



American Homeowners Grassroots Alliance
Representing the nation's 70 million homeowners

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Antitrust Modernization Commission
Attention: Public Comments
1001 Pennsylvania Ave., NW
Suite 800 South
Washington, DC 20004-2505
By email: comments@amc.gov

Gentlemen:

We are submitting the following recommendations on antitrust laws and related issues that are appropriate for the Commission to study pursuant to the [Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856](#). The Commission is charged by statute:

- (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
- (2) to solicit views of all parties concerned with the operation of the antitrust laws;
- (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
- (4) to prepare and submit to Congress and the President a report which is to "contain[] a detailed statement of the findings and conclusions of the Commission, together with recommendation for legislative or administrative action the Commission considers to be appropriate."

The American Homeowners Grassroots Alliance (AHGA) submits these comments on behalf of the more than 70 million U.S. homeowners. AHGA is a national consumer advocacy organization that focuses on real estate and other policy that has significant impact on homeowners and home ownership. The Alliance commends Congress for creating the Antitrust Modernization Commission and wishes members of the Commission great success in this extremely important endeavor.

There is clearly a need to modernize U.S. antitrust laws and to identify and study other issues related to the purpose of antitrust laws, which are intended to protect consumers. Much has changed since the last major revision of U.S. antitrust laws. Electronic commerce has become a major factor in our economy,

societal values have changed, and antitrust laws themselves have been refined by judicial interpretation.

One thing that has not changed, and should not change in the future, is the intent of antitrust laws. The ultimate purpose of the nation's antitrust laws are to protect consumers, and AHGA believes that purpose should be the focus of any revisions in antitrust laws and/or the creation of new antitrust or consumer protection laws. Their purpose is unrelated to the interests of any business or a category of businesses. Whether or not revisions of existing antitrust laws or the creation of new antitrust or consumer protection laws economically favor, disfavor, or are neutral to the interests of some companies or groups of companies is not material. The objective of the exercise is to protect consumers by increasing competition and eliminating of barriers to competition, and some business models may have to be modified to achieve that goal.

In that spirit AHGA makes the following recommendations to the Antitrust Modernization Commission:

Electronic Commerce. The Commission should recommend the elimination of numerous existing barriers to competition in electronic commerce. Electronic Commerce is of rapidly growing importance to homeowners. The potential efficiency is of particular benefit to families where both spouses work, as is increasingly the case with homeowners. The majority of Americans now use the Internet as a tool in buying and selling homes. Home buyers obviously would like maximum information about homes on the market, including such things as home addresses, so they can use that information as part of their screening process. It is obviously in the interest of home sellers to provide all relevant data on homes for sale to prospective buyers.

The majority of U.S. homes are still marketed through traditional real estate channels. While detailed information is provided about homes for sale on multiple listing forms, and is also provided about properties marketed on "for sale by owner" (fsbo) websites, some of the desired information, such as the home addresses, is unavailable on web sites of multiple listing services. Real estate organizations whose members have a fiduciary duty to sellers to provide market exposure often own and/or control those websites. Those same real estate organizations often seek to limit the dissemination of data on homes for sale by third parties, such as virtual office websites (VOWs). AHGA believes that many of these practices are barriers to commerce. The Alliance urges the Commission to review these practices, and to recommend such changes in laws as needed to assure that home sellers and buyers have full and complete access to all data relevant to real estate transactions.

Regulatory Barriers to Competition: Many states have created barriers to competition, and some of them are absolute barriers. For example most state

laws prohibit automobile dealers from selling new cars on the Internet, and other products, such as wine and spirits, are prohibited from Internet sale in some states. At the federal level homeowners and other consumers are precluded from purchasing prescription drugs from pharmacies in other countries by mail order or over the Internet. There appears to be no reason that such purchases should not be allowed as long as some common sense precautions applied to the practice. The Commission should investigate these and other regulatory barriers and recommend modifications to existing laws, or the creation of appropriate new laws to stop such anticompetitive and anti-consumer practices.

Erosion of the Law of Real Estate Agency: Traditional real estate agency relationships recognized the fiduciary responsibility of real estate brokers and agents to their clients. As the practice of exclusive buyer brokerage expanded in recent years, representatives of traditional real estate organizations have set out at the state level to create laws legalizing “dual agency”, that would allow a broker and agent to simultaneously represent both home buyers and sellers. Among the fiduciary responsibilities of a real estate broker and agent is to help negotiate for the best price and terms for their clients. When the broker/agent simultaneously represents a buyer and seller of the same property getting the best price and terms for both clients is mutually exclusive.

In practice these state laws have lead the development of language that is included in standard listing agreements providing real estate brokers and agents the right to “represent” buyers interested in the property. Those clauses provide for no reduction in selling commission to reflect the reduced level of fiduciary service provided should that eventuality occur. This is the opposite of practice of “discount” real estate brokers who offer a substantial reduction of commission or listing fees as an inducement to home sellers who are willing to accept less than a full range of services. We urge the commission to examine this issue and to recommend a federal law pre-empting state “dual agency” laws should it conclude that consumers are being denied full benefit of real estate broker and agent fiduciary responsibilities.

Tie-in arrangements between real estate trade associations and multiple listing service (MLS) organizations would also appear to undermine real estate agency. Those arrangements require membership in the local real estate trade association as a precondition for the use of the MLS, which is generally recognized as the most powerful real estate marketing tool. As in the previous example organizations with a fiduciary responsibility to home sellers are engaging in practices that serve to limit the use of the MLS to the detriment of both buyers and sellers. There are pending lawsuits and contradictory prior court decisions on this issue, and a bright line prohibition of this practice would be timely.

Real Estate Financing: There are several potential antitrust issues related to real estate financing. There appears to be insufficient competition in title insurance reissue market. Consumers in many cases are charged the full retail price or near the full retail price for reissued title insurances on homes that are refinanced fairly soon after their purchase. It would seem unnecessary to repeat the entire research process for the history of the property in such cases, and relatively simple and inexpensive to determine if any new threats to the marketability of the title had occurred in very recent years.

As multiple factors, including consumer demand, are driving increased overlap between real estate lending and real estate marketing, antitrust laws should be adjusted to both protect consumer interests and encourage greater competition. For example, real estate agents or brokers who arrange home financing should be subject to all Truth-In-Lending-Act (TILA) requirements. Similarly while antitrust laws should facilitate the ability of banks to enter the real estate sales market, at the same time all consumer protections and other appropriate laws and regulations should apply to new entrants into the field of real estate marketing.

Illinois Brick: The Illinois Brick decision, which denied legal standing to consumers suffering economic injury on the basis of their tier level in the chain of commerce, is no longer appropriate. If a consumer is injured they should have a right to seek redress even if the alleged injury occurred above the level of the company from whom they purchased the product or service.

Independent Advocacy: Congress should consider the creation of an independent advocacy function within the Department of Justice and other regulatory agencies. Like the office of the Chief Counsel for Advocacy within the Small Business Administration, the role of those offices would be to advocate on behalf of the best interests of the consumer on all matters, including proposed federal laws and regulations, totally free of political pressures from any incumbent Administration. Some of the aforementioned recommendations beg for such independence and presume the engagement of antitrust agencies in the legislative and regulatory process at the federal, state and local levels.

On behalf of the nation's 70 million homeowners we urge the Commission to consider these issues and recommendations as part of its agenda. Please let us know if there is any additional information we can supply.

Sincerely,

Bruce N. Hahn
Chairman