HomeServices of America's Comments on
Competition in the Real Estate Brokerage Industry

HomeServices of America, Inc. welcomes the opportunity to provide comments to the Department of Justice and Federal Trade Commission in conjunction with the June 5, 2018 joint workshop on competition in the real estate brokerage industry.

HomeServices, through its operating companies, is the country's second-largest residential real estate-brokerage company and is one of the country's premier providers of homeownership services, including brokerage, mortgage, franchising, title, escrow, insurance, and relocation services. HomeServices also owns the Berkshire Hathaway HomeServices and Real Living Real Estate real estate-franchise networks.

HomeServices employs more than 7,000 people, and its full-service real estate brokers have nearly 43,000 independent-contractor sales associates operating in nearly 900 offices across 30 states and the District of Columbia. In 2017, these sales associates facilitated more than $137 billion in residential real estate sales and nearly 360,000 transactions.

In these comments, we'll answer the questions that the Department and Commission posed to the industry before the workshop, and within those answers we'll address important issues that arose during the workshop itself.

Q: How has competition among real estate brokers evolved over the last 10 years? Has consumers' reliance on Internet-enabled technologies changed consumer demand for particular brokerage services or models?

The residential real estate market is highly dynamic, transparent, and constantly evolving. New Internet-enabled technologies introduced by brokers, Multiple Listing Services (MLSs), and media companies—such as Zillow, Trulia, and Realtor.com—have given consumers access to more information and choices in brokerage services than ever before when selling or buying a home.

Brokers compete in two distinct economic markets: (1) the market for consumers who want to buy or sell homes (the "consumer market"); and (2) the market for recruiting and retaining sales associates (the "sales-associate market"). We discuss competition in both markets below.

Limited-service and Internet-only brokers have increased competition among brokers in the consumer market.

Full-service, limited-service, and Internet-only brokers compete in the consumer market on price, value, convenience, or a combination of these factors. Internet-enabled technologies have significantly reduced barriers to entry for new broker models that use innovative technology to replace traditional brick-and-mortar service options with lower-cost online options. The ability of Internet-only brokers to deliver many consumer services entirely online significantly reduces their day-to-day operational costs and has enabled their rapid growth. Consider Redfin's business model. Redfin takes advantage of lower online-marketing costs and the fact that it doesn't have physical offices to give consumers the option to list their homes online for as little as a 1% commission. Redfin now offers brokerage services in more than 37 states. Internet-enabled technologies also have created a growing submarket where consumers can buy new, entry-level homes directly from large homebuilders. And consumers now can buy homes entirely online, without a broker or sales associate, through companies such as Ten-X (formerly Auction.com) and Roofstock.

Despite increased competition among brokers offering consumers different brokerage-service options, some people in the industry still incorrectly claim that brokers rarely deviate from standard commissions.

First, many state laws provide that commissions must be negotiable, a broker must disclose that fact to consumers in writing (often conspicuously), and a broker can't collect a commission unless it's in writing. Second, available commission-rate data shows that brokers' commissions vary widely. The variability in commission rates is primarily caused by the fact that commissions are usually offered and negotiated, not by brokers, but by sales associates competing for listings. In tight inventory markets, for example, sales associates often will offer lower commissions during negotiations with potential clients.

Commissions also vary across geographic markets and within local markets based on overall market conditions, the quality or value of a listing, and consumers' own choices. Even in today's low-inventory market, some sellers still choose to list their homes at a 7% or greater commission, or they use online brokers commonly known as "iBuyers"[1] to sell their homes to investors, even though iBuyers often charge extra "convenience fees" that result in comparatively exorbitant total commission costs of about 12%. Although these consumers could use brokers that offer lower-cost options, they purposefully choose these higher-cost alternatives because they value convenience or are financially challenged and need to sell their homes quickly.

For consumers who don't want to pay a 6% or 7% or even a 12% total effective commission when selling their home, their choices today range from 1% listing brokers, limited-service brokers, flat-fee brokers, For Sale by Owner (FSBO) brokers, and rebate brokers (if state law permits consumer rebates). Under all these lower-cost options, sellers can list their homes on the local MLS, and, in some cases, they can do so by paying only a nominal fee.

