

## Policy Consideration

Display of IDX information by real estate franchise organizations and real estate networks.

## Background Information

At the 2010 Annual Convention the Multiple Listing Issues and Policies Committee recommended, and the Board of Directors approved, amendment of the Internet Data Exchange (“IDX”) policy through the addition of the following provision:

*Participants may provide IDX information to their real estate franchise organizations (“franchisors”) to be indexed for display on franchisors’ websites. For purposes of this policy, “real estate franchisor” is defined as a company granting real estate brokerage franchises under the franchisor’s trademarks pursuant to a franchise disclosure document meeting applicable Federal trade Commission rules. Display of IDX information by franchisors is subject to the following requirements and limitations. Failure of a franchisor to comply with the following requirements and limitations can, at the discretion of the MLS, result in suspension or termination of the participant(s)’ authority to provide IDX information to the franchisor:*

- 1. Initial search results that provide minimal information (e.g. “thumbnails”) are exempt from MLS-required disclosures (e.g. listing firm, listing agent, source of information, notice that information is deemed reliable but is not guaranteed accurate) provided that a direct link to a detailed (“full view”) display that includes all required disclosures is provided.*
- 2. Consumers can link directly to the detailed (“full view”) display that complies with MLS disclosure/display rules of the source MLS.*
- 3. IDX information is not used for any unauthorized purpose.*
- 4. Inaccurate or incomplete information related to any listing is promptly corrected by the franchisor at the request of the source MLS.*
- 5. No advertising may appear on pages displaying IDX information.*
- 6. IDX listing information will not be modified, manipulated or permanently retained.*

Following publication of the amended IDX policy which became effective upon publication of the 2011 *Handbook on Multiple Listing Policy*, questions were raised about whether the policy should be further amended to permit display of IDX listings by real estate networks whose members are MLS Participants. Attached as Appendix 5A is March 28, 2011 correspondence from Leading Real Estate Companies of

the World proposing expansion of the IDX policy to permit display by real estate networks. Committee members will want to review that letter in preparation for the meeting. A representative of the Leading Real Estate Companies of the World has been invited to present their request to the Committee.

Attached as Appendix 5B is April 18, 2011 correspondence from HomeServices of America, Inc., asking that the amendments to the IDX policy adopted last November be repealed. Committee members will want to review that letter prior to the meeting. A representative of HomeServices of America has been invited to present their request to the Committee.

Attached as Appendix 5C is April 18, 2011 correspondence from The Realty Alliance asking that the amendments to the IDX policy adopted last November be repealed. Again, Committee members will want to review that letter in preparation for the meeting. The Realty Alliance has advised that a representative will be present to present their request to the Committee.

The consideration of the Committee is requested to the proposals discussed in Appendices 5A, 5B and 5C respectively.

**Action / Recommendation of the Committee**



**RECEIVED**

MAR 31 2011

**MEMBER POLICY**

March 28, 2011

Mr. Dale Stinton  
Chief Executive Officer  
NATIONAL ASSOCIATION OF REALTORS®  
430 North Michigan Avenue  
Chicago, IL 60611

Dear Dale:

Please accept this formal request to have NAR grant our brokerage network, Leading Real Estate Companies of the World® ("LeadingRE"), the same rights as national franchise organizations to index affiliates' IDX listings with their permission.

LeadingRE is a downtown Chicago-based international brokerage services network whose members compete directly with members of national franchise networks, albeit with a different business model. Our 500 U.S. affiliate brokerages represent 3,600 offices and 128,000 sales associates in this country alone, in addition to coverage in 30 other countries, bringing our total to 150,000 agents. Our company (legal name Reliance Relocation Services, Inc.) holds a broker's license and is a member of NAR. Just as our franchise competitors do, we have affiliates under contract to our organization who pay annual fees to receive diverse brokerage support services, including lead generation, technology systems and services, brand enhancement and marketing collateral, and a robust learning platform for agents and managers.

We are not a "virtual" organization or a loose amalgamation of independent brokerages. Rather, we are a privately held corporation owned by 35 of the largest residential brokerages in the country, with affiliate brokerages who consider LeadingRE to be their national/global network just as independently owned franchisee brokerages do with their national brands, and we operate national and global websites just at franchisors do.

