

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**
In the Matter of Austin Board of Realtors, File No. 0510219

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Austin Board of Realtors (“ABOR” or “Respondent”), an association of real estate brokers in the Austin, Texas, metropolitan area. The Agreement settles charges that ABOR violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate services. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. Industry Background

A Multiple Listing Service, or “MLS,” is a cooperative venture by which real estate brokers serving a common local market area submit their listings to a central service, which in turn distributes the information, for the purpose of fostering cooperation among brokers and agents in real estate transactions. The MLS facilitates transactions by putting together a home seller, who contracts with a broker who is a member of the MLS, with prospective buyers, who may be working with other brokers who are also members of the MLS. Membership in the MLS is limited to member brokers who generally must possess a license to engage in real estate brokerage services and meet other criteria set by MLS rules.

Prior to the late 1990s, the listings on an MLS were typically directly accessible only to real estate brokers who were members of a local MLS. The MLS listings typically were made available through books or dedicated computer terminals, and generally could only be accessed by the general public by physically visiting a broker’s office or by receiving a fax or hand delivery of selected listings from a broker.

Information from an MLS is now typically available to the general public not only through the offices of brokers who are MLS members, but also through three principal categories of internet web sites. First, information concerning many MLS listings is available through Realtor.com, a national web site run by the National Association of Realtors (“NAR”). Realtor.com contains listing information from many local MLS systems around the country and

is the largest and most-used internet real estate web site. Second, information concerning MLS listings is often made available through a local MLS-affiliated web site, such as Austinhomesearch.com. Third, information concerning MLS listings is often made available on the internet sites of various real estate brokers, who choose to provide these web sites as a way of promoting their brokerage services. Most of these various web sites receive information from an MLS pursuant to a procedure known as Internet Data Exchange (“IDX”), which is typically governed by MLS policies. The IDX policies allow operators of approved web sites to display MLS active listing information to the public.

As a survey of home buyers and sellers conducted by the National Association of Realtors has shown, home buyers are increasingly relying upon the internet in their search for homes, and web sites of the kind affected by the Web Site Policy are the most popular internet sites for home buyers.¹ According to the NAR survey, 74 percent of home buyers nationally used the internet to assist in their home search, with 53 percent reporting frequent internet searches; 15 percent of respondents first learned about the home they selected from the internet; 69 percent of home buyers found the internet to be a “very useful” source of information, and a total of 96 percent found the internet to be either “very useful” or “somewhat useful.”² Moreover, the NAR Survey makes clear that the overwhelming majority of web sites used nationally in searching for homes contain listing information that is provided by local MLS systems.³

A. Types of Real Estate Brokerage Professionals

A typical real estate transaction involves two real estate brokers: these are commonly known as a “Listing Broker” and a “Selling Broker.” The Listing Broker is hired by the seller of the property to locate an appropriate buyer. The seller and the Listing Broker agree upon compensation, which is determined by written agreement negotiated between the seller and the Listing Broker. In a common traditional listing agreement, the Listing Broker receives compensation in the form of a commission, which is typically a percentage of the sales price of the property, payable if and when the property is sold. In such a traditional listing agreement, the Listing Broker agrees to provide a package of real estate brokerage services, including promoting the listing through the MLS and on the internet, providing advice to the seller regarding pricing and presentation, fielding all calls and requests to show the property, supplying a lock-box so that potential buyers can see the house with their agents, running open houses to show the house to potential buyers, negotiating with buyers or their agents on offers, assisting with home inspections and other arrangements once a contract for sale is executed, and attending the closing

¹ PAUL C. BISHOP, THOMAS BEERS AND SHONDA D. HIGHTOWER, THE 2004 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS (“NAR Survey”) at 3-3, 3-4, 3-5, 3-6, 3-18.

² *Id.* See *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006), available at <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/HmBuyerSellerSurvey06?OpenDocument>.

³ NAR Survey at 3-18.

of the transaction.

The other broker involved in a typical transaction is commonly known as the Selling Broker. In a typical transaction, a prospective buyer will seek out a Selling Broker to identify properties that may be available. This Selling Broker will discuss the properties that may be of interest to the buyer, accompany the buyer to see various properties, try to arrange a transaction between buyer and seller, assist the buyer in negotiating the contract, and help in further steps necessary to close the transaction. In a traditional transaction, the Listing Broker offers the Selling Broker a fixed commission, to be paid from the Listing Broker's commission when and if the property is sold. Real estate brokers typically do not specialize as only Listing Brokers or Selling Brokers, but often function in either role depending on the particular transaction.

B. Types of Real Estate Listings

The relationship between the Listing Broker and the seller of the property is established by agreement. The two most common types of agreements governing listings are Exclusive Right to Sell Listings and Exclusive Agency Listings. An Exclusive Right to Sell Listing is the traditional listing agreement, under which the property owner appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the Listing Broker a commission if and when the property is sold, whether the buyer of the property is secured by the Listing Broker, the owner or another broker.