But the commission is just one of many factors that influence a consumer's decision of which broker and sales associate to use. Despite the prevalence of many new broker models, the majority of consumers continue to choose full-service brokers for several reasons, including the quality or value of the home, the complexity of the transaction (from the consumer's perspective), convenience, and their desire for expert guidance. Each consumer ultimately chooses the broker that best fits his or her needs based on price, value, convenience, expert guidance, or the desire for a quick sale. Different consumers place different degrees of importance on these factors, and simply examining commission rates ignores these other critical considerations.

Competition among brokers for sales associates is fierce.

When competing for sales associates, Internet-enabled technologies have helped brokers offer sales associates one or a combination of the following value propositions: (1) a higher commission split; (2) better technology at lower cost; (3) integration of services to improve sales-associate value (i.e., earnings productivity); (4) coaching and support; and (5) additional professional guidance for particularly challenging transactions. Because different brokers offer sales associates different price, technology, and overall value propositions, sales associates choose their brokers based on the value proposition that best suits their needs.

Internet-enabled technologies also have allowed both new brokers and nonbroker businesses to enter the submarket of providing business-support services (i.e., consumer-lead generation and other tools) both to sales associates who are affiliated with a broker and unaffiliated referral sales associates.[2] The entry of these new brokers and nonbroker businesses into this submarket has further increased competition among brokers for sales associates by giving sales associates more choices among brokers, negotiating power with their existing brokers, and, in the case of referral sales associates, additional sources of income.

Nonbroker media and technology companies have increased competition in the submarkets of sales-associate advertising, lead generation, and productivity tools.

Nonbroker media companies give consumers access to nationwide market and price information. The media companies don't charge consumers for access to this information; instead, they've traditionally generated revenue by selling sales associates and brokers advertising next to home listings and by forwarding leads to these advertising sales associates and brokers if consumers request that a sales associate or broker contact them about a listing. Advertising on a media-company website isn't cheap. For example, a sales associate's average annual cost to participate in Zillow's Premier Agent advertising program has tripled over the last five years from $3,000 to $9,000.[3]

By getting sales associates and brokers (under similar advertising programs such as Zillow's Premier Broker program) to pay for advertising on their websites, the media companies contribute to the downward pressure on brokers' effective commissions. To try to recoup their increased advertising costs on these websites, for example, top-performing sales associates often demand higher commission splits with their brokers on leads that the sales associates get from the media companies. By generating consumer leads for sales associates who pay to advertise on their websites, the media companies compete with brokers that also invest in expensive consumer-facing technologies to try to generate their own consumer leads for their sales associates.

Finally, brokers face increased competition from nonbroker technology companies in the submarket of sales-associate-productivity tools. These technology companies offer sales associates workflow-technology products such as customer-relationship management (CRM), online-transaction management, and back office-workflow management. By taking advantage of their scale and lack of state and MLS regulation, these companies can offer and support these productivity tools at a reduced cost and successfully compete with brokers that could, without the competition, sell their own productivity tools to sales associates.

Q: How have Internet-enabled technologies—including consumer-facing platforms for accessing listing information—changed the residential real estate market? How do these technologies benefit and disadvantage consumers?

As the Council of Multiple Listing Services explains in its comments,[4] listing content is now ubiquitous on the Internet. In most markets, consumers can choose from *hundreds* of Internet Data Exchange (IDX) websites that display every available local listing. Because the vast majority of brokers opt into their local MLS's IDX feed so that they can display other brokers' listings in exchange for sharing their listings with other MLS members, consumers can conveniently see all available listings on one broker's website.

In most markets, the majority of consumers can receive information about new listings and changes to existing listings through real-time alerts, so they don't need to continually visit brokers' websites for this information. They can simply sign up with one broker (or an MLS, a media company, a lender, or a social-media website) to receive alerts when a home that meets their criteria becomes available. MLSs alone send consumers an estimated 200 million listing notifications each month.

Because most brokers and MLSs already license their listings to media companies, consumers also can find listing information on those websites. Zillow, Realtor.com, Trulia, and Homes.com, for example, display most U.S. listings through separate agreements with brokers and MLSs that have voluntarily chosen to share their listings with these companies.

