

burden on respondents, such as use of automated means of collection of the information, to the addresses listed under **ADDRESSES**. Please refer to the appropriate OMB control number in all correspondence, 1029-0054 for 30 CFR part 872 and 1029-0083 for 30 CFR part 955 and the OSM-74 form.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: June 5, 2008.

**John R. Craynon,**

*Chief, Division of Regulatory Support.*

[FR Doc. E8-14212 Filed 6-24-08; 8:45 am]

**BILLING CODE 4310-05-M**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### **United States v. National Association of Realtors®; Proposed Final Judgment and Competitive Impact Statement**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Illinois in *United States of America v. National Association of Realtors®*, No. 05-C-5140. On September 8, 2005, the United States filed a Complaint alleging that the National Association of Realtors® (“NAR”) violated section 1 of the Sherman Act, 15 U.S.C. 1, by adopting policies that suppress competition from real estate brokers who use password-protected “virtual office Web sites” or “VOWs” to deliver high-quality brokerage services to their customers. The proposed Final Judgment, filed on May 27, 2008, requires NAR to repeal the challenged policies and to adopt new rules that do not discriminate against brokers who use VOWs.

Copies of the Amended Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 5th Street, NW., Room 1010, Washington, DC 20530 (telephone: 202

514-2481), on the Department of Justice’s Web site at <http://www.usdoj.gov/atr>, and at the Office of the Clerk of the United States District Court for the Northern District of Illinois. Copies of these materials may be obtained from the Antitrust I Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be addressed to John R. Read, Chief, Litigation III section, Antitrust Division, U.S. Department of Justice, 450 5th Street, NW., Suite 4000, Washington, DC 20530, (202) 307-0468.

**J. Robert Kramer II,**

*Director of Operations, Antitrust Division.*

#### **United States District Court for the Northern District of Illinois Eastern Division**

United States of America, Department of Justice, Antitrust Division, 325 7th Street, NW., Suite 300, Washington, DC 20530. Plaintiff,

v.

National Association of Realtors, 430 North Michigan Ave., Chicago, IL 60611, Defendant.

Civil Action No. 05C-5140, Judge Filip. Magistrate Judge Denlow, Filed: October 4, 2005.

#### **Amended Complaint**

The United States of America, by its attorneys acting under the direction of the Attorney General, brings this civil action pursuant to section 4 of the Sherman Act, as amended, 15 U.S.C. 4, to obtain equitable and other relief to prevent and restrain violations of section 1 of the Sherman Act, as amended, 15 U.S.C. 1. The United States alleges:

1. The United States brings this action to enjoin the defendant a national association of real estate brokers—from maintaining or enforcing policies that restrain competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules.

2. The brokers against whom the policies discriminate operate secure, password-protected Internet sites that enable the brokers’ customers to search for and receive real estate listings over the Internet. These Web sites thus replace or augment the traditional practice by which the broker conducts a search of properties for sale and then provides information to the customer by hand, mail, fax, or e-mail. Since these Web sites were first developed in the late 1990s, brokers’ use of the Internet in connection with their delivery of brokerage services has become an important competitive alternative to traditional “brick-and-mortar” business models.

3. Defendant’s members include traditional brokers who are concerned about

competition from Internet-savvy brokers. Before defendant adopted its policies, several of its members voiced opposition to brokers’ delivery of listings to customers through their Web sites—sites that defendant referred to as “virtual office Web sites,” or “VOWs.” The head of the working group created by defendant to develop regulations for VOWs argued that defendant should act quickly in adopting regulations for the use of these Web sites because brokers operating VOWs were “scooping up market share just below the radar.” The chairman of the board of RE/MAX, the nation’s second-largest real estate franchisor, publicly expressed his concern that these Internet sites would inevitably place downward pressure on brokers’ commission rates. One broker complained that because of the lower cost structure of brokers who provide listings to their customers over the Internet, “they are able to kick-back 1% of the sales price to the buyer.” And Cendant, the nation’s largest real estate franchisor and owner of the nation’s largest real estate brokerage, asserted in a widely circulated white paper that it was “not feasible” for even the largest traditional brokers to compete with large Internet companies that operated or affiliated with brokers operating VOWs.

4. In response to such concerns, defendant, through its members, adopted a policy (the “Initial VOW Policy”) limiting this new competition. The Initial VOW Policy has been implemented in many markets. After plaintiff informed NAR of its intention to bring this action, NAR announced that it had modified this policy (the “Modified VOW Policy”). Plaintiff challenges both policies in this action as part of a single, ongoing contract, combination, or conspiracy.

5. These policies significantly alter the governing multiple listing services (“MLSs”). MLSs collect detailed information about nearly all properties for sale through brokers and are indispensable tools for brokers serving buyers and sellers in each MLS’s market area. Defendant’s local Realtor associations (“member boards”) control a majority of the MLSs in the United States.

6. Defendant’s VOW Policies permit brokers to withhold their clients’ listings from VOW operators by means of an “opt-out” right. In essence, the policies allow traditional brokers to block the customers of web-based competitors from using the Internet to review the same set of MLS listings that the traditional brokers provide to their customers.

7. The working group that formulated defendant’s Initial VOW Policy understood that the opt-out right was fundamentally anticompetitive and harmful to consumers. Two members of the working group wrote that the opt-out right would be “abused beyond belief” as traditional brokers selectively withhold listings from particular VOW-based competitors. The chairman of the working group admitted that the opt-out right was likely to be exercised by brokers notwithstanding the fact that “it may not be in the seller[']s best interest to opt out.” But he took comfort in the fact that the rule did not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers as a result of the

brokers' opt-out decision, thus providing brokers "flexibility without conversation."

8. Defendant's VOW Policies restrict the manner in which brokers with efficient, Internet-based business models may provide listings to their customers, and impose additional restrictions on brokers operating VOWs that do not apply to their traditional competitors. Defendant thus denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, and it suppresses technological innovation, discourages competition on price and quality, and raises barriers to entry. Defendant—an association of competitors—has agreed to policies that suppress new competition and harm consumers.

#### **Jurisdiction and Venue**

9. This Complaint is filed under section 4 of the Sherman Act, as amended, 15 U.S.C. 4, to prevent and restrain violations by defendant of section 1 of the Sherman Act, 15 U.S.C. 1. This Court has subject matter jurisdiction over this action under 28 U.S.C. 1331, 1337(a), and 1345.

10. Venue is proper in this district under 28 U.S.C. 1391(b) because defendant maintains its principal place of business in Chicago, Illinois, and is found here.

#### **Defendant**

11. Defendant National Association of Realtors ("NAR") is a trade association organized under the laws of Illinois with its principal place of business in Chicago, Illinois. NAR establishes and enforces policies and professional standards for its over one million individual member brokers and their affiliated agents and sales associates ("Realtors"), and 1,600 local and state member boards. NAR's member brokers compete with one another in local brokerage services markets to represent consumers in connection with real estate transactions.

#### **Concerted Action**

12. Various others, not named as defendants, have contracted, combined, or conspired with NAR in the violations alleged in this Complaint and have performed acts and made statements in furtherance thereof.

#### **Trade and Commerce**

13. NAR's policies govern the conduct of its members in all fifty states, including all Realtors and all of NAR's member boards. NAR's member boards control approximately eighty percent of the approximately 1,000 MLSs in the United States.

14. NAR's activities, and the violations alleged in this Complaint, affect home buyers and sellers located throughout the United States.

15. NAR, through its members, is engaged in interstate commerce and is engaged in activity affecting interstate commerce.

#### **Relevant Markets**

16. The provision of real estate brokerage services to sellers of residential real property and the provision of real estate brokerage services to buyers of residential real property are relevant service markets.

17. The real estate brokerage business is local in nature. Most sellers prefer to work

with a broker who is familiar with local market conditions and who maintains an office or affiliated sales associates within a reasonable distance of the seller's property. Likewise, most buyers seek to purchase property in a particular city, community, or neighborhood, and typically prefer to work with a broker who has knowledge of the area in which they have an interest. The geographic coverage of the MLS serving each town, city, or metropolitan area normally establishes the outermost boundaries of each relevant geographic market, although meaningful competition among brokers may occur in narrower local areas.

#### **Background of the Offense**

18. At any one time there are over 1.5 million homes for sale in the United States. Most home sellers and buyers engage residential real estate brokers to facilitate transactions.

19. The predominant form of payment for brokerage services is a "commission," a percentage of the price paid for the property. In a typical transaction, the seller agrees to pay a commission to the broker who has contracted with the seller to market the home (the "listing broker"). If the listing broker finds the buyer, the listing broker keeps the full commission. Frequently, however, a second broker (the "cooperating broker") finds the buyer, and the two brokers share the commission.

20. After a listing broker has established an agency relationship with a seller, the broker typically submits detailed information regarding the seller's property to a local NAR-affiliated MLS. Along with the information about the property it submits to the MLS, the listing broker also typically includes an offer to split the commission with any cooperating broker.

#### **Multiple Listing Services**

21. MLSs are joint ventures among competing brokers to share their clients' listings and to cooperate in other ways. MLSs list virtually all homes for sale through a broker in the areas they serve. In a substantial majority of markets, a single MLS provides the only available comprehensive compilation of listings. The MLS allows brokers representing sellers to effectively market the sellers' properties to all other broker participants in the MLS and their buyer customers. Conversely, the MLS allows brokers to provide their buyer customers information about all listed properties in which the customers might have an interest.

22. NAR promulgates rules governing the conduct of MLSs and requires its member boards to adopt these rules.

23. The vast majority of brokers believes that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers. As a result, few brokers would withdraw from MLS participation even if the fees or other costs associated with that participation substantially increased.

24. By virtue of industry-wide participation and control over a critically important input, the MLS (a joint venture of competing brokers) has market power in almost every relevant market.

25. The methods of making MLS information available to customers have changed as technology has evolved. From the 1920s, when MLSs first became prevalent, brokers allowed customers to view a printed "MLS book." Later, the availability of copy machines allowed brokers to reproduce pages from the MLS book and deliver the pages with responsive listings to customers by hand or mail. The advent of facsimile transmission—and, later, electronic mail—further quickened the process of delivering MLS listings to customers.

#### **Virtual Office Web Sites**

26. With the development of the Internet as an information source for consumers, potential home buyers began to seek Internet sources of information about homes for sale. Beginning in the late 1990s, a number of NAR member brokers began creating password-protected Web sites that enabled potential home buyers, once they had registered as customers of the broker and agreed to certain restrictions on their use of the data, to search the MLS database themselves and to obtain responsive MLS listings over the Internet. These Web sites came to be known as virtual office Web sites or VOWs. NAR recognizes the Internet delivery of MLS listings to customers to be an authorized method of providing brokerage services.

