

Data and Choices Breed Competition

A CMLS White Paper

America's MLSs are Making the Market Work™

On April 5, 2018, the Federal Trade Commission (FTC) and Department of Justice (DOJ) announced they would hold a joint workshop on June 5, 2018, to “explore competition issues in the residential real estate brokerage industry. As part of the workshop, the FTC and DOJ are seeking public comment.” The Council of Multiple Listing Services (CMLS) provides this paper as input to the FTC, DOJ, and interested industry participants about the critical pro-competitive role of Multiple Listing Services (MLSs) in the American residential real estate industry.

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The approximately 630¹ MLSs in the United States play a critical role in the market for residential real estate sales. The history of MLS over the past 20 years, but in particular the last 10, shows that MLSs seek to facilitate adoption of new technologies and content distribution without prompting from regulators. MLSs are essential conduits powering the MLS function and distribution of listing data content to brokers, consumer-facing listings websites and mobile applications, and third-party sites and apps—all increasing availability of listing information to consumers and the brokers who serve them.

This whitepaper addresses questions the FTC and DOJ raised² in advance of their workshop on June 5, 2018, touching particularly on the following points: (1) MLSs play a pro-competitive role in facilitating cooperation between competing brokers and are critical conduits for listing data content distribution. (2) Listing data content represents valuable intellectual property of brokers and others, and (3) broker and seller choice is to protect the data content, the listing brokers, and the sellers. (4) Past efforts by government to regulate listing content distribution by MLSs have been limited in scope and effectiveness, and (5) they do little to suggest that forced listing distribution will be good for competition. (6) Finally, proposed policy changes should center on leveraging the pro-competitive nature of MLSs.

MLSs play a critical pro-competitive role

The multiple listing service is a rare successful instance of “coopetition,” cooperating in such a way as to enhance competition. Real estate brokers who participate in MLS agree to provide their listing information to the MLS in exchange for the ability to see other participants’ listings. Furthermore, with each listing the participating broker offers to any other participating broker a commission if that cooperating broker is the procuring cause of a sale of the subject property. As a hub of thousands of offers to enter such unilateral contracts, the MLS ensures cooperating brokers are paid. It is through this “cooperation and compensation” among brokers facilitated by MLS that home-sellers may have confidence that their home listings will be considered by all interested parties in the marketplace.

The MLS organization maintains rules to help facilitate the cooperation and compensation, in part by ensuring the MLS is the source of accurate real estate data in its geographic service area. Note that the National Association of REALTORS® (NAR) plays an important role in MLS rules in many parts of the country. Many MLSs in the U.S. are affiliated with NAR, and they are bound by NAR multiple listing policies, which govern some of the rules and policies that the local MLSs can impose.

Participating brokerages and other data recipients have confidence that the listing data in the MLS is the most accurate and complete available: The data is accurate because MLSs have rules regarding data quality and timeliness. It is complete because most MLSs require participants to put all their listings in a given geographic service area into the MLS, unless the home-seller desires to withhold a listing from the MLS. Brokers nevertheless compete vigorously with each other for sellers’ and buyers’ business.

Consumers benefit from the inter-broker cooperation, compensation, and competition that MLSs make possible. Courts have routinely found the MLS function to be pro-competitive under applicable antitrust laws.³ Recently, in *Findling v. Realcomp II*, Judge Bernard Friedman noted that

“[i]ndeed, absent allegations of unfair discrimination, it is hard to imagine that any MLS is a net anti-competitive force....”⁴

Judge Friedman also observed that “data and choices breed competition.”⁵ In addition to aggregating substantial quantities of listing data content and maintaining quality standards for it, MLSs provide a wide array of choices for distributing listing content to participant brokerages, their salespeople, and technology companies, and such distribution of listing data content ultimately benefits consumers.

MLSs are critical conduits, offering an array of choices to access listing data content

MLSs serve as critical *conduits* among and between brokerages, appraisers, and many consumers and users of listing-related data content. The history of the MLS industry over the last 20 years, and the reality of nearly every MLS today, demonstrates their drive to give recipients of data content—brokerages, appraisers, and those to whom listing brokers direct data content—as many choices as possible to receive as much listing-related data content as possible.

