PROCOMPETITIVE BENEFITS OF POLICIES LIMITING ACCESS TO LOCAL MULTIPLE LISTING SERVICE DATA

APRIL 5, 2018

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I. Overview

Recent policy demands for greater public access to proprietary data, such as local multiple listing service ("MLS") information on real estate for sale,[2] are based on faulty expectations that unrestricted access helps consumers of real estate brokerage services. While market participants generally benefit from the open flow of information, incentives of participants also impact outcomes, and forcing brokers to provide complete access to proprietary information can alter important ones, and in turn harm consumers of brokerage services. Effective promotion of consumer welfare in the provision of real estate broker services entails identifying the source of value creation. A local MLS's repository of sales (and related) data creates great value. Additionally, because these data are built on the voluntary sharing of information between brokers, broker incentives to participate in the MLS ultimately influence the efficacy of local brokerage services.

In the remainder of this paper, I expand on the economic basis for my central conclusion: While market participants generally benefit from the open flow of information, incentives of participants also impact outcomes, and limiting public access to proprietary MLS data ultimately serves consumers. On the other hand, forcing brokers to provide unrestricted access to proprietary MLS information can alter important incentives, which ultimately would harm consumers of brokerage services because:

- MLS data are built on the voluntary sharing of information between brokers, and so broker incentives on how to participate in the MLS ultimately influence the efficacy of local brokerage services.

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[2] For example, see Daniel Castro and Michael Steinberg, "Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help," Center for Data Innovation of the Information Technology and Innovation Foundation, November 6, 2017, http://www2.datainnovation.org/2017-open-apis.pdf.

- Regulatory policies, such as mandatory broker information sharing with third-party data aggregators, can lessen competition by diminishing the economic incentives for brokers to obtain and service listings.

    - Specifically, if information sharing allows consumers to avoid payments to real estate agents for listings they contributed to the MLS or for brokerage services provided, then broker incentives to cooperate and share information are diminished.

    - Conversely, setting limits on access to brokers' data by third-party aggregators can enhance broker competition and in turn make consumers better off.

- The net harm to consumers from diminished broker reliance on the MLS can manifest in different way as brokers attempt to preserve the value of their listings including:
    - Greater participation in private listing markets
    - Delay in posting listings
    - Broker withdrawal

In the end, allowing complete and open access to MLS data ultimately would not be in consumer interests, as economic incentives of real estate brokers are important in promoting consumer welfare. Local MLS databases require resources to be built, maintained, and distributed in a time-effective manner, and so properly incentivizing those who invest the resources is important to the continued vibrancy of the MLS. The close relationship between real estate brokers' efforts to attain, develop, and service listings and the value of the MLS means that allowing brokers to determine the extent to which they will provide public access to their MLS information can serve consumers by incentivizing brokers to invest in the attainment, development and overall servicing of listings. There are no easy changes to information-sharing policies, as any proposed changes must be evaluated on the entirety of embodied effects, with potential consumer benefits being weighed against potential consumer harm. By not properly framing the economic question, and not correctly identifying potential benefits and harm, one might ignore the possibility that increased information sharing could lessen competition by diminishing the economic incentives of brokers to participate and rely on the local MLS. Reserving to brokers the right to determine the appropriate scope of public access to their proprietary property listings incentivize brokers' efforts (by protecting the value of the information they collect) and promotes consumer welfare in the long run.

II. **Local MLSs Provide Large Procompetitive Benefits**

The many hundreds of MLSs in the United States are joint ventures between brokers in specific localities. For most geographic locations, the MLS provides brokers an integral tool to service clients, as the MLS organizes listing information in a common database that facilitate brokers' abilities to match real estate buyers and sellers.[3] Beyond the organization of current listings into a common database, the local MLSs also provide 1) A means for communicating unilateral offers of compensation to other participants, in exchange for their cooperation in the sale of listed properties; and 2) Rules and dispute resolution processes to ensure orderly functioning of the MLS system.

The consumer benefits of organizing seller information into a common repository is well recognized in the economics literature, as many efficiencies have been identified as flowing from the local MLS data. These benefits start with the lowering of search costs, with local MLSs typically providing buyers access to the vast majority of local real estate for sale and sellers exposure to the vast majority of potential buyers of real estate. For example, a 2015 article by Li and Yavas states:

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[3] See National Association of Realtors, Handbook on Multiple Listing Policy 2007, p. 13.