27. Brokers can use the Internet to operate more efficiently than they can by using only traditional methods. By transferring search functions from the broker to customers who prefer such control over the process, VOW-operating brokers allow customers to educate themselves at their own pace about the market in which they are considering a purchase. By doing so, brokers with successful password-protected Web sites are able to reduce or eliminate the time and expense involved in identifying and providing relevant listings and otherwise educating their customers. These brokers also spend less time on home tours with their buyer customers, as these buyers frequently tour fewer homes before making a purchase decision than typical buyers. With lower cost structures, brokers with Internet-intensive business models have offered discounted commissions to sellers or commission rebates to buyers.

28. Other sources of listing information on the Internet are inferior to the password-protected VOWs because they do not and cannot guarantee access to all information available in the MLS.

29. Brokers can also use the Internet to support a "referral" business model. Referral services provide brokers information about potential buyers in return for a share of any commission the broker receives if the "lead" results in a completed transaction. Brokers are not obliged to purchase leads from referral services and do so only when they choose to. Some traditional brokers refer customers to other brokers for a fee, and some VOW operators, similarly, have referred (or have considered referring) some of their customers to other brokers for a fee. Many brokers dislike the concept of paying for leads, and the prospect that Internet-savvy brokers could support referral business

models has been a source of industry antipathy to VOWs.

#### Nature of the Offense

30. Brokers with innovative, Internet-based business models present a competitive challenge to brokers who provide listings to their customers only by traditional methods. Many brick-and-mortar brokers fear the ability of VOW operators to use Internet technology to attract more customers and provide better service at a lower cost.

31. In response to concerns raised by certain NAR members about this new form of competition, NAR's Board of Directors voted on May 17, 2003, to adopt the "Initial VOW Policy," a "Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Web sites')." Prior to the filing of the Complaint in this action, NAR had mandated that all 1,600 of its member boards implement the Initial VOW Policy by January 1, 2006. Approximately 200 member boards implemented the Initial VOW Policy and received NAR's approval of their implementing rules.

32. Section 1.3 of the Initial VOW Policy contains an opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any VOW (a "blanket opt-out"), or on a particular competing broker's VOW (a "selective opt-out").

33. In contrast, prior to NAR's adoption of the Initial VOW Policy, a broker could provide any relevant listing in the MLS database to any customer—by whatever method the customer or broker preferred, including via the Internet. Nearly all of NAR's member boards had also adopted rules requiring all participants in their affiliated MLSs to submit, with minor exceptions, all of their clients' listings to the MLS. More importantly, NAR did not permit any broker to withhold his or her clients' listings from a rival.

34. In several of the markets in which NAR's member boards have implemented the Initial VOW Policy, brokers have already exercised their opt-out rights to withhold their clients' listings from the customers of brokers operating VOWs, as well as from brokers who will use password-protected Web sites to provide listings to their customers in the future. In at least one such instance, an innovative broker discontinued operation of his Web site because all of his competitor brokers had opted out, making him unable to effectively serve his customers through operation of his site.

35. Section II.4.g of the Initial VOW Policy contains an "anti-referral" provision that, with minor exceptions, forbids VOW operators from referring their customers to "any other entity" for a fee. In contrast, no NAR rule limits referrals for a fee by brokers who do not convey MLS listings to customers over the Internet.

36. The Initial VOW Policy includes other provisions that impose greater restrictions and limitations on brokers with Internet-

based business models than on traditional brokers. For example, under section IV.I.b of the Initial VOW Policy, NAR's member boards may forbid VOW operators from displaying advertising on any Web site on which MLS listings information is displayed. In contrast, no NAR rule limits the ability of traditional brokers to include advertisements in packages of printed listings they provide to their customers.

37. The Initial VOW Policy also contains provisions to make it obligatory and enforceable. Section I.4 of the Initial VOW Policy expressly forbids NAR's member boards from adopting rules "more or less restrictive than, or otherwise inconsistent with" the Initial VOW Policy, including the opt-out provisions and the anti-referral provision. Appendix A to the Initial VOW Policy provides for remedies and sanctions for violation of the Policy, including financial penalties and termination of MLS privileges.

38. On September 8, 2005, after plaintiff informed NAR of its intention to bring this action, NAR advised its member boards to suspend application and enforcement of the above-referenced provisions of the Initial VOW Policy, and announced its adoption of a new "Internet Listings Display Policy" and its revision of an MLS membership policy (together, the "Modified VOW Policy"). NAR's Modified VOW Policy continues to impede brokers from using the Internet to serve home sellers and buyers more efficiently and cost effectively. NAR's Modified VOW Policy mandates that all of NAR's member boards enact rules implementing the Internet Listings Display Policy by July 1, 2006, but NAR subsequently communicated to its member boards that they "wait to adopt" the policy "until th[is] litigation is over."

39. Section 1.3 of the Modified VOW Policy contains a blanket opt-out provision that forbids any broker participating in an MLS from conveying a listing to his or her customers via the Internet without the permission of the listing broker. Specifically, the opt-out provision allows brokers to direct that their clients' listings not be displayed on any competitor's Internet site. When exercised, this provision prevents a broker from providing over the Internet the same MLS information that brick-and-mortar brokers can provide in their offices. Additionally, NAR's Modified VOW Policy specifically exempts its own "Official Site," Realtor.com, from the blanket opt-out that applies to all Internet sites operated by brokers.

40. The portion of the Modified VOW Policy that is NAR's revision to its membership policies—much like the Initial VOW Policy's anti-referral rule—denies MLS membership and access to listings to brokers operating referral services. This membership policy effectively forbids Internet-based brokers from referring their customers to other brokers for a fee.

41. NAR's Modified VOW Policy includes other provisions that restrict brokers' ability to use the Internet to serve their customers effectively. The Modified VOW Policy, for example, allows MLSs to downgrade the quality of the data feed they provide brokers,

effectively restraining brokers from providing innovative, Internet-based features to enhance the service they offer their customers. The Modified VOW Policy also permits MLSs to interfere with efficient "cobranding" relationships between brokers and entities that refer potential customers to the broker.

42. Defendant's policies, both the Initial VOW Policy and the Modified VOW Policy, thus prevent brokers from guaranteeing customers access through the Internet to all relevant listing information, increase the business risk and other costs associated with operating an efficient, Internet-intensive brokerage, deny brokers a source of high-quality referrals, and withhold from Internet brokers revenue streams permitted to other participants in the MLS. Moreover, the opt-out provisions provide brokers an effective tool to individually or collectively punish aggressive competition by any Internet-based broker.

43. Unless permanently restrained and enjoined, defendant will continue to engage in conduct that restricts competition from innovative brokers in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

#### Violation Alleged

44. NAR's adoption of the above-referenced provisions in its Initial VOW Policy and its Modified VOW Policy, or equivalent provisions, constitutes a contract, combination, or conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

45. The aforesaid contract, combination, or conspiracy has had and will continue to have anticompetitive effects in the relevant markets, including:

- Suppressing technological innovation;
- Reducing competition on price and quality;
- Restricting efficient cooperation among brokers;
- Making express or tacit collusion more likely; and
- Raising barriers to entry.

46. This contract, combination, or conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

#### Request for Relief

Wherefore, the United States prays that final judgment be entered against defendant declaring, ordering, and adjudging:

- That the aforesaid contract, combination, or conspiracy unreasonably restrains trade and is illegal under section 1 of the Sherman Act, 15 U.S.C. 1;

- That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the opt-out provisions;

- That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules implementing the anti-referral provision or an MLS

membership restriction that denies MLS access to operators of Internet-based referral services;

d. That the defendant be restrained and enjoined from requiring or permitting its member boards or the MLSs with which they are affiliated to adopt rules that restrict—or condition MLS access or MLS participation rights on—the method by which a broker interacts with his or her customers, competitor brokers, or other persons or entities;

e. That the Court grant such other relief as the United States may request and the Court deems just and proper; and

f. That the United States recover its costs in this action.

Dated: October 4, 2005.

J. Bruce McDonald,  
*Deputy Assistant Attorney General.*

J. Robert Kramer II,  
*Director of Operations.*

Patrick J. Fitzgerald,  
*United States Attorney, Northern District of Illinois, by Linda Wawzenski, Assistant United States Attorney.*

Craig W. Conrath,  
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*Attorneys for the United States, Department of Justice, Antitrust Division, 325 Seventh Street, NW., Suite 300, Washington, DC 20530, Telephone: (202) 305-9969, Facsimile: (202) 307-9952.*

#### Certificate of Service

I hereby certify that on this 4th day of October, 2005, I have caused a copy of the foregoing Amended Complaint to be served by Federal Express upon counsel for Defendant in this matter:

Jack R. Bierig, Sidley Austin Brown & Wood, LLP, Bank One Plaza, 10 South Dearborn Street, Chicago, IL 60603.

Linda Wawzenski.

#### United States District Court for the Northern District of Illinois Eastern Division

United States of America, Plaintiff, v.  
National Association of Realtors®,  
Defendant.

Civil Action No. 05 C 5140,  
Judge Kennelly,  
Magistrate Judge Denlow.

#### [Proposed] Final Judgment

*Whereas*, Plaintiff, the United States of America, filed its Amended Complaint on October 4, 2005, alleging that Defendant National Association of Realtors® (“NAR”) adopted policies that restrain competition from innovative real estate brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any issue of fact or law;

*Whereas*, Defendant has not admitted and does not admit either the allegations set forth

in the Amended Complaint or any liability or wrongdoing;

*Whereas*, the United States does not allege that Defendant’s Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws; and

*Whereas*, the United States requires Defendant to agree to certain procedures and prohibitions for the purpose of preventing the loss of competition alleged in the Complaint;

*Now therefore*, before any testimony is taken, without trial or adjudication of any issue of fact, and upon consent of the parties, it is *Ordered, Adjudged and Decreed*:

#### I. Jurisdiction

This Court has jurisdiction over the Parties and subject matter of this action. The Complaint states a claim upon which relief may be granted against Defendant under section 1 of the Sherman Act, as amended (15 U.S.C. 1).

#### II. Definitions

As used in this Final Judgment:

A. “Broker” means a Person licensed by a state to provide services to a buyer or seller in connection with a real estate transaction. The term includes any Person who possesses a Broker’s license and any agent or sales associate who is affiliated with such a Broker.

B. “Customer” means a seller client of a Broker or a Person who has expressed to a Broker an interest in purchasing residential real property and who has described the type, features, or location of the property in which he or she has an interest, entitling the Broker to Provide the Customer multiple listing service (“MLS”) listing information by any method (e.g., by hand, mail, facsimile, electronic mail, or display on a VOW).