Consumers have unprecedented access to listing content, thanks in part to MLSs

Consumers have greater access to listing content and more ways of receiving it than ever before. MLSs facilitate those ways of receiving listing content. Every MLS in the country has at least two, and most have dozens, of access points for consumers to find listing data. Along with their participating brokers and business partners, MLSs facilitate the following data distribution channels: Broker IDX,⁶ VOW,⁷ and valuation⁸ distributions; MLS consumer-facing listing websites and mobile apps; brokerage and franchise distribution; third-party content aggregators and distributors; and third-party display websites and mobile applications, such as Zillow, Realtor.com, and Homes.com.

First, practically all MLSs facilitate IDX and VOW data uses, and all NAR-affiliated MLSs do so, in addition to providing data for valuation uses.⁹ Many MLSs provide separate data for “back office” uses of MLS content to participating brokerages.¹⁰ The foregoing listing content uses further enable brokerages to serve their clients and the public.

Second, many MLSs have their own consumer-facing listing sites and apps.¹¹ By definition, listings on those platforms are available to the public.

Third, most brokerage firms of any size have their own operations for sharing data. If the local brokerage firm or franchise office does not, the large franchises (which often serve smaller local firms) also have such operations. Those operations further enable brokers to provide listings to recipients in fulfilling their obligations to sellers.

Fourth, there are several third-party aggregation and distribution companies. These companies serve to aggregate listing content from many MLSs and provide it in a normalized fashion for authorized licensees. Move, Inc. subsidiary Listhub provides data of 615 MLSs to more than 70 national publishers and nearly 70 regional publishers.¹² In 2017, several MLSs formed MLS Grid, a platform to provide a new option for accessing and distributing data compliant with standards promulgated by the Real Estate Standards Organization (RESO) under uniform licensing terms.¹³ Some brokers have formed UpstreamRE, which is meant to make their delivery of listing content simpler and more consistent.¹⁴ And Zillow Group provides data aggregation and distribution solutions compliant with standards via its wholly owned subsidiary Bridge Interactive.¹⁵ The net result of these products and others like them, such as FBS’s Spark and CoreLogic’s Trestle, is that

there is no shortage of ways for MLSs to distribute listing data content in a standardized format and method.¹⁶

Finally, MLSs negotiate licenses for public display of listing data content to third-party publishers. For example, most MLSs (and nearly all of any significant size) have agreements with Zillow and Realtor.com. Under these agreements, those third parties can ensure that they get the quantity and scope of data they need, and MLSs can attempt to incorporate provisions in license agreements to protect listing brokers' interests.

Each of these data distribution channels has its own business interests and independently imposes its own terms and conditions. With all except the VOW, the listing broker has the choice whether to provide data, and that's a decision over which sellers can have direct influence (more on that in a moment). These options provide a wide variety of terms, limitations, and costs. And they are generally cumulative and non-exclusive: When MLSs and brokers adopt a new data distribution channel, they usually leave the old ones in place as options. If a third party cannot get listings from a broker's MLS, it can go directly to the broker, the broker's parent firm, the broker's franchise, or to another distribution channel the broker uses, like CoreLogic's Trestle. Together, these options function as a true, diversified and competitive market for distribution services and content licenses. Choices are likely only to increase and costs to decrease with the standardization efforts that are being undertaken nationally.

The industry is embracing standards without regulatory pressure

The Real Estate Standards Organization (RESO) has led development of data standards. The National Association of REALTORS® (NAR) late in the 1990s, voluntarily and before it was entangled in litigation with the Department of Justice, planted the seeds of what would become RESO. Today, the organization has broad-based industry participation—with 777 members as of March 2018, including 129 technology companies and vendors, more than 550 MLSs and real estate associations, and more than 80 brokers.¹⁷ NAR has also made the adoption of RESO data standards mandatory for NAR-affiliated MLSs.¹⁸ As of March 2018, more than 600 MLSs, representing over 1.2 million MLS subscribers and a vast majority of U.S. listings, had certified compliance with the RESO data dictionary, and more than 400 had certified compliance with the RESO web API.