Several panelists at the workshop suggested that MLSs or the government should force consumers, sales associates, and brokers to display *all* their listings online. But state law and NAR's Code of Ethics and Standards of Practice[5] require sales associates and brokers to exercise professional judgment and care when advising their clients whether, where, and to what extent they should market their homes. Some clients choose to market their homes online, and others choose to market their homes in more limited or targeted ways. Indeed, there's a segment of consumers who, for privacy or personal-safety reasons, deliberately choose not to market their homes on online.

Brokers today must invest hundreds of millions of dollars in new technology to attract new and support existing clients and to try to protect consumers from real estate-related cybercrime.

As the infographic attached to these comments shows, technology has transformed the residential real estate market. For brokers that represent home buyers in particular, technology has extended the life cycle of home buying beyond what used to be the first stage of the home-buying process—choosing a broker and sales associate. Now, when consumers start planning to buy a home they can spend months visiting dozens of broker and nonbroker websites to research market and price information for cities, neighborhoods, and individual homes.

But even in today's real estate market, where Internet-enabled technologies play a vital role, technology can get home buyers only so far. Homes are unique and transactions can be risky and complex. A consumer typically buys or sells a home only once every ten years, which dramatically increases the relative importance of the transaction.[6] When consumers get to the stage of actually buying a home, they often choose a broker and sales associate to help them navigate the complexities of the transaction. This is the stage where sales associates and brokers—as highly regulated fiduciaries—provide the most value to their clients.

Each home is uniquely located within a neighborhood, a school district, and a community. Depending on its location, it may or may not have access to essential public and private services such as police and fire departments, gas, water, cable, and Internet. Except for small subsets of the market where homes are mostly commoditized (e.g., the submarket of investors buying homes directly from consumers), buying a home isn't like buying a commodity such as an airline ticket on a travel-services website or using a financial-technology firm's website to find the credit card with the biggest cash-back rewards.

Because consumers usually begin their home-buying process online, sales associates and brokers must use Internet-enabled technologies to attract their attention and interest and secure them as clients before they choose another sales associate and broker. The time when brokers could simply host low-cost, off-the-shelf websites with basic access to MLS listings is mostly a thing of the past. Today, brokers must continually invest in new technology to catch consumers' attention and interest early in the home-buying process by promising and then delivering to them an exceptional, high-trust consumer experience.

One panelist at the workshop mistakenly claimed that brokers spend less money today on consumer marketing because consumers now use the Internet to self-direct their home searches. To the contrary, in a world where thousands of websites and apps vie for consumers' attention, the content creators—brokers and sales associates—struggle to compete with the pure content distributors such as media companies that have inserted themselves between brokers and consumers in the home-buying process. Brokers—large and small, full-service, limited-service, and Internet-only—must collectively spend hundreds of millions of dollars each year to roll out new consumer-facing technologies to attract new home-buying clients and support existing clients. In fact, most brokers' spending on consumer-facing technology has become a large part of their annual operating budgets after sales-associate commissions and office-space costs.

To remain competitive, brokers now must give home-buying consumers access to a public-facing website that they can access using both their personal computers and smartphones. Instead of performing a daily update of MLS listings on their websites, many brokers now invest in technology that updates listings every 15 minutes. Some brokers' websites now feature consumer-friendly tools that (1) calculate the costs associated with home ownership; (2) provide computer-generated home-valuation models; (3) provide listing alerts that automatically deliver new and updated listings to consumers via e-mail; (4) streamline the ways to connect buyers with a seller's property; (5) allow consumers to perform targeted searches by community preferences, walkability scores, crime levels, schools, entertainment, shopping, etc.; and (6) allow consumers to save their "Favorite" homes.

Besides using technology to attract consumers' attention and interest, brokers also invest in technology to make the real estate transaction itself simpler and more efficient for their clients. For example, many brokers invest in technology that allows clients to buy or sell a home electronically if they prefer to complete the transaction entirely online. For those transactions that aren't performed entirely online, many brokers already allow clients to receive disclosures electronically and sign transaction documents online. Brokers' significant investments in technology to securely provide these consumer-friendly conveniences help them create superior client experiences.