C. “Final Judgment” includes the Modified VOW Policy attached as Exhibit A and the definition of MLS Participant and accompanying Note attached as Exhibit B.

D. “ILD Policy” means the “ILD (Internet Listing Display) Policy” that NAR adopted on or about August 31, 2005, and any amendments thereto.

E. “Including” means including, but not limited to.

F. “Listing Information” means all records of residential properties (and any information relating to those properties) stored or maintained by a multiple listing service.

G. “Member Board” means any state or local Board of Realtors® or Association of Realtors®, including any city, county, inter-county, or inter-state Board or Association, and any multiple listing service owned by, or affiliated with, any such Board of Realtors® or Association of Realtors®.

H. “Modified VOW Policy” means the policy attached to this Final Judgment as Exhibit A.

I. “NAR” means the National Association of Realtors®, its predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures and all directors, officers, employees, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate,” and “joint venture” refer to any Person in which there is or has been partial (twenty percent or more) or total

ownership or control between NAR and any other Person.

J. “Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

K. “Provide” means to deliver, display, disseminate, convey, or reproduce.

L. “Rule” means any rule, model rule, ethical rule, bylaw, policy, standard, or guideline and any interpretation of any Rule issued or approved by NAR, whether or not the final implementation date of any such Rule has passed.

M. “VOW” or “virtual office Web site” means a Web site, or feature of a Web site, operated by a Broker or for a Broker by another Person through which the Broker is capable of providing real estate brokerage services to consumers with whom the Broker has first established a Broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Broker’s oversight, supervision, and accountability.

N. “VOW Policy” means the “Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants (‘Virtual Office Web sites’),” adopted by NAR on or about May 17, 2003, and any amendments thereto.

O. The terms “and” and “or” have both conjunctive and disjunctive meanings.

#### III. Applicability

This Final Judgment applies to NAR and all other Persons in active concert or participation with NAR who have received actual notice of this Final Judgment. A Member Board shall not be deemed to be in active concert with NAR solely as a consequence of the Member Board’s receipt of actual notice of this Final Judgment and its affiliation with or membership in NAR and its involvement in regular activities associated with its affiliation with or membership in NAR (e.g., coverage under a NAR insurance policy, attendance at NAR meetings or conventions, or review of Member Board policies by NAR).

#### IV. Prohibited Conduct

Subject to the provisions of sections V and VI of this Final Judgment, the Modified VOW Policy (Exhibit A), and the definition of MLS Participant and accompanying Note (Exhibit B), NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly

A. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

B. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

C. Prohibits, restricts, or impedes the referral of Customers whose identities are obtained from a VOW by a Broker who uses a VOW to any other Person, or establishes the price of any such referral;

D. Imposes fees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the reasonably estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs in providing a service to a Person who operates a VOW for a Broker than it incurs in providing the same service to the Broker; or

E. Is inconsistent with the Modified VOW Policy.

#### V. Required Conduct

A. Within five business days after entry of this Final Judgment, NAR shall repeal the ILD Policy and direct each Member Board that adopted Rules implementing the ILD Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

B. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards that adopted Rules implementing the VOW Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

C. Within five business days after entry of this Final Judgment, NAR shall adopt the Modified VOW Policy. NAR shall not change the Modified VOW Policy without either obtaining advance written approval by the United States Department of Justice, Antitrust Division ("DOJ") or an order of the Court pursuant to Section VIII of this Final Judgment authorizing the proposed modification.

D. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards to adopt the Modified VOW Policy within ninety days after entry of this Final Judgment, and to thereafter maintain, act consistently with, and enforce Rules implementing the modified VOW Policy. NAR shall simultaneously direct Member Boards, beginning upon receipt of the directive, not to adopt, maintain, or enforce any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs).

E. If NAR determines that a Member Board has not timely adopted or maintained, acted consistently with, or enforced Rules implementing the Modified VOW Policy, it shall, within thirty days of such

determination, direct in writing that the Member Board do so. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to adopt, maintain, act consistently with, and enforce rules implementing the Modified VOW Policy. NAR shall also notify the DOJ of the identity of that Member Board and the Modified VOW Policy provisions it refused to adopt, maintain, act consistently with, or enforce. For purposes of this provision, a failure of a Member Board to adopt, maintain, act consistently with, or enforce Rules implementing the Modified VOW Policy within ninety days of a written directive to that Member Board from NAR shall constitute a refusal by the Member Board to do so.

F. If NAR determines that a Member Board has adopted, maintained, or enforced any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs), it shall, within thirty days of such determination, direct in writing that the Member Board rescind and cease to enforce that Rule or practice. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to rescind and cease to enforce that Rule or practice. NAR shall also notify the DOJ of the identity of that Member Board and the Rule or practice it refused to rescind and cease to enforce. For purposes of this provision, a Member board's failure to rescind and cease to enforce the Rule or practice within ninety days of a written directive from NAR shall constitute a refusal by the Member board to do so.

G. Within thirty days of entry of this Final Judgment, NAR shall designate an Antitrust Compliance Officer with responsibility for educating Member Boards about the antitrust laws and for achieving full compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

(1) Supervising NAR's review of Rules of NAR's Member Boards for compliance with this Final Judgment and the Modified VOW Policy;

(2) Maintaining copies of any communications with any Person containing allegations of any Member Board's (i) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (ii) failure to enforce any Rules implementing the Modified VOW Policy;

(3) Reporting to the United States 180 days after entry of this Final Judgment and again on the first anniversary of the entry of this Final Judgment, the identity of each Member Board that has not adopted Rules implementing the Modified VOW Policy;

(4) Ensuring that each of NAR's Member Boards that owns or operates a multiple listing service are provided briefing materials, within ninety days of the entry of this Final Judgment, on the meaning and requirements of the Modified VOW Policy and this Final Judgment; and

(5) Holding an annual program for NAR Member Boards and their counsel that

includes a discussion of the antitrust laws (as applied to such Member Boards) and this Final Judgment.

H. NAR shall maintain and shall furnish to the DOJ on a quarterly basis (beginning ninety days after entry of this Final Judgment) copies of any communications with any Person containing allegations of any Member's Board's (1) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (2) failure to enforce any Rules implementing the Modified VOW Policy.

I. Within five business days after entry of this Final Judgment, NAR shall provide, in a prominent size and location on its Web site (<http://www.realtor.org>) a hyperlink to a Web page on which NAR has published copies of

(1) This Final Judgment;

(2) A notification that Member Boards must repeal any Rules implementing the ILD and VOW Policies (in accordance with Sections V.A and V.B of this Final Judgment); and

(3) A copy of the Modified VOW Policy.

NAR shall also publish each of the three above items in the first issue of Realtor® Magazine scheduled for publication after the date of entry of this Final Judgment.

#### VI. Permitted Conduct

A. Subject to section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting and maintaining the definition of MLS Participant and the accompanying Note, together attached as Exhibit B. However, NAR shall direct each Member Board not to suspend or expel any Broker from multiple listing service membership or participation for reasons of the Broker's then-failure to qualify for membership or participation under the definition of MLS Participant and the accompanying Note, together attached as Exhibit B, until May 27, 2009.

B. Notwithstanding any of the above provisions, and subject to section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting, maintaining, or enforcing Rules that are generally applicable on their face and that do not, in their application, unreasonably restrict any method of delivery of Listing Information to Customers.

#### VII. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the DOJ, including consultants and other Persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NAR, be permitted:

(1) Access during NAR's office hours to inspect and copy, or at the option of the United States, to require NAR to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of NAR, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, NAR's officers, employees, or agents, who may have their individual counsel and counsel for NAR present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by NAR. NAR may, however, prevent the interviewee from divulging matters protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, NAR shall submit written reports or response to written interrogatories, under oath if requested, relating to its compliance with any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any Person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by NAR to the United States, NAR marks as confidential any pertinent page of such material on the grounds that such page contains information as to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, then the United States shall give NAR ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

### VIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

### IX. No Limitation on Government Rights

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards.

### X. Expiration of Final Judgment

This Final Judgment shall expire ten years from the date of its entry.

### XI. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the

Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

Matthew F. Kennelly,  
United States District Judge.

### Exhibit A

#### Policy Governing Use of MLS Data in Connection With Internet Brokerage Services Offered by MLS Participants ("Virtual Office Web sites")

##### I. Definitions and Scope of Policy

1. For purposes of this Policy, the term Virtual Office Website ("VOW") refers to a Participant's Internet Web site, or a feature of a Participant's Internet Web site, through which the Participant is capable of providing real estate brokerage services to consumers with whom the Participant has first established a broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Participant's oversight, supervision, and accountability.

a. A Participant may designate an Affiliated VOW Partner ("AVP") to operate a VOW on behalf of the Participant, subject to the Participant's supervision and accountability and the terms of this Policy.

b. A non-principal broker or sales licensee, affiliated with a Participant, may, with the Participant's consent, operate a VOW or have a VOW operated on its behalf by an AVP. Such a VOW is subject to the Participant's supervision and accountability and the terms of this Policy.

c. Each use of the term "Participant" in this Policy shall also include a Participant's non-principal brokers and sales licensees (with the exception of references in this section to the "Participant's consent" and the "Participant's supervision and accountability," and in section III.10.a, below, to the "Participant acknowledges"). Each reference to "VOW" or "VOWs" herein refers to all VOWs, whether operated by a Participant, by a non-principal broker or sales licensee, or by an AVP.

2. The right to display listings in response to consumer searches is limited to display of MLS data supplied by the MLS(s) in which the Participant has participatory rights. This does not preclude a firm with offices participating in different MLSs from operating a master Web site with links to such offices' VOWs.

3. Participants' Internet Web sites, including those operated for Participants by AVPs, may also provide other features, information, or services in addition to VOWs (including the Internet Data Exchange ("IDX") function).

4. The display of listing information on a VOW does not require separate permission from the Participant whose listings will be available on the VOW.

5. Except as permitted in sections III and IV, MLSs may not adopt rules or regulations that conflict with this Policy or that otherwise restrict the operation of VOWs by Participants.

### II. Policies Applicable to Participants' VOWs

1. A Participant may provide brokerage services via a VOW that include making MLS active listing data available, but only to consumers with whom the Participant has first established a lawful consumer-broker relationship, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter "Registrants"). Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).