> The MLS is one of the most significant features of today's real estate industry in the United States. Under MLS, member brokers share listings with one another by combining their listings into a single pool. The MLS eliminates the need for a buyer to visit several brokers in order to insure a sufficient coverage of the market. Nor must a seller visit several brokers in order to ensure sufficient exposure of a property. … The benefit of an MLS to sellers is that it increases exposure to their property. Buyers benefit as well because they can obtain information about all the properties listed by the MLS while working with only one broker.[4]

In short, the sharing of listing information provides great benefits to customers of brokerage services, as buyers get to check broad inventories of properties for sale with minimal search costs and sellers get to display their properties to broad sets of potential buyers.

Beyond promoting better matching between buyers and sellers, the MLS also encourages competition between real estate brokers. In particular, participating brokers immediately gain access to the MLS, regardless of the size of the brokerage firm, the age of the agency, or the nature of services provided (e.g., discount, full service). All brokerage-affiliated listings get placement on the MLS, and any buyer represented by any broker attains full access to these listings. The availability and immediate access to such information facilitates the growth of new brokerage entrants. A recent article in *Real Estate Economics* aptly states that:

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[4] See p. 471-472, Lingxiao Li and Abdullah Yavas, "The Impact of a Multiple Listing Service" *Real Estate Economics*, 2015, V43 2: pp. 471–506.

(footnote continued)

> [T]he MLS found in practically every local real estate market acts to level the playing field because listings from small firms or new entrants receive equal exposure with those of large established firms.[5]

The importance of the MLS enabling new entrants to effectively compete is especially important when one considers the minimal barriers to entry in the real estate brokerage industry. Specifically, the brokerage industry's low entry barriers facilitate competition between brokers, as many new entrants come into the market during peak times of demand for brokerage services. A recent economic analyses of brokerage services provided in the Boston metro area found that 13% of agents were new to the industry, which evidences (as the authors acknowledge) the low barriers to entry in brokerage services.[6] This easy entry allows timely expansion of brokerage services supply during higher pricing periods, and thus provides a disciplining constraint against sustained higher pricing.

Strong competition between brokers (enhanced by flexible supplies of new entrants) means that the consumers are the ones who gain most from the MLS, as brokers largely compete away the value created by the MLS service. That is, consumers of brokerage services ultimately benefit from the efficiencies provided by the local MLS, as competition from low barriers to entry ensures that brokerage service providers only earn competitive returns over the long run. In sum, the provision of brokerage services is

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[5] See p. 422, Beck Scott Yelowitz "Concentration and Market Structure in Local Real Estate Markets," *Real Estate Economics*, 2012, V40 3: pp. 422–460 2.

[6] "See Panle Jia Barwick and Parag Pathak, "The Cost of Free Entry: An Empirical Analysis of Real Estate Agents in Greater Boston," *RAND Journal of Economics*, January 2015, 46(1), p 106.

highly competitive, and over the long run, brokers cannot earn monopoly rents, as broker supplies can and do quickly change in response to changes in market demand.

III. **Limiting Access to MLS Information is Procompetitive**

These competitive dynamics mean policies that enhance the value of the local MLS, sourced from information voluntarily provided by participating brokers, ultimately lead to higher benefits to consumers of brokerage services, all else being equal. In other words, promoting broker incentives increases the benefits consumers gain from the sharing of information in the MLS and the eventual value of brokerage services provided. Encouraging broker participation and investment in local MLS infrastructures is procompetitive because it gives new entrants instant access to a valuable input in providing services to consumers, and so is a potent disciplining constraint on current brokers' competitive offerings. In sum, the MLS is not costless to build and constantly needs updating and new distribution to maintain relevancy, and so incentivizing those who "build" the MLS and contribute the listings that it contains is important to the promotion of consumer welfare.

Evaluating Policies on Forced Information Sharing

Given that broker incentives matter for the efficient operations of an MLS, the effects of a policy that forces information sharing cannot be judged from the myopic lens of whether consumers care about the information at stake. That only speaks to part of the issue. Other factors, such as whether consumers of brokerage services have alternative access to the information and how brokers will react to proposed changes, matter too. To evaluate the entirety of the effects from a policy change, one must weigh all the benefits of a policy against all the costs.

