



U.S. Department of Justice

Antitrust Division

*Liberty Place Building
325 Seventh Street NW
Washington, DC 20530*

May 12, 2007

Via Facsimile

Speaker James O. Naifeh
Tennessee House of Representatives
19 Legislative Plaza
Nashville, TN 37243

Dear Speaker Naifeh:

I write to express the views of the Antitrust Division of the U.S. Department of Justice regarding House Bill 2095.¹ It is our understanding that the Tennessee House of Representatives will vote on this pending legislation on May 14, 2007. The Department is concerned that Amendment 1 to House Bill 2095 (“Amendment 1”) would cause serious harm to the competitive process and home buyers and sellers in Tennessee.

Amendment 1 would prohibit brokers from paying “cash rebates, cash gifts, or cash prizes” to home buyers or home sellers in real estate transactions. If Amendment 1 is enacted, this ban on rebating part of a broker’s commission would impede real estate brokers from competing on price, which in turn would cause Tennesseans to pay more in real estate broker commissions. Because Amendment 1 would limit this competition without any offsetting pro-consumer benefit, we urge you to reject it.²

The Tennessee Real Estate Commission (“Commission”) recently had a regulation (Ten. Admin. Reg. 1260-2-.33(2)) that similarly prohibited brokers from giving cash rebates to their clients. The Department investigated that regulation as a *per se* violation of the antitrust laws because it reduced price competition among brokers. In response to our investigation, the Commission last week voted to repeal its regulation.

¹ The Department is one of the federal agencies responsible for enforcing the antitrust laws and protecting competition.

² There is ample evidence showing that rules and laws banning rebates hamper competition between brokers. For example, a 2005 Department of Justice case against the Kentucky Real Estate Commission, *United States v. Kentucky Real Estate Commission*, 3:05CV188-H (W.D. Ky 2005), involving a regulation that banned rebates and inducements, uncovered such evidence. In that case, one Kentucky broker noted that “[i]f inducements were allowed, they could lead to competitive behavior” *Complaint* at 2.

The Commission's action brought Tennessee into line with the 39 other states and the District of Columbia that permit rebates. Indeed, the current trend is for states to repeal such regulations.³ We applaud the Commission for repealing its regulatory ban.

But Amendment 1 overrides the Commission's decision, and eliminates the pro-consumer benefits of the Commission's efforts. Rejecting Amendment 1's ban on rebates is vital to consumers and to competition.

The structure of the typical real estate contract makes brokers' freedom to offer rebates important. As you know, the seller and seller's broker typically agree on the rate of the commission to be paid and how the commission is allocated between the seller's and buyer's brokers. As a result, there is no opportunity for the buyer to negotiate with his or her broker for a lower commission rate. No matter how their agreement allocates the commission between the brokers, however, the total commission paid is the same. And that commission is substantial: at the median home price in the Nashville area of roughly \$161,800⁴, a 6% brokers' commission equals approximately \$9,708. It is easy to see why saving money on commissions is vital to consumers. Based on the Department of Justice's experience with similar bans in other states, a rebate ban could well cost Tennessee consumers millions of dollars per year in additional commission fees.

Rebates are important under this typical structure because they often present the only viable way for a buyer's broker to compete for business on the basis of price. If the buyer's broker were simply to reduce his or her share of the joint commission, the savings would go directly to the seller's broker, not to the home buyer or the home seller. Thus, lowering the commission does not bring the buyer's broker more business or save his customers money. Rebates, in contrast, go directly to the buyer or the seller, and are powerful tools for competition among brokers. For example, a buyer's broker can offer prospective home buyers \$1,000 (payable from his share of the joint commission) at the time of closing. By returning money to home buyers, rebates also benefit home sellers, since buyers will then have more to spend on the home. Thus, rebates are key to broker competition, and the benefits to consumer that come from competition.

Reinstating the rebate ban through Amendment 1 would retain the current restriction on competition and, as a result, prevent price discounting and hurt consumers. There is no apparent need for such a restriction. The Department of Justice has found no evidence that cash rebates harm buyers and sellers. Indeed, rebates are part of core competition on price, whether in real

³ For example, South Dakota, West Virginia and Kentucky recently repealed similar bans on consumer rebates following Department of Justice investigations. Last year, the South Carolina legislature passed legislation clarifying that brokers could offer rebates to home buyers and sellers.

⁴ See [http://www.realtor.org/Research.nsf/files/06TNNashville.pdf/\\$FILE/06TNNashville.pdf](http://www.realtor.org/Research.nsf/files/06TNNashville.pdf/$FILE/06TNNashville.pdf)

estate or in almost any other industry. Even in the real estate industry, such price competition is permitted in most states, and discount brokers in such states freely advertise rebates and inducements that often save consumers thousands of dollars per transaction.

Experience shows that Tennessee consumers likely would see substantial benefits if brokers could rebate part of their commission to them. After the Kentucky Real Estate Commission's decision to allow rebates, some brokers began offering rebates that enabled the consumers to save as much as one-third of the price they were previously paying for buyer's brokerage services. Similar offers in the Nashville area could save home buyers about \$1,618 on a typical home purchase.⁵ With thousands of homes sold last year in Tennessee, such rebates could put millions of dollars back in the pockets of Tennessee consumers.

Tennessee consumers would benefit if brokers could compete by offering cash rebates. Accordingly, we encourage you to reject Amendment 1 to House Bill 2095.

Respectfully Submitted,

John R. Read
Chief, Litigation III

cc: Representative Charles Curtiss (via e-mail)

⁵ For examples of firms offering one percentage point rebates in other states, see <http://rebatereps.com/>, <http://www.readyrealestate.com/buyer.cfm>, <http://www.sourcehomes.com/faq.htm>, and <http://www.texasdiscountrealty.com/buyers1.htm>.