



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

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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).



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

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(...continued)

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.

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 reduce harm to Michigan consumers. Further, we believe that including a

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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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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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U.S. Department of Justice

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Federal Trade Commission