With the exception of VOW data uses, the aforementioned listing content distribution channels, uses, and standardization initiatives that are facilitated by or heavily supported by MLSs have occurred within the last 20 years and without government pressure or regulation. The MLS industry has a long history of supporting its participant brokers with numerous options for data distribution and exposure to consumers. In fact, with the exception of IDX and VOW, many of the above efforts have occurred or accelerated since 2008—what is now known as IDX began in the late 1990s. This shows the MLSs' desire to further cooperation and competition among participant brokers through data access options—again, all of which benefit consumers.

Some have argued for open access to listing content. Those arguments overlook the nature of listing data content, and core principles of control of listings.

Listing data content represents valuable intellectual property of brokers and others

Some have argued for open access to listing content. Those arguments overlook the nature of listing data content, and core principles for distribution of listings. Listing data content is not a *byproduct* of brokers' professional work. The marketing presentation of a listing—on the internet and in other forms—is a central product of a contemporary listing brokerage. It is a principal part of their service to the seller, and its form and content are essential to the development of a brokerage brand.¹⁹ The contention that brokers are not in the listing-data business but in the listing-selling business overlooks the fact that these things are intimately entwined in the contemporary market. The listing data and content are *an integral part* of the listing-selling business.

Other factors counsel caution in listings distribution. First and foremost, broker participants are on the hook for the use and content of their listings under state and federal law. For example, brokers must abide by state advertising rules and federal Fair Housing guidelines. Second, creative content within the listing, such as photos and narrative text, are subject to copyright, and brokers must ensure they have proper licenses for content they don't own, lest they infringe third-party copyrights. Brokerage-firm and MLS contracts with third-party data companies may further restrict use of factual and public-records content. Finally, uncontrolled distribution can result in third-party abuses. For example, MLSs have dealt with reports of fraudulent rental advertising, where a swindler takes a photo from a listing record on a consumer-facing site, puts it up with a rental listing on Craigslist or similar site, and then collects and absconds with a renter's deposit—usually on a property that is not even for rent.

Fully appreciating the MLS's role in listings distribution means understanding that the listing data content is an important part of the brokers' service and that listing data records themselves represent complex assemblages of legal rights and restrictions. As a result, the MLSs take the stance that listing brokers and sellers should decide where listing data content goes.

Broker and seller choice is critical to protect data content, listing brokers, and sellers

The principle that the seller and listing broker should choose where to send their listing data content is rooted in the MLSs' relationships with brokers, who in turn have relationships with consumers. It is good business for a company to leave decisions about customers' data in their hands; when that doesn't happen, as when Facebook released its customers' data in a way they did not expect, consumers *and* regulators get distressed.

MLSs support seller and listing broker decision-making about distribution

The principle of seller and listing broker decision-making about distribution is embodied in the rules of most U.S. MLSs, the vast majority of which are bound by policies of the National Association of REALTORS®. Even those MLSs that are not bound by NAR policy often pattern their policies on those of NAR. And at the heart of these policies is the stricture that sellers and their listing brokers cannot be required to allow distribution of their listing data content as a condition of participation in MLS. The only exception is for the core purpose of the MLS—facilitating the offer of cooperation and compensation among other participants—which means that sellers and listing brokers must allow MLSs to distribute their listings to other participants, and those participants are allowed to

distribute the listings to their buyer customers, either face-to-face or through a VOW. In all other cases, MLSs must have listing-broker permission, and brokers must have seller permission.

In real estate, this decision implicates not just the rights of the seller but also the rights of listing brokers. Brokers and their contractors (including photographers and others) create and own intellectual property, including copyrights in textual descriptions and photographs,²⁰ so even sellers don't have unrestricted control over data content related to listings of their own properties. This is quite different from a for-sale-by-owner seller putting a picture of her home that she took on Instagram—there, the seller is owner of the image copyright as its author; Instagram can accept the image as “user-generated content.”