Finally, as the threat of real estate-related cybercrime grows, some brokers are investing in costly cybersecurity technology to attempt to protect their clients from computer-based crimes. The FBI's most recent statistics show that the residential real estate industry remains one of the top targets for cybercriminals. Between 2015 and 2017, the number of victims reporting a computer-based crime during a real estate transaction increased 1100%, and reports of monetary losses from such crimes increased almost 2200%.[7]

Brokers try to combat cybercrime by educating both sales associates and clients to recognize and thwart these scams. But they also have invested substantial effort and money in new technology to try to ensure, for example, that e-mail communications between sales associates and their clients are secure. Brokers also have implemented new transaction processes—such as giving clients a written wire-fraud-prevention disclosure—to raise clients' awareness about the many types of and risks from cybercrime during a real estate transaction.

Brokers invest in technology to attract and support sales associates.

Because of the intense competition among brokers in the sales-associate market, brokers also have invested in new technology to attract new and support their existing sales associates (who, if a broker retains them, will themselves attract and keep clients). These technologies include platforms for customer-relationship management (CRMs), automated-marketing programs, personalized websites, and transaction-management platforms. Brokers must ensure that all these tools work seamlessly on a variety of mobile devices to meet the demands of modern sales associates and their clients.

Although Internet-enabled technologies have delivered great benefits to consumers, they also have exposed consumers to new significant risks.

As explained above, Internet-enabled technologies have made the residential real estate market more transparent and efficient. They have allowed market participants to share information widely and cheaply, given them tools to track and anticipate consumer behavior, and helped them advertise to consumers more effectively than traditional advertising. But despite these consumer benefits, Internet-enabled technologies also have exposed consumers to new risks when selling or buying a home, some of which didn't exist 10 years ago.

First, although Internet-enabled technologies have significantly increased the amount of market information available to consumers online, in some cases they have decreased the quality, reliability, and accuracy of that information. For example, when an unregulated, nonfiduciary firm doesn't promptly update its market or listing information or inaccurately displays that information on its website, consumers may make bad decisions based on stale or incorrect information.

Second, although consumers can benefit from algorithms that predict which products and services might best meet their needs, they can be harmed if unregulated, nonfiduciary firms use algorithms to analyze their behavioral data and then use that data to steer them to products or services that they either don't need or can't afford. For example, although some consumers benefit from Internet-enabled technologies that send them quick-cash offers for their homes, other consumers can be harmed if they're steered to accept quick-cash offers that are well below their homes' fair market value or are accompanied by high "convenience fees" not charged by brokers in ordinary real estate transactions.

Finally, although Internet-enabled technologies can benefit consumers by allowing them to quickly and easily share their personal information when applying for a mortgage loan or selling or buying a home online, they can be harmed if media or technology companies, brokers, or sales associates don't take industry-appropriate security measures to protect consumers' personal information or otherwise don't attempt to prevent consumers from becoming victims of cybercrime. And even if these market participants implement industry-appropriate security measures to prevent cybercrime, consumers nonetheless can still be harmed if they fall prey to sophisticated cyberfraud techniques such as malware and spoofed e-mails that cause them to wire down payments or closing funds to fraudulent bank accounts.

Q: What are the current barriers to competition in the residential real estate brokerage market?

The barriers to entry in the residential real estate brokerage market are quite low. State laws, rules, and regulations govern brokers' entry into the market, but they don't present significant barriers to entry. The states continue to closely regulate brokers and sales associates by considering them to be legal fiduciaries of their clients. As fiduciaries of their clients, brokers generally owe them duties of loyalty, confidentiality, disclosure, obedience, reasonable care, diligence, and accounting.

HomeServices' biggest concern related to competition in the residential real estate brokerage market is the consumer confusion that results from media and technology companies that hold themselves out as being an integral part of the heavily regulated residential real estate market, yet are neither regulated like brokers nor obligated as fiduciaries to ensure that the consumers who use their websites make informed decisions based on accurate information when evaluating individual homes, mortgage loans, brokers, and sales associates.

Because some media and technology companies now tout programs with investors to buy homes directly from consumers, HomeServices also is concerned about the potential for consumer harm that can result when nonfiduciary, unregulated firms engage in or otherwise facilitate "Instant Offer" or similar quick-cash, off-market real estate transactions.[8] Using real-time analytics, media and technology companies, iBuyers, and investors can easily target individual consumers with quick-cash offers for their homes, regardless of whether these cash offers are below the homes' fair market value or are otherwise in the consumers' best interest. Given that neither media or technology companies nor iBuyers nor investors owe consumers any fiduciary duties and often charge consumers comparatively exorbitant fees to sell their homes, the potential for predatory practices that can harm consumers in these unregulated, off-market transactions is very real.

