



UNITED STATES OF AMERICA



FEDERAL TRADE COMMISSION  
Washington, DC 20580

DEPARTMENT OF JUSTICE  
Washington, DC 20530

May 30, 2007

The Honorable Jennifer M. Granholm  
111 South Capitol Avenue  
P.O. Box 30013  
Lansing, Michigan 48909

**Re: Michigan House Bill 4416**

Dear Governor Granholm:

The staffs of the Federal Trade Commission<sup>1</sup> and the Antitrust Division of the United States Department of Justice are pleased to respond to your request for comments on the likely competitive effects of proposed Michigan House Bill 4416 ("HB 4416" or the "Bill").<sup>2</sup> We believe that this legislation may force consumers to buy services they may not want or need and is likely to impair the ability of non-traditional brokers to compete against their full-service rivals.

HB 4416 is a revised version of a bill on which the FTC and DOJ commented in 2005.<sup>3</sup> At that time we advised that the 2005 version of the Bill raised competitive concerns because it would have changed current law to require Michigan real estate professionals to provide "at a minimum" certain real estate brokerage services that Michigan home sellers might not want or need.<sup>4</sup> If Michigan home sellers had been required to purchase these real estate brokerage services, both home sellers and home buyers likely would have had to pay thousands of dollars

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<sup>1</sup> This letter expresses the views of the Federal Trade Commission's Office of Policy Planning. The letter does not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Commission has, however, voted to authorize the submission these comments.

<sup>2</sup> Michigan House Bill 4417 ("HB 4417") sets out disclosure requirements pursuant to the substantive provisions of HB 4416. Neither bill will take effect unless both are enacted into law.

<sup>3</sup> See Letter from FTC and DOJ to Michigan State Sen. Alan Sanborn (Oct. 18, 2005), at <http://www.ftc.gov/os/2005/10/051020commhousebill4849.pdf>.

<sup>4</sup> *Id.*

more to complete a real estate transaction in Michigan. There was no evidence, moreover, that any form of minimum-service law was needed in Michigan to protect consumers.

HB 4416, like the 2005 bill, would require real estate professionals who enter into a “service provision” agreement to provide several services. Specifically, the Bill would require brokers to (1) accept and present offers and counteroffers; (2) assist in developing, communicating, negotiating, and presenting offers and counteroffers; (3) provide assistance necessary to complete the transaction under the terms specified in the purchase agreement; and (4) furnish, or cause to be furnished, a complete and detailed closing statement as required by R 339.22311 of the Michigan Administrative Code.<sup>5</sup> Unlike the 2005 bill, however, HB 4416 would allow consumers and brokers to enter into “limited service provision” agreements, under which consumers could waive all of these services except the provision of a detailed closing statement.<sup>6</sup> Additionally, HB 4417, the companion legislation to HB 4416, would require brokers to disclose the services that they are obligated to provide and which, if any, of the services that consumers are waiving.<sup>7</sup>

Although HB 4416, as currently drafted, is less restrictive than the 2005 bill, there still is no evidence that any form of minimum-service law is needed in Michigan to protect consumers. Further, we are concerned that this Bill would impose unnecessary restrictions on a broker’s ability to compete for customers.

## **I. The Proposed Legislation Raises Competitive Concerns**

HB 4416 contains an unnecessary and confusing provision, Section 2512D(3)(E), that would require a broker acting pursuant to a service agreement to furnish, or cause to be furnished, “a complete and detailed closing statement as required by R 339.22311 of the Michigan Administrative Code.”<sup>8</sup> R 339.22311, in contrast, appears to require a broker to furnish a closing statement only if he or she is “involved” in the closing.<sup>9</sup> Thus, it is unclear what would be required of a broker who has not been hired to assist in closing. Under one reading of Section 2512D(3)(E), a broker would not be required to attend a closing or provide a detailed closing statement if the consumer has chosen not to have the broker “involved” in the closing. Another possible interpretation of this provision, however, is that all brokers acting pursuant to service provision agreements – regardless of whether they were hired to assist in the

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<sup>5</sup> HB 4416 also requires brokers to market the client’s property in the manner agreed upon. *See* HB 4416 § 2512D(3)(A)-(E).

<sup>6</sup> HB 4416 § 2412D(5).

<sup>7</sup> HB 4416 § 2517(4).

<sup>8</sup> HB 4416 § 2512D(3)(E).

<sup>9</sup> Mich. Admin Code § R. 339.22311(1).

closing – must prepare a closing statement. If interpreted in this latter manner, Section 2512D(3)(E) could require some consumers to purchase services related to closing a real estate transaction from a broker that they do not want or need.

## II. The Proposed Legislation Unnecessarily Restricts Certain Forms of Advertising

FTC staff, drawing on its experience analyzing advertising regulations in the licensed professions<sup>10</sup> and its recent investigations into the real estate industry in Michigan,<sup>11</sup> is concerned that another provision of the Bill, Section 2512D(4), would also harm the public. Section 2512D(4) in the Bill prohibits a broker from advertising the seller's property as "for sale by owner or otherwise mislead[ing] the public to believe that the seller is not represented by a real estate broker."<sup>12</sup> FTC staff believes that this provision is unnecessary and has the potential to limit consumer choice and competition among real estate brokers.