Our company was formed in 1997 as the result of a consolidation of several networks (RELO®, Genesis, All Points) and 50 of the largest Cendant/HFS brokerages. Since that time, we have consistently been a well-capitalized, highly profitable enterprise even during this market downturn. Our organization – like franchisor corporations – is heavily invested in the success and competitive strength of our affiliate firms. We function much like a franchisor, with the principal difference being that our affiliates are all locally branded companies organized under the LeadingRE umbrella. In recent years, about 20 percent of our new affiliates are former franchisees who have elected to transition to a local brand and our franchise-comparable service offerings. In other words, LeadingRE competes directly with national franchise organizations, and because local brands resonate with consumers based on the evolution of Internet search and the preferences of the X and Y generations, we do so quite successfully.

*continued...*

Mr. Stinton  
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Our network represents a significant constituency of NAR, with the following credentials:

- Nearly \$250 billion in U.S. sales in 2009 (2010 figures are yet to be finalized), more than any single franchise brand.
- Six\* of the top ten brokerages in the country and 35 of the top 100 firms, with the highest sales production among the nation's top 500 companies – 27% of the total. These figures are from the third-party **REAL Trends** annual report. According to that report, our members are also the #1 market share ranked companies in 39 of the top 90 companies in the country, with our next competitor (Coldwell-Banker) holding that distinction in 22 markets.  
*\*Majority of Home Services companies, Long & Foster, Howard Hanna, Crye-Leike, Realty USA and Real Estate One.*
- Our affiliates are the #1 market share companies in 39 of the nation's top 90 markets, per **REAL Trends**, with our closest competitor being #1 in just 22 such markets.
- We are recognized as a national brokerage network alongside the franchises by **REAL Trends**, **Inman News**, and other industry media outlets.

We would be happy to provide references from any of our member firms, including shareholders as well as newer affiliates who were formerly long-time franchisees with the original BH&G/GMAC, Prudential, Century 21, and Coldwell-Banker.

LeadingRE operates several websites, including the premier luxury showcase, [LuxuryPortfolio.com](#), but this particular request relates to our all-price-points consumer search site, [RELOHomeSearch.com](#). If given the same rights as our franchisor colleagues, this is the site on which we would display IDX listings – with the approval of our affiliates. RHS features about 400,000 listings of our affiliate companies and operates as a portal to drive traffic to our member brokerage sites via 1) aggressive search engine optimization and 2) member-to-member website traffic channeled through RHS.

Collectively, LeadingRE affiliate websites attract over 100 million unique users annually, and RHS is the “connector” that unites those sites. Its purpose is no different than that of a national franchise site and, like theirs, would generate valuable exposure to all REALTOR® listings.

I have no doubt that the intent of NAR's ruling was not to discriminate or competitively disadvantage LeadingRE versus our franchisor competitors, but that is what the ruling as it stands effectively accomplishes. Our hope is that by being made aware of the “apples to apples” nature of the LeadingRE network vis à vis the franchise networks, NAR will extend this ruling to include Leading Real Estate Companies of the World<sup>®</sup>.


*continued...*

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Attached is background information on LeadingRE and a list of our affiliate brokerages, which include future NAR President Steve Brown of Irongate Realtors, and other past and present NAR contributors - Lennox Scott, Ebby Halliday, Bill Moore, Merle Whitehead, Helen Hanna Casey, Ron Peltier, Nestor Weigand, Joe Aveni, and many more.

Dale, we would be happy to meet with you and any other appropriate NAR representatives at your offices or ours or at the NAR mid-year meeting in Washington to further explain our position and provide any other pertinent information.

Thank you very much for your consideration, and I look forward to hearing from you.

Sincerely,  


Pamela J. O'Connor  
President/CEO

cc: Ron Phipps, 2011 NAR President  
Steve Brown, Irongate Realtors  
William Watson, Watson Realty, FL (Chairman)\*  
Robert Sibcy, Sibcy Cline, OH (Vice Chairman)\*  
Pat Riley, Allen Tate Company, NC (Secretary)\*  
Jeff Detwiler, Long & Foster, VA (Treasurer)\*  
Stephen Baird, Baird & Warner, IL\*  
Harold Crye, Crye-Leike, TN (Past Chairman)\*  
Dan Elsea, Real Estate One, MI\*  
Joe Horning, Shorewest Realtor, WI\*  
Christopher Meyers, Houlihan Lawrence, NY\*  
Ronald Peltier, HomeServices of America, MN\*  
Michael Robinson, Weichert Realtors, NJ\*  
Michael Saunders, Michael Saunders & Co., FL\*  
*\* LeadingRE Board of Directors*

HomeServices of America, Inc.