The previous section identified risks when sellers and listing brokers do not make decisions about listing distribution. Some have argued that the brokers should not be in the position to make decisions regarding distributions by MLS, because the brokers do not “own” the data or that they have some kind of duty to the seller to make it widely and freely available. As noted in the previous paragraph, the ownership question is actually quite complex. And the extent to which seller and listing broker owe each other duties is a matter between them; strangers to them have no claims in the resolution. If a seller has a reason to send data content about her listing somewhere, she can take it up with the broker. Consumers unhappy with their brokers face low switching costs, and the broker across the street would like nothing better than to take a listing away from a competitor.

Independent broker and seller decision-making is pro-competitive

The choice of MLSs to leave listing-distribution decisions in the hands of sellers and listing brokers is not only a matter of good business and risk mitigation, it encourages competition and the types of decision-making that competition laws seek to increase. Requiring that sellers and listing brokers make distribution decisions maintains or increases the number of independent economic decision-makers in the market. Eroding seller and listing broker decision-making authority decreases broker and seller choice and increases consolidated decision-making power, which could harm brokers and their customers.

The number of choices for MLS-facilitated listing distribution is staggering compared to 10 years ago. There are thousands of public-facing options for brokers and sellers to consider where listing content is delivered via traditional websites, mobile applications, TV, social media, and emerging voice-controlled applications. Hundreds of thousands of brokerage offices exercise localized and independent economic decision-making when determining how to market and distribute listings. Those many brokerages and listing distribution choices mean consumers have many options; and options and data breed competition.

Despite these considerations, some have suggested there should be forced distribution by MLSs or brokers of listing data content.

Past efforts to regulate listing content distribution have had limited effectiveness

The only “regulatory” requirements relating to MLS listing distribution (other than the constraints of copyright law, of course) have been those imposed under the consent decree approximately 10 years ago between the DOJ and NAR relating to VOWs. The consent decree imposed several

requirements on NAR, including that it adopt a VOW policy verbatim, not change it without the consent of the government, and impose it on all NAR-affiliated MLSs.

Under the VOW policy, a broker operating a VOW has to meet detailed requirements to establish a brokerage relationship between the broker operating the VOW and the consumer receiving the brokerage services on the VOW.²¹ It is arguable that the VOW policy itself has not done much to encourage VOWs. For example, a policy NAR had previously adopted for VOWs would have permitted a new-model brokerage firm to do business much as it has under the consent decree.

But a pernicious result of the consent decree is that VOW policy has stood still for 10 years. From a time one year after Apple introduced the first iPhone until today, during which technology has vastly changed, MLSs were required by federal agency decree not to touch a policy that referred only to “websites.” Of course, NAR could have sought out the DOJ to negotiate revisions to the consent decree, but given the cost of the litigation in the first decade of the century, NAR can be excused for letting sleeping dogs lie.

While the VOW policy was frozen in the past, NAR and its affiliated MLSs continued to make MLS policies more open to new models of doing business—without any pressure from regulators. For example, NAR has voluntarily been making its rules for IDX—a program with fewer restrictions on displaying brokers than the VOW program—more flexible so that brokers can do the things the settlement requires without jumping through all the hoops to operate a VOW.²² Additionally, NAR has required MLSs to provide listing data content to brokers for creation of property valuations (outside of the VOW policy). And more recently, in Fall 2017, NAR adopted an “MLS of choice” policy, which would permit a “virtual” real estate broker hoping to operate across many real estate jurisdictions to pay MLS fees for a dramatically lower number of salespeople.²³ The policy goes into effect on July 1, 2018. In all these policy deliberations, leading members of CMLS played instrumental roles.

In short, government regulation of NAR-affiliated MLSs so far has done as much to stifle as to encourage innovation in listing distribution. Meanwhile, MLSs have of their own accord worked to revise policies and expand data distribution to be more open for new models of doing business. It is not clear how policy interventions now would improve the situation, and whether the costs of imposing them would be worth the results or the results would just be higher costs.²⁴ These concerns are certainly true with regard to proposals to force listing distribution.

Forced listing distribution would be misguided policy

Third parties who want listing data, the ones who don’t already have it, may support arguments that having some kind of open API, listing utility, or other free-for-all would benefit consumers.²⁵ But these arguments are mistaken in key respects.

