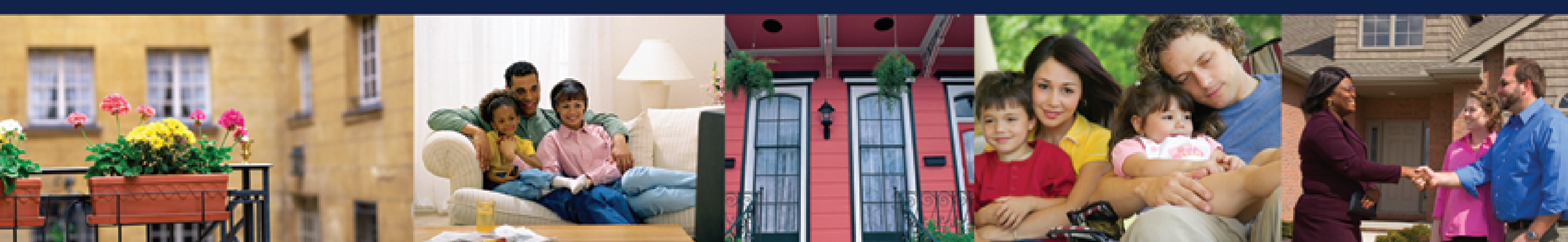
U.S. DEPARTMENT OF JUSTICE

FEDERAL TRADE COMMISSION

Competition in the Real Estate Brokerage Industry

A Report by the Federal Trade Commission and the U.S. Department of Justice

April 2007



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Federal Trade Commission

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INTRODUCTION

Competition provides American consumers lower prices, better quality services, and greater choice. In the residential real estate industry, competition is vitally important because buying or selling a home is one of the most important financial transactions a consumer will ever undertake. Given the size of the real estate industry,[1] any restraints on competition in real estate brokerage will have significant adverse consequences for consumers. Moreover, because real estate broker commissions are typically a percentage of the home sales price, the dollar amount charged by real estate brokers has increased significantly in recent years as home sales prices have escalated.[2] And, because the amount home sellers pay their real estate broker is built into the home sales price, both home buyers and sellers bear this expense.[3]

The residential real estate industry has undergone a number of substantial changes in recent years. Today, real estate agents and brokers are changing the way they operate and are increasingly incorporating the Internet into their business models in a variety of ways, such as offering potential buyers the option to view full, detailed multiple listing services ("MLSs") online, using websites to gather "lead" information on potential customers, and using the Internet to match home buyers and sellers. The increased ease with which home buyers and sellers can perform tasks that once were the exclusive domain of real estate agents and brokers likely has been an important factor in the increased demand for innovative, non-traditional real estate brokerage services.[4] In fact, the Internet has surpassed the yard sign as the most important marketing tool to reach consumers.[5]

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[1] In 2005 real estate broker commissions exceeded $60 billion. *See The Changing Real Estate Market: Hearing Before the House Financial Services Subcommittee on Housing and Community Opportunity*, 109th Cong. 1 (2006) [hereinafter *Hearing*] (testimony of David G. Wood, Director, Financial Markets and Community Investment, Government Accounting Office), *available at* http://financialservices.house.gov/media/pdf/072506dgw.pdf.

[2] Between 1998 and 2005, the real median real estate broker commission per transaction grew by 25.5% to $11,549. *See* Table 1 in Chapter III of this Report.

[3] *See* Robert W. Hahn et al., *Paying Less for Real Estate Brokerage: What Will Make It Happen?* 5 (American Enterprise Institute-Brookings Joint Center for Regulatory Studies, Working Paper 05-11, 2005) [hereinafter AEI-Brookings Paper]; GAO, REAL ESTATE BROKERAGE: FACTORS THAT MAY AFFECT PRICE COMPETITION (GAO-05-947) 15 n.33 (2005) [hereinafter GAO REPORT].

[4] According to one survey, 80 percent of home buyers used the Internet during their home search in 2006, and 24 percent of recent home buyers first located the home they bought on the Internet. NAR, 2006 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS 34, 38 (2006) [hereinafter NAR 2006 SURVEY] (covering 12-month period ending June 2006). In contrast, in 1997 only 2 percent of recent home buyers had first located their home on the Internet. *Id.* at 38.

[5] *Id.* at 34 (Internet cited by 80% of home buyer respondents, while yard sign cited by 63%).

While there have been many positive developments in the residential real estate industry, there are some indications that consumers are not enjoying all of the possible benefits of competition in the real estate brokerage industry. A number of developments have raised competitive concerns, particularly laws and regulations in some states that limit consumer choice of real estate brokerage service offerings and that prohibit rebates to consumers, anticompetitive agreements among brokers, and industry practices that impede competition. These practices can lead to substantial consumer harm through reduced choice of real estate brokerage services, higher fees, and limitations on the ability to access information about real estate listings.