A Berkshire Hathaway Affiliate

**RECEIVED**

APR 19 2011

**MEMBER POLICY**

April 18, 2011

Mr. Ron Phipps  
2011 President  
National Association of Realtors  
430 N Michigan Avenue  
Chicago, IL 60611

RE: Franchisor IDX Rule Reconsideration

Dear Mr. Phipps:

HomeServices of America, Inc. respectfully requests that the Committee reconsider its adoption of the rule "Display of IDX Information by Real Estate Franchise Organizations" (the "Franchisor IDX Rule"). The effect of the Franchisor IDX Rule is far reaching, has unintended consequences for the industry, and creates serious liability issues for all parties.

**A. The Franchisor Rule Raises Significant Antitrust Concerns**

**1. The Franchisor IDX Rule May Impermissibly Restrain Competition**

In the United States of America vs. National Association of Realtors, the United States government alleged that NAR had engaged in anti-competitive behavior violating the Sherman Act by denying IDX feeds to those real estate brokers who operated virtual office websites ("VOWs"). It is difficult to imagine a more corollary set of facts than the one presented by the passage of a mandatory Franchisor IDX Rule which arbitrarily denies national IDX feeds to all competitors in the market place except for a favored two.

The stated basis for denying IDX data feeds to all other competitors is that the favored two operate under franchise documents in compliance with the rules of the Federal Trade Commission and have franchisees in each of the local MLS's. Franchisors are not real estate brokers. They do not hold the requisite real estate licenses, engage in providing brokerage services to consumers, and are not bound by the same state advertising law prohibitions as real estate licensees. Their business is franchising like McDonald's business is franchising.

Because franchisors are not real estate licensees and do not engage in the business of real estate brokerage, they are no more entitled to receive IDX data feeds than

McDonald's is. There is clearly no reason to exclude those competitors that actively own real estate brokerage companies in a parent-subsidary relationship or voluntary associations of real estate brokers, such as Leading Real Estate Companies of the World, The Realty Alliance, and others, from access to national IDX data feeds. That NAR would choose to deny IDX data feeds to real estate brokerage associations that are similarly situated to franchisors simply because they operate under FTC requirements, like McDonald's does, is a bizarre and arbitrary standard.

NAR has engaged in behavior that is arbitrary and anti-competitive. Either the Franchisor IDX Rule must be changed, to give database access to all competitors, or the Franchisor IDX Rule must be repealed to correct this egregious error.

2. The Franchisor IDX Rule Raises Significant Monopolization And Concentration of Market Power Issues

Until the time of the passage of the Franchisor IDX Rule, no single aggregator of listing data was able to aggregate the listing data in a single, national collection point. The dispersion of listing data across the market place and the need to obtain the consent and cooperation of each real estate broker responsible for the content of the listing data under various state laws was a substantial barrier to the concentration of market power in a single, national MLS website, especially given the local nature of real estate markets.

The passage of the Franchisor IDX Rule effectively removed this barrier to the concentration of market power. No longer is it necessary to obtain the consent or cooperation of the authors and owners of the listing data, the real estate brokers and agents, who are responsible for its supervision. By allowing two, potentially market-dominant franchisors to obtain the entire IDX feed for any particular MLS upon request, the consent and cooperation of each real estate broker to the collection of its data is no longer necessary. Rather, two franchisors can aggregate listing data by making a single request for it to each of the MLS's in which they have a franchisee.

It is our expectation that this request will ultimately take the form of a provision in their franchise agreements by which the franchisee consents to the franchisor's receipt of the franchisee's IDX feed. Franchise agreements will become IDX aggregation agreements. This will allow two, chosen franchisors who have a franchisee in every MLS market in the country to create a national MLS database by aggregating those listing data feeds and to develop a unique, NAR-legislated competitive advantage relating thereto.

By partnering with a technology provider, perhaps for example Yahoo! Real Estate, there will be a concentration of market power as those two franchisors which have the ability to aggregate all 900+ MLS's create the most searchable national MLS database in the country. A national MLS operated by a national

franchisor will not even be required to identify itself as the website of the franchisor because the Franchisor IDX Rule does not require it, further franchisors as non-licensees are not subject to the state law advertising requirements that real estate brokers and agents are subject to in every state in the nation. This gives one or two competitors in the market place that ability to be the next "AMAZON.COM," the single, national MLS website on the Internet while excluding their competitors. With more than 78% of consumers starting their search for a home on the Internet, according to NAR statistics, the Franchisor IDX Rule creates the potential for the concentration of market power heretofore unobtainable by any single competitor and raises the specter of potential NAR-legislated monopoly power.

