



U.S. Department of Justice

Antitrust Division

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Washington, DC 20530*

February 27, 2007

**By Electronic Mail & Facsimile**

The Honorable John C. Andreason  
Chairman, Commerce and Human Resources Committee  
Room 437  
Idaho State Senate  
State Capitol Building  
Boise, Idaho 83720

Dear Senator Andreason:

At the request of Ms. Copley of your office, I would like to respond on behalf of the Antitrust Division of the U.S. Department of Justice to the Idaho Real Estate Commission's letter of February 8, 2007, commenting on the Antitrust Division's analysis of real estate minimum service proposals and on draft legislation that became House Bill 135 ("HB 135").

As the Antitrust Division has previously explained, passing legislation such as HB 135 will harm Idaho consumers by reducing their choices of real estate brokerage services and potentially increasing the price Idahoans pay for such services. HB 135 would require that Idaho real estate brokers provide certain services to their customers, even if those customers would rather save money by performing those services themselves.

In disagreeing with the Antitrust Division's analysis, the Commission does not contend or describe how HB 135 will benefit Idaho consumers. The letter merely asserts that HB 135's requirement that brokers "receive and timely present all written offers and counteroffers" is a "minimal requirement." However, this so-called "minimal" requirement will both run counter to the preferences of some Idaho consumers and impose extra costs on some brokers that will likely be passed on to their clients. Based on our experience in this industry, there are many home sellers who prefer to perform some of the tasks that brokers have traditionally provided in exchange for reduced commissions on the sale of their home. For example, some consumers may want to have written sale offers presented directly to them – rather than to their broker – in order to have more control over the negotiation of the price of their home. To reduce the price they pay for brokerage services, other consumers may want to have written sale offers made directly to them and not require their broker to be available to receive an offer.

HB 135 not only deprives consumers of the right to make these choices, it would impede competition by brokers who have chosen business models different from traditional full service

brokers. By forcing brokers to provide required services whether or not customers want those services, HB 135 would impose extra costs on brokers who are trying to customize the services they provide to their clients, thereby reducing the competitive pressure placed on full service brokers to offer lower prices and better services. In Idaho as in other states, competition from innovative brokerage models is beginning to provide home sellers with significant savings on the costs of selling their home. For example, instead of paying 3% of the home's sales price, Idaho consumers under current law can elect to pay \$495 for a broker just to list their property in a local multiple listing service. Today, consumers with a less expensive package like that could conduct on their own any additional services incurred as a part of the transaction. HB 135 will likely affect consumers' ability to choose such packages in the future and limit their ability to pay just the brokerage services they want.

HB 135 is particularly problematic because it does not explicitly allow a consumer to waive any of the services that the legislation would require. Without waiver, the bill simply does not accommodate these different consumer preferences. Other states examining these issues permit consumers to waive these otherwise mandated services.

The Commission does not address any of the competitive issues discussed above. Nor does it provide any evidence or argument that HB 135 will benefit consumers. Instead, the Commission attaches two memoranda discussing immunities from the antitrust laws: the *Noerr-Pennington* immunity and the state action immunity. The Division does not dispute that under the *Noerr-Pennington* doctrine competing real estate brokers may jointly seek legislation that would have anticompetitive effects and harm consumers, and under the state action doctrine state legislatures may enact legislation that has such effects without creating antitrust liability. But the discussion on these two immunities misses the point. The brokers' right to seek this legislation and the legislature's right to enact it does not make HB 135 good public policy. We believe this bill would have anticompetitive effects and harm Idaho consumers. On that issue, the Commission is silent.

We appreciate your consideration of our experiences and analysis, and my staff stands ready to further assist you in any way it can. Please feel free to call, in particular, Matt Bester at 202-353-3491 or Bill Jones at 202-514-0230 with any questions you may have. In addition, we would be happy to travel to Idaho to meet with the Committee in person.

Respectfully submitted,



John R. Read  
Chief, Litigation III  
Antitrust Division  
United States Department of Justice

cc: Senator Charles H. Coiner