July 31, 2018

Mr. Donald S. Clark
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue N.W.
Washington, DC 20580

Mr. Clark,

On behalf of the Center for Data Innovation (datainnovation.org), I am pleased to submit this response to the joint request for public comment from the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) regarding competition issues in the residential real estate brokerage industry.[1]

The Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington, D.C., and Brussels, the Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends such as predictive analytics, open data, cloud computing, and the Internet of Things. The Center is a non-profit, non-partisan research institute affiliated with the Information Technology and Innovation Foundation.

As the Center for Data Innovation has outlined in a recent report, the residential real estate brokerage industry has exploited its exclusive control of listing data to limit access to third-parties who would introduce technology-driven competition.[2] For example, Multiple Listing Services (MLSs), the regional organizations that maintain exclusive access to property listings on behalf of real estate agents, will often prevent certain third-parties from using current and historic listing data by creating strict data-use policies, denying access to non-brokers, or by keeping the data fragmented and unstandardized. Whether this is willful obstruction or strategic neglect, these technical and administrative restrictions have no legitimate business justification, but they do undercut the business models of digital services that would allow consumers to be less reliant on traditional, high-

[1] "What's New in Residential Real Estate Brokerage Competition – An FTC-DOJ Workshop," Federal Trade Commission, June 5, 2018, https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj.

[2] Daniel Castro and Michael Steinberg, "Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help," Center for Data Innovation, November 6, 2017, http://www2.datainnovation.org/2017-open-apis.pdf.

cost brokers for buying and selling homes.[3] Where feasible, the FTC and DOJ should take steps to stop this type of anti-competitive behavior that limits innovation and hurts consumers.

A BRIEF HISTORY OF ANTI-COMPETITIVE BEHAVIOR IN THE REAL ESTATE INDUSTRY

The residential real estate brokerage industry has an unfortunate history of engaging in anti-competitive practices when it is not subject to strict oversight.

Efficiently buying and selling real estate requires access to information, such as details about which properties are available and recent sales of comparable properties. In the late 1800s, real estate brokers in the United States began creating regional membership organizations to gather and share this property information and fairly compensate agents who assist in selling a property.[4] These organizations, known as MLSs, have spread and total more than 700 in the United States, sometimes with overlapping markets.[5] Each MLS maintains exclusive control of a centralized listing of homes for sale in a given region. As the Fifth Circuit Court of Appeals wrote, in a ruling supporting increased access to real estate listings, "there exists the potential for significant competitive harms when the [MLS], having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources."[6]

Each MLS sets its own policies for property listings, such as defining what types of listings it allows and what information listing agents must provide. Local real estate brokers, and their agents, are responsible for adding listings to the MLS database.[7] MLSs are also responsible for enforcing these rules among brokers.[8] MLSs tightly control access to their databases by charging fees for membership and restricting membership eligibility to licensed agents and brokers, and they have taken legal action in the past against third parties who have accessed or used MLS data without

[3] As the First Circuit has explained, "In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons, while the desire to maintain a monopoly market share or thwart the entry of competitors would not." Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir.1994) (citing Eastman Kodak, 504 U.S. at 483, 112 S.Ct. 2072; Aspen Skiing, 472 U.S. at 608-11, 105 S.Ct. 2847).
[4] "Multiple Listing Service (MLS): What Is It." *National Association of Realtors*, accessed June 29, 2017, https://www.nar.realtor/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it.
[5] Andrea V. Brambila, "Why More MLASs and Association Will Merge in 2017," *Inman,* https://www.inman.com/2016/12/30/why-more-mlss-and-associations-will-merge-in-2017/.
[6] U.S. v. Realty Multi-List, Inc., No. 78-2481, November 14, 1980, https://openjurist.org/629/f2d/1351/united-states-v-realty-multi-list-inc.
[7] "Multiple Listing Service (MLS): What Is It." *National Association of Realtors*, accessed June 29, 2017. https://www.nar.realtor/topics/nar-doj-settlement/multiple-listing-service-mls-what-is-it.
[8] Rob Hahn, "A Quick Question On Upstream & the Local MLS," *The Notorious R.O.B,* February 18, 2016, http://www.notorious-rob.com/2016/02/a-quick-question-on-upstream-the-local-mls-2/.

