



14 July 2005

Ms. Whitney A. Clark
Department of State
Counsel's Office
41 State Street
Albany, NY 12231

Re: Proposed Rule Making for Apartment
Information Vendor Law

Dear Ms. Clark,

Thank you for taking time to speak with me last week. As I explained in our discussion, MLX, an open Multiple Listing Service that has been adversely impacted by the Apartment Information Vendor ("AIV") law for over a decade, serves as a case study for the shortcomings of that law: not only have consumers have been deprived of efficient, cost saving real estate service, in the hands of protectionist regulators, the overly broad AIV law is a weapon of selective enforcement against honest, innovative entrepreneurs.

BACKGROUND

MLX, a licensed real estate broker, refused to obtain an Apartment Information Vendor license because we believed this antiquated law did not pertain to our business. We knew that taking the AIV license would both have denied consumers access to information they wanted and exposed our company to potential fines of millions of dollars for the ten thousand "violations" per day attributable to our pro-consumer online partnerships with Yahoo, Homestore, and other organizations.

Although former Secretary of State Sandy Treadwell initially supported our position, in 1998 MLX was forced into a hearing in which an Administrative Law Judge determined that MLX was an "unlicensed AIV" and revoked the real estate broker's license of MLX's CEO. No consumer-protection issue was at stake: MLX had no consumer complaints and was operating a *de facto* Multiple Listing Service for 3,000 Manhattan brokers.

It is my belief that MLX, whose listings of available rental apartments make up only a small part of its multifaceted services, is no more an Apartment Information Vendor than a baker who sells a cake is a flour or egg vendor.



Even though we continue to maintain that the Real Property Law and not the AIV law should apply to our business, this ALJ's erroneous finding impels us to offer comments on the Proposed Rule Making.

COMMENTS ON THE PROPOSED RULE MAKING

In response to your publication on 15 June 2005 of the Proposed Rule Making to amend 19 NYCRR § 190.1, § 190.2, §190.3, § 190.6 and § 190.7 and repeal 10 NYCRR § 190.4 and § 190.8 of the Apartment Information Vendor law, we believe that the Proposed Rule Making:

- A. Fails to benefit consumers because 1) it does not address how consumers are using the Internet or how they want to use online apartment services, and 2) it hampers innovation that benefits consumers;
- B. Will not effectively regulate Apartment Information Vendors;
- C. Does not recognize that many "online apartment information" services offer better protection to consumers than ever contemplated by the AIV rules and regulations;
- D. Is inconsistent in its treatment of different kinds of providers;
- E. Validates our complaint that the DOS has selectively enforced the AIV law against MLX and its CEO, LaLa Wang.

A. The Proposed Rule Making fails to benefit consumers.

Consumers who are looking for a home to rent or buy turn to a wide variety of online services, operating under an equally wide variety of business models. Only a few of them -- those that charge consumers "advance fees" for providing "information concerning location and availability of property" for rent -- can even be argued to fall under the New York AIV law. Still, in seeking to remedy the antiquated AIV law, the DOS should understand the variety of online services enjoyed by consumers. For example:

- Aggregator services such as realtor.com and apartmentguide.com are offered free to home seekers and charge a listing fee to brokers and owners.
- Forsalebyowner.com is offered free to buyers and charges a listing fee to homeowners.
- Rent.com, recently purchased by eBay, does not charge anyone unless a rental transaction takes place. A successful rental triggers both a \$300 fee to the landlord who listed the apartment and a \$100 rebate to the renter.
- Classified bulletin boards, such as Craigslist.org and Plugstar.com or matching services, such as Matchifieds.com, are free to all parties.
- The classified ads on newspaper websites are free to home seekers and charge a listing fee to landlords and brokers.
- Brokerage firms' websites are free for renters and buyers to browse; clients must work through a commissioned broker to visit and rent or buy a property.



While most of these websites are operated by standard, full-service brokerages, discount brokerages such as Ziprealty.com and Foxtons.com offer seller commissions as low as 2%.