Preventing deceptive and misleading advertising practices is at the core of the FTC's mission and the FTC recognizes that government action sometimes is necessary to protect consumers from such conduct. However, it is unclear how the FSBO advertising provision in HB 4416 is likely to provide Michigan consumers any additional protection against fraud. First, Michigan law already prohibits brokers from engaging in misleading advertising, and the FTC is

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<sup>10</sup> See, e.g., Letter from FTC Staff to the Florida Bar (Mar. 23, 2007), available at <http://www.ftc.gov/opa/2007/03/fyi07225.htm>; <http://www.ftc.gov/be/V070002.pdf>; Letter from FTC Staff to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), available at <http://www.ftc.gov/opa/2007/03/fyi07225.htm>; Letter from FTC Staff to the Office of Court Administration, Supreme Court of New York (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-image.pdf>; Letter from FTC Staff to the Professional Ethics Committee for the State Bar of Texas (May 26, 2006), available at <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>; Letter from FTC Staff to Committee on Attorney Advertising, the Supreme Court of New Jersey (Mar. 1, 2006), available at <http://www.ftc.gov/be/V060009.pdf>; Letter from FTC Staff to Robert G. Esdale, Clerk of the Alabama Supreme Court (Sept. 30, 2002), available at <http://www.ftc.gov/be/v020023.pdf>; THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC STAFF REPORT (1980). The FTC also has substantial experience advising the FDA on the competitive effects of regulating advertisements and labeling requirements for food and drugs. See, e.g., FTC Staff Comments before the Food and Drug Administration, *In the Matter of Assessing Consumer Perceptions of Health Claims* (Jan. 17, 2006), available at <http://www.ftc.gov/be/V060005.pdf>; FTC Staff Comment Before the Food and Drug Administration, *In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion* (May 10, 2004), available at <http://www.ftc.gov/os/2004/05/040512dtcdrugcomment.pdf>; FTC Staff Comment before the Food and Drug Administration, *In the Matter of Food Labeling: Transfatty Acids in Nutrition Labeling* (Apr. 15, 2004), available at <http://www.ftc.gov/os/2004/04/040416foodlabeling.pdf>.

<sup>11</sup> See *Decision and Order, In re MiRealSource, Inc.*, Docket No. 9321 (Mar. 20, 2007), available at <http://www.ftc.gov/os/adjpro/d9321/070323decisionorder.pdf>; *Complaint, In re Realcomp II, Ltd.*, Docket No. 9320 (Oct. 10, 2006), available at <http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf>.

<sup>12</sup> HB 4416 § 2512D(4).

unaware of any evidence that existing law is ineffective.<sup>13</sup> Further, the FTC is not aware of any evidence that consumers actually have been misled in the manner envisioned by HB 4416.<sup>14</sup> At the same time, Section 2512D(4) has the potential to restrict competition among real estate brokers, which will harm consumers.

For example, Section 2512D(4) could be read to prevent brokers who include in their firm names the term “FSBO,” “For-Sale-By-Owner,” or a similar term that may risk “causing the public to believe that the seller is not represented by a real estate broker” from using their firm names in connection with advertising properties that they also have listed in the multiple listing service (“MLS”) pursuant to a brokerage agreement. For example, the Bill would appear to prevent such a broker from entering into a brokerage agreement with a consumer and simultaneously marketing the home with a yard sign that displays the firm’s name or advertising the home on the firm’s website or in the firm’s print advertising. Further, Section 2512D(4) could be read to prevent any broker – regardless of his or her firm’s name – who also advertises FSBO homes from displaying the homes of clients who have entered into brokerage agreements on the same website or in the same magazine that he or she uses to advertise FSBO homes.<sup>15</sup>

In this manner, the FSBO advertising provision in HB 4416 could be read to require some non-traditional brokers either to alter the ways in which they advertise their listings (for example, by creating a separate entity with a different name to handle brokerage listings, referring brokerage listings to a non-affiliated broker, or segregating brokerage listings from FSBO advertising in online and offline advertising) or to stop entering into brokerage agreements altogether.<sup>16</sup> By unnecessarily restricting how these brokerage firms may meet consumer demand, HB 4416 risks reducing competition in the real estate brokerage industry.

Further, it is also unclear from the text of HB 4416 what other types of advertising may be considered to mislead the public to believe that the seller is not represented by a real estate broker. For example, the Bill could be interpreted to prevent brokers from using yard signs,

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<sup>13</sup> See MICH OCC. CODE §§ 339.604 (b), (f) (prohibiting all occupational professionals from engaging in “false advertising” or practicing “fraud, deceit, or dishonesty”).