Given how important competition is to consumers in this industry, the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ") held a public workshop in October 2005 ("Workshop") to address issues affecting competition in the residential real estate brokerage industry.[6] Panelists at the Workshop included traditional real estate brokers, brokers offering nontraditional business models, state regulators, and academics.[7]

This Report presents an overview of the information provided and opinions expressed at the Workshop, as well as existing literature and studies, and examines some of the competitive issues raised at the Workshop and in other proceedings.[8] Chapter I provides background information on the real estate brokerage industry, including the roles that real estate agents and brokers play in a typical real estate transaction; considers the importance of MLSs; and examines some of the alternative business models used by

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[6] The agenda, transcript, and other information relating to the Workshop are available at the Agencies' websites at http://www.usdoj.gov/atr/public/workshops/reworkshop.htm and http://www.ftc.gov/bc/realestate/workshop/index.htm.

[7] The following people testified at the Workshop: Cathy Whatley, real estate broker and Past President of NAR; Robert Hahn, economist and Executive Director, American Enterprise Institute-Brookings Joint Center for Regulatory Studies; Aaron Farmer, Owner of Texas Discount Realty; Thomas Kunz, President and Chief Executive Officer of Century 21 Real Estate LLC; Colby Sambrotto, Chief Operating Officer of ForSaleByOwner.com; Wayne Thorburn, Administrator, Texas Real Estate Commission and Immediate Past President of the Association of Real Estate License Law Officials; Steve DelBianco, Executive Director, NetChoice Coalition; Thomas Early, President, National Association of Exclusive Buyers' Brokers; Philip Henderson, Vice President, Lending Tree; Geoff Lewis, Senior Vice President and Chief Legal Officer, RE/MAX International, Inc; Alexander Perriello, President and Chief Executive Officer, Cendant Real Estate Franchise Group; Lawrence Yun, Managing Director of Quantitative Research, NAR; Chang-Tai Hsieh, Associate Professor of Economics, University of California. In addition, the Agencies received almost 400 submissions in response to their request for public comment in connection with the Workshop.

[8] This Report, however, does not draw on any non-public information gathered during investigations conducted by the FTC or DOJ or obtained through litigation brought by the Agencies. The FTC and DOJ do not necessarily endorse, support, verify, or agree with the comments, opinions or statements of Workshop participants or of others who have published articles regarding the industry that are included in this Report.

real estate brokerages. Chapter II discusses the impact of the Internet on the real estate brokerage industry and information asymmetries. Chapter III explores the competitive structure of the real estate brokerage industry and publicly available evidence concerning brokerage commission rates and fees. Chapter IV addresses obstacles to a more competitive market environment, including government-imposed impediments, MLS rules that can cause anticompetitive effects, and the importance of broker interdependence. The final part of the Report offers conclusions and recommendations.

I. Background

This Chapter provides an overview of the traditional real estate transaction and the participants involved in the process, discusses the important role of the MLS, and examines how the Internet has affected residential real estate brokerage-related services. It also identifies and describes certain types of nontraditional real estate business models, including: (1) full-service discount brokers; (2) fee-for-service brokers; (3) Virtual Office Website ("VOW") operators; (4) for-sale-by-owner ("FSBO") facilitators; and (5) broker referral networks.

A. Overview of the Typical Real Estate Transaction

At its most basic, real estate brokerage is about matching a home seller with a home buyer.[9] As one panelist, who represents a major brokerage franchise, remarked, a home seller wants to "negotiate the best possible price in the quickest possible time."[10] Brokers reduce the transaction costs of matching buyers and sellers and also provide their clients with ancillary services related to the transaction. Although there is no legal impediment to consumers buying and selling homes on their own, the large majority of consumers choose to work with a real estate broker. For example, a recent National Association of Realtors ("NAR") survey found that 84 percent of consumers employ a real estate broker to help them sell their home, and the vast majority of these home sellers appear to be contracting with real estate brokers to provide assistance on all aspects of the transaction.[11] Another NAR survey found that nine out of ten buyers use a real estate professional during their home searches.[12] The Internet also appears to be playing an increasingly important role in the real estate transaction. For example, NAR data show that the Internet was second only to real estate agents as the most commonly used information source for home buyers.[13]

1. Description of Real Estate Brokers and Agents

Although the terms may vary by state, there are two principal categories of real estate brokerage professionals: "agents" and "brokers." Generally speaking, agents work

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[9] *See* Federal Trade Commission, The Residential Real Estate and Brokerage Industry: Los Angeles Regional Office Staff Report Volumes I and II and The Butters Report 9 (1983) [hereinafter 1983 FTC Staff Report], *available at* http://www.ftc.gov/bc/realestate/workshop/index.htm.

[10] Kunz, Tr. at 103. Throughout this Report citations to "Tr." refer to the transcript of the Workshop. Speakers are identified by last name. The full transcript is available at http://www.ftc.gov/opp/workshops/comprealestate/051209transcript.pdf and http://www.usdoj.gov/atr/public/workshops/rewagenda.htm.