First, having data doesn’t make one anticompetitive: “[T]he possession of large amounts of data, by itself, does not usually create a large barrier to entry. Even if it did, competition policy should not seek to create a level playing field for all companies at all times, especially when companies benefit from advantages that they created with their own resources and which others are free to emulate.”²⁶

Second, most folks find the latter part of the last quote intuitive: Listing data content is not freely available to third parties because they have done nothing to make listing brokers or sellers want to

share it. Confronted with the difficulty of offering something of value in exchange for listing data, some third parties throw their hands up and say the data should be *given* to them. If those parties want listing data, they should offer the listing broker or seller something to make sharing worthwhile. For example, consumers who want Mint.com to provide them services to track their income, assets, investments, and spending, willingly give Mint access to their financial data on banking and brokerage websites. Mint does not claim that *all* banks must turn over all consumers' financial information; it gets data only for those consumers who chose to exchange data for its services.

Third, forced listing distribution completely ignores that the listing is part of the brokerage services, the content within the listing is potentially subject to contractual and copyright restrictions, and the liability associated with distribution falls on the broker and, to a lesser extent, the seller. Forced listing distribution is comparable to saying that music publishers, who are in the music distribution business, should have to give their music to Spotify for free to lower its barriers to entry into the music distribution business.

Fourth, the creation of a mandatory "open API" or data "utility" would likely be unsatisfactory, because it would involve the creation of a bureaucracy that would have to coordinate the activities of not just some 600 MLSs, but hundreds of thousands of brokerage firms. The unintended consequence could likely be increased consolidation and less competition. Given the unclear benefits of such a solution, its failure of ever having been tested or proven anywhere, and its likely costs, MLSs cannot understand the motivation for it.

Fifth and finally, the ostensible reason for forcing sellers and listing brokers to make their data available against their wishes (or at least without their consent) is that it will promote market efficiency. Sadly, when third parties get listing data, they often do the very opposite: instead of *dis*intermediating, they *super*intermediate. Disintermediation is what makes the internet so disruptive—and valuable. For example, Orbitz and Expedia provide value to consumers in part by taking transaction mediators, like travel agents and even airline retail ticket desks, out of the transaction stream—they *disintermediate* those folks to provide a simpler more efficient transaction stream for the consumer. Superintermediators superimpose themselves onto existing transaction streams without disintermediating anyone else.

For example, there have been many real estate referral companies that have sought listing data in hopes of using it to get buyers signed up and then handing them off to local traditional brokers for service. The referral-broker-*cum*-technology-company charges the local broker actually providing services a hefty referral fee, sometimes as much as one-third of the local broker's commission. Of course, this does not result in any efficiency, and certainly provides no cost *savings* to pass on to the consumer.²⁷ It's not hard to see why listing brokers don't want to supply their listing data content to play into models like this. There are, of course, some successful superintermediary models with which brokers do willingly share their listing data content. For example, most brokers' listings are on Zillow, and it now collects in advertising fees from real estate brokers more than 1 of every 100 commission dollars the brokers earn.²⁸ Zillow is not "disrupting" the market by disintermediating brokers; as a superintermediator, it is dependent on the continued prosperity of those brokers for its revenues.

In short, the MLS industry offers this invitation to all technology companies: If you offer some advantage or incentive that causes the seller and listing broker to want their listing data content to go to you, we will be happy to be the conduit—that’s our job.²⁹

Proposed policy changes should leverage the pro-competitive nature of MLS

Brokers, technology companies, and MLSs do not need government help to get listing data distributed widely. They’ve already managed that. Some new entrants into the industry have met with profound success, including portals like Zillow (worth about \$10 billion in April 2018); “ibuyers” like Open Door (which has a \$2 billion value after its last venture capital round) and Knock (which has raised more than \$32 million in venture capital since 2016); and new-model brokerage and referral firms like Redfin (worth some \$2 billion in April 2018), Homelight (which received \$40 million venture capital in 2017), Zillow (acquired by Realogy in 2014), and eRealty (acquired by Prudential in 2004). If there is a problem successfully innovating in residential real estate, it’s difficult to see where, and it’s difficult to see how regulatory intervention will help.