Q: How have past regulatory- and antitrust-enforcement actions affected the residential real estate market? What actions can the government take to maintain future competition in this industry?

Past federal regulatory- and antitrust-enforcement actions have reduced barriers to entry in the residential real estate market, improved consumers' access to important market information, and given consumers more choices of different broker models and price options. All together, these developments have benefitted consumers by increasing competition in the market.

But the residential real estate market traditionally has been and still is primarily regulated by state law and rules adopted by state real estate commissions. The states require brokers and sales associates to be licensed and act as fiduciaries of their clients. The fiduciary-client relationship between brokers and sales associates and their clients distinguishes the residential real estate market from many other consumer markets. The substantial state regulation of brokers and sales associates gives them a strong incentive to comply with the law because their businesses and livelihoods are potentially at stake.

Despite being primarily regulated by state law, the residential real estate market also is heavily regulated by federal law. The Dodd–Frank Act and the regulations promulgated by the Bureau of Financial Consumer Protection, among other things, regulate the content and timing of important consumer disclosures. The Department of Housing and Urban Development enforces the federal fair-housing laws applicable to the buying and selling of homes. The Real Estate Settlement Procedures Act prohibits, among other things, kickbacks and other improper payments for referrals of residential real estate business and requires disclosures of possible conflicts of interest. The penalties—both criminal and civil—for brokers and sales associates who violate these federal laws are substantial.

Given the substantial existing state and federal regulation of the residential real estate market, we believe that the federal agencies responsible for enforcing federal law should primarily focus their regulatory efforts on providing market participants with clear guidance, direction, and recommended best practices to foster a continuing culture of compliance in the market. Using individual enforcement actions instead of formal regulatory guidance to educate the market creates only confusion and uncertainty among the market participants that are best positioned to prevent consumer harm.

Government action to improve transparency in brokers' fee structures and restrict "pocket" listings wouldn't help consumers or promote market competition.

Consumers aren't forced to choose a particular type of broker or fee structure because of brokers' artificial suppression of information about or innovation in fee structures. To claim, for example, that consumers only use full-service brokers because they don't have another choice ignores that they have plenty of alternative broker models to choose from. It also ignores that even today consumers often choose an experienced, professional sales associate to guide them through the process because of the significance and stress of selling or buying a home. Choosing a full-service broker instead of a low-commission broker is a perfectly rational choice for consumers, not a forced one.

Despite the idiosyncratic nature of each real estate transaction, some panelists at the workshop who represent limited-service brokers nonetheless advocated for requiring brokers and sales associates to disclose their fee structures in *all* their advertising materials. Such a uniform-disclosure requirement would run afoul of many state laws, and, in any event, wouldn't be feasible.

First, many state laws *require* commissions to be negotiable and brokers must conspicuously disclose that fact to potential clients.[9] Second, brokers don't advertise one-size-fits-all commissions for the same reason lawyers don't advertise one-size-fits-all legal fees. Each transaction is different. For one transaction, it might be appropriate for a broker and client to agree to a 6% commission. In another transaction, a 5% commission might be justified. Unlike buying a plane ticket on a travel-services website, selling a home isn't a fungible transaction—it's a uniquely individual transaction. Finally, and most importantly, competition among sales associates to secure listings forces them to be fully transparent with consumers about their fee structures.

Some people also claim that private or "pocket" listings—listings that a broker doesn't publicly display on an MLS—harm consumers because they're solely the result of sales associates wanting to collect both sides (the seller and buyer parts) of a commission. But brokers' and sales associates' fiduciary duties—and often MLS rules—require them to advise their clients of the benefits and disadvantages of particular marketing strategies—including *not* to publicly market their home. Some sellers purposely choose a private listing because they're uncomfortable with allowing the public to tour their homes. Other sellers don't publicly market their homes for personal-safety or other reasons. Regardless of why these sellers choose a private listing, they have every right to market their properties as they see fit, subject to fair-housing and other applicable laws.

Forcing brokers to give away for free the listing content that they create for their clients would disregard consumers' choices regarding whether, where, and to what extent to market their homes, and would undermine existing competition among brokers and media companies.