[11] NAR 2006 Survey, *supra* note 4, at 67, 68.

[12] NAR, *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006), http://www.realtor.org/press_room/news_releases/2006/hmbuyersellersurvey06.html.

[13] NAR 2006 Survey, *supra* note 4, at 34.

directly with consumers and brokers supervise agents. Typically, agents solicit listings, work with homeowners to sell their homes, and show buyers homes that are likely to match their preferences. Instead of working with customers directly, brokers often provide agents with branding, advertising, and other services that help the agents complete transactions. In terms of branding, the broker may invest in and create a brand or affiliate with a national or regional franchisor that provides a brand with certain reputational value and an advertising campaign. As for services, brokers may provide agents with computers, website hosting, office space, training, and marketing.

States require real estate brokers and agents to be licensed. These licensing statutes form the framework for state regulation and oversight of the profession by establishing requirements for licensure (such as minimum age, education, and experience) and various requirements and prohibitions regarding business practices and conduct. State commissions, frequently composed of real estate brokers, oversee drafting of and compliance with these laws and regulations.[14]

Brokers and agents (hereinafter, "brokers")[15] usually are more informed about the local real estate market and the process of a real estate transaction than most home buyers and sellers.[16] This informational advantage derives from two sources. First, only brokers have direct access to the MLS, which is a local or regional joint venture of real estate brokers who pool and disseminate information on homes available for sale in their particular geographic areas.[17] The MLS provides information both on the homes currently for sale in a particular geographic area and past sales data, which typically are used in determining a home's listing price or a buyer's offer price. Second, most brokers have been involved in many more real estate transactions than their clients. This experience builds expertise in gauging market conditions and knowledge of the details involved in completing a real estate transaction.

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[14] *See* PATRICK WOODALL & STEPHEN BROBECK, CONSUMER FEDERATION OF AMERICA, STATE REAL ESTATE REGULATION: INDUSTRY DOMINANCE AND ITS CONSUMER COSTS 3 (July 2006), *available at* http://www.consumerfed.org/pdfs/CFA_Real_Estate_Commissioner_Report.pdf.

[15] We refer to brokers and agents collectively as "brokers" throughout this Report, except when a distinction between the two is necessary to the meaning or when quoting a panelist or author.

[16] *See* R.C. Rutherford et al., *Conflicts Between Principals and Agents: Evidence From Residential Brokerage*, 76 J. FINANCIAL ECON. 627 (2005); Steven D. Levitt & Chad Syverson, *Market Distortions When Agents are Better Informed: The Value of Information in Real Estate* (NBER Working Paper 11053, 2005), *available at* http://www.nber.org/papers/w11053.

[17] The importance of the MLS as the primary source of information about homes currently for sale and prices at which comparable homes have sold is discussed in Chapter I.B. of this Report.

2. *The Seller's Agreement with the Listing Broker*

The typical real estate transaction involves several steps. First, if the seller chooses to hire a real estate broker rather than selling the home on his or her own, the seller contracts with a "listing broker." A home seller may consider any number of brokers before choosing one with whom to list the home, but NAR's 2006 industry survey notes that the majority of sellers contact only one listing broker.[18] Once the seller has selected a listing broker, they enter into a contractual relationship called a "listing agreement" by which the broker agrees to market and sell the home in exchange for a set fee, typically in the form of a percentage commission. The commission "rate" is the percentage of the home sales price that the broker retains as a commission. Commission "fees" are the total dollar amount paid by consumers for real estate brokerage services. This contract often specifies the commission the homeowner will pay the listing broker if the home is sold within a specified period of time, how the home is to be listed in the MLS, and, as discussed below, the share of the commission to be offered by the listing broker to a so-called "cooperating broker," who works with the buyer.[19] The listing broker typically markets the home, both within his or her brokerage firm and to other brokers in the community, by uploading the listing data, including the offer of compensation to cooperating brokers, into the MLS database so that the information can be disseminated to cooperating brokers, who in turn can inform potential buyers of the listing.

There are three principal types of listing agreements. In the most common of the three, an "exclusive right to sell" contract, the listing broker receives a payment if the home is sold during the listing period, regardless of who finds a buyer for the home.[20] In an "exclusive agency" agreement, the listing broker receives payment if any broker finds the buyer, but does not receive payment if the seller finds the buyer.[21] In an "open listing," a broker has a nonexclusive right to sell the home and receive payment, but other brokers or the seller may also sell the home without any payment to the listing broker.[22]

[18] *See* NAR 2006 SURVEY, *supra* note 4, at 74 (69% of sellers contacted only one agent; 74% of sellers found their agent through either a referral or a prior relationship with the agent).

[19] *See* Whatley, Tr. at 39; Perriello, Tr. at 198-99. In some instances the cooperating and listing agents may work for the same brokerage firm. Some states protect parties' interests in this situation through "designated agency," under which different agents within the brokerage firm are "designated" separately to represent the buyer's and seller's interests in the transaction. *See* Ann Morales Olazabal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. ON LEGIS. 65, 75 (2003).