- Flat-fee MLS services offer sellers the opportunity to list their properties for a nominal flat fee – usually \$250 - \$600, plus an additional 3% if the listing is distributed to the brokerage community.
- Rapidly growing franchises such as Helpusell.com and Assist2sell.com offer fee-for-service models in which consumers choose from a menu of services.
- Lead-generation websites such as Homegain.com or Justlisted.com are free to home seekers and charge brokers to participate.
- Research tools such as Propertyshark.com or NYForeclosure.com charge users for information.
- AOL.com bundles access to property listings with its broadband service.
- Sublet.com and rent-direct.com are free to advertisers and charge fees to apartment seekers.

Even companies that may appear to offer the same service may have different missions and different business models. For example, Pepsi and Gatorade may both appear to be drinkable liquids. But Pepsi is a thirst quenching soft drink whereas Gatorade is a vehicle for delivering electrolytes. With respect to online apartment services, MLX.com (formerly a licensed real estate broker) and Rent-direct.com (a licensed AIV that, by its own admission, does not operate in accordance with AIV regulations) both offer consumers free Guest and premium paid accounts which enable a renter to create a search profile and view matching apartments. Both MLX and Rent-Direct offer clients the ability to receive real-time email alerts of new matching apartments.

But whereas MLX operates more as a multi-directional platform with renters, buyers, Sellers, landlords and brokers who can list properties or “Apartment Wanted” ads and search for properties or apartment seekers, and where MLX formerly, as a licensed broker, offered services such as negotiating commissions and on occasions showing apartments, Rent-Direct.com offers only no-fee landlord listings. For MLX, formerly a licensed real estate broker, “listing information” was just one component of many other brokerage services with a premium subscription valid until the customer finds an apartment; for Rent-Direct, which considers itself an information service with a finite 60 day term and no obligation to find a subscriber an apartment, “listing information” is the entire scope of service.

Why are there so many different business models? Apartment hunters who use online services are no different from any other shoppers. They want the combination of information, functionality, service, and price that is optimal for them. Different consumers place different values on:

- 24/7 access and on-demand, real-time results
- Dynamic, updated property listings

- Rich detail including photos, floorplans, virtual tours, measurements, neighborhood information, landlord requirements, and rental tips
- Functionality including customization, saving favorites, and navigation flexibility
- Email alerts about new listings that match their requirements
- Online feedback and live customer service; and
- Competitive pricing.

NYDOS treats the regulation of online apartment services as if only one flavor of service were available; in reality, consumers' sophisticated demands have given rise to an entire spectrum—"sphere" might be a better term—of online apartment services.

Enacted in 1975 and amended in 1980, the AIV law was designed to regulate the sale of lists of information about apartments for rent—lists provided by one-dimensional, low-tech companies. Today's renters are unlikely to be satisfied with yesterday's one-size-fits-all "list." In fact, today's apartment hunter doesn't just want "listing information." He wants *richness, functionality, service, and choice*.

The AIV law regulates "information concerning location and availability of real property" for rent. Yet most online apartment services offer much more than "information concerning location and availability of real property" for rent. They offer a variety of services and features that add value for consumers. The AIV law hampers the ability of honest, innovative businesses to deliver services that help consumers find the most suitable apartments at the lowest cost.

The regulation of online apartment services needs to be addressed from the ground up, not by tinkering with outdated rules. It is important to understand the full range of available online services, from "information only" to discount and full-service real estate brokers, and the range of payment models. If the DOS expects to benefit consumers, the AIV law should be reviewed along with the Real Property Law.

B. The Proposed Rule Making will not effectively regulate apartment information vendors.

The Proposed Rule Making states that DOS's purpose for amending the AIV regulations is to encourage unlicensed AIVs to obtain AIV licenses. DOS states that all but a small percentage of AIVs are unlicensed because the existing regulations are not appropriate for online vendors. While we commend DOS for proposing to repeal some of the more onerous regulations, we believe that even the amended regulations would be extremely impractical and inappropriate for online vendors to follow.

If this Proposed Rule Making is adopted, online service providers will continue to face the same option they have faced for years: they can remain unlicensed, or they can apply



for licenses and then violate every AIV term on a daily basis. Whatever they decide, DOS will have failed to achieve its goal of bringing AIVs into the regulatory fold.