2. A Participant's VOW must obtain the identity of each Registrant and obtain each Registrant's agreement to Terms of Use of the VOW, as follows:

a. A Registrant must provide his or her name and a valid e-mail address. The Participant must send an e-mail to the address provided by the Registrant confirming that the Registrant has agreed to the Terms of Use (described in subsection c below). The Registrant may be permitted to access the VOW only after the Participant has verified that the e-mail address provided is valid and that Registrant received the Terms of Use confirmation.

b. The Registrant must supply a user name and a password, the combination of which must be different from those of all other Registrants on the VOW, before being permitted to search and retrieve information from the MLS database via the VOW. The user name and password may be established by the Registrant or may be supplied by the Participant, at the option of the Participant. An e-mail address may be associated with only one user name and password. The Registrant's password and access must expire on a date certain but may be renewed. The Participant must at all times maintain a record of the name and e-mail address supplied by the Registrant, and the user name and current password of each Registrant. Such records must be kept for not less than 180 days after the expiration of the validity of the Registrant's password. If the MLS has reason to believe that a Participant's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants, the Participant shall, upon request, provide to the MLS a copy of the record of the name, e-mail address, user name, current password, and audit trail, if required, of any Registrant identified by the MLS to be suspected of involvement in the violation.

c. The Registrant must be required affirmatively to express agreement to a "Terms of Use" provision that requires the Registrant to open and review an agreement that provides at least the following:

i. That the Registrant acknowledges entering into a lawful consumer-broker relationship with the Participant;

ii. That all data obtained from the VOW is intended only for the Registrant's personal, non-commercial use;

iii. That the Registrant has a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through the VOW;

iv. That the Registrant will not copy, redistribute, or retransmit any of the data or information provided;

v. That the Registrant acknowledges the MLS's ownership of, and the validity of the MLS's copyright in, the MLS database.

After the Registrant has opened for viewing the Terms of Use agreement, a "mouse click" is sufficient to acknowledge agreement to those terms. The Terms of Use Agreement may not impose a financial obligation on the Registrant or create any representation agreement between the Registrant and the Participant.

The Terms of Use agreement shall also expressly authorize the MLS, and other MLS Participants or their duly authorized representatives, to access the VOW for the purposes of verifying compliance with MLS rules and monitoring display of Participants' listings by the VOW.

d. An agreement entered into at any time between the Participant and Registrant imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant must be established separately from the Terms of Use, must be prominently labeled as such, and may not be accepted solely by mouse click.

3. A Participant's VOW must prominently display an e-mail address, telephone number, or specific identification of another mode of communication (e.g., live chat) by which a consumer can contact the Participant to ask questions, or get more information, about properties displayed on the VOW. The Participant, or a non-principal broker or sales licensee licensed with the Participant, must be willing and able to respond knowledgeably to inquiries from Registrants about properties within the market area served by that Participant and displayed on the VOW.

4. A Participant's VOW must protect the MLS data from misappropriation by employing reasonable efforts to monitor for and prevent "scraping" or other unauthorized accessing, reproduction, or use of the MLS database.

5. A Participant's VOW must comply with the following additional requirements:

a. No VOW shall display listings or property addresses of sellers who have affirmatively directed their listing brokers to withhold their listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as e-mail, fax, or otherwise, the listings of sellers who have determined not to have the listing for their property displayed on the Internet.

b. A Participant who lists a property for a seller who has elected not to have the property listing or the property address displayed on the Internet shall cause the seller to execute a document that conforms to the form attached to this Policy as Appendix A. The Participant shall retain such forms for at least one year from the date they are signed.

c. With respect to any VOW that

(i) Allows third-parties to write comments or reviews about particular listings or displays a hyperlink to such comments or reviews in immediate conjunction with particular listings, or

(ii) Displays an automated estimate of the market value of the listing (or hyperlink to such estimate) in immediate conjunction with the listing, the VOW shall disable or discontinue either or both of those features as to the seller's listing at the request of the seller. The listing broker or agent shall communicate to the MLS that the seller has elected to have one or both of these features disabled or discontinued on all Participants' Web sites. Except for the foregoing and subject to subparagraph (d), a Participant's VOW may communicate the Participant's professional judgment concerning any listing. Nothing shall prevent a VOW from notifying its customers that a particular feature has been disabled "at the request of the seller."

d. A VOW shall maintain a means (e.g., e-mail address, telephone number) to receive comments about the accuracy of any data or information that is added by or on behalf of the VOW operator beyond that supplied by the MLS and that relates to a specific property displayed on the VOW. The VOW operator shall correct or remove any false data or information relating to a specific property upon receipt of a communication from the listing broker or listing agent for that property explaining why the data or information is false. However, the VOW operator shall not be obligated to remove or correct any data or information that simply reflects good faith opinion, advice, or professional judgment.

e. Each VOW shall refresh MLS data available on the VOW not less frequently than every 3 days.

f. Except as provided elsewhere in this Policy or in MLS rules and regulations, no portion of the MLS database may be distributed, provided, or made accessible to any person or entity.

g. Every VOW must display a privacy Policy that informs Registrants of the ways in which information obtained from them will be used.

h. A VOW may exclude listings from display based only on objective criteria, including, but not limited to, factors such as geography, list price, type of property, cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.

6. A Participant who intends to operate a VOW must notify the MLS of its intention to establish a VOW and must make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy and any other applicable MLS rules or policies.

7. A Participant may operate more than one VOW itself or through an AVP. A Participant who operates a VOW itself shall not be precluded from also operating VOWs in conjunction with AVPs.

### III. Policies Applicable to Multiple Listing Services

1. A Multiple Listing Service shall permit MLS Participants to operate VOWs, or to have VOWs operated for them by AVPs,

subject to the requirements of state law and this Policy.

2. An MLS shall, if requested by a Participant, provide basic "downloading" of all MLS non-confidential listing data, including without limitation address fields, listings types, photographs, and links to virtual tours. Confidential data includes only that which Participants are prohibited from providing to customers orally and by all other delivery mechanisms. They include fields containing the information described in paragraph IV(1) of this Policy, provided that sold data (i.e., listing information relating to properties that have sold) shall be deemed confidential and withheld from a download only if the actual sales prices of completed transactions are not accessible from public records. For purposes of this Policy, "downloading" means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis. An MLS may also offer a transient download. In such case, it shall also, if requested, provide a persistent download, provided that it may impose on users of such download the approximate additional costs incurred by it to do so.

3. This Policy does not require an MLS to establish publicly accessible sites displaying Participants' listings.

4. If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data included in the feed described in paragraph 2 above except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet.

5. An MLS may pass on to those Participants who will download listing information the reasonably estimated costs incurred by the MLS in adding or enhancing its "downloading" capacity to enable such Participants to operate VOWs.

6. An MLS may require that Participants (1) utilize appropriate security protection, such as firewalls, as long as such requirement does not impose security obligations greater than those employed concurrently by the MLS, and/or (2) maintain an audit trail of Registrants' activity on the VOW and make that information available to the MLS if the MLS has reason to believe that any VOW has caused or permitted a breach in the security of the data or a violation of applicable MLS rules.

7. An MLS may not prohibit or regulate display of advertising or the identification of entities on VOWs ("branding" or "co-branding"), except to prohibit deceptive or misleading advertising or co-branding. For purposes of this provision, co-branding will be presumed not to be deceptive or misleading if the Participant's logo and contact information (or that of at least one Participant, in the case of a VOW established and operated by or for more than one Participant) is displayed in immediate conjunction with that of every other party, and the logo and contact information of all Participants displayed on the VOW is as large as the logo of the AVP and larger than that of any third party.

8. Except as provided in this Policy, an MLS may not prohibit Participants from enhancing their VOWs by providing



information obtained from sources other than the MLS, additional technological services (such as mapping functionality), or information derived from non-confidential MLS data (such as an estimated monthly payment derived from the listed price), or regulate the use or display of such information or technological services on any VOW.

9. Except as provided in generally applicable rules or policies (such as the Realtor® Code of Ethics), an MLS may not restrict the format of data display on a VOW or regulate the appearance of VOWs.

10. Subject to the provisions below, an MLS shall make MLS listing data available to an AVP for the exclusive purpose of operating a VOW on behalf of a Participant. An MLS shall make MLS listing data available to an AVP under the same terms and conditions as those applicable to Participants. No AVP has independent participation rights in the MLS by virtue of its right to receive data on behalf of a Participant, or the right to use MLS data except in connection with operation of a VOW for a Participant. AVP access to MLS data is derivative of the rights of the Participant on whose behalf the AVP is downloading data.

a. A Participant, non-principal broker or sales licensee, or AVP may establish the AVP's right to receive and use MLS data by providing to the MLS a writing in which the Participant acknowledges its or its non-principal broker's or sales licensee's selection of the AVP to operate a VOW on its behalf.

b. An MLS may not charge an AVP, or a Participant on whose behalf an AVP operates a VOW, more than a Participant that chooses to operate a VOW itself (including any fees or costs associated with a license to receive MLS data, as described in (g), below), except to the extent that the MLS incurs greater costs in providing listing data to the AVP than the MLS incurs in providing listing data to a Participant.

c. An MLS may not place data security requirements or restrictions on use of MLS listing data by an AVP that are not also imposed on Participants.

d. An MLS must permit an AVP to download listing information in the same manner (e.g., via a RETS feed or via an FTP download), at the same times and with the same frequency that the MLS permits Participants to download listing information.

e. An MLS may not refuse to deal directly with an AVP in order to resolve technical problems with the data feed. However, the MLS may require that the Participant on whose behalf the AVP is operating the VOW participate in such communications if the MLS reasonably believes that the involvement of the Participant would be helpful in order to resolve the problem.

f. An MLS may not condition an AVP's access to a data feed on the financial terms on which the AVP provides the site for the Participant.

g. An MLS may require Participants and AVPs to execute license or similar agreements sufficient to ensure that Participants and AVPs understand and agree that data provided by the MLS may be used only to establish and operate a VOW on

behalf of the Participant and not for any other purpose.

h. An MLS may not (i) prohibit an AVP from operating VOWs on behalf of more than One Participant, and several Participants may designate an AVP to operate a single VOW for them collectively, (ii) limit the number of entities that Participants may designate as AVPs for purposes of operating VOWs, or (iii) prohibit Participants from designating particular entities as AVPs except that, if an AVP's access has been suspended or terminated by an MLS, that MLS may prevent an entity from being designated an AVP by another Participant during the period of the AVP's suspension or termination.

i. Except as stated below, an MLS may not suspend or terminate an AVP's access to data (a) for reasons other than those that would allow an MLS to suspend or terminate a Participant's access to data, or (b) without giving the AVP and the associated Participant(s) prior notice and the process set forth in the applicable provisions of the MLS rules for suspension or termination of a Participant's access. Notwithstanding the foregoing, an MLS may immediately terminate an AVP's access to data (a) if the AVP is no longer designated to provide VOW services to any Participant, (b) if the Participant for whom the AVP operates a VOW ceases to maintain its status with the MLS, (c) if the AVP has downloaded data in a manner not authorized for Participants and that hinders the ability of Participants to download data, or (d) if the associated Participant or AVP has failed to make required payments to the MLS in accordance with the MLS's generally applicable payment policies and practices.