[20] *See* Whatley, Tr. at 35.

[21] *Id*. at 36.

[22] *Id*.

3. *The Buyer's Relationship with the Cooperating Broker*

The broker who works with the buyer is often referred to as the "cooperating broker" "or "buyer's broker."[23] Cooperating brokers typically attempt to find housing from the available stock that match buyers' preferences, show prospective buyers homes for sale, provide them information about comparable home sales that have occurred in the area, assist prospective buyers in becoming pre-qualified for a certain level of financing,[24] advise them on making offers, and assist in closing the transaction. Buyers typically do not pay their brokers directly.[25] Rather, listing brokers compensate cooperating brokers according to the terms stated in the MLS listing, which usually specifies an unconditional offer of compensation to any broker that is the "procuring cause" of the sale.[26] For example, a listing broker who charges a 6 percent commission may offer to compensate a cooperating broker with 3 percent, half of the listing broker's commission. As one panelist reported, it is common for a listing broker to offer 50 percent of his or her commission to a broker who provides a buyer who closes on the home, although this percentage may vary according to market conditions; in slow markets, a listing broker may offer higher compensation to attract scarce buyers, and this may be reversed in a hot market.[27] Differences in offers of compensation may also arise based on local norms for historical reasons.[28]

[23] We use the terms "cooperating broker" and "buyer's broker" interchangeably throughout this Report.

[24] Sellers often want potential buyers to be pre-qualified for the level of financing required to purchase their homes. Often, at the recommendation of their brokers, prospective buyers receive a letter of pre-qualification from a lender or mortgage broker, which is presented at the time of offer. Listing brokers may verify the pre-qualification letter.

[25] Although buyers do not pay a direct fee to their brokers, some portion of brokerage fees likely is built into the prices of homes for sale. *See* AEI-Brookings Paper, *supra* note 3, at 5. Because broker fees are paid indirectly, buyers may be less likely to negotiate over them. In fact, commentators have expressed concern that some buyers may believe that their brokers' services are free. *See* Mark S. Nadel, *A Critical Assessment of the Standard, Traditional Residential Real Estate Broker Commission Rate Structure*, 23, American Enterprise Institute-Brookings Joint Center for Regulatory Studies (Oct. 2006), *available at* http://www.aei-brookings.org/publications/abstract.php?pid=1119.

[26] "Procuring cause" refers to the efforts of the primary broker, who brings a buyer to the listing and causes the transaction to be completed. *Cf.* BLACK'S LAW DICTIONARY 234 (8th ed. 2004) (defining procuring cause as "[t]he efforts of the agent or broker who effects the sale of realty and who is therefore entitled to a commission.").

[27] *See* Perriello, Tr. at 199 ("[W]hen I was in a market that was very, very slow, it was not uncommon to actually have a disproportionate share going to the buyer . . . . So, at that point, if it was say a 6 percent commission, I might take 2 percent and offer 4 percent.").

[28] One Workshop panelist, an economist, expressed concern about the effect of these compensation arrangements on competition and on consumers. Hahn, Tr. at 41. Hahn believes that the involvement of multiple parties and the "unique" compensation arrangements in real estate transactions make it difficult for home buyers and sellers to pay for services according to their needs, and he questioned whether alternative business models have had a fair chance to compete under the current structure. AEI-Brookings Paper, *supra* note 3, at 5.

The legal relationship between the buyer and the cooperating broker varies from state to state and has changed over time. Until the 1990s it was common for the cooperating broker to be a subagent of the listing broker, working on the seller's behalf.[29] During the 1990s, most states revised their laws to allow buyer representation, and at the same time NAR revised its policies, eliminating seller-subagency as a condition of participation in the MLS.[30] Today, after a decade of agency law reform across the country, it is more common for the cooperating broker to owe fiduciary duties solely to the buyer.[31] In some states, however, a cooperating broker may be a "transaction" broker who has limited fiduciary duties to both the buyer and seller and whose role is to assure that the transaction proceeds smoothly.[32] In all states, brokers are required to disclose to buyers the type of relationship that exists so buyers know whom the cooperating broker represents, although the timing of this disclosure varies by state.[33]

4. The Buyer's Offer, Contingencies, and Closing in a Typical Transaction

Once a buyer makes an offer on a home, the listing broker may help the seller evaluate offers and formulate counteroffers and may negotiate directly with the buyer or buyer's broker. If the seller accepts the offer, the home is "under contract," and, pursuant to contracts containing typical contingencies, several things must occur during a stated time period before the transaction closes, such as home inspections, appraisals, securing

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[29] Royce de R. Barondes & V. Carlos Slawson, Jr., *Examining Compliance With Fiduciary Duties: A Study of Real Estate Agents*, 84 OR. L. REV. 681, 689 (2005).