Today, the AIV law is so widely disregarded, even by licensed vendors, that DOS does not even attempt to enforce the vast majority of violations. It is hard to imagine that the situation will be any different with these proposed regulations.

Following is a brief summary of the reasons the proposed regulations are still impractical:

1. Section 190.1(a) and 190.2 Fees to be paid and Escrow

Section 190.1 (a) While eliminating the sequential number provision for contracts, the new section Section 190.1 (a) will still require that

“NO FEE IS TO BE PAID WHEN THIS CONTRACT IS SIGNED. THE CUSTOMER MUST SIGN AND RECEIVE A SEPARATE ESCROW AGREEMENT BEFORE AND ADVANCE FEE MAY BY COLLECTED.”

The requirement that AIVs create escrow agreements and escrow monies is burdensome, expensive, and unrealistic. To the best of my knowledge, no licensed AIV escrows money today, and none will do so in the future. What is the purpose of the escrow account? To date, the DOS has refused to enforce the escrow requirement of any licensed AIV. Why will licensed AIVs abide by this same rule after the adoption of Proposed Rules?

2. Section 190.1(a): List of apartments

The contract must contain a list of apartments that meet the customer’s specifications.

MLX.com and many other online services do not provide static lists of apartments -- that is the value of the service. Rather, they facilitate a customer’s iterative process of finding out about new apartments coming on the market that meet their requirements, and even let them refine their requirements if, for example, they decide to expand their searches to additional neighborhoods or higher-priced apartments. Flexible, up-to-date information is obviously much more valuable to consumers than a one-time list would be, but is illegal under this Proposed Rule Making.

3. Section 190.1(a): Fees

Section 3 notes that the AIV’s fee is “payable when the customer rents or lease an apartment as a result of information supplied by the vendor.” But, again, all licensed AIVs collect advance fees *irrespective* of a customer’s renting an apartment or not. This practice of licensed AIVs will not change after adoption of the Proposed Rules.

The AIV law requires that the fee charged by AIVs may not exceed “one month’s rent” on the apartment leased by the subscriber -- while every licensed AIV charges fees far below the cost of one month’s rent -- typically less than 7% of one month’s rent. The fee charged by online services today -- for providing rich content, and much higher functionality and customer service -- is *not the same fee* referred to by the antiquated AIV law. Could it be that, in fact, the *service* offered by today’s “AIVs,” in fact, is not the same service which should be regulated under the 1975 AIV law?

4. Section 190.1(b): Electronic signatures

This section calls for “actual or electronic” signatures on contracts—a gesture toward making it possible to operate a business online. However, even the tech-savvy can find electronic signatures daunting. Have NYDOS employees ever tried to set up an electronic signature? More likely, when they subscribe to an online service, they enter their contact and payment information, click a button stating that they accept the vendor’s terms, and then click on “submit order.” Consumers encountering a requirement to obtain an electronic signature on an e-commerce website would simply abandon the site and find an online service that offered both convenience and security.

5. Section 190.2: Refunds

This section gives the customer a right to obtain a refund within ten days if the information supplied does not lead to the customer’s renting an apartment. Licensed AIVs today generally create fee structures based upon days of service in order to circumvent the refund policy, and can be expected to continue to do so in the future.

Why should the AIV’s fee be contingent upon renting an apartment? The fact that the consumer does not rent an apartment through the vendor does not mean that the vendor’s service was not valuable. Why should an AIV fee be refundable? Newspapers do not reimburse those who buy copies of their publications.

As we explained above, many different business models exist in the online world, and requiring vendors to conform to a particular model deprives businesses from being able to invest in their businesses to differentiate their services and deprives consumers of choice. In fact, every *licensed* AIV has crafted fee policies to *circumvent* the refund policy. And the NYDOS looks the other way.

The \$15 allowance for administrative expenses is based upon the 1975 Apartment Referral Agency law. How does the DOS justify raising its AIV application fee from \$25 in 1975 to \$450 in 2005 while permitting AIVs to only retain \$15 of any advance fee. By refusing to enforce compliance with

this refund policy, the DOS has conveyed its own skepticism about the AIV's rules on the books.