Broadening this rule to include parent-subsidiary relationships or trade associations will not avoid the concentration of market power as long as access to local MLS IDX data feeds is governed by the arbitrary standard set forth in the Franchisor IDX Rule. Except for one or two competitors in the market place, no other competitor has the market presence to aggregate more than ten percent (10%) of national IDX data feeds. The only alternative available to avoid an unacceptable concentration of market power is to allow all potential competitors to access all MLS's in the country irrespective of whether they have a franchise brand or company in the local MLS. As set forth above, therefore, if NAR continues to offer national access to a select couple of competitors in the market place, then it must expand national IDX feed access to all competitors in the market place.

It is one thing for a competitor to achieve market power on its own merit, it is quite another when an organization such as NAR, which ostensibly exists to benefit its members, colludes with non-members to impose an arbitrary mandatory rule upon its membership to force the delivery of member data to non-members without their consent thereby legislating a concentration of competitive advantage and, presumably, market power. No other single change in the industry has so facilitated the concentration of market power as the Franchisor IDX Rule has. As such, it raises significant antitrust concerns.

Accordingly, the Franchisor IDX Rule must be repealed or expanded to allow all competitors access to national IDX feeds without arbitrary restrictions that favor two competitors against all others.

## **B. Copyright Liability**

NAR has created liability for itself and its MLS's in passing a mandatory rule that requires MLS's to violate copyright law on pain of losing NAR-provided insurance coverage. Under the federal Copyright Act of 1976, individual real estate brokers are the authors and the owners of the listing content they create, including but not limited to listing photographs. Some real estate brokers currently register their photographic database with the United States Patent and Trademark Office perfecting their rights in

this data set. Other real estate brokers have entered into licensing agreements with their MLS's and the other third parties that display listing data to protect their listing data from misuse and unauthorized distribution. Some of these agreements require the real estate broker's own local MLS to take all necessary action to prevent or stop any infringing activity by third parties. These agreements not only protect the intellectual property rights of real estate brokers in their listing data, but create privity of contract with those third parties that display their listing data. It is this privity of contract that enables real estate brokers to comply with state advertising laws.

NAR's mandated Franchisor IDX Rule creates liability for local MLS's by mandating that they violate the intellectual property rights of their members and, in many cases, that they breach their contractual obligations with their members on pain of losing their NAR-provided insurance coverage if they are not complicit with this illegal mandate.

NAR does not have the legal right or authority to vitiate federal copyright law by fiat. Where such rules violate federal or state law, they are illegal and unenforceable. Any MLS that is complicit in pirating protected listing data in violation of the federal copyright law creates potential legal liability under the Copyright Act for such violations.

The Franchisor IDX Rule must be repealed as illegal and unenforceable.

### **C. The Franchisor IDX Rule Violates State Laws**

Although NAR may choose to exempt "Initial search results that provide minimal information" from required MLS disclosures, such search results are not exempt from state advertising law requirements as the very brief survey of state advertising law set forth below makes abundantly clear. NAR, it seems, has overlooked that real estate brokers and agents are responsible for actively supervising their advertising materials on pain of license suspension or revocation.

As it stands, real estate agents and brokers currently make a conscious choice as to where to send their listing data for advertising purposes. Those choices, when made, come with extensive agreements concerning the advertisers' use of the listing data. Moreover, those agreements create privity of contract among real estate agents, brokers and their advertisers in the event that the advertisers fail to adhere to the terms of the contract. This allows real estate agents and brokers to take legal action against advertisers when necessary to protect the use of the listing data and ensure compliance with their state law obligations.

NAR in passing the Franchisor IDX Rule has forgotten, or is ignorant of, the legal compliance requirements placed on real estate agents and brokers when advertising listings. This oversight creates significant legal liability for real estate agents and brokers. Whereas prior to the passage of the Franchisor IDX Rule real estate agents and brokers designated the recipients of their listing data, under the Franchisor IDX

Rule a local MLS does not even have to go so far as to notify real estate agents and brokers where their listing data has been sent. How are real estate agents and brokers to meet their state law requirement to supervise their listing data when they do not even know where or when it is being sent?