their authorization.[9] The reason for this exclusion is clear. Again, to quote the Fifth Circuit, "A new entrant into the market might, for example, be more aggressive and willing to accept a lower commission rate. Exclusion of such a broker would tend to reduce the amount of price competition in the market."[10]

Moreover, many MLSs create unnecessarily complex and cumbersome policies and procedures for third-parties to gain access to MLS data, and they are slow to provision access to data for approved third-parties. As a result, companies that want to use technology to provide new services to consumers or agents—particularly those that might upset the traditional full-service broker business model—face significant challenges to scaling their businesses nationally, as they must work through these types of barriers at every single MLS where they encounter them.

Real estate agents and brokers have consistently and vociferously resisted competition, including from for-sale-by-owner sites and discount brokers, knowing that if they can limit these incursions that they can collude to price-fix their services at approximately six percent of sales price.[11] In the 1990s, the DOJ's Antitrust Division began pursuing multiple cases against the National Association of Retailers (NAR) and the MLSs for anti-competitive actions that discriminate against innovative business models. For example, the DOJ opposed the NAR's creation of rules that inhibit competition from Internet brokers, local MLS's requirements for brokers to have a physical office within the MLS area, and states that passed laws prohibiting brokers from offering rebates to consumers.[12]

The DOJ rightly pursued a case against the NAR for unfairly discriminating against online brokers, who were undercutting the traditional brokers' standard commission and lowering costs for consumers. The investigation resulted in NAR entering into a 10-year agreement in which the association agreed to rescind its anti-competitive policies preventing online brokers from accessing MLS listing data and guarantee that online brokers would not be treated differently than traditional ones.[13]

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[9] "MLS Data Security." *National Association of Realtors*, accessed June 29, 2017, https://www.nar.realtor/ae/manage-your-association/association-policy/mls-data-security.
[10] U.S. v. Realty Multi-List, Inc., No. 78-2481, November 14, 1980, https://openjurist.org/629/f2d/1351/united-states-v-realty-multi-list-inc.
[11] Norman W. Hawker, "Competition in the Residential Real Estate Brokerage Industry: A Report on the AAI Symposium," (American Antitrust Institute, 2005), http://www.antitrustinstitute.org/files/517b.pdf.
[12] "Enforcing Antitrust Laws in the Real Estate Industry," U.S. Department of Justice, last updated July 2, 2015, https://www.justice.gov/atr/enforcing-antitrust-laws-real-estate-industry.
[13] United States of America v. National Association of Realtors, Civil Action No. 05 C 5140 (November 18, 2008), https://www.justice.gov/atr/case-document/final-judgment-142.

THREE PROBLEMS IN THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY

The residential real estate brokerage industry has three main problems that lead to worse outcomes for consumers: limited alternatives to traditional brokers; steering by buyers agents; and incentives for dual-agency. In each of these cases, traditional brokers use restrictions on data to maintain these practices.