More fundamentally, we believe that free markets should determine what businesses charge. Businesses should decide what they want their refund policies to be. Consumers will gravitate to services that, in their opinions, give the best value for the cost. Many unregulated businesses have liberal refund policies, while others don't -- showing that different consumers have different preferences regarding refunds.

6. Section 190.3: Recordkeeping

This section requires vendors to maintain three years' worth of contracts and escrow agreements, on and off site. Even with the proposed amendments, this section is so detailed that it is almost guaranteed to be violated. All reputable businesses create record retention policies that balance the need for access against the need for practicality. Rather than micromanaging vendors' record retention, why not just require them to follow prevailing standards?

7. Section 190.5: Verification of information

This section requires AIVs to verify the availability of all apartments at the time of referral.

Any online service that wants to remain in business verifies its listings on an ongoing basis. However, it is simply not possible to verify listings "at the time of referral," since there is no single "referral event" analogous to handing over a paper listing. For an online vendor to try to comply with this section, it would have to shut down its service during nights, weekends, and holidays, when its offices are closed -- contrary to the expectation of customers who demand 24/7 access to our information and services.

8. The Apartment Information Vendor Application

Perhaps most damning to the falsity of the AIV law is the NYDOS's change in the Affirmation required by the AIV Applicant. In April 1997, an AIV Applicant affirmed:

"I subscribe and affirm, under the penalties of perjury, that the statement made in this application (including statements made in any accompanying papers) have been examined by my and to the best of my knowledge and belief are true and correct. I certify that, if the license applied for is issued, I will act exclusively as an apartment information vendor as defined by Section 446-a(2) of the Real Property Law."

By January, 2001, the AIV Applicant Affirmation no longer required an AIV to "act" as an AIV.



“I affirm, under the penalties of perjury, that the statements made in this application are true and correct. I further affirm that I have read and understand the provisions of Section 446-a(2) of the Real Property Law and the rules and regulations promulgated thereunder.”

Under the Proposed Rule Making, *every licensed* Apartment Information Vendor will still be in violation of the AIV law and will continue to violate the AIV regulations. Such massive, ongoing, and unenforceable violation serves only to breed disrespect for the law.

C. The Proposed Rule Making does not recognize that many “online apartment information” services offer better protection to consumers than ever contemplated by the AIV rules and regulations.

While online apartment services cannot conform to the AIV law, ironically, they often afford consumers even better protection than the AIV law does. All consumers want to sample before they buy. More than ten years ago, MLX.com, a licensed real estate broker, pioneered the free Guest Account, which is now offered by other services such as Rent-Direct.com.

With a Guest Account, a renter could create a search profile including location, number of bedrooms and baths, price, and building features such as doorman, elevator, and with/without broker fee. By using a touch-tone telephone or, later, the Internet, the renter could preview all apartment matches or just new ones, or change his profile. A Guest Account holder could also create an “Apartment Wanted” ad so that landlords and/or brokers could propose apartments to him. He could also sign up for email alerts about new matching apartments. If and when he was ready to move forward, the Guest Account holder could activate a paid Insider Account for between \$39 and \$149, and receive contact information, complete addresses, and other services such as advice or assistance in negotiating a broker’s commission.

The free Guest Account is a consumer’s best protection; before making a payment, the consumer can be sure that the vendor has new listings that meet his requirements. Yet nowhere in the AIV law, rules, or regulations is there a requirement for a free Guest Account that would show a renter which apartments would be matched to him should he pay. (In fact, the Guest Account is illegal under the current AIV law, which bans the advertising of specific properties, though the Proposed Rule Making repeals this regulation.)

A fundamental problem with the AIV regulations is that they assume all Apartment Information Vendors are scam artists from whom consumers must be protected. But the great majority of online apartment services today are honest, reputable businesses which provide valuable services in a highly competitive marketplace. That’s why they offer their consumers more protection than the AIV law requires. By and large, consumers *don’t* need to be protected from them.

Of course, regulations are needed to protect consumers from the occasional unscrupulous vendor. But such protection doesn't require detailed prescriptions about contract language, refund processes, record keeping, etc. (In fact, as I argued above, overly detailed regulations are all but unenforceable and don't effectively protect anyone.) Instead, I would propose regulations that prevent fly-by-night businesses from taking advantage of customers, while allowing honest providers to go about their business.