<sup>14</sup> It is not obvious how a prospective home buyer who believes that a home is for sale without any assistance from a real estate professional and later discovers that the seller has hired a broker to list the property in the MLS is harmed. This fact does not appear to present any additional monetary costs or risks to the prospective home buyer. To the extent that the seller has contracted with the listing broker to perform some of the tasks necessary to complete the transaction, the property may be more attractive.

<sup>15</sup> This would be the case if the Bill were interpreted so that commingling advertising for FSBO homes and homes of clients with whom the broker has entered a brokerage agreement constituted advertising that would “mislead the public to believe that the seller is not represented by a real estate broker.”

<sup>16</sup> The FTC understands that some brokers who advertise FSBO homes and also take limited-service listings currently refer their listing business to non-affiliated brokers. The Bill may not affect these business models to the extent that the client, rather than the listing broker, is deemed to be the one that is advertising the listed home on the FSBO website.

websites, or print advertising that contains the homeowner's contact information. Limited-service brokers often direct cooperating brokers and potential home buyers to contact the home seller directly, placing the homeowner's contact information in all advertising. To the extent that HB 4416 would prevent this sort of business practice it would require limited-service brokers to incur the additional cost associated with handling inquiries and forwarding them to homeowners. Faced with higher costs, limited-service brokers likely would increase the price that they charge home sellers, which also is likely to reduce the competitive pressure on the price that some full-service brokers charge.<sup>17</sup>

Finally, apart from how the State of Michigan would interpret and enforce the FSBO advertising restrictions in HB 4416, there is a further risk that private groups (such as MLSs) might adopt restrictive rules pursuant to this language. For example, an MLS could claim that HB 4416 bars the advertisement of a listed property to the public as "for-sale-by-owner" and refuse to accept listings from certain non-traditional brokers or exclude these brokers' listings from data feeds sent to real estate advertising websites like Realtor.com.<sup>18</sup> Similarly, an MLS could adopt rules that discriminate against limited-service listings when homeowner contact information is displayed on yard signs or in print or online advertising.

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HB 4416 addresses a problem that does not appear to exist, and its provisions risk limiting consumer choice and the ability of brokers to compete in meeting consumers' needs. The FTC and DOJ continue to believe that no minimum-service legislation is necessary and that the current Bill presents additional specific risks. If such legislation is nevertheless to be enacted, we believe it is essential that the Bill be revised to clarify Section 2512D(3)(E) so that consumers can choose whether or not to have their broker prepare a detailed closing statement. In addition, the FTC staff, drawing on its special expertise, believes that eliminating Section 2512D(4) would

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<sup>17</sup> Press accounts indicate that fee-for-service brokers have raised their prices or exited the market altogether in response to minimum-service laws. See Glenn Roberts Jr., *Flat-fee brokers adapt to new real estate law Texas' new minimum-service law enacted Sept. 1*, INMAN NEWS (Oct. 12, 2005), available at <http://www.inman.com/inmannews.aspx?ID=48325>; see also <http://www.texasdiscountrealty.com/laws.htm> (website of Texas Discount Realty explaining that "because of the added responsibilities forced on to you, the seller and us the broker, by [the Texas minimum-service law], we are forced, as most brokers to adjust our prices); Tracy Donhardt, *New Law Provides Realtors and Edge*, INDIANAPOLIS BUSINESS JOURNAL (July 10, 2006), available at <http://indybiznow.com/Default.aspx?TabId=391&issueyear=2006&issuemonth=07&issueday=10&page=1&article=Ar00101> (noting that Indiana's minimum-service law has caused at least one limited-service broker to exit the market).

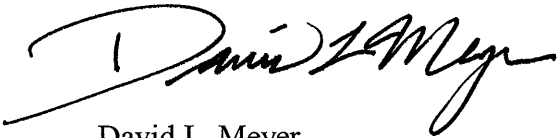
<sup>18</sup> See, e.g., *In re MiRealSource, Inc.*, Complaint at ¶19 (Docket No. 9321, issued Oct. 12, 2006), at <http://www.ftc.gov/os/adjpro/d9321/061012admincomplaint.pdf> (explaining how MiRealSource's "FSBO" policy allegedly was used to exclude exclusive agency listings from the MLS and from advertising at major national websites). This case was settled when MiRealSource agreed to a consent order prohibiting it from engaging in the challenged conduct. See *Decision and Order, In re MiRealSource, Inc.*, Docket No. 9321 (Mar. 20, 2007), available at <http://www.ftc.gov/os/adjpro/d9321/070323decisionorder.pdf>.

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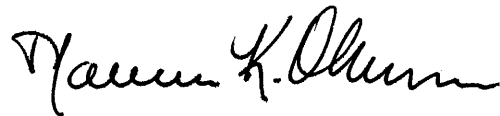
reduce harm to Michigan consumers. Further, we believe that including a specific provision that state and federal antitrust laws continue to apply would reduce competitive concerns.

We appreciate this opportunity to comment and would welcome any further inquiries on this matter.

Respectfully submitted,



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