First, consumers face limits on using non-traditional, lower-cost brokers, such as state laws that restrict rebates. The most serious evidence for this lack of competition is that, as noted by Cornell economist Panle Jia Barwick, the price-cost margin (i.e. how much price is above cost) has increased significantly over the past couple of decades in the industry.[14] Even as technology has driven down the costs of buying and selling properties (e.g. lower printing costs, reduced search costs, etc.), the amount paid by sellers has increased because the commission rate most consumers pay for selling a home has not changed substantially even as the prices for homes have increased faster than inflation.[15] Attempts to introduce competition from non-traditional brokers are met with fierce resistance by traditional brokers. For example, Steve Games, the CEO of Pacific Sotheby's International Realty, recently led a group of real estate agents in a chant of "no discounts" to the typical commission rates after admitting that low-cost brokers like Purplebricks, which offers consumers a flat-fee for listings, puts pressure on businesses like his to lower their commissions. In effect, sellers are paying nearly twice as much as they were 20 years ago, showing a lack of competition in the industry.[16] While traditional measures of competition, such as the Herfindahl–Hirschman index (HHI index), would suggest that the residential real estate brokerage industry is competitive, this is not the case. Many factors, including professional norms, collusion, control of key data, and a lack of knowledge by consumers, make the industry anything but competitive.

One reason that low-cost alternatives to traditional brokers have not gained more ground is that they face significant barriers to entry. Discount brokers that theoretically should have no barriers to accessing MLS data (since as brokers they are entitled to this information) face significant challenges to scaling up nationally. The problem is that these companies not only have to be licensed brokers in every state in which they want access to the data, they also must apply for and

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[14] Panle Jia Barwick, Comments at the "What's New in Residential Real Estate Brokerage Competition – An FTC-DOJ Workshop," Federal Trade Commission, June 5, 2018, https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj.

[15] "Prices for Housing, 2000-2018," n.d., Official Data Foundation, http://www.in2013dollars.com/Housing/price-inflation.

[16] Panle Jia Barwick, Comments at the "What's New in Residential Real Estate Brokerage Competition – An FTC-DOJ Workshop," Federal Trade Commission, June 5, 2018, https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj.

maintain membership in every single MLS within these states, as well as integrate with the different databases. According to Judd Schoenholtz, the CEO and founder of Open Listings (an Internet broker that refunds to homebuyers half of the commission their agent receives), the cost of adding each MLS amounts to approximately $20,000 in upfront costs, plus another $10,000 annually to maintain, not including the membership fees and dues owed for every agent.[17] And, as noted previously, there are hundreds of MLSs in the United States. We estimate the total cost to scale nationally would be $15 million in startup costs and $7.5 million in recurring costs.[18]

Second, sellers face opposition from buyers agents when they attempt to set lower commissions. Properties listed with lower commissions face adverse outcomes—they are less likely to sell and more likely to take longer to sell.[19] This suggests that buyers agents are engaging in “steering,” a practice of directing potential buyers away from properties with lower commissions and towards those with higher commissions for the agent, even if they are not necessarily in the best interests of the consumers. In large part this practice is possible because the vast majority of consumers may buy or sell a home just once or twice in their life and therefore lack experience and knowledge about these types of transactions.

Increased market transparency, such as allowing buyers to see the commission rates for different listings, could help mitigate this behavior. Unfortunately, MLSs strictly limit public access to this information. For example, when a Denver-based flat-fee brokerage attempted to provide this information to consumers on its website, the local MLS immediately sent a cease-and-desist letter demanding they remove that information.[20] Since the discount brokerage was at the mercy of the MLS for getting access to listing data, it was forced to comply with the demand.

Third, many agents engage in dual-agency, or the practice of representing both the buyer and the seller in a transaction. These situations are appealing to listing agents because they do not have to split a commission with a buyers agent. In these situations, it is unclear that agents are acting in the best interests of both parties since their primary financial incentive will come from completing the

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[17] Judd Schoenholtz, the CEO and founder of Open Listings (openlistings.com) in email message to author, October 2017.

[18] Daniel Castro and Michael Steinberg, “Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help,” Center for Data Innovation, November 6, 2017, http://www2.datainnovation.org/2017-open-apis.pdf.

[19] Panle Jia Barwick, Parag Pathak, and Maisy Wong, “Conflicts of Interests and the Realtor Commission Puzzle,” NBER Working Paper Series, August 2015, http://www.nber.org/papers/w21489.pdf.