Some industry commentators contend that the government should force brokers to give away their listing content to nonbroker market participants that don't have anything to do with real estate transactions and, in fact, add an unnecessary layer to transactions.

But as discussed above, any business that gets a broker's license can access and display other brokers' listing content. Listing content is also widely available on thousands of brokers' and MLSs' public-facing websites and on the websites of media companies that have entered into license agreements with brokers and MLSs to display their listing content. Given that listing content is now widely available to consumers online, there's no credible argument that the government needs to force brokers to give it to nonbroker market participants so that consumers can access it.

More importantly, forcing brokers to give away listing content to nonbroker market participants wouldn't give brokers' clients any say in the matter. As detailed above, some sellers purposefully choose not to market their homes online, much less to a nationwide audience. Individual consumers' informed, purposeful choices regarding exactly where and to what extent their brokers and sales associates market their homes should be respected, not disregarded.

Listing content isn't a "public good" or "public utility"—it has been and always will be a valuable intellectual-property asset that brokers create when serving their clients.

In advocating for government intervention to force brokers to give away their listing content to nonbroker market participants (such as media companies), some industry commentators wrongly analogize listing content to a "public good" or a "public utility." To understand why that analogy is wrong, it's helpful to understand what the terms "public good" and "public utility" mean.

In economics, a "public good" is nonrival and nonexcludable. Examples of public goods include air, public parks, and national defense. A "public utility" usually is a monopoly that the government allows to exist because there's no room in the market for competition—only one firm can naturally produce the product or service at a lower cost than its competitors. Examples of public utilities include suppliers of essential goods or services such as water, electricity, and natural gas.

Advocates in the residential real estate industry for a purported "public-utility" or "public-good" approach to listing content seem to assume that listing content just appears on brokers' doorsteps without any effort or expense on the brokers' part. Because of that initial assumption, these advocates then further assume that no one will be harmed if brokers are forced to give away that listing content to nonbroker market participants that also did nothing and spent nothing to create it.

Both assumptions are wrong.

Viewing listing content as a "public good" or "public utility" that brokers should be forced to give away to nonbroker market participants ignores brokers' significant costs in creating the content, disrespects brokers' legal rights in the underlying intellectual property of the content, disregards the economic realities of competition among brokers and media and technology companies in the submarkets of sales-associate advertising, lead generation, and productivity tools, and would expose brokers and sales associates to potential legal liability for third parties' misuse or mismanagement of the content.

First, forcing brokers to give away listing content to nonbroker market participants—especially companies that now compete with brokers in the consumer market—ignores the economics of content creation. Forcing brokers to pay for the substantial technology and labor costs of obtaining listings and creating listing content, when nonbroker market participants don't incur these up-front costs, would give these participants a free competitive advantage vis-à-vis brokers. In economic terms, they would be free riders.

Second, forcing brokers to give away listing content to nonbroker market participants would ignore brokers' legally protected rights in that proprietary content. U.S. law has long recognized content creators' intellectual property in proprietary content. Brokers and sales associates annually invest hundreds of millions of dollars (and hundreds of thousands of work hours) to create accurate, compelling, and unique listing content for their clients. Forcing brokers to give away that proprietary content to their competitors in the consumer and sales-associate markets ignores that brokers have legal rights in that content that should be respected.

Third, as discussed above, brokers compete with media and technology companies in the submarkets of sales-associate advertising, lead generation, and productivity tools. Requiring brokers to give these companies the listing content that they create would force brokers to subsidize their direct competitors in these submarkets.

Finally, forcing brokers to give away listing content to unregulated, nonfiduciary market participants also could result in legal liability for brokers if third parties misuse or mismanage the content. Federal and state law holds brokers legally responsible for the content and use of their clients' listing content. State laws, for example, prohibit brokers from marketing a client's home unless a listing agreement is in effect and require brokers to stop marketing a home if a client's listing agreement is expired or terminated. To comply with these laws, brokers must be able to strictly control where they send listing content and, if they voluntarily choose to license their listing content to nonbroker market participants, how and for how long these companies can use and display the content.