On the other hand, there are some initiatives that could benefit consumers if the regulators intervened.

First, regulators could help by making public records more accessible. So far as we know, no state provides real-time, state-wide access to real property tax public-record data through an API. And many counties still try to make it hard to get data despite open records laws. Electronic access to those data sources through RESO standards could further strengthen the MLS and the competition it promotes.

Second, given that use of MLS is the *sine qua non* for listing exposure in a marketplace for cooperating brokers, which again, benefits consumers, efforts could be undertaken to better understand why some sellers and brokers are excluding listings from MLS. After all, if listings are excluded from the MLS on a widespread basis, the MLS might falter in one of its core consumer-centric functions—having a relatively complete database of listings.

Third, regulators may look to policies that impact technology generally, not just within the real estate industry. For example, the repeal of net-neutrality regulations could negatively impact competition in the real estate industry. As richly capitalized real estate tech companies become even larger, they may have the power to limit consumer access to listing content on alternative platforms at the ISP. It is not unrealistic to picture a future where the repeal of net-neutrality regulations impacts the data conduits the MLSs rely on to cultivate competition and provide a wide variety of choices for data distribution.

In discussions of these and any other possible policy interventions, the members of the Council of Multiple Listing Services stand ready to assist in analysis and deliberations. Our MLSs are *Making the Market Work*TM.

¹ According to consulting firm T3 Sixty, there are 634 MLSs in the U.S. as of this writing.

² The event summary description was as follows. “Technological innovation has made it cheaper, easier, and faster to buy and sell most products. However, the real estate industry has firmly resisted disruption, successfully lobbying for state laws banning commission rebates, preventing the public disclosure of residential sales prices, and requiring consumers to purchase real estate services that they may not want, as well as blocking third parties from accessing listing data. These practices have allowed the industry to preserve the long-standing fixed commissions for brokers even as home prices have climbed much faster than inflation.” (<https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj>) Additionally, the FTC-DOJ workshop was announced at and is occurring in the shadow of an Information Technology & Innovation Foundation (ITIF) event titled “Using Technology to Make Real Estate More Competitive,” which occurred on April 5, 2018. (<https://itif.org/events/2018/04/05/using-technology-make-real-estate-more-competitive>) That event was preceded by a November 6, 2017, ITIF report which suggested that antitrust regulators should investigate MLS data distribution policies and require brokers to provide open access to their real estate listings. Daniel Castro & Michael Steinberg, Center for Data Innovation, Information Technology & Innovation Foundation, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help* (November 2017) (available at <http://www2.datainnovation.org/2017-open-apis.pdf>).

³ See, e.g., *Reifert v. South Cent. Wisc. MLS Corp.*, 450 F.3d 312 (7th Cir. 2006); *Buyer’s Corner Realty, Inc. v. N. Ky. Ass’n of REALTORS*, 410 F. Supp. 2d 574 (E.D. Ky. 2006); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991).

⁴ No. 17-CV-11255, 2018 WL 1425952, at *2 (E.D. Mich. March 22, 2018).

⁵ *Id.*

⁶ The Internet Data Exchange (IDX) program permits a broker-participant of an MLS to display listings of other broker-participants on their websites for advertising purposes, unless the other broker-participants have opted out of the IDX program. For example, listings on EdinaRealty.com are not only those listed by Edina Realty, but also listings of other broker-participants of the MLS that have not opted-out of IDX. MLS rules govern display on a broker’s IDX site of other brokers’ listings. For NAR-affiliated MLSs, NAR provides a framework of rules in its HANDBOOK OF MULTIPLE LISTING POLICY 23–27 (30th ed. 2018). Since 2000 NAR policies have required that affiliated MLSs provide IDX listing data content to participating brokers. The NAR policy imposes requirements and limitations on MLSs, *id.* at 23–24, 26, but also allows MLSs some room for variation, *id.* at 26–27. A broker displaying IDX listings has a choice whether to ask visiting consumers to register to view data on the site; in other words, views of listings on the IDX may be completely anonymous, and the displaying broker is not presumed to have formed any type of agency or brokerage relationship with the consumer. The first IDX-type websites debuted around 1996–97 in the U.S. northwest. The Regional MLS of Minnesota popularized a model for regulating these displays under the name “Broker Reciprocity” in 1999–2000, and the NAR policy originally fairly closely followed the Minnesota model. Many of the MLSs not affiliated with NAR nevertheless adopt models for IDX that are similar to that in the NAR policies. Note that listing-broker consent is required for display of the broker’s listings in IDX, because advertising other brokers’ listings is not a core function of the MLS. Brokers may display IDX data on websites, in mobile apps, and via audio-controlled devices such as Alexa. *Id.* at 23.