[20] Paul Hagey, “Broker pulls commission data from listing site after MLS demand,” February 13, 2015, Inman, https://www.inman.com/2015/02/13/broker-pulls-commission-data-from-listing-site-after-mls-demand/.

sale regardless of the sales price. Indeed, research has shown that real estate agents tend to sell their own homes for more than homes for which they are hired to sell.[21]

The desire for dual-agency is one reason that many agents want to limit third-party sites from displaying properties for which they are the listing agent. They would prefer that buyers come directly to them, rather than going to another agent who may be advertising on a listing search portal where the buyer is browsing homes on the market.

HOW TRADITIONAL REAL ESTATE BROKERS PROTECT HIGH COMMISSIONS BY EXCLUDING ACCESS TO LISTING DATA

Over the past two decades, the Internet has made it easier for consumers to compare prices in many industries by lowering the search cost to find this information. In addition, consumers can go online to more easily obtain information about the quality of products and services.[22] Many businesses have opposed these increases in market transparency as these changes stood to increase competition and lower their margins. Indeed, in the e-commerce space, some early online sellers even attempted to block third-party price comparison sites.[23] However, on balance, these advances have greatly empowered consumers by reducing information asymmetries and increasing market transparency.[24]

Traditional real estate brokers have resisted many efforts to increase transparency in the industry. Multiple companies have tried to disrupt the real estate industry by using technology to provide consumers direct access to real estate listings, information about the quality and costs of competing real estate professionals, and rebates on the commissions paid by sellers to real estate brokers. In addition to MLS listings, these sites may pull in listing data from for-sale-by-owner listing sites allowing homeowners more flexibility in how they sell their homes.[25] These sites also provide access to additional information that may interest home buyers and sellers, such as walkability scores, crime data, quality of nearby schools, ownership history of the home, and solar energy potential, as well as appraisal tools. These companies need accurate and timely data about real estate listings to

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[21] Steven D. Levitt and Chad Syverson, "Market Distortions when Agents are Better Informed: The Value of Information in Real Estate Transactions," NBER Working Paper No. 11053, January 2005, http://www.nber.org/papers/w11053.
[22] Yannis J. Bakos, "Reducing buyer search costs: implications for electronic marketplaces," Management Science, 199,7 43 (12).
[23] Rebecca Quick, "Web's robot shoppers don't roam free," September 3, 1998, *Wall Street Journal*.
[24] Behrang Rezabakhsh et al., "Consumer Power: A Comparison of the Old Economy and the Internet Economy," *Journal of Consumer Policy,* 29, issue 1, (2006): 3-36, https://link.springer.com/article/10.1007%2Fs10603-005-3307-7.
[25] "Redfin's Dedication to Data Quality," Redfin Real Estate, https://www.redfin.com/about/data-quality-study.

provide these services. However, many of these companies, including sites that aggregate real estate listings, must negotiate with the MLSs to obtain this information.[26] And the MLSs may not agree to share this information with these third parties.[27]

In addition, multiple real estate brokerages, both large and small, have restricted certain third parties from displaying their listing data.[28] For example, Edina Realty, one of the largest brokers in Minnesota, North Dakota, and Wisconsin, pulled all of its listings from third-party sites in 2011.[29] Although Edina began providing these listings again three years later, it did so only after the third-party sites agreed to special terms, such as how agents appear next to listings.[30] And other brokerages, such as Crye-Leike Realtors in Memphis, Sibcy Cline Realtors in Cincinnati, and Allen Tate Realtors in Charlotte, have pulled their listings from sites like Zillow and Trulia and not reinstated them.[31]

Some brokerages are upfront about their dislike for third-party real-estate sites. For example, in a blog post in November 2015, the brokerage FC Tucker, which bills itself as "the undisputed real estate leader in central Indiana," begs the public to stop using Zillow and Trulia, stating that these sites "do provide helpful tools for buyers and sellers."[32] They also accuse these sites of having inaccurate information, missing the irony that by not providing access to their listings, they are perpetuating the very problem they say they want to solve.