The protocol for such an analysis is described in the Guidelines jointly published by the United States Department of Justice ("DOJ") and Federal Trade Commission ("FTC"). The DOJ/FTC Antitrust Guidelines for Collaboration among Competitors ("Joint Venture Guidelines") describe the focus of the U.S. antitrust agencies as encouraging competition to prevent harm to consumers.[7] Under the Guidelines, evaluating whether a joint venture between competitors is likely to cause consumer harm requires consideration of both the potential costs and benefits associated with the joint venture. In other words, the U.S. antitrust agencies are focused on a joint venture's likely overall effect on competition, and assessment of this overall effect includes evaluation of on the anticompetitive effects, if any, of the joint venture (which might reduce innovation, quality, or service, or lead to higher prices) and its procompetitive benefits (which might lead to increased innovation, quality, service, or lower prices).[8]

Reliably measuring the effects from policy changes regarding property listing information sharing involves assessing how much consumers value the "incremental" information being shared, and then measuring potential consumer harm in the relevant antitrust market that results from sharing. Showing that consumer choices would be

[7] Copies of the Guidelines can be found at www.ftc.gov/os/2000/04/ftcdojguidelines.pdf .

[8] The Joint Venture Guidelines state: "[Joint ventures] not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably [sic] to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." (Section 3.3)

affected by an information-sharing policy requires the identification of the specific relevant antitrust markets impacted by the policy and weighing the resulting consumer benefits against the harm in these markets. In other words, policy evaluations cannot be made reliably by only considering potential benefits; one must also consider costs in assessing the impact on consumers, and identify the correct market in which these occur.

Assessing Effects on Consumer Welfare Requires Identifying the Relevant Market

A key misconception of those who criticize policies that place restriction on access to MLS information involves market definition. In particular, much of the criticism of limiting information access stems from the concern that consumers of Internet-based data aggregators of real estate listings, such as Zillow and Trulia, will not have access to full MLS information. However, what's important to recognize is that these websites compete in a different antitrust market from MLSs, as neither Zillow nor Trulia broker real estate transactions (and so are not competitors of real estate brokers).

There is nothing exclusionary about preventing third-party data aggregators from using MLS data. Real estate websites such as Zillow and Trulia are in the business of vying for Internet "eyeballs" and are not in the business of providing brokerage services; hence limiting these sites' access to proprietary MLS data does not harm consumers of brokerage services nor does it limit their access to information.

These sites are not even essential to consumers who use actual brokerage services, since these data aggregation sites do not provide consumers of brokerage services with any greater access to information. That is, I understand the property listing information they display is a subset of the information available in the MLS. As I discuss below, such reserving to brokers the opportunity to determine whether to share their property listings for display on third-party aggregators in the end can benefit consumers of brokerage services, as maintenance and promotion of broker listing value encourages investment and expansion in the brokerage service industry. Obligating brokers to provide their information to businesses in different markets, without any explicit compensation or derived benefits in return, is not a sustainable economic model. Maintaining a business climate that promotes investments and encourages entry of new competitors in brokerage services is critical to consumer welfare in the long run.

Forced Information Sharing Can Reduce Competition and Harm Consumers

Focusing policy evaluation on the correct antitrust market, specifically the provision of broker services, leads one to the conclusion that broker control over distribution of property listing information, even though it may result in limited access to such information by some third-party aggregators, can be procompetitive. Namely, such information sharing incentivizes brokers to invest more in the attainment and servicing of listings, to eventually benefit consumers. Conversely, forced information sharing with businesses in other industries, or the public in general, that diminishes the value of broker efforts, or reduces their returns from MLS participation, can lead to reduced consumer welfare. Put simply, if compelled information sharing allows consumers to avoid payments to real estate agents for listings they contributed to the MLS or for brokerage services provided, then the incentives to cooperate and share information are diminished. The harm to consumers from such diminished incentives, as mentioned earlier, can take the form of formation of private listing markets, delays in listing postings, broker withdrawal from the MLS, and other acts that attempt to avoid the loss in value associated with listings. Incentivizing broker efforts by protecting the value of the information they collected promotes consumer welfare in the long run.

In the end, evaluating the effectiveness and overall consumer impact of a new policy on expanded or compulsory information sharing involves understanding how the new policy would change incentives and affect competition in brokerage services. Policies that make brokerage services more efficient and benefit consumers will be the ones that facilitate access to the most complete and accurate MLS data. Thus, evaluating competitive impacts of any changes in policy involves balancing the potential consumer benefits against potential consumer harm emanating from such policies.

Large Innovation in Brokerage Services Occurs with Restrictions on MLS Data

Allowing broker control over access to their property listing information has not impeded innovation in realty brokerage services, nor has it stopped the rapid expansion of new competitors. The provision of brokerage services remains a highly dynamic industry. The equal availability of property listing information in the MLS to competing brokers, along with protection of broker listing investments, has promoted both new competition and innovation. Even though these many new real estate brokers entering the market gain immediate access to the MLS information, established brokers with inventories of listings still have strong incentives to contribute listings to the MLS, as economic credit for these listing is maintained under MLS protocols. In other words, by protecting brokers' listing investments, current established brokers have incentives to make their listings available and thus enable new entrants to more effectively compete and expand, as these new entrants gain access to these listings via the MLS.