[30] *See* Olazabal, *supra* note 19, at 74-75. Olazabal notes that the subagency regime was not a creature of state law, but rather was a result of most MLSs permitting listing brokers to split commissions only with cooperating agents who agreed to be a subagent of the seller. *Id*. at 70. Some have argued that subagency was created by members of NAR in order to restrict access to the MLS. As one study explains:

> the designation of subagency in an MLS transaction allowed the NAR to argue that sellers and listing brokers would only want to extend subagency to ethical cooperating brokers. Brokers not bound by NAR's Code of Ethics therefore could not be trusted with the responsibility of subagency. Bundling the requirement of subagency with the MLS therefore gave the NAR a justification for limiting access to the MLS to NAR members . . . .

Thomas J. Miceli et al., *Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis*, 20 J. REAL ESTATE RESEARCH 30, 34-35 (2000).

[31] Whatley, Tr. at 38-39; NAR 2006 SURVEY, *supra* note 4, at 48 (64 percent of buyers reported that they worked with an agent who represented their interests alone); *see also* Christopher Curran & Joel Schrag, *Does it Matter Whom and Agent Serves? Evidence from Recent Changes in Real Estate Agency Law*, 43 J. L. & ECON. 265, 269 (2000) ("In recent years it has become more common for buyers to employ a buyer's agent, rather than a traditional seller's agent").

[32] *Id*.

[33] *See* Olazabal, *supra* note 19, at 91-100; *see also* Early, Tr. at 169 (discussing the timing of disclosure of agency relationship in many states as having been changed from "first meaningful contact" to "as soon as practical but no later than the writing of an offer," and how this can give rise to procuring cause issues).

buyer financing, assuring the title to the home is clear, and conducting necessary repairs.[34] Both listing and cooperating brokers typically work together to assure that all contingencies are satisfied, allowing the closing to occur as scheduled. As one broker-panelist explained, in addition to real estate brokers, many other actors are necessary to assure a successful closing, including the mortgage lender, the insurance agent, the home inspector, the termite inspector, the surveyor, the appraiser, the closing attorney (in some states), the title company, and the escrow agent.[35] According to this panelist, the seller's broker and the buyer's broker "will work together to make sure that all parts of the transaction are facilitated appropriately," including "working through the transaction itself, meeting the home inspector, helping the seller and/or the buyer understand what the results of the inspection were, overseeing repairs, making sure that things that are necessarily time-sensitive get responded to in a time-sensitive manner."[36]

Once all contingencies have been satisfied, the parties proceed to closing, where they exchange purchase money and title to the home. One panelist noted that, in her experience as a broker, lenders' increased use of technology has streamlined the mortgage process, causing the average time from contract to closing to fall from forty-five to sixty days, to thirty days.[37] The HUD-1 form required by the Real Estate Settlement Protection Act ("RESPA") is a centerpiece of the closing and requires a detailed listing of the flow of funds from buyer to seller and the use of funds, including selling and buying expenses associated with the transaction and the amount of commission paid to each broker. Although they typically do not play an active role at this stage, brokers often accompany their clients to the closing.[38] The brokers are paid their commission at closing.

B. The Multiple Listing Service

Access to the MLS is one of the most important services that real estate brokers traditionally have offered. The 1983 FTC Report traces the evolution of the exchange of home information by brokers, from the weekly in-person "exchanges" of the Nineteenth Century to the formation of the modern MLS.[39] The MLS has evolved still further since

[34] Repairs may be ordered by the lender as a condition for financing or requested by the home buyer after the results of inspection. How the cost of such repairs is split is often the subject of additional negotiation.

[35] Whatley, Tr. at 26. Detailed discussion of the ancillary services often provided in connection with real estate transactions was beyond the scope of the Workshop and, likewise, is beyond the scope of this Report.

[36] *Id*. at 27-28. Whatley analogized the real estate transaction to a play where each actor has a role and knows the script; the play would be disrupted if an actor were to enter at the wrong time or forget his or her lines. *See id*. at 26-27.

[37] *Id*. at 161-62.

[38] *See* NAR, THE 2005 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS 58 (2006) [hereinafter NAR 2005 SURVEY] (71% of sellers report that their agent attended the closing).

[39] 1983 FTC STAFF REPORT, *supra* note 9, at 107-116.

1983, reflecting the rapid pace of technological developments during this period.[40] The following two sections describe the present-day MLS and discuss its importance to home sellers, buyers, and brokers.

1. Description of the MLS

The MLS is a local or regional joint venture of real estate brokers, typically operated by a local group of brokers affiliated with NAR, who pool and disseminate information on homes available for sale in their particular geographic areas.[41] The MLS combines its members' home listings information into a database, usually in electronic form. The MLS then makes these data available to all brokers who are members of the MLS.[42] By listing information on a home in the MLS, a broker can market it to a large set of potential buyers. A cooperating broker likewise can search the MLS to provide a home buyer with information about all the listed homes in the area that match the buyer's housing needs.