The Franchisor IDX Rule provides,

*Initial search results that provide minimal information (e.g., "thumbnails") are exempt from MLS-required disclosures (e.g., listing firm, listing agent, source of information, notice that information is deemed reliable but not guaranteed accurate) provided that a direct link to a detailed ("full view") display that includes all required disclosure is provided. (Emphasis added)*

State laws require,

All advertisements placed by a broker must indicate that the advertiser is a broker or give the name of the broker and his telephone number.

**NEW YORK CODE, RULES AND REGULATIONS §175.25**

A licensee shall identify himself or herself as either a broker or an agent salesperson in any advertising for the purchase, sale, lease, exchange, mortgaging, transfer, or other disposition of real property, whether the advertising pertains to the licensee's own property or the property of others.

**MINN. STAT. §82.69**

No advertising, whether in print, via the Internet, or through any other media, shall be fraudulent, deceptive, inherently misleading, or proven to be misleading in practice. ...

No blind advertisements may be used by any licensee, in any media, except as provided for in this Section.

"Blind advertisement" means any real estate advertisement that does not include the sponsoring broker's business name and that is used by any licensee regarding the sale or lease of real estate, including his or her own, licensed activities, or the hiring of any licensee under this Act.

**ILLINOIS REAL ESTATE LICENSURE ACT OF 2000 §§10-30, 1-10**

"Advertising" means all forms of representation, promotion and solicitation disseminated in any manner and by any means of communication to consumers for any purpose related to licensed real estate activity. *All advertising must be under the direct supervision of the principal broker or supervising broker, in the name of the firm ... The firm's licensed name must be clearly and legibly displayed on all advertising.*

All online listings advertised must be kept current and consistent as follows:

Online listing information must be consistent with the property description and actual status of the listing. The licensee shall update in a timely manner material changes to the listing status authorized by the seller or property description when the licensee controls the online site.

The licensee shall make timely written requests for updates reflecting material changes to the listing status or property descriptions when a third party online listing service controls the website displaying the listing information.

All listing information shall indicate in a readily visible manner the date that the listing information shown was last updated.

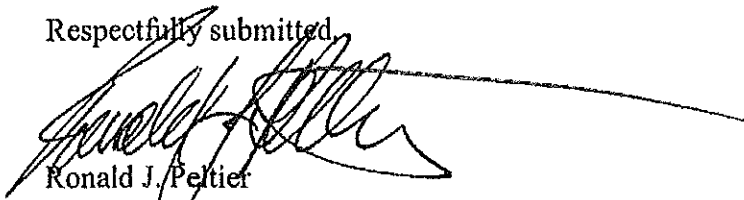
**18 VIRGINIA ADMINISTRATIVE CODE §135-20-190** (emphasis added)

Unless otherwise set forth herein, subsections (b) through (o) below shall apply to all categories of advertising including all publications, radio or television broadcasts, all electronic media including E-mail and the Internet, business stationery, business cards, business and legal forms and documents, and signs and billboards. ... All advertising by a salesperson or broker-salesperson shall include the name in which they are licensed and the regular business name of the individual, partnership, firm or corporate broker through whom they are licensed. ... With regard to information on listings disseminated through the Internet by licensees other than the listing broker, listing brokers shall be deemed to have given the consent referred to in (n) above with the knowledge of the owner where: A written listing agreement contains the seller's authorization for information on the listing to be posted on the website of the broker, or of a multiple listing service to which the broker belongs, or of another party to which the broker or such an MLS submits information on listings; and the website on which the listing information shall initially appear has instituted no measures to prevent other parties with websites from utilizing an electronic link to enable consumers to view that information while remaining in the website of the other party.

**NEW JERSEY ADMINISTRATIVE CODE §11:5-6.1**

The Franchisor IDX Rule creates significant legal liability for real estate agents and brokers under the various state laws regulating the advertising of listings by disregarding those laws and mandating the forced distribution of regulated listing data to un-licensed advertisers that have no privity of contract with or obligation to the real estate agents and brokers who are personally liable for its use. The Franchisor IDX Rule must be repealed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald J. Peltier", is written over a horizontal line. The signature is stylized and cursive.

Ronald J. Peltier  
Chairman and Chief Executive Officer  
HomeServices of America, Inc.