New entrants with innovative technologies or services can differentiate themselves from established brokers, as all broker participants gain equal access to (and display on) the property listings in the MLS. The ability of new entrants to gain a foothold in the marketplace through offering innovative services is evidenced by the rapid growth and expansion of Redfin, which has grown steadily and developed innovative Internet-based services to provide many different types of brokerage products to customers. Through provision of these innovative services, Redfin has grown rapidly in recent years and now is one of the largest real estate brokers in the United States. From its initial service offerings in 2006, Redfin has grown and now offers real estate broker services in over 37 states and Washington, D.C.[9]

This rapid growth and reliance on the Internet to do so provide Redfin with a unique perspective on the MLS and the importance of restrictions on data access. That is, despite the reliance on MLS data and an Internet-based delivery system to serve customers, Redfin has explicitly supported data restrictions on public access to MLS data. Namely, in commenting on the need for restrictions, Redfin references the economic problem termed the "tragedy of the commons," where a shared resource is threatened to be destroyed by the collective actions of individuals acting independently and in their own self-interest. This threat of independent action destroying a common good provides an economic motive for restricting individual behavior. Specifically, Redfin states in assessing the policy recommendation of free access to the MLS data:

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[9] https://www.redfin.com/out-of-area-signup.

(footnote continued)

> If we accepted the [Castro] study's recommendation, and today's MLS participants could access MLS data without contributing our own listings as MLS members, some participants would immediately stop contributing listings. No one would be able to see all the homes for sale. The result would be a tragedy of the commons, where everyone accesses the data but no one contributes to it.[10]

Ultimately, the protection of listing value associated with the MLS information creates investment incentives to build infrastructure that enhances the future provision of brokerage services. Both individual brokerages, as well as many local MLSs, have invested heavily in computer and Internet–related infrastructure; investments that may not occur if the value of the MLS-information were diminished, or if such value destruction were anticipated in the future.

Nevertheless, despite these recent investments, critics of information restrictions have openly wondered why the Internet hasn't played even a more significant role in the provision of real estate brokerage services.[11] They have even suggested that MLS data access policies have inhibited use of the Internet in real estate. They cite the example of the Internet's greater role in replacing the provision of brokerage travel services. However what this example misses is that effective brokerage services still require substantial personal service for which there is no computer substitute (currently). Most buyers will want to physically look at a house and get inspections before purchasing. Moreover, housing prices and other contractual terms for a sale will still have to be

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[10] Chelsea Goyer and Glenn Kelman, "Tragedy of the Commons," December 21, 2017, https://www.redfin.com/blog/2017/12/a-tragedy-of-the-commons.html.

[11] Daniel Castro and Michael Steinberg, "Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help," Center for Data Innovation of the Information Technology and Innovation Foundation, November 6, 2017, http://www2.datainnovation.org/2017-open-apis.pdf.

negotiated, and brokers assist in these negotiations. In short, the opportunity to replace a broker with Internet-based services is not as great in real estate (because of the size and complexity of the underlying purchase) as the opportunity to replace a broker who sells tickets to sporting events or flights from Toledo to Miami. The provision of real estate brokerage services still requires a lot of human labor, and so comparing this industry to others needing far less human capital leads to misleading inferences on the level of innovation occurring in brokerage services. In short, for large investments to occur in the MLS, one must believe in the long-run viability of the service. That requires belief in future broker participation and depends intrinsically on broker cooperation, MLS participation, and overall support for the integrity of MLS data.

IV. **Conclusion**

Real estate broker efforts to organize, build, and distribute listing information form the backbone of the MLS. The considerable footwork required of participating brokers, who voluntarily share their information, ensures that the local MLS will continue to provide great value to buyers and sellers of real estate. The great efficiencies and enhanced competition in the marketplace created by the MLS depend on real estate brokers' continued cooperation in the sharing of listing information. That is, the large procompetitive benefits gained from the MLS must be understood and protected in order to craft effective policies for consumers of real estate brokerage services. Policies that ignore participation incentives risk diminishing the substantial consumer value that currently results from brokers' voluntary participation in local MLSs. In sum, policies that interfere with broker determination of how they will use and profit from their efforts, or that allow others to benefit from broker efforts (without compensation), means that brokers will face distorted incentives when making decisions on investments, including their investments in obtaining and sharing property listing information. In the long run consumers will end up paying for the resulting misallocation of resources. Put simply, effective policies must be cognizant and protective of real estate brokers' property rights.