An Exclusive Agency Listing is a listing agreement under which the Listing Broker acts as an exclusive agent of the property owner or principal in the sale of a property, but under which the property owner or principal reserves a right to sell the property without assistance of the Listing Broker, in which case the Listing Broker is paid a reduced or no commission when the property is sold.

Some real estate brokers have attempted to offer services to home sellers on something other than the traditional full-service basis. Many of these brokers, often for a flat fee, will offer sellers access to the MLS's information-sharing function, as well as a promise that the listing will appear on the most popular real estate web sites. Under such arrangements, the Listing Broker does not offer additional real estate brokerage services as part of the flat fee package, but allows sellers to purchase additional services if sellers so desire. These non-traditional arrangements often are structured using Exclusive Agency Listing contracts.

There is a third type of real estate listing that does not involve a real estate broker, which is a "For Sale By Owner" or "FSBO" listing. With a FSBO listing, a home owner will attempt to sell a house without the involvement of any real estate broker and without paying any compensation to such a broker, by advertising the availability of the home through traditional advertising mechanisms (such as a newspaper) or FSBO-specific web sites.

There are two critical distinctions between an Exclusive Agency Listing and a FSBO for the purpose of this analysis. First, the Exclusive Agency Listing employs a Listing Broker for access to the MLS and web sites open to the public; a FSBO listing does not. Second, an Exclusive Agency Listing sets terms of compensation to be paid to a Selling Broker, while a FSBO listing often does not.

II. The Complaint

The Complaint alleges that ABOR, a Texas not-for-profit corporation operating for the benefit of its members, has violated Section 5 of the FTC Act. Specifically, the proposed Complaint alleges that ABOR has unlawfully restrained competition among real estate brokers in central Texas by adopting a policy that constitutes a concerted refusal to deal except on specified terms.

A. ABOR Has Market Power

ABOR has more than 5,000 real estate professionals, and the large majority of residential real estate brokerage professionals in the Austin, Texas, metropolitan area are members of ABOR. These professionals compete with one another to provide residential real estate brokerage services to consumers.

The ABOR MLS is organized through the Austin/Central Texas Realty Information Service (“ACTRIS”) and ACTRIS is the only MLS that serves metropolitan Austin, Texas. Membership in ACTRIS is critical to a broker providing residential real estate brokerage services to sellers and buyers of real property in the ACTRIS service area. ABOR, through ACTRIS, controls key inputs needed for a Listing Broker to provide effective real estate brokerage services, including: (1) a means to publicize to all brokers the residential real estate listings in central Texas; and (2) a means to distribute listing information to web sites for the general public. By virtue of industry-wide participation and control over a key input, ABOR and ACTRIS have market power in the provision of residential real estate brokerage services to sellers and buyers of real property in the Austin, Texas and/or the ACTRIS Service Area.

B. ABOR Conduct

In February 2005, ABOR adopted a rule that prevented information on Exclusive Agency Listings provided to ACTRIS from being transmitted to real estate web sites available to the general public (the “Web Site Policy”). The Web Site Policy specifically prevents any information on listings other than traditional Exclusive Right to Sell Listings from being included in the IDX-formatted information that is available from ACTRIS to be used and published by publicly-accessible web sites.⁴ The effect of this rule is to prevent such

⁴ The ABOR rule states: “Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis.” *ACTRIS Rules and Regulations* at 18

information from being available to be displayed on a broad range of web sites, including the NAR-operated “Realtor.com” web site; the ABOR-owned “Austinhomesearch.com” web site; and ABOR member web sites.

Exclusive Agency Listings are often used by members of ABOR acting as Listing Brokers to offer lower-cost real estate services to consumers. ABOR’s Web Site Policy is joint action by a group of competitors to withhold distribution of listing information to publicly accessible web sites from competitors who do not contract with their brokerage service customers in a way that the group wishes. This conduct represents a new variation of a type of conduct that the Commission condemned 20 years ago. In the 1980s and 1990s, several local MLS boards banned Exclusive Agency Listings from the MLS entirely. The Commission investigated and issued complaints against these exclusionary practices, obtaining several consent orders.⁵

C. Competitive Effects of the Web Site Policy

The Web Site Policy has the effect of discouraging members of ABOR and participants in ACTRIS from accepting Exclusive Agency Listings. Thus, the Web Site Policy strongly impedes one way of providing unbundled brokerage services, and may make it more difficult for home sellers to market their homes. The Web Site Policy has caused some home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements. According to ACTRIS records, prior to the initiation of the Web Site Policy, about 1,500 of 8,500, or 18 percent, of the listings on ACTRIS were Exclusive Agency Listings. After the Web Site Policy was implemented, the number of Exclusive Agency Listings as shown on ACTRIS records dropped to about 250 out of 10,000, or 2.5 percent.