⁷ A Virtual Office Website (VOW) is a “[broker]-participant’s Internet website, or a feature of a participant’s Internet website, 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.” NATIONAL ASSOCIATION OF REALTORS®, HANDBOOK OF MULTIPLE LISTING POLICY 40 (30th ed. 2018). Because the VOW is considered to be delivering brokerage services, one of the core purposes of MLS, no listing-broker consent is required for another broker to display the listing broker’s listings on a VOW, *id.* at 41, though a seller can opt out

of internet display of her listing, *id.* at . 42, an option few sellers take. Consequently, there is potentially at least slightly more listing data content available for display in a VOW than an IDX site. Note that before a broker can display listing data content in the VOW context to a consumer, they must form a broker-consumer relationship and meet several other requirements. *Id.* at 41–42. In the last 10 years, there has been some apparent convergence between IDX and VOWs. In the early 2000s, brokers were reluctant to ask consumers to create an account to search listings on IDX sites, fearing that consumers would leave rather than register. After Facebook’s public launch in 2006 and the advent of other social media platforms, consumers apparently became much more comfortable signing up. What’s more, advancements in broker IDX technology resulted in consumers having access to useful functions (like saving listings) but only if they registered. Meanwhile, the National Association of REALTORS® extended the range of data available for display on IDX sites to include, for example, sold listings.

⁸ In 2014 NAR adopted a policy to allow brokers participating in MLS to develop and deploy automated valuation models and tools. See NATIONAL ASSOCIATION OF REALTORS®, HANDBOOK OF MULTIPLE LISTING POLICY 21 (30th ed. 2018).

⁹ For example, as of April 2018, according to its Chief Strategy Officer, David Charron, Bright MLS on the eastern seaboard provides data for 15,000 distinct IDX websites of brokers and salespeople.

¹⁰ See note 8 regarding NAR policy on this.

¹¹ Perhaps the most well-known example is HAR.com, operated by Houston Association of REALTORS®. There are, however, dozens (and perhaps hundreds—there is no official count) of such sites. Many, including HAR, have their own mobile apps.

¹² Data as of April 2018. For current details, see ListHub’s website at <https://www.listhub.com/mls-list.html> and <https://www.listhub.com/publisher-list.html>.

¹³ Information about the project is available at <http://www.mlsgrid.com/>. News coverage appears at <https://www.inman.com/2018/04/06/mls-grid-launches-first-in-chicago-with-plans-to-expand-across-the-us/>.

¹⁴ Some brokers have unfortunately said some things about Upstream, suggesting it will provide a way for brokers as a cartel to control data flows to third parties. However, its organizers will be the first to acknowledge that it means to leave listing brokers in control, and it will not invite them to collude with each other about such decisions; and indeed, if they did so, they would probably be violating antitrust laws. Note that former DOJ lawyer David Kully, during ITIF’s session on April 5, described Upstream as “a solution in search of a problem.” In a sense, that may be true, because there are so many outlets for listing data. But if, as some folks think, data access is a problem, Upstream is another option for addressing it.

¹⁵ See the company’s information at <http://www.bridgeinteractive.com/mls-topic-pageretsly-platform/>

¹⁶ See information on Spark at <http://landing.sparkplatform.com/> and Trestle at <https://www.corelogic.com/products/trestle.aspx>.