MLSs are the primary source of home listings information because they contain real time information on virtually every home listed for sale in a given area, except FSBO homes. Most MLSs require that a member broker, upon acceptance of a listing, enter the listing into the MLS database within a short period of time, *e.g.*, twenty-four to seventy-two hours. Although the specific data fields on each listing are determined by the individual MLS, they typically include detailed descriptions of the homes for sale, the asking price, the offer of compensation that will be paid to a cooperating broker who finds a suitable buyer,[43] and the name of the listing broker. The MLS allows broker-

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[40] Illustrative of the continued changes is a court's description of a local MLS as it progressed from distribution of an index card for each property listing to computerized downloads of digitized photographs. *See Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 783 F. Supp. 952, 955 (D. Md. 1992).

[41] NAR's 1,600 local and state member boards control approximately 80 percent of the approximately 1,000 MLSs in the United States. *See* Amended Complaint at 5, *United States v. Nat'l Ass'n of Realtors* (N.D. Ill. Oct. 4, 2005).

[42] *See* GAO REPORT, *supra* note 3, at 6 (explaining the structure and purpose of the MLS).

[43] The MLS facilitates the offering of unilateral offers of compensation to cooperating brokers, according to NAR. NAR, HANDBOOK ON MULTIPLE LISTING POLICY 50 (2006). NAR's President-Elect has stated:

> An MLS is a cooperative venture between real estate brokers in which brokers share information on their listings with other competing brokers along with an offer to compensate them in the event they sell the listing. The MLS provides sellers with the advantage of listing with one brokerage firm but having exposure to all buyers working with other brokers in the community. It benefits buyers because they only need to work with one broker but have access to the properties listed by all of the other brokers who participate in the MLS. It is a *business to business* cooperative created by real estate professionals to enable them to share information relating to properties they list for sale, and to research and present property-related information to their clients seeking to buy real estate properties.

members to search and filter homes based on detailed criteria, including property and neighborhood information, offers made on the home, prior sales history, and days on the market.[44] In addition to the database of currently available homes, an MLS maintains a database of homes sold through the MLS. Brokers can use this database to provide their clients with information on sales of comparable homes so that the clients can more accurately value their homes or determine the amount to bid on a home.

The MLS also operates an arbitration mechanism to resolve compensation disputes between listing and cooperating brokers. For example, if a cooperating broker secures a buyer for a transaction and can establish through arbitration that he or she was the "procuring cause" of the sale, then the listing broker is liable for the cooperative compensation.[45]

One panelist who is a real estate broker and past president of NAR described the MLS as "a broker-to-broker information exchange that provides an opportunity for cooperation and compensation."[46] Another panelist, however, described the MLS as a "club" that can limit membership and access to MLS listings to firms that conduct business in a particular manner, thereby limiting consumer choice.[47] This panelist, an economist, stressed that when competitors cooperate, as in an MLS, the rules governing that cooperation and the conditions under which the cooperation occurs must be examined closely.[48]

Hearing, *supra* note 1, at 18-19 (testimony of Pat Vredevoogd-Combs, President-Elect, NAR), *available at* http://financialservices.house.gov/media/pdf/072506pvc.pdf.

[44] *See Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006) (finding that the features and information available through the MLS at issue are not available through any other service).

[45] *See supra* note 26. To enforce his or her right to payment, the cooperating broker may bring a complaint to the MLS's arbitration system. *See* NAR, CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS, STANDARD OF PRACTICE 17-4 (effective Jan. 1, 2006), *available at* http://www.realtor.org/mempolweb.nsf/pages/code.

[46] Whatley, Tr. at 30.

[47] Hahn, Tr. at 32. Hahn's concerns are more fully developed in his AEI-Brookings Paper, where he describes how the cooperative relationship among brokers in an MLS has the potential to give rise to uniformity in services provided and brokerage fees charged. AEI-Brookings Paper, *supra* note 3 at 8-10. Other analysts have expressed similar views. *See* Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?* 6 (New York University School of Law, New York University Law and Economics Working Papers 51, 2006); GAO REPORT, *supra* note 3, at 3, 12-13 (MLS may encourage price conformity by, for example, by requiring that each listing state the fee split that the cooperating broker will receive. Because, all else being equal, brokers have less incentive to show properties that offer them a lower commission, brokers may refrain from offering less than the prevailing commission.).

[48] Hahn, Tr. at 32-36.