When home sellers switch to full service listing agreements from Exclusive Agency Listings that often offer lower-cost real estate services to consumers, the sellers may purchase services that they would not otherwise buy. This, in turn, may increase the commission costs to consumers of real estate brokerage services. By preventing Exclusive Agency Listings from being transmitted by ACTRIS to public-access real estate web sites, the Web Site Policy has adverse effects on home sellers and home buyers. In particular, the Web Site Policy denies home sellers choices for marketing their homes and denies home buyers the chance to use the internet to easily see all of the houses listed by real estate brokers in the area, making their search less efficient.

(February 2006).

⁵ *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, Docket No. C-3461, 116 F.T.C. 972 (1993); *In the Matter of American Industrial Real Estate Association*, Docket No. C-3449, 116 F.T.C. 704 (1993); *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (F.T.C., Aug. 2, 1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C., Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 115 F.T.C. 305 (1990); *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, Docket No. C-3163, 106 F.T.C. 95 (1985); *In the Matter of Orange County Board of Realtors, Inc.*, Docket No. C-3162, 106 F.T.C. 88 (1985).

D. There is No Competitive Efficiency Associated with the Web Site Policy.

There are no cognizable and plausible efficiency justifications for the Web Site Policy. An MLS in some circumstances might be concerned with the possibility that buyers and sellers of properties under an Exclusive Agency Listing could “free-ride” on the legitimate and valuable cooperative efforts that the MLS is intended to foster, by using the services of the MLS to carry out real estate transactions but bypassing the brokerage services that were one of the principal reasons why the MLS was created. However, this concern does not provide justification for the Web Site Policy as implemented by ABOR and ACTRIS. Exclusive Agency Listings are not a credible means for home buyers or sellers to bypass the use of the brokerage services that ACTRIS was created to promote, because a Listing Broker is always involved in an Exclusive Agency Listing, and the ABOR rules already include protections against such misuse.

The ABOR Web Site Policy does not involve situations where brokerage services are bypassed entirely. The policy only operates where home sellers purchase services from a Listing Broker using an Exclusive Agency contract, not when home sellers are pursuing a FSBO sale and purchase no brokerage services at all. It is possible, of course, that a buyer of an Exclusive Agency Listing may make the purchase without using a Selling Broker, but this is true for traditional Exclusive Right to Sell Listings as well. Under existing ACTRIS rules that apply to any form of the listing agreement, the Listing Broker must ensure that the home seller pays compensation to the cooperating Selling Broker (if there is one), and the Listing Broker may be liable himself for a lost commission if the home seller fails to pay a Selling Broker who was the procuring cause of a completed property sale. The possibility of sellers or buyers using the MLS but bypassing brokerage services is already addressed effectively by ABOR’s existing rules that do not distinguish between forms of listing contracts, and does not justify the Web Site Policy.

III. The Proposed Consent Order

The proposed order is tailored to ensure that the MLS does not misuse its market power, but also takes care to ensure that the procompetitive incentives of joint ventures such as ABOR and ACTRIS remain intact. The proposed order enjoins ABOR from treating Exclusive Agency Listings, or any other lawful listing agreements with sellers of property, in a less advantageous manner than Exclusive Right to Sell Listings.

More specifically, ABOR is enjoined from adopting or enforcing any policy to deny, restrict, or interfere with the ability of ABOR members or ACTRIS participants to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties. The proposed consent order prohibits ABOR from preventing its members or ACTRIS participants from: offering or accepting Exclusive Agency Listings or other lawful listing agreements; cooperating with Listing Brokers or agents that offer or accept Exclusive Agency Listings or other lawful listing agreements; or publishing Exclusive Agency Listings or other lawful listing agreements on web sites otherwise approved to use ACTRIS information. The proposed order

also prohibits ABOR from denying or restricting the Services of the MLS⁶ to Exclusive Agency Listings or other lawful listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; or treating Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings.

The proposed order contains a general proviso that preserves to ABOR the ability to adopt or enforce any policy, rule, practice or agreement that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS. This includes reasonable rules regarding membership requirements, payment of dues, administrative matters, or other policies. The proviso is intended to preserve existing or future rules or regulations of ACTRIS that ABOR can demonstrate are reasonably related to the legitimate and pro-competitive purposes of the MLS.

In addition, the proposed order requires ABOR, within thirty days after the Order becomes final, to conform its rules to the substantive provisions of the Order. ABOR is also required to notify ABOR members and participants in ACTRIS of the Order through email communications and its website. The proposed order requires notification of changes in the structure of ABOR, and requires ABOR to file regular written reports of ABOR's compliance with the terms of the Order.

The proposed Order applies to ABOR and entities that it owns or controls, including ACTRIS and Austinhomesearch.com. The Order by its terms does not prohibit ABOR members, or other persons or entities independent of ABOR that receive listing information from ABOR for use on their websites, from making independent decisions concerning their use or display of ACTRIS listing information that are consistent with their contractual obligations to ACTRIS.

The proposed order will expire in 10 years.

⁶ "Services of the MLS" means the benefits and services provided by the MLS to assist ABOR members or ACTRIS Participants in selling, leasing and valuing property and/or brokering real estate transactions, including but not limited to: (1) having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and (2) having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on Austinhomesearch.com, Realtor.com and IDX Web Sites.