¹⁷ As Rebecca Jensen, CEO of the MRED MLS stated: “We all watch the sausage being made, because we all have to eat it!” All statistics about RESO are from RESO’s management.

¹⁸ NATIONAL ASSOCIATION OF REALTORS®, HANDBOOK OF MULTIPLE LISTING POLICY 14 (30th ed. 2018).

¹⁹ Admittedly, not all brokers are equally focused on delivering a high-quality product in this regard, but many firms are very careful about the public face of their brands and services.

²⁰ For a fuller discussion of who owns what data content relating to listings, see BRIAN N. LARSON & MITCHELL A. SKINNER, REAL ESTATE LISTINGS & COPYRIGHT (2017). Most MLSs claim copyrights in the data

compilation within them, and some will take assignments of copyrights from brokerages (which have the option not to make them) in order to allow the MLS to enforce the copyrights against third parties.

²¹ NATIONAL ASSOCIATION OF REALTORS®, HANDBOOK OF MULTIPLE LISTING POLICY 41–42 (30th ed. 2018).

²² According to NAR: “For example, in 2014, NAR’s MLS rules were amended to authorize use of any MLS content for valuation purposes when servicing clients and customers, including online displays of property valuations known as AVMs. In 2015, NAR’s MLS rules were amended to require that non-confidential pending sale listing data be included in IDX data feeds and to eliminate any restrictions on participants’ display of pending listings. Also in 2015, the NAR MLS Committee approved a policy requiring MLSs to provide at least three years of sold data for display on participants’ IDX sites, and that policy was expanded last year to require MLSs to provide all sold data available as of 2012.” See <https://www.nar.realtor/breaking-down-the-2008-doj-nar-settlement-agreement>

²³ These are hardly the moves of an organization that wants to tighten things up after the NAR/DOJ consent decree expires.

²⁴ “The main impediment to more competition is often government. By imposing high regulatory and licensing costs, governments can substantially raise the fixed costs of entering a market, especially for smaller firms. Regulatory uncertainty or hostility can also deter competitors.” Joe Kennedy, Information Technology & Innovation Foundation, *The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown* 11 (March 2017) (available at <http://www2.itif.org/2017-data-competition.pdf>).

²⁵ Daniel Castro & Michael Steinberg, Center for Data Innovation, Information Technology & Innovation Foundation, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help* 2–3 (November 2017) (available at <http://www2.datainnovation.org/2017-open-apis.pdf>).

²⁶ Joe Kennedy, Information Technology & Innovation Foundation, *The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown* 7 (March 2017) (available at <http://www2.itif.org/2017-data-competition.pdf>). It’s interesting to note that ITIF refuses to disclose who funds it but acknowledges that funders include large technology and Internet companies. It’s interesting that in the same year, it published one report arguing that data monopolies of big Internet companies (its likely funders) should not raise antitrust concerns, while hundreds of thousands of independent economic decision makers, like real estate brokers and MLSs, should be forced into some kind of data syndicate, to benefit (surprise!) technology and Internet companies.

²⁷ Even where the technology company offers a rebate to a buyer, for example, the seller is still on the hook for the full commission, and listing brokers are unlikely to discount them further so long as they have to pay the full cooperative compensation to the buyer’s broker, a technology company, or both.

²⁸ See Zillow’s 10Q from the quarter ending September 20, 2017, <http://investors.zillowgroup.com/secfiling.cfm?filingID=1193125-17-335790>; transcript of Zillow’s 2017 Q4 earnings call (behind sign-in) - <https://edge.media-server.com/m6/p/e2n2x3nf>

²⁹ During the ITIF panel, a government lawyer expressed concern that perhaps sellers don’t know that their data can be sent places, and perhaps brokers don’t tell them. We don’t really have data to say whether that’s true or not—it’s just speculation at this point. But MLSs actually work to counter that in any event. For example, many MLSs have forms that sellers sign giving permission for data to go out, and other forms for sellers who want to withhold listings from MLS to know that they have the option to put it in. See, e.g., the “Notice of Change to Seller’s Internet Display Options Addendum to Listing Input Form” available at http://www.ntreis.net/documents/Forms_652009141525.pdf