2. *Why the MLS is Important to Sellers, Buyers, and Brokers*

As the primary source of information about homes currently for sale and the prices at which other, comparable homes have been sold, the MLS is an extraordinarily important resource for sellers, buyers and brokers.[49] Home sellers benefit from exposure of their listings to a wide audience of potential buyers, increasing the probability of selling their homes quickly and at an optimal price for those sellers.[50] In addition, sellers, through their brokers, can use the MLS information on comparable homes to decide whether to sell their homes and, if so, at what price.[51] According to NAR's 2006 survey of home buyers and sellers, 88 percent of sellers reported that their home was listed in the MLS.[52]

Buyers also benefit from the MLS because they can go to a single source (that is, a single broker) for information regarding the vast majority of homes for sale within a given area, instead of visiting multiple brokerages to obtain such information. Access to the largest number of potentially appropriate homes for sale allows buyers to maximize their chances of finding a home that most closely matches their desired characteristics.[53]

MLSs are so important to the operation of real estate markets that, as a practical matter, any broker who wishes to compete effectively in a market must participate in the local MLS.[54] As previously noted, brokers using the MLS reduce the costs of matching buyers and sellers and can market their service to a large set of potential clients. Further, by stating up-front the compensation being offered to a cooperating broker, the MLS can

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[49] *See* Whatley, Tr. at 31 ("The MLS is strategically one of the most valuable things to me").

[50] NAR, Public Comment 208, at 5 (comment). Throughout this Report citations to "Public Comments" refer to comments submitted in response to the Agencies' Federal Register Notice inviting comments on the topics addressed at the Workshop. 70 Fed. Reg. 53,362 (Sept. 8, 2005). The public comment numbers cited in this Report refer to those found on the FTC's website. Some parties submitted a cover letter with the public comment. Citations to submissions by these parties contain a parenthetical reference either to the "comment" or the "cover letter." The public comments are available at http://www.ftc.gov/os/comments/realestatecompetition/index.htm and http://www.usdoj.gov/atr/public/workshops/reworkshop_rewcomments.htm. *See also* Whatley, Tr. at 160-61 (although the Internet provides useful information to buyers and sellers of real estate, by the time properties are advertised on the Internet, they may be gone already; thus, the MLS is crucial).

[51] John H. Crockett, *Competition and Efficiency in Transacting: The Case of Residential Real Estate Brokerage*, 10 JOURNAL OF THE AMERICAN REAL ESTATE AND URBAN ECONOMICS ASSOCIATION 209, 211 (1982).

[52] *See* NAR 2006 SURVEY, *supra* note 4, at 77.

[53] 1983 FTC STAFF REPORT, *supra* note 9, at 31.

[54] *See United States v. Realty Multi-List*, 629 F.2d 1351, 1370 (5th Cir. 1980) (membership in the MLS becomes essential to a broker's ability to compete effectively on equal terms); GAO REPORT, *supra* note 3, at 12. *See also Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991).

reduce the costs associated with listing brokers having to negotiate separately with each potential cooperating broker.[55] As a result, the use of an MLS can substantially reduce transaction costs.[56]

The efficiencies associated with use of an MLS in the real estate industry are well documented in the real estate, legal, and economic literature[57] and in court decisions.[58] In the seminal case, *United States v. Realty Multi-List, Inc.*, the Fifth Circuit described the various benefits offered by an MLS.[59] First, the MLS reduces the "obstacles brokers must face in adjusting supply to demand: market imperfections are overcome in that information and communication barriers are reduced, along with the easing of the built-in geographical barrier confronting the buyer-seller relationship. Moreover, a realistic price structure is engendered. In effect, real estate becomes by virtue of the multiple listing service 'a more liquid commodity.'"[60] Second, sellers benefit from wider exposure of their listings, while buyers benefit from reduced search costs.[61] Finally, the court noted that "[t]he broker is particularly benefited by having immediate access to a large number

[55] *See* Whatley, Tr. at 39-40.

[56] White, *supra* note 47, at 4. According to NAR, the MLS has been especially beneficial to smaller brokers, because it "levels the playing field" on which brokers compete. *See* NAR, Public Comment 208, at 5 (comment) ("Brokerages of different sizes and business models are able to compete on a level playing field because most real estate professionals and firms share their detailed property listing information . . . through the local or regional [MLS]."). *See also* Yun, Tr. at 223-24 (describing how the MLS puts small and large brokers "on equal footing").

[57] *See, e.g.*, William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179, 184-185 (1981); Crockett, *supra* note 51, at 211. For a discussion of the positive network effects associated with MLSs, *see* 13 HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 2220b4, 2223b3 (2d ed. 2005):

> A real estate multiple listing service may also be subject to network externalities. As each real estate broker is added to the system the consequences are (1) that the new broker is entitled to sell the houses listed on the system by other members, thus increasing the chances of sale; and (2) existing members are entitled to sell the houses listed by the new broker, thus giving each broker a larger inventory of houses to show. A larger multiple listing service would generally have an advantage over a smaller service, for the person listing a house for sale presumably wishes to be placed in contact with as many potential buyers as possible. As a result, most municipalities have a single multiple listing service, and virtually all real estate brokers except perhaps a few highly specialized ones are members.

Id. ¶ 2220b4, at 343.

[58] *See, e.g.*, *Reifert*, 450 F.3d at 317; *Metropolitan Multi-List*, 934 F.2d at 1579-80; *Realty Multi-List*, 629 F.2d at 1356.

[59] *Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980).

[60] *Id.* at 1356.

