-20-30.6, 135-20-89.3, 135-20-100.

8. 629 F.2d 1351 (5th Cir. 1980).

9. *Id.* at 1384.

10. *Id.* at 1383 n.69.

11. *Id.* at 1384.

12. Industrial Multiple and American Industrial Real Estate Association, 116 F.T.C. 704, 703 (1993) (complaint paragraph 11).

13. *Id.* at 712 (order paragraph I.A.1(a)).

14. Multiple Listing Service of the Greater Michigan City Area, Inc., 106 F.T.C. 95, 99 (1985) (complaint paragraph 15).

15. *Id.* at 105 (consent order paragraph I.C.2.a).