While other brokers are more circumspect about why they do not want to share data about their listings, their motivations are easy enough to surmise. Third-party sites display ads for local real

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[26] Kate Abrosimova, "What Technology Stack Do Zillow, Redfin and Realtor.com Use for Property Listings," Yalantis, August 4, 2015, https://yalantis.com/blog/what-technology-stack-do-zillow-redfin-and-realtorcom-use-for-property-listings/.
[27] Kate Abrosimova, "What Technology Stack do Zillow, Redfin and Realtor.com Use for Property Listings?" Yalantis, August 4, 2015, https://yalantis.com/blog/what-technology-stack-do-zillow-redfin-and-realtorcom-use-for-property-listings/; https://www.inman.com/2017/07/07/zillow-group-rejects-unified-listing-feed-from-new-york-brokers/.
[28] Paul Hagey, "Some Brokers Learning to Live Without Zillow and Trulia," *Inman,* https://www.inman.com/2015/04/08/some-brokers-learning-to-live-without-zillow-and-trulia/.
[29] Matt Carter, "Minnesota Broker Will Stop Sending Listings to Trulia, Realtor.com," *Inman,* https://www.inman.com/2011/11/21/minnesota-broker-will-stop-sending-listings-trulia-realtorcom/.
[30] Paul Hagey, "Edina Realty Does About-Face Sending Listings to Zillow, Trulia, Realtor.com, *Inman,* https://www.inman.com/2014/09/30/edina-realty-does-about-face-sends-listings-to-zillow-trulia-realtor-com/.
[31] Paul Hagey, "Some Brokers learning to live Without Zillow and Trulia, *Inman,* https://www.inman.com/2015/04/08/some-brokers-learning-to-live-without-zillow-and-trulia/.
[32] "About Us." FC Trucker Shelby County, http://www.fctuckershelbycounty.com/about-us; and "PLEASE Stop Using Zillow and Trulia!" FC Trucker Shelby County, November 17, 2015, http://www.fctuckershelbycounty.com/single-post/2015/11/17/PLEASE-Stop-Using-Zillow-and-Trulia.

estate brokers and agents to prospective home buyers, often with useful consumer reviews of their experiences. Since prospective buyers may not have an agent when they begin looking at homes, brokers fear they will lose out on potential clients, including the opportunity to act as both a buyer's agent and seller's agent for their listed properties.[33] By cutting off third-party sites from listings, the brokerages hope to drive more search traffic to their own sites where they do not show ads for competitors. These restrictions hurt buyers and sellers, including their own clients, since there is less information available about their properties.

These types of restrictions are unnecessary. As economists at Northwestern University and the University of Wisconsin wrote in an assessment of the MLS, "the bundling of agents' services with the MLS…is the current practice, but is not technologically dictated. It might be beneficial to unbundle the platform from the additional services offered by agents."[34]

CONCLUSION

Traditional real estate brokers unfairly limit third-parties from using data and these practices are hurting innovators and consumers. The FTC and DOJ should insist the MLSs and brokers ensure data controlled by these entities is available to improve competition, innovation, and the consumer experience. Without intervention, real estate brokers will continue to restrict access to this data, even if this comes at the expense of consumers, because they want to avoid competition enabled by emerging digital services while preserving their higher commissions.

Sincerely,

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[33] Andrea v. Brambila, "Zillow Group rejects unified listing feed from New York brokers," *Inman,* https://www.inman.com/2017/07/07/zillow-group-rejects-unified-listing-feed-from-new-york-brokers/.
[34] Igal Handel, Aviv Nevo, and François Oratal-Magné, "The relative performance of real estate marketing platforms: MLS versus FSBOMadison.com," CSIO working paper, 2007, No. 0091, Center for the Study of Industrial Organization at Northwestern University.