

**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 (MLS) is a computerized database of real estate listings for sale or lease. It is a key input for the provision of real estate services. The MLS is owned and operated by the National Multiple Listing Service, Inc. (NMLS), a non-profit organization. The MLS is used by real estate brokers to find potential buyers or renters for properties listed for sale or lease. The MLS is also used by real estate brokers to find potential sellers or landlords for properties they wish to list for sale or lease. The MLS is a critical component of the real estate industry.

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 I

of the transaction.

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 Excl

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 membership to the Illinois Real Estate Board.