Summary

In the past 10 years, competition in the residential real estate market has been robust and constantly evolving. The market's low barriers to entry and new Internet-enabled technologies have allowed new brokerage-service models to both enter the market and gain increasing market share from incumbent brokers. Brokers' fee structures remain transparent and continue to vary widely because of competition among sales associates for listings and the many factors that individual consumers consider to be important when choosing a broker and sales associate. By using their scale to offer sales associates advertising, lead generation, and productivity tools at a lower cost than brokers, media and technology companies also have increased competition in these submarkets.

Internet-enabled technologies have made market information, listing information, and tools that consumers use to evaluate the benefits and costs of selling or buying a home widely available. Yet these technologies also have created new risks to consumers who can (1) make bad decisions by relying on inaccurate or misleading online information; (2) be influenced to accept quick-cash online offers that are well below the fair market value of their homes; (3) pay comparatively exorbitant transaction fees for the "convenience" of selling their homes online; or (4) become the unwitting victims of real estate-related cybercrime.

Although federal and state regulation of the residential real estate market remains comprehensive, new federal or state oversight might be appropriate in the submarket where nonfiduciary, unregulated media and technology companies are engaging in or facilitating quick-cash home sales directly with consumers because of the potential for consumer harm in these off-market transactions.

New federal regulation to force brokers to give away for free the listing content that they create for their clients isn't needed to promote consumer welfare or competition in the market. Forcing brokers to give away the proprietary listing content that they create for their clients wouldn't additionally benefit consumers because they already can access listing content on hundreds of MLS, broker, and media-company websites. It also would harm those consumers who rely on their broker–fiduciary to responsibly control and manage their listing information and advise them whether, where, and to what extent they should market their homes.

Forcing brokers to give away listing content to nonbroker market participants—many of whom are their direct competitors—also would ignore the economics of brokers' content creation, trample on brokers' intellectual property in listing content, disregard the economic realities of the competition among brokers and media and technology companies in the submarkets of sales-associate advertising, lead generation, and productivity tools, and expose brokers and sales associates to potential legal liability under state law if third parties misuse or mismanage the content. Simply put, brokers' proprietary listing content can't be considered a "public good" or a "public utility," no matter how some industry commentators try to spin it otherwise.

July 31, 2018

---

[1] *E.g.*, Opendoor, Zillow Instant Offers, Offerpad, and Knock.

[2] Although nonaffiliated referral sales associates might not actively assist consumers with buying and selling homes, they can generate income by referring consumers to active sales associates. After a consumer sells his or her home, the active sales associate who received the referral will pay part of his or her commission to the referral sales associate.

[3] Comment, Residential Real Estate Brokerage Competition Workshop at 5, Realogy Holdings Corp. (May 21, 2018) (#00026).

[4] Comment, Data and Choices Breed Competition: A CMLS White Paper, Council of Multiple Listing Services (Jun 1, 2018) (#00030).

[5] *E.g.*, National Association of Realtors®, Code of Ethics and Standards of Practice Art. 1 (Jan. 1, 2018) ("When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interest of their client.").

[6] National Association of Realtors®, Infographic: 2017 Profile of Home Buyers and Sellers.

[7] FBI Public Service Announcement, Alert No. I-071218-PSA, July 12, 2018.

[8] *E*.g., Zillow Group, Inc. Investor Update Call—Prepared Remarks (Apr. 12, 2018) (discussing Zillow's Instant Offers program, under which a consumer can submit information about her home to Zillow and then, within two business days, receive offers from investors to buy the home along with a Zillow Premier Agent sales associate's analysis of what the home would sell for on the open market). W+R Studios—a technology company that operates CloudCMA—recently announced that it will now include an investor offer in every comparative-market analysis (CMA) that a sales associate sends to a potential client–seller. *See* Press Release, W+R Studios (July 17, 2018) ("W+R Studios announces Cloud Investor Connect. Cloud CMA subscribers will be able to get investors' cash offers to present to home sellers.").

[9] *E.g.*, Minn. Stat. § 82.66 subd. 1(b)(8) & subd. 2(b)(6) (2018).

The chart below is found in Jonathan Aizen, *$1B invested in real estate tech, with companies bringing innovation to search, discovery leading the pack*, Inman.com (May 16 & 21, 2014), https://www.inman.com/2014/05/16/1b-invested-in-real-estate-innovation/#.