11. An MLS may not prohibit, restrict, or impede a Participant from referring Registrants to any person or from obtaining a fee for such referral.

#### **IV. Requirements That MLSs May Impose on the Operation of VOWs and Participants**

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

i. Expired, withdrawn, or pending listings.

ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

iii. The compensation offered to other MLS Participants.

iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

v. The seller(s) and occupant(s) name(s), phone number(s) and e-mail address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

b. The content of MLS data that is displayed on a VOW may not be changed

from the content as it is provided in the MLS. MLS data may be augmented with additional data or information not otherwise prohibited from display as long as the source of such other data or information is clearly identified. This requirement does not restrict the format of MLS data display on VOWs or display of fewer than all of the listings or fewer authorized data fields.

c. There shall be a notice on all MLS data displayed indicating that the data is deemed reliable but is not guaranteed accurate by the MLS. A Participant's VOW may also include other appropriate disclaimers necessary to protect the Participant and/or the MLS from liability.

d. Any listing displayed on a VOW shall identify the name of the listing firm in a readily visible color, and reasonably prominent location, and in typeface not smaller than the median typeface used in the display of listing data.

e. The number of current or, if permitted, sold listings that Registrants may view, retrieve, or download on or from a VOW in response to an inquiry may be limited to a reasonable number. Such number shall be determined by the MLS, but in no event may the limit be fewer than 100 listings or 5% of the listings in the MLS, whichever is less.

f. Any listing displayed on a VOW shall identify the name of the listing agent.

2. An MLS may also impose the following other requirements on the operation of VOWs:

a. Participants displaying other brokers' listings obtained from other sources, e.g., other MLSs, non-participating brokers, etc. shall display the source from which each such listing was obtained.

b. A maximum period, no shorter than 90 days and determined by the MLS, during which Registrants' passwords are valid, after which such passwords must be changed or reconfirmed.

3. An MLS may not prohibit Participants from downloading and displaying or framing listings obtained from other sources, e.g., other MLSs or from brokers not participating in that MLS, etc., but may require either that (i) such information be searched separately from listings obtained from other sources, including other MLSs, or (ii) if such other sources are searched in conjunction with searches of the listings available on the VOW, require that any display of listings from other sources identify such other source.

#### **Effective Date**

MLSs have until not later than [90 DAYS AFTER ENTRY OF THE FINAL JUDGMENT] to adopt rules implementing the foregoing policies and to comply with the provisions of section III above, and (2) Participants shall have until not later than 180 days following adoption and implementation of rules by an MLS in which they participate to cause their VOW to comply with such rules.

See Appendix A for Seller Opt-Out Form.

#### **Appendix A. Seller Opt-Out Form**

1. [Check one]

a. [Check here] I have advised my broker or sales agent that I do not want the listed property to be displayed on the Internet; or

b. [Check here] I have advised my broker or sales agent that I do not want the address



of the listed property to be displayed on the Internet.

2. I understand and acknowledge that, if I have selected option a, consumers who conduct searches for listings on the Internet will not see information about the listed property in response to their search. initials of seller

#### Exhibit B

#### (Statement of MLS Policy)

##### *Statement 7.9. Definition of MIS "Participant"*

The term "Participant" in a Board Multiple Listing Service is defined, as follows:

"Where the term REALTOR® is used in this explanation of policy in connection with the word 'Member' or the word 'Participant', it shall be construed to mean the REALTOR® principal or principals, of this or any other Board, or a firm comprised of REALTOR® principals participating in a Multiple Listing Service owned and operated by the Board. Participatory rights shall be held by an individual principal broker unless determined by the Board or MLS to be held by a firm. It shall not be construed to include individuals other than a principal or principals who are REALTOR® Members of this or any other Board, or who are legally entitled to participate without Board membership. However, under no circumstances is any individual or firm, regardless of membership status, entitled to MLS 'Membership' or 'Participation' unless they hold a current, valid real estate broker's license and are capable of offering and accepting offers or accept cooperation and compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property. Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey 'Participation' or 'Membership' or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. Additionally, the foregoing does not prohibit Board Multiple Listing Services, at their discretion, from categorizing non-principal brokers, sales licensees, licensed and certified appraisers and others affiliated with the MLS 'Members' or 'Participants' as 'users' or 'subscribers' and, holding such individuals personally subject to the rules and regulations and any other governing provisions of the MLS and to discipline for violations thereof. MLSs may, as a matter of local determination, limit participatory rights to individual principal brokers, or to their firms, and to licensed or certified appraisers, who maintain an office or Internet presence from which they are available to represent real estate sellers, buyers, lessors or lessees or from which they provide appraisal services. (Amended 5/02)

"Where the terms 'subscriber' or 'user' are used in connection with a Multiple Listing Service owned or operated by a Board of REALTOR®, they refer to non-principal

brokers, sales licensees, and licensed and certified real estate appraisers affiliated with an MLS Participant and may, as a matter of local option, also include a Participant's affiliated unlicensed administrative and clerical staff, personal assistants, and individuals seeking licensure or certification as real estate appraisers provided that any such individual is under the direct supervision of an MLS Participant or the Participant's licensed designee. If such access is available to unlicensed or uncertified individuals, their access is subject to the rules and regulations, the payment of applicable fees and charges (if any), and the limitations and restrictions of state law. None of the foregoing shall diminish the Participant's ultimate responsibility for ensuring compliance with the rules and regulations of the MLS by all individuals affiliated with the Participant. (Adopted 4/92)

"Under the 'Board of Choice' policy, MLS participatory rights shall be available to any REALTOR® (principal) or any firm comprised of REALTORS® (principals) irrespective of where they hold primary membership subject only to their agreement to abide by any MLS rules or regulations; agreement to arbitrate disputes with other Participants; and payment of any MLS dues, fees, and charges." Participatory rights granted under Board of Choice do not confer voting privileges or eligibility for office as an MLS committee member, officer, or director, except as granted at the discretion of the local Board and/or MLS. (Amended 5/97)

The universal access to services component of Board of Choice is to be interpreted as requiring that MLS Participatory rights be available to REALTOR® principals, or to firms comprised of REALTOR® principals, irrespective of where primary or secondary membership is held. This does not preclude an MLS from assessing REALTORS® not holding primary or secondary membership locally fees, dues, or charges that exceed those or, alternatively, that are less than those charged Participants holding such memberships locally or additional fees to offset actual expenses incurred in providing MLS services such as courier charges, long distance phone charges, etc., or for charging any Participant specific fees for optional additional services. (Amended 11/96)

None of the foregoing shall be construed as requiring a Board to grant MLS participatory rights, under Board of Choice, where such rights have been previously terminated by action of that Board's Board of Directors." (Adopted 11/95) (Model MLS rules)

Section 3—Participation: Any REALTOR® of this or any other Board who is a principal, partner, corporate officer, or branch office manager acting on behalf of a principal, without further qualification, except as otherwise stipulated in these bylaws, shall be eligible to participate in Multiple Listing upon agreeing in writing to conform to the rules and regulations thereof and to pay the costs incidental thereto.\* However, under no circumstances is any individual or firm, regardless of membership status, entitled to Multiple Listing Service "membership" or

"participation" unless they hold a current, valid real estate broker's license and are capable of offering and accepting offers or accept compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property.\*\* Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey "participation" or "membership" or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. (Amended 11/96)

**Note:** Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm 'offers or accepts cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. "Actively" means on a continual and on-going basis during the operation of the Participant's real estate business. The "actively" requirement is not intended to preclude MLS participation by a Participant or potential Participant that operates a real estate business on a part time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a Participant or potential Participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law.

The key is that the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a Participant or potential Participant that operates a Virtual Office Website ("VOW") (including a VOW that the Participant uses to refer customers to other Participants) if the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a Participant "actively endeavors during the operation of its real estate business" to "offer or accept cooperation and compensation" only if the MLS has a reasonable basis to believe that the Participant or potential Participant is in fact not doing so.

The membership requirement shall be applied on a nondiscriminatory manner to all Participants and potential Participants.

**United States District Court for the Northern District of Illinois Eastern Division**  
United States of America, Plaintiff,

v.  
National Association of Realtors®, Defendant.  
Civil Action No. 05 C 5140  
Judge Kennelly.

### Competitive Impact Statement

Plaintiff United States of America (“United States”), pursuant to section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

### I. Nature and Purpose of the Proceedings

**Overview.** The United States brought this lawsuit against Defendant National Association of Realtors® (“NAR”) on September 8, 2005, to stop NAR from violating section 1 of the Sherman Act, 15 U.S.C. 1, by its suppression of competition from real estate brokers who use the Internet to deliver real estate brokerage services. NAR’s policies singled out these innovative brokers and denied them equal access to the for-sale listings that are the lifeblood of competition in real estate markets. The settlement will eliminate NAR’s discriminatory policies and restore even-handed treatment for all brokers, including those who use the Internet in innovative ways.

**Virtual Office Websites (“VOWs”).** The brokers who have been restrained by NAR’s policies operate password-protected websites through which they deliver brokerage services to consumers. NAR has referred to these websites as “virtual office websites” or “VOWs.” As discussed below and in the United States’ October 4, 2005, Amended Complaint, brokers who use VOWs (“VOW brokers”) can operate more productively than other brokers, providing high quality brokerage services efficiently to consumers.

**Defendant NAR and MLSs.** NAR is a trade association whose membership includes both traditional, bricks-and-mortar real estate brokers and innovative brokers, such as those who operate VOWs. NAR promulgates rules for the operation of the approximately 800 multiple listing services (“MLSs”) affiliated with NAR. MLSs are joint ventures of virtually all real estate brokers in each local or regional area. MLSs aggregate information about all properties in the areas they serve that are offered for sale through brokers.

**NAR’s Challenged Policies.** On May 17, 2003, NAR adopted its “VOW Policy,” which contained rules that obstructed brokers’ abilities to use VOWs to serve their customers, as described below in Section II. After an investigation, the United States prepared to file a complaint challenging this Policy.

On September 8, 2005, NAR repealed its VOW Policy and replaced it with its Internet Listings Display Policy (“ILD Policy”). NAR hoped that this change would forestall the United States’ challenge to its policies. NAR’s ILD Policy, however, continued to discriminate against VOW brokers. As part of its adoption of the ILD Policy, NAR also revised and reinterpreted its MLS membership rule, which would have excluded sonic brokers who used VOWs, as

detailed below in Section II. (NAR’s VOW and ILD Policies, including its membership rule revision and reinterpretation, are referred to collectively in this Competitive Impact Statement as NAR’s “Challenged Policies.”)