**RECEIVED**

APR 19 2011

**MEMBER POLICY**

18 April 2011

Pat Callan, Chairman  
Multiple Listing Issues and Policies Committee  
National Association of Realtors  
430 North Michigan Avenue  
Chicago, Illinois 60611

Dear Pat,

The Realty Alliance represents more than 60 of the largest residential real estate companies in the United States, comprising close to 100,000 licensed salespeople, all of whom are members of the National Association of Realtors and participants in literally hundreds of MLSs. Our shared membership has an important stake in the policies related to MLS policy and Internet Data Exchange (IDX). Close to one-third of our member firms are franchises, so our perspective on franchisor issues is informed and balanced.

The Board of Directors of The Realty Alliance formally requests that the National Association of Realtors at its earliest opportunity repeal the recent change in policy, which allows real estate franchise organizations to receive and display IDX information.

This policy change would be inconsistently applied across the United States, as it conflicts with various state real estate laws and regulations. Regulatory agencies, legislatures and governors in several states – all of whom are charged with protecting the public interest – have enacted laws and rules that limit certain activities to those who are licensed to practice real estate. This provides a level of accountability necessary for consumer protection and appropriate regulation of the industry. Participants in MLSs have been required to be licensed real estate practitioners for similar reasons. Allowing non-participants to display IDX data puts real estate licensees in violation of state laws/regulations that require their control over advertising and certain required disclosures. The whole idea of allowing a non-participant to use/display data goes against the core concept of IDX. Opening up IDX to any entity that is not actively engaged in local real estate business violates foundational IDX principles and creates a very dangerous precedent. This policy change will bring significant legal challenges for NAR.

The policy creates a widely different standard for non-participants and participants. Participants in MLSs fall under strict guides for data quality and data usage, with serious penalties for failure to comply. Participants pay significant fees and contribute time and effort to sustain the infrastructure and systems necessary to ensure the standard is met. Under the new policy, the franchisors' sole penalty for improper usage and/or display of the data would be the loss for some period of time of the ability to receive and display the data. In addition, each MLS receives the added burden on its systems and infrastructure to monitor franchisor use of data and to decide appropriate penalties for misuse. Participants and their MLSs take on the time and expense to secure and curate the data – as well as the liability – and non-participants gain use of the data with no responsibility for the cost of the process and without exposure to the kind of penalties participants risk in their own handling of the data.

This policy change makes it impossible for brokers to manage liabilities with respect to infringement claims and breach of contract claims between the broker and the seller regarding the protection of proprietary property information.

The policy violates any agreements between participants and MLSs that provide assurances that listing information will be safe, secure and not sent to any third-party or non-participant without the broker's permission.

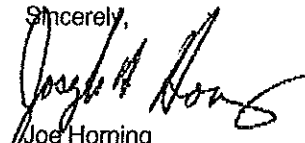
The policy arbitrarily discriminates against all non-participants other than real estate franchisors. Failure to adequately justify this one exemption to participant requirements places all MLS policy in jeopardy of action by federal agencies that police anti-competitive activities and punish restraint of trade. Even if a departure from the time-honored rule of participant-only use could be properly rationalized, limiting the exemption to real estate franchisors cannot. This allowance also opens the door to the creation of "straw broker" franchisors. Similar loopholes have been exploited in the past, and this one is far too tempting for sham franchisors to resist – entities who can secure qualifying status with the Federal Trade Commission, but not be *bona fide* franchisors in the spirit of this new policy.

This policy change likely forces many MLSs to violate copyright law and violate their participants' intellectual property rights. Brokers own their listing content. Compliance with the new policy often would make the MLS complicit in mishandling of protected listing data under the Copyright Act of 1976.

In summary, we firmly believe the intent to increase the availability of listing data does not outweigh the many legal issues raised with the policy change. We believe the policy also is unfair and anticompetitive. In addition, we believe the market consequences of this policy are not favorable to the participants who bear the burden of creating and curating the content. We also believe the MLSs charged with implementing this new policy bear unreasonable liability and undue burden. We believe that, after a deeper study of the implications and unintended consequences, your committee should repeal the policy change immediately and restrict IDX information display to participants in MLSs.

Thank you in advance for your consideration of this matter on your official agenda at the committee's next meeting. Please contact me with any questions. Member representatives of The Realty Alliance can make themselves available to participate in your meeting to support the committee's work in addressing the grave concerns raised by this new policy.

Sincerely,



Joe Homing  
Chairman of the Board