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**COMMISSION
APPROVED**

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

BUREAU OF COMPETITION

January 9, 1987

Ms. Florence R. Brassier
Assistant Director
Virginia Real Estate Board
3600 West Broad Street
Richmond, VA 23230-4917

Dear Ms. Brassier:

The Federal Trade Commission's Bureau of Competition, Consumer Protection and Economics are pleased to submit this letter in response to the Virginia Real Estate Board's ("Board") request for public comments on proposed changes to its regulations.¹

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years the Commission has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including real estate brokers, optometrists, dentists, lawyers, physicians and others. The Commission's goal has been to identify and seek removal of restrictions that impede competition, increase costs and harm consumers without providing significant countervailing benefits.

II. Overview of Comments

We support the Board's proposal to expand current Regulation § 1.7 to permit all brokers, not just principals of brokerage firms, to do business through more than one firm. We believe this change will promote competition and enhance consumer welfare.

¹ These comments represent the views of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has reviewed these comments and has authorized their submission.

We also discuss several Board regulations that may adversely affect competition and harm consumers, and that the Board might therefore wish to reconsider. These rules fall into two categories: (1) existing and proposed regulations that establish subjective standards for whether a person may hold a license; and (2) an existing regulation that restricts a broker's use of his or her residence as a place of business. While we recognize the Board's legitimate consumer protection interests in these regulations, including the goals of assuring competence and preventing fraud and deception, we believe the regulations may be overbroad. They may have the effect of unnecessarily restricting competition in Virginia real estate markets by excluding competitors who may be inclined to offer consumers lower prices or new or different services. Because such loss of competition harms rather than protects consumers, we recommend that the Board delete or amend these regulations.²

III. Allowing All Brokers to Associate with More than One Firm

We applaud the Board's proposal to amend Regulation § 1.7 to allow all brokers, not just principals of firms, to associate with more than one brokerage firm. This change should increase competition among firms for broker associates and improve the quality of brokerage services available to consumers. We believe that consumers will be better served to the extent that they can obtain direct access to the resources of more than one brokerage firm through the use of a single broker.

IV. Regulations that Incorporate Subjective Standards for Obtaining or Maintaining a License

We are troubled by some other parts of the Board's proposal, however. For example, several of the proposed regulations seem to incorporate standards for licensure that are more subjective than is necessary. Proposed Regulations §§ 2.1.A, 2.3.A.6 and 2.4.A contain language requiring applicants for various professional licenses to have "a good reputation for honesty, truthfulness and fair dealing and be competent to transact the business of a real estate broker or a real estate salesperson in

² We express no opinion on the other proposed or existing regulations of the Board not discussed in this letter.

such a manner as to safeguard the interests of the public."³ Proposed Regulation § 3.5.NN provides that the Board may revoke or suspend a license or otherwise discipline licensed brokers for "being unworthy or incompetent to act as a real estate broker or salesperson . . . or otherwise engaging in improper, fraudulent, or dishonest conduct."⁴ The regulations do not specify how such determinations of reputation, competence and impropriety are to be made.

We recognize the consumer protection goals that underlie those regulations, including the purposes of assuring competence and preventing fraud and deception. In the absence of more precise definition, however, we are concerned that the requirements are unduly subjective and could be applied in a discriminatory fashion, with anticompetitive effects. We are particularly concerned that innovative or nontraditional competitive strategies, such as offers by brokers of low commission rates or of services that differ from the traditional array of brokerage services, may be unfairly disparaged by traditional competitors. Complaints along these lines could discourage or prevent nontraditional brokers from obtaining or maintaining a Virginia license under the above-quoted regulations. The FTC's Los Angeles Regional Office conducted a nationwide survey to assess the actual experiences of such nontraditional brokers. The problem most frequently reported was disparagement of their business strategies by traditional brokers, including statements to consumers that the nontraditional brokers₅ were operating in an unethical or unprofessional manner.