As an association of competitors with market power, NAR’s adoption of policies that suppress new and efficient competition to the detriment of consumers violates section 1 of the Sherman Act, 15 U.S.C. 1.

**The Complaint.** On September 8, 2005, the day NAR adopted its ILD Policy, the United States filed its Complaint. The United States filed an Amended Complaint on October 4, 2005, that explicitly addressed the ILD Policy and membership rule revision and reinterpretation. The Amended Complaint alleges that NAR’s adoption of the Challenged Policies constitutes a contract, combination, and conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States, in violation of section 1 of the Sherman Act, 15 U.S.C. 1.

In the Amended Complaint, the United States asks the Court to order NAR to stop violating the law. The United States did not seek monetary damages or fines; the law does not provide for these remedies in a case of this nature.

**Motion to Dismiss.** NAR filed a motion to dismiss the case, claiming that, because NAR did not restrain brokers by compelling them to use the “opt-out” provisions of the Challenged Policies (discussed below in section IIC), those provisions did not constitute actionable restraints of trade. NAR also sought dismissal on two procedural grounds. On November 27, 2006, the Court issued an opinion denying NAR’s motion. The Court found that the appropriate analysis under Section 1 is not whether individual market actors are restrained but instead whether competition is restrained.<sup>1</sup> The Court also rejected NAR’s procedural arguments.<sup>2</sup>

**Course of the Litigation.** Discovery began in December 2005 and continued through 2006 and 2007. The case was scheduled for trial on July 7, 2008.

**Proposed Settlement.** On May 27, 2008, six weeks before trial was scheduled to begin, the United States and NAR reached a settlement. The United States filed a Stipulation and proposed Final Judgment that are designed to eliminate the likely anticompetitive effects of NAR’s Challenged Policies. The proposed Final Judgment, which is explained more fully below, requires NAR to repeal its VOW Policy and its ILD Policy and to adopt and apply new rules that do not discriminate against brokers who use VOWs to provide brokerage services to their customers.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final

Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

### II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

#### A. Description of Competition and Innovation Enabled by VOWs

In many respects, most VOW brokers operate just like their more traditional competitors. They hold brokers’ licenses in the states in which they operate, they ordinarily are Realtor members of NAR, they participate in their local MLS, they tour homes with potential buyer customers and guide those customers through the negotiating, contracting, and closing process, and they derive revenues from commissions earned in connection with real estate transactions.<sup>3</sup>

These VOW brokers differ from other brokers in how they use the Internet to provide brokerage services. VOW brokers use primarily their Web sites, rather than the efforts of their agents, to educate potential buyers about the market. This service necessarily involves—as it does with brokers who operate in a more traditional fashion—providing those MLS listings to buyer customers that meet their expressed needs and interests. NAR’s MLS rules permit brokers to “reproduce from the MLS compilation and distribute to prospective purchasers” information about properties in which the purchaser might have an interest. See NAR, *Handbook on Multiple Listing Policy*, “Model Rules & Regulations for an MLS Operated as a Committee of an Association of Realtors®,” § 12.2 (21st ed. 2008). Rather than providing this information to prospective buyers by hand delivery, mail, fax, or e-mail—the delivery methods historically used by brokers VOW brokers deliver listings over the Internet.<sup>4</sup>

<sup>3</sup> The real estate licensing laws of most states allow real estate professionals to be licensed as either brokers or as agents or sales associates. To offer real estate brokerage services, a person licensed as an agent or sales associate must affiliate with and be subject to the supervision of a person who holds a broker’s license. See, e.g., 225 ILCS 454/1–5.

<sup>4</sup> As the court found in *Austin Board of Realtors v. E-Realty, Inc.*, No. 00–CA–154, 2000 WL 34239114, at \*4 (W. D. Tex. Mar. 30, 2000), “all \* \* \* methods of distribution” of listings, including the Internet, “are equivalent” and should be treated equally under MLS rules. Until it began developing its VOW Policy, NAR agreed with this position. For instance, on January 29, 2001, a top NAR official stated in a letter to the president of eRealty (a VOW broker) that eRealty’s distribution of MLS listings through its VOW was “in compliance with” MLS rules governing the provision of MLS listings to prospective buyers. NAR also published a white paper in December 2001 in which it described VOWs as an “emerging, authorized use of MLS current listing data,” and stated that brokers using VOWs are subject to the same MLS rules governing the dissemination of listings to potential buyers that are applicable to all other brokers. The same official reiterated the point in a March 8, 2002, interview, stating that NAR’s rules “don’t discriminate between methods of delivery.”

<sup>1</sup> See *United States v. NAR*, No. 05–C–5140, 2006–2 Trade Cas. ¶ 75,499, 2006 WL 3434263, at \*12–14 (N.D. Ill. Nov. 27, 2006).

<sup>2</sup> *Id.* at \*6–11 & 15.

With lower costs and increased productivity, some VOW brokers have offered discounted commission rates to their seller clients and rebates to their buyer customers.<sup>5</sup> VOW brokers have already delivered tens of millions of dollars in financial benefits directly to their customers. Another study conducted in connection with this case revealed evidence consistent with a finding that the growth of a VOW broker that offered discounts led a sizeable traditional competitor to reduce its commissions to consumers.

Innovative brokers with VOWs have enhanced the consumer experience by offering tools and information that allow consumers to approach the purchase of a home well informed about all aspects of the markets they are considering. VOW brokers not only provide their customers access to up-to-date MLS listings information, but also offer mapping and property-comparison tools and provide school district information, crime statistics, and other neighborhood information for consumers to consider as they educate themselves regarding the most important purchase in the lives of most Americans. Many VOW brokers also allow customers to maintain a personal portfolio of properties they are monitoring, with the VOWs automatically updating those listings as their price or status changes.

Of course, many traditional brokers provide neighborhood and other similar information to their customers, and some even provide such information on Internet Web sites. VOWs can differ, however, in the quantity and quality of information that they provide. VOW brokers offer their customers complete and up-to-date information and often focus on information most valuable to prospective buyers, identifying price reductions and the number of days a property has been on the market and providing information about comparable recent sales. Customers of VOW brokers can obtain information at their own pace, on their own time, and in the form in which they are most interested in receiving it.

Some VOW brokers have established brokerage businesses that focus solely on the high technology aspects of brokerage services that can be delivered over the Internet. Like

other VOW brokers, these “referral VOWs” educate prospective buyers about the market in which they are considering a purchase by providing buyers MLS listings and other information on a VOW. When the buyer is ready to tour a home, the referral VOW broker can direct the buyer to brokers or agents who specialize in guiding the buyer on tours of homes and advising them during the negotiating, contracting, and closing process. In some instances, referral VOW brokers have obtained a referral fee (contingent on closing) for delivering educated buyer customers to the brokers or agents who received the referrals. Some referral VOW brokers have offered commission rebates or other financial benefits to their customers.

#### *B. Description of the Defendant and Its Activities*

Chicago-based MAR is a trade association that establishes and enforces policies and professional standards for its over one million real estate professional members and 1,400 local and state Boards or Associations of Realtors® (“Member Boards”). NAR promulgates rules governing the operation of the approximately 800 MLSs that are affiliated with NAR through their ownership or operation by NAR’s Member Boards.<sup>6</sup> In order to encourage adherence to its policies, NAR can deny coverage under its errors and omissions insurance (i.e., professional liability insurance) policy to any Member Board that maintains MLS rules not in compliance with NAR’s policies.

MLSs are joint ventures among virtually all real estate brokers operating in local or regional areas.<sup>7</sup> MAR’s MLS rules require its

members to submit to the MLS, generally within two to three days of obtaining a listing, information about each property listed for sale through a broker member. By doing so, the broker promotes his or her seller client’s listing to all other brokers in the MLS, who can provide information about the listing to their buyer customers. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting with each new listing an “offer of cooperation and compensation,” identifying the amount (usually specified as a percentage of the listing broker’s commission) that the listing broker will pay to any other broker who finds a buyer for the property.

Brokers regard participation in their local MLS to be critical to their ability to compete with other brokers for home sellers and buyers. By participating in the MLS, brokers can promise their seller clients that the information about the seller’s property can be immediately made available to virtually all other brokers in the area. Brokers who work with buyers can likewise promise their buyer customers access to the widest possible array of properties listed for sale through brokers. An MLS is thus a market-wide joint venture of competitors that possesses substantial market power: To compete successfully, a broker must be a member; and to be a member, a broker must adhere to any restrictions that the MLS imposes.

#### *C. Description of the Alleged Violation*

##### *1. The Challenged Policies*

NAR’s Challenged Policies discriminate against and restrain competition from brokers who use VOWs. In its Challenged Policies, NAR denied VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods. NAR did so by allowing a listing broker to “opt out” and keep his or her client’s listings from being displayed on a competitor’s VOW.

On May 17, 2003, NAR adopted its “VOW Policy.” As the Amended Complaint alleges, the VOW Policy, most significantly, allowed brokers to opt out of VOWs, withholding their seller-clients’ listings from display on VOWs. The opt-out provisions discriminated against VOW brokers because NAR’s rules do not otherwise permit one broker to dictate how competitors can convey his or her listings to customers. The VOW Policy permitted opt out either against all VOW brokers (“blanket”) or against a particular VOW broker (“selective”).

The Amended Complaint also alleges that the VOW Policy’s “anti-referral” rule restrained competition by prohibiting VOW brokers from receiving any payment for referring prospective buyer customers to other brokers. The prospect that brokers

VOWs help brokers operate more efficiently and increase the quality of services they provide. By enabling consumers to search for and retrieve relevant MLS listings, VOW brokers can operate more efficiently than other brokers. Because customers are educating themselves without the broker’s expenditure of time, a VOW broker can expend less time, energy, and resources educating his or her customers. Operating a VOW can also enhance broker competitiveness in working with home seller clients by allowing the broker to provide detailed information to both potential and active seller clients about the apparent interests of buyers who are searching for homes in the seller’s neighborhood. A study conducted in connection with this case showed that one sizeable VOW broker, for example, was able to generate many more transactions per agent (controlling for years of agent experience) than the traditional brokers it competed against.

<sup>5</sup> Prospective buyers frequently do not enter contractual relationships with the broker from whom they receive brokerage services and, as such, are considered “customers,” rather than “clients,” of the broker.