How do we strike a balance between what "protections" consumers want and what businesses are willing to provide? I am not confident that, as written, the AIV law protects consumers or serves any useful purpose. With respect to online apartment services in general, I am not opposed to licensure under the Real Property Law or other law which would require full disclosure of terms of service to customers, and providing of free Guest Accounts that allow customers to preview enough information to decide whether they want to pay for services.

D. The Proposed Rule Making is inconsistent in its treatment of different types of services.

Under a literal interpretation of the AIV law, newspapers should hold AIV licenses, since they take an "advance fee" and provide "information concerning location and availability of property" for rent. What makes listings in a newspaper different from listings provided over the Internet? A Federal court recently held that the California Department of Real Estate could not require the advertising website Forsalebyowner.com to obtain a broker's license when it didn't require licensing for online newspapers listing the same home ads.

Another inconsistency is that the regulations treat different classes of customers differently. Why should a Multiple Listing Service need an AIV license to provide services to consumers when it can provide the same services to brokers without a license?

E. The Proposed Rule Making validates our complaint that DOS has selectively enforced the AIV law against MLX and its CEO, LaLa Wang.

Since 1993, MLX has offered a platform for renters, buyers, sellers, landlords, and brokers to connect with each other. MLX was an innovative real estate service offering consumers more choice, more efficiency, and lower fees. More than 3,000 real estate brokers used MLX's professional version.

In 1995, MLX sought out Secretary of State Sandy Treadwell to ensure that MLX would not fall under the AIV statute. Secretary Treadwell wrote:

"It is my opinion that these statutory requirements [of the Apartment Information Vendor statute] make it virtually impossible to carry on the business of apartment information vending within New York State... I agree with Ms. Wang that the law



is onerous and should be amended. I would be pleased to assist you in fashioning a legislative solution to this problem."

However, in 1998, the Department of State issued a complaint against MLX for refusing to obtain an AIV license that MLX believed did not apply to its business. Applying its one-flavor approach to MLX's new business, the DOS revoked Wang's broker's license for refusing to obtain a license which would have caused MLX to break the law.

Ten years later, the text of the Proposed Rule Making acknowledges that the AIV rules have been "obsolete" and that that "a majority of apartment information vendors operating in New York State are doing so without the benefit of a license":

"The existing agency regulations were drafted at a time when the unique characteristics and challenges of e-commerce were not factors to be considered.

*The evolution of the industry had resulted in **obsolete** and dated provisions in the agency regulation that should properly be amended so as to ease compliance and enforcement while continuing to provide optimum protections to consumers.*

Accordingly, the Secretary of State has determined that the instant rule making is necessary. This rule will provide the necessary amendments to Part 190 by repealing obsolete provisions and amending the regulations to encourage licensed operation while, at the same time, providing necessary protections to consumers." [Emphasis added.]

Yet, for ten years, DOS has continued to selectively prosecute MLX and Wang, first by revoking Wang's broker's license for refusing to obtain an AIV license, and later by refusing to grant Wang the AIV license. When an Administrative Law Judge overruled DOS and granted Wang the AIV license, DOS opposed the ALJ's ruling and has set a re-Hearing for Wang's AIV license.

DOS has sent its message loud and clear: It is better to obtain an AIV license and not abide by it than to challenge the applicability of the AIV law. DOS has a long way to go in recognizing the fallacies of the AIV law and DOS' misguided selective enforcement of the AIV law.

The regulation of online apartment services can be best achieved by permitting and encouraging innovation among licensed brokers and entrepreneurs. Licensed real estate brokers who charge an "advance fee" can be regulated adequately through the Real Property Law. In today's age, the AIV law needs a total review, not cosmetic amendments and repeal of minor regulations. The New York Department of State's misapplication of the AIV law to MLX has suffocated an honest, innovative business and deprived consumers of the opportunity for more choices, greater efficiency, and lower commissions. Division of Licensing officials might want to consider whether being confederates in selective enforcement practices violates public trust.



Sincerely,

LaLa Wang

LaLa Wang

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