We believe that the Board's efforts to pursue legitimate consumer protection interests should be reflected in specific, objectively verifiable standards to the maximum extent possible. We note that all of the regulations of the Board other than Proposed Regulations §§ 2.1.A, 2.3.A.6, 2.4.A and 3.5.NN are

³ Proposed Regulation § 2.1.A is similar in content to the Board's current Regulation § 2.1.1A. The only change is that Proposed Regulation § 2.1.A would require applicants to "be competent" while the existing regulation only requires applicants to have a good reputation for competence.

⁴ This regulation is pre-existing and has merely been renumbered in the proposed regulations.

⁵ See FTC Los Angeles Regional Office, Federal Trade Commission, The Residential Real Estate Brokerage Industry 278-92 (1984).

in that form. We also note that many of the Board's regulations address the same goals underlying the subjectively stated regulations -- the goals of assuring competency and protecting consumers from what the Board has determined to be improper acts or practices. It therefore appears that the Board's concerns may already be adequately addressed by the objectively stated rules, and, furthermore, if the Board determines that additional regulations are desirable it may be possible to draft them in objective rather than subjective terms.

For these reasons, we urge the Board not to adopt Proposed Regulations §§ 2.1.A, 2.3.A.6, 2.4.A and 3.5.NN, or to modify them to incorporate objective standards.

V. Regulation of a Place of Business in a Residence

Proposed Regulation § 3.1.B states that "[n]o place of business shall be in a residence unless it is separate and distinct from the living quarters of the residence and is accessible by the public."⁶

We are concerned that this regulation may create an unnecessary entry barrier to Virginia real estate markets for brokers who wish to operate on a part-time basis or who wish to enter and exit the market as market conditions, personal circumstances or other conditions dictate. In particular, this regulation raises the costs of entry for part-time and other "fringe" brokers who wish to operate out of their residence but who do not have sufficient space in their homes to dedicate an entire room exclusively for business purposes. In addition, to the extent that this regulation requires,⁷ a broker's in-home office to have its own outdoor entrance, it would make entry

⁶ This regulation is pre-existing and has merely been renumbered in the proposed regulations.

⁷ We are concerned that the requirement that a place of business in a residence be "accessible by the public," taken together with the requirement that it be separate and distinct from the living quarters, may mean that a business office located in a residence must have its own outdoor entrance.

even more costly for those fringe brokers whose homes would have to be extensively reconstructed before they could be used.⁸

This regulation may raise market entry costs for many fringe brokers to the point where entry is no longer feasible for them and may, as a result, cause substantial loss of competition and consumer harm. This is so because part-timers and others on the fringe of the market may be more inclined to adopt aggressive, nontraditional competitive strategies. We question whether any legitimate consumer protection goal could outweigh the loss of competition and the resulting consumer injury that may be caused by this regulation. Moreover, it is not clear to us that this regulation provides any countervailing benefit to consumers.

We recognize that Virginia Code § 54-733 requires that "[e]very resident real estate broker shall maintain a place of business in this state." However, this statutory provision does not require either a place of business separate and distinct from living quarters or an outdoor entrance that is separate from living quarters.

For these reasons we urge the Board not to adopt Proposed Regulation § 3.1.B.

VI. Conclusion

In sum, we support as pro-competitive and pro-consumer the Board's proposal to change Regulation § 1.7 to allow all brokers, not just principals of firms, to operate with more than one brokerage firm. However, other regulations containing subjective licensure standards and restricting the use of a residence as a place of business may have the unintended impact of harming consumers by hindering competition without advancing the Board's legitimate consumer protection goals. In particular, these regulations may unnecessarily limit competition by excluding from Virginia real estate brokerage markets competitors who may be motivated to offer consumers lower prices or new or different services. Consequently, we recommend that the Board delete or amend these regulations.

We appreciate this opportunity to comment on the proposed regulations. We have referred to a Commission staff report on

⁸ Such brokers, in order to enter the market through an in-home office, would be faced with the costly alternatives of either renovating their residence or relocating.

Florence R. Brassier

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residential real estate brokerage. We would be happy to supply a copy of the report or to provide any other assistance you desire.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jeffrey I. Zuckerman".

Jeffrey I. Zuckerman
Director
Bureau of Competition