<sup>6</sup> There are approximately 1,000 MLSs in the United States, approximately 800 of which are affiliated with NAR and subject to NAR’s rules. The rules of the remaining approximately 200 MLSs are not at issue in this lawsuit, although, as a practical matter, many MLSs that are not affiliated with NAR adopt rules that confirm substantially to NAR’s. Some non-NAR MLSs, such as the MLS serving the Columbia, South Carolina, area and the MLS serving the Hilton Head, South Carolina, area, adopted and maintained rules that have been the subject of antitrust enforcement. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia alleging that its rules restrain competition among real estate brokers in that area and likely harm consumers. See *Complaint in United States v. Consolidated Multiple Listing Service, Inc.*, No. 3:08-cv-01786-SB (D.S.C. May 2, 2008), available at <http://www.usdoj.gov/atr/cases/f232800/232803.htm>. The United States challenged similar allegedly anticompetitive rules imposed by the MLS in Hilton Head, South Carolina, also not affiliated with NAR. See *Complaint in United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. Oct. 16, 2007), available at <http://www.usdoj.gov/atr/cases/f226800/226869.htm>. The MLS in Hilton Head agreed to settle the case by repealing the challenged rules and agreeing to other conduct restrictions, and the court entered the Final Judgment in the case on May 28, 2008. See Final Judgment in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. May 28, 2008), available at <http://www.usdoj.gov/atr/cases/f233900/233901.htm>.

<sup>7</sup> Many MLSs draw brokers and their listed properties from a single local community. Others are substantially larger, with some covering entire

states and others—such as Metropolitan Regional Information Systems, Inc., which serves the District of Columbia, and parts of the states of Maryland, Virginia, West Virginia, and Pennsylvania—serving multi state regions. As the Amended Complaint alleges, the relevant geographic markets in which brokers compete are local and normally no larger than the service area of the MLS or MLSs in which they participate.

could use VOWs to support referral-based businesses was a source of industry antipathy to VOWs, and NAR's rules singled out VOW brokers for a ban on referring customers for a fee.

NAR's VOW Policy, as alleged in the Amended Complaint, also restrained competition from VOW brokers by prohibiting them from selling advertising on pages of their VOWs on which the VOW broker displayed any listings, and by permitting MLSs to degrade the data they provide to VOWs, thus preventing the use of popular technological features offered by many VOW brokers.

NAR repealed its VOW Policy and replaced it with its ILD Policy on September 8, 2005, the day the United States filed its initial Complaint. As alleged in the Amended Complaint, NAR's ILD Policy continued to discriminate against VOW brokers by permitting their competitors a blanket opt out where they could withhold their listings from display on all VOWs.<sup>8</sup> Although the ILD Policy did not include an explicit anti-referral rule, NAR revised and reinterpreted its rule on MLS membership to prevent brokers who operate referral VOWs from becoming members of the MLS and obtaining access to MLS listings. The Amended Complaint also alleges that the ILD Policy continued to permit MLSs to downgrade the data they provide to VOWs and to restrict VOW brokers' co-branding or advertising relationships with third parties.

## 2. Effects of the Challenged Policies

As discussed above, NAR's rules permit brokers to show prospective buyers all MLS listings in which the buyers might have an interest. For most brokers, this means that they can respond to a request from a buyer customer by delivering responsive listings by whatever delivery method the broker and customer choose. NAR's opt-out provisions deny this right only if the method of delivery selected by the broker and the customer is a VOW. Thus, NAR's rules restrain VOW-operating brokers from competing in a way that is efficient and desired by many customers.

Even if no broker uses the opt-out device, its existence renders a VOW broker unable to promise customers access to all relevant MLS listings, materially disadvantaging brokers who use a VOW to compete. When opt out occurs, a VOW broker is further disadvantaged because it cannot deliver complete MLS listings to customers through its VOW. Finally, with the threat of opt outs constantly hanging over it, any VOW broker contemplating a pro-consumer initiative would have to weigh the prospect of an angry response from its incumbent competitors.

Opt outs were an empirical reality. Although the United States' investigation became public just a few months after NAR adopted its VOW Policy, the United States discovered over fifty instances of broker opt outs under a wide variety of circumstances in fourteen diverse markets. Brokers opted out of VOWs in large markets (e.g., Detroit and Cleveland), medium markets (e.g., Des

Moines), and small markets (e.g., Emporia (Kansas), Hays (Kansas), and York (Pennsylvania)). In some markets (Emporia and Hays), virtually all brokers opted out. In others, only one or a few opted out (e.g., Detroit, York, Maine). Opt outs occurred in a market with one dominant broker (Des Moines), in markets with only a small number of broker competitors (Emporia and Hays), and in markets with hundreds of brokers (Detroit). In some markets (e.g., Des Moines, Detroit, Cleveland, York, and Jackson (Wyoming)), large brokers opted out. In others (e.g., Marathon (Florida) and Hudson (New York)), only relatively small brokers opted out. Brokers opted out in markets in which price competition is highly restricted by the state (Kansas, which prohibits brokers from providing commission rebates to home buyers), as well as in markets in which the state does not restrict such price competition (Michigan). Opt outs occurred in circumstances that imply they were independent business decisions by the opting-out brokers (e.g., Detroit) and in circumstances in which opt-out forms were filled out by almost all brokers in the same room at the same time (Emporia).

NAR's Challenged Policies also obstruct the operation of referral VOWs. NAR's VOW Policy prohibited referral fees explicitly and directly. NAR's 2005 modification to the requirements of MLS membership denied MLS membership and of greatest significance to a referral VOW access to MLS data to any broker whose business focused exclusively on educating customers on a VOW and referring those customers to other brokers to receive other in-person brokerage services. Each of these policies prevents two brokers from working together in an innovative and efficient way, with a VOW broker attracting new business and educating potential buyers about the market, and the other broker guiding the buyer through home tours and the negotiating, contracting, and closing process.

As discussed above, NAR's Challenged Policies also permit MLSs to downgrade the MLS data feed provided to VOW brokers, which limits the consumer-friendly features VOW brokers could provide through their VOWs. The Challenged Policies also allow MLSs to prohibit VOW brokers from establishing some advertising or co-branding relationships with third parties, limiting the freedom of VOW brokers to operate their businesses as they desire and enabling MLSs (which are controlled by a VOW broker's competitors) to micromanage the appearance of brokers' VOWs.

## 3. The Challenged Policies Violate the Antitrust Laws

NAR's Challenged Policies violate section 1 of the Sherman Act, which prohibits unreasonable restraints on competition. The Challenged Policies were the product of an agreement among a group of competitors (the members of NAR) mandating how brokers could use VOWs to compete and unreasonably restraining competition from VOW brokers. Competition from VOW brokers had posed a threat to the established order in the real estate industry. Yet it was clear from prior litigation that antitrust law would not allow incumbent brokers simply

to prevent VOW brokers from providing any listings to customers through their VOWs. See *Austin Board of Realtors v. e-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000). Instead, NAR's Challenged Policies restrained competition from VOW brokers by denying them full access to MLS listings and restricting how VOW brokers could do business.

While an MLS, like other joint ventures with market power, can have reasonable membership restrictions related to a legitimate, procompetitive purpose, it cannot create rules that unreasonably impede competition among brokers and harm consumers. See *United States v. Realty Multi-List*, 629 F.2d 1351, 1371 (5th Cir. 1980). NAR's Challenged Policies restrain competition because they dictate how the MLS's broker-members could compete specifically, restricting how they could compete using a VOW. See *id.*, at 1383-85 (finding MLS rule precluding part-time brokerage to be unlawful); *Cantor v. Multiple Listing Serv. of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (S.D.N.Y. 1983) (finding that MLS yard sign restriction violated section 1 of the Sherman Act because it "substantially impair[ed] [the plaintiffs'] freedom to conduct their businesses as they see fit" and "vitiated any competitive advantage which plaintiffs endeavored to obtain" through association with a national franchisor); see also *National Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 695 (1978) (condemning trade association ban on competitive bidding by members). Similarly, NAR's Challenged Policies restrain competition because they impede the operations of a particularly efficient class of competitors: VOW brokers. See *Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (upholding verdict against railroads that "block[ed] the entry of low cost competitors"); see also *RE/MAX v. Realty One, Inc.*, 173 F.3d 995, 1014 (6th Cir. 1999) (upholding Sherman Act § 1 claim where competitors "impose[d] additional costs" on innovative entrant). NAR's Challenged Policies also restrain competition by denying consumers the full MLS listings information (including valuable information such as sold data and data fields such as days on market) that consumers want. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457, 462 (1986) ("The Federation's collective activities resulted in the denial of the information the customers requested in the form they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether \* \* \*. The Federation is not entitled to preempt the working of the market by deciding for itself that its customers do not need that which they demand.")

Moreover, NAR's Challenged Policies constitute an unreasonable restraint on competition because they produced no procompetitive benefits that justified the restraints. Although NAR claimed that the Challenged Policies were essential to the continued existence of MLSs, those MLSs without the Challenged Policies functioned just as well without them. Given the market power of the MLS, brokers believe it would amount to economic suicide for them to leave the MLS.

<sup>8</sup>NAR did delete from its ILD Policy its rule allowing brokers to selectively opt out against particular VOW brokers.

### D. Harm From the Alleged Violation

Taken together, NAR's Challenged Policies obstruct innovative brokers' use of efficient, Internet-based tools to provide brokerage services to customers and clients. The Challenged Policies inhibit VOW brokers from achieving the operating efficiencies that VOWs can make available and likely diminish the high-quality and low-priced services offered to consumers by VOW brokers. The result is that the Challenged Policies, products of agreements among competitor brokers, likely would deter, delay, or prevent the benefits of innovation and competition from reaching consumers, and thus violate section 1 of the Sherman Act, 15 U.S.C. 1.

### III. Explanation of the Proposed Final Judgment

The proposed Final Judgment embodies the fundamental principle that an association of competing brokers, operating an MLS, cannot use the aggregated power of the MLS to discriminate against a particular method of competition (in this case, VOWs). The proposed Final Judgment will end the competitive harm resulting from NAR's Challenged Policies and will allow consumers to benefit from the enhanced competition that VOW brokers can provide. The proposed Final Judgment requires NAR to repeal its VOW and ILD Policies and to replace them with a "Modified VOW Policy" (attached to the proposed Final Judgment as Exhibit A) that makes it clear that brokers can operate VOWs without interference from their rivals.<sup>9</sup> With respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment's general nondiscrimination provisions apply.<sup>10</sup>

The Modified VOW Policy does not allow brokers to opt out and withhold their clients' listings from VOW brokers.<sup>11</sup> This change eliminates entirely the most egregious impediment to VOWs that was contained in the Challenged Policies.<sup>12</sup> Under the

Modified VOW Policy, the MLS must provide to a VOW broker for display on the VOW all MLS listings information that brokers are permitted to provide to customers by all other methods of delivery.<sup>13</sup>

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. It expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.<sup>14</sup> It also provides two avenues by which a broker desiring to serve customers through a referral VOW may do so: As an "Affiliated VOW Partner" ("AVP") and as a member who directly serves some customers.

Under the Modified VOW Policy, a broker who desires to operate a referral business can partner as an AVP with a network of brokers and agents to whom the AVP will ultimately refer educated buyer customers who are ready to tour homes and receive in-person brokerage services.<sup>15</sup> The Modified VOW Policy requires MLSs to provide complete MLS listings information to a broker designated by another broker to be an AVP that will operate a VOW on the designating broker's behalf.<sup>16</sup> The MLS must provide

useful information to other potential purchasers of the same items, the uniqueness of each individual home creates an opportunity for an interested buyer (or his or her broker) to attempt to manipulate the market by providing a negative review in hopes of deterring other buyers from visiting or making an offer on the home. An individual home seller is also permitted under the Modified VOW Policy to request that an automated home valuation feature provided by a VOW broker be disabled as to the seller's individual property, although the VOW broker is permitted to state on the VOW that the seller requested that this type of information not be presented on the VOW about his or her property. *See Id.* Though such valuations might be provided in a bricks-and-mortar environment, they would not likely be provided without evaluation, comment, or input from an agent or sales associate. The Modified VOW Policy also provides a mechanism for sellers to correct any false information about their property that a VOW adds, *id.*, ¶ II.5.d, consistent with the general responsibility of any broker (VOW or otherwise) to present accurate information.

<sup>13</sup> *See id.*, ¶ III.2. The information that MLSs must provide to VOW brokers for display on their VOWs includes information about properties that have sold (except in areas where the actual sales prices of homes is not accessible from public records) and all other information that brokers can provide to customers by any method, including by oral communications. *Id.*

<sup>14</sup> *Id.*, ¶ III.11.

<sup>15</sup> Nothing in the Modified VOW Policy requires an AVP to hold a broker's license. An unlicensed technology company would be permitted under the Modified VOW Policy to host a VOW for a broker or brokers (or for one or more agents or sales associates, with the consent of their supervising brokers). When a licensed broker operates VOWs as an AVP in conjunction with other brokers (or their agents or sales associates), the AVP can perform services for which a broker's license may be required, including answering questions for customers who register on the VOW and referring customers to the brokers and agents or sales associates for whom the AVP operates the VOWs. *See, e.g.*, 225 ILCS 454/1–10 (describing the activities for which a broker's license is required in Illinois, including "assist[ing] or direct[ing] in procuring or referring of prospects").

<sup>16</sup> Modified VOW Policy, ¶¶ I.1.a & III.10. An AVP's rights to obtain listings information from the

listings information to the AVP on the same terms and conditions on which the MLS would provide listings to the broker who designated the AVP to operate the VOW.<sup>17</sup> This provision will allow referral VOWs to partner with brokers or agents, obtain access to MLS data to operate their referral VOWs, and provide the efficiencies that come from operating a VOW to the brokers and agents with whom they partner.

Under the proposed Final Judgment, a broker who works directly with some buyers and sellers, but who also wants to operate a VOW and focus on referrals, can become a member of the MLS and use MLS data as a member, including for its referral VOW. The Final Judgment permits NAR's Member Boards to implement the new requirements for MLS membership that NAR originally adopted with its ILD Policy,<sup>18</sup> but an interpretive Note (see Exhibit B to the proposed Final Judgment) explains that the new membership rule is not to be interpreted to restrain VOW competition.<sup>19</sup>

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers<sup>20</sup> and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.<sup>21</sup> VOW brokers, under the Modified VOW Policy, will be free from MLS interference in the appearance and features of their VOWs.<sup>22</sup>

NAR is required by the Final Judgment to direct its Member Boards to adopt rules implementing the Modified VOW Policy within ninety days of this Court's entry of the Final Judgment.<sup>23</sup> To ensure that its Member Boards adopt, maintain, and enforce rules implementing the Modified VOW Policy, NAR is required to deny errors and omissions insurance coverage to any Member Board that refuses to do so and forward to the United States any complaints it receives concerning the failure of any Member Board (or any MLS owned or operated by any Member Board) to abide by or enforce those rules.<sup>24</sup> The proposed Final Judgment also broadly prohibits NAR from adopting any other rules that impede the operation of VOWs or that

MLS is derivative of the rights of the brokers for whom the AVP is operating VOWs. *Id.*, ¶ III.10. The AVP would not itself be an MLS member entitled to MLS access directly.

<sup>17</sup> *Id.*, ¶ III.10.

<sup>18</sup> Proposed Final Judgment, ¶ VI.A.

<sup>19</sup> Under the interpretive Note included in Exhibit B to the proposed Final Judgment, if a VOW broker actively endeavors to obtain some seller clients for whom it will market properties or some buyer customers to whom it will offer in-person brokerage services, that VOW broker will be permitted to operate a referral VOW and refer to other brokers the educated customers he or she does not serve directly.

<sup>20</sup> *See* Modified VOW Policy, ¶ III.2 ("For purposes of this Policy, 'downloading' means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis" (emphasis added)).

<sup>21</sup> *See id.*, ¶ III.7.

<sup>22</sup> *See Id.*, ¶¶ III.8 & III.9.

<sup>23</sup> Proposed Final Judgment, ¶ V.D.

<sup>24</sup> *Id.*, ¶¶ V.E & V.H.

<sup>9</sup> *See* proposed Final Judgment, ¶¶ V.A–V.D. Under the Modified VOW Policy, with the consent of their supervising broker, agents and sales associates are also expressly permitted to operate VOWs. Brokers cannot agree, by MLS rule or otherwise, to ban VOWs operated by agents or sales associates. *See* Modified VOW Policy, ¶ I.1.b.

<sup>10</sup> *See* proposed Final Judgment, ¶¶ IV.A, IV.B, & IV.C; *see also id.*, ¶ V.F (requiring NAR to deny insurance coverage to any Member Board that maintains rules at odds with ¶ IV of the proposed Final Judgment).

<sup>11</sup> *See* Modified VOW Policy, ¶ I.4.

<sup>12</sup> The Modified VOW Policy does allow an individual home seller to direct that information about his or her own home not appear on any Internet Web sites, *id.*, ¶ II.5.a, recognizing the legitimate interests of a seller to protect his or her privacy and not to expose information about his or her property or the fact that it is on the market to the public on the Internet. It also allows a home seller to request that a VOW broker who permits customers to provide written reviews of properties disable that feature as to the seller's listing. *Id.*, ¶ II.5.c. Such comments—which can be anonymous—have no exact analogue in the bricks-and-mortar world. Unlike books, music, or other consumer goods, reviews of which can provide

discriminate against VOW brokers in the operation of their VOWs.<sup>25</sup>

Finally, the proposed Final Judgment, applicable for ten years after its entry by this Court,<sup>26</sup> establishes an antitrust compliance program under which NAR is required to review its Member Board's rules for compliance with the proposed Final Judgment, to provide materials to its Member Boards that explain the proposed Final Judgment and the Modified VOW Policy, and to hold an annual program for its Member Boards and their counsel discussing the proposed Final Judgment and the antitrust laws.<sup>27</sup> The proposed Final Judgment expressly places no limitation on the United States' ability to investigate or bring an antitrust enforcement action in the future to prevent harm to competition caused by any rule adopted or enforced by NAR or any of its Member Boards.<sup>28</sup>

#### IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against NAR.

#### V. Procedures Available for Modification of the Proposed Final Judgment

The United States and NAR have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John R. Read, Chief, Litigation III Section,

Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.<sup>29</sup>

#### VI. Alternatives to the Proposed Amended Final Judgment

At several points during the litigation, the United States received from defendant NAR proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with the full trial on the merits against NAR that was scheduled to commence on July 7, 2008. The United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that consumers can benefit from the enhanced brokerage service competition brought by VOW brokers as effectively as any remedy the United States likely would have obtained after a successful trial.

#### VII. Standard of Review Under the APPA for Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C.

2007) (assessing public interest standard under the Tunney Act).<sup>30</sup>

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

"[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree."

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).<sup>31</sup> In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; see also *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the

<sup>30</sup> The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); see also *SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

<sup>31</sup> Cf. *BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

<sup>25</sup> *Id.*, ¶¶ IV.A & IV.B.

<sup>26</sup> *Id.*, ¶ X.

<sup>27</sup> *Id.*, ¶ V.G.

<sup>28</sup> *Id.*, ¶ IX.

<sup>29</sup> Proposed Final Judgment, ¶ VIII.



market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); see also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial (prosecutorial by bringing a case in the first place), it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As the United States District Court for the District of Columbia recently confirmed in SBC Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.<sup>32</sup>

<sup>32</sup> See *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney

## VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

David C. Kully,

Craig W. Conrath,

David C. Kully.

*U.S. Department of Justice, Antitrust Division, 450 5th Street, NW; Suite 4000, Washington, DC 20530, Tel: (202) 307-5779, Fax: (202) 307-9952.*

Dated: June 12, 2008

## Certificate of Service

I, David C. Kully, hereby certify that on this 12th day of June 2008, I caused a copy of the foregoing Competitive Impact Statement to be served by ECF on counsel for the defendant identified below.

Jack R. Bierig, Sidley Austin LLP, One South Dearborn Street, Chicago, IL 60603, (312) 853-7000, [jbierig@sidley.com](mailto:jbierig@sidley.com).

David C. Kully.

[FR Doc. E8-13902 Filed 6-24-08; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF LABOR

### Office of the Secretary

### Submission for OMB Review: Comment Request

June 20, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or by contacting Darrin King on 202-693-4129 (this is

Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

not a toll-free number)/e-mail: [king.darrin@dol.gov](mailto:king.darrin@dol.gov).

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202-395-7316/Fax: 202-395-6974 (these are not toll-free numbers), E-mail: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* Occupational Safety and Health Administration.

*Type of Review:* Extension without change of a previously approved collection.

*Title of Collection:* Methylene Chloride (29 CFR 1910.1052).

*OMB Control Number:* 1218-0179.

*Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions.

*Estimated Number of Respondents:* 92,354.

*Estimated Total Annual Burden*

*Hours:* 67,362.

*Estimated Total Annual Costs Burden:* \$16,753,110.

*Description:* The information collection requirements contained in the Methylene Chloride Standard (29 CFR 1910.1052) serve to ensure that employees are not being harmed by exposure to Methylene Chloride. For additional information, see related notice published at 73 FR 22176 on April 24, 2008.