[61] *Id.*

of listings and at the same time by being furnished with a method for quickly and expansively exposing his own listings to a broader market."[62]

Due to these significant efficiencies and procompetitive features, the Fifth Circuit held that the alleged MLS-related restrictions at issue should not be condemned as *per se* illegal.[63] At the same time, the Court held that the efficiencies and benefits flowing from the MLS, combined with other factors, resulted in the MLS having market power in a relevant antitrust market, thereby simplifying the rule of reason inquiry concerning the legality of restrictions imposed by the MLS and its members.[64]

C. Nontraditional Business Models

Although the data show that most consumers currently contract with a broker that supplies the full range of services traditionally offered by brokers, many consumers prefer to use brokers whose business models are alternatives to the traditional one. Some consumers may also choose to work with non-brokers who offer services that will facilitate the marketing and sale of their homes. The growing popularity of some of these new business models is likely linked to consumers' increasing use of, and comfort with, the Internet. In this Section we discuss the following non-traditional business models: (1) full-service discount brokers; (2) fee-for service brokers; (3) VOW brokers; (4) websites that provide advertising and other assistance to sellers who choose not to use a broker; and (5) referral networks.[65]

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[62] *Id.*

[63] *Id.* at 1369. Subsequent decisions largely have followed this approach. *See, e.g.*, *Metropolitan Multi-List*, 934 F.2d at 1579-80; *Austin Bd. of Realtors v. E-Realty, Inc.*, No. Civ. A-00-CA-154 JN, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000). A discussion of the various private litigation involving alleged MLS-related restraints is beyond the scope of this Report.

[64] *Realty Multi-List*, 629 F.2d at 1373-74 (citing A. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 COLUMBIA L. REV. 1325, 1346 (1970)); *accord Metropolitan Multi-List*, 934 F.2d at 1580 ("Market power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole."); *see also, e.g., Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) ("In short, it is impossible to perform the tasks of a real estate agent or appraiser in the relevant geographic area without using [the defendant MLS]. Thus, it possesses sufficient market power to restrain competition."); *Austin Bd. of Realtors*, 2000 WL 34239114, at *4 n.4 ("It is undisputed that ABOR has significant market power in the relevant product market for residential real estate brokerage services in the Austin metropolitan area and exclusive access to the MLS Data which is essential to effective competition in this market."); 1983 FTC STAFF REPORT, *supra* note 9, at 37 ("At the MLS level, there is, in fact, no effective competition at the present time, and almost all brokers are, therefore, members of one system in each local community.") In the twenty-five years since the Realty Multi-List case, the Agencies have brought a number of antitrust cases involving anticompetitive effects associated with an MLS.

[65] There is some overlap between the categories because certain business models fit into more than one category. For example, a VOW operator may or may not also be a discount broker.

1. Full-Service Discount Brokers

Discount brokers offer buyers and sellers full-service real estate brokerage services at a price lower than the prevailing commission fees.[66] For example, a discount broker may offer all of the services provided by a traditional broker for a 3 or 4 percent commission in an area where 6 to 7 percent is the prevailing rate. In addition, in states that do not prohibit them, brokers may offer rebates (*i.e*. cash payments) and inducements, such as gift certificates, coupons, vouchers, and discounted or free services relating to buying and selling a home, to buyers and sellers.[67] These are incentives that typically are offered by cooperating brokers to home buyers to encourage them to use the brokers' services. For example, 1% Realty offers buyers a rebate of approximately 1 percent of the purchase price in states that have not prohibited rebates.[68] Brokers sometimes also pay rebates to home sellers. For example, home sellers who are referred by one broker to another broker sometimes receive rebates. Additionally, some listing brokers pay their clients secret rebates rather than offering a lower listing commission in order to disguise discounting.[69]

Rebates are an important form of price competition under the traditional structure of real estate transactions because the seller and seller's broker, not the buyer's broker, determine the amount of the buyer's broker's commission via the listing agreement. Without rebates, if the buyer's broker were simply to reduce his or her commission, the savings would go to the seller's broker, not to the home buyer. As one panelist explained: the mechanics of the typical real estate transaction make it difficult for a buyer's broker to reduce the price of his or her services because the "custom of the industry" is for the listing broker to split his or her commission with the buyer's broker.[70] Rebates, therefore, can be powerful tools for price competition between brokers. And by returning money to home buyers, rebates can also benefit home sellers, because buyers will have more to spend on the home as opposed to commission payments.

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[66] *See* GAO REPORT, *supra* note 3, at 19.

[67] We refer to all such rebates and inducements generally as "rebates" throughout this Report. State laws and state real estate commission regulations prohibiting rebates are referred to generally as "rebate prohibitions" or "rebate bans." State anti-rebate laws and regulations and their effect on price competition and consumer choice are discussed in Chapter IV.A.1 of this Report.

[68] *See* 1% Realty, Buying a New Home, http://www.onepercentusa.com/buy.htm (last visited Mar. 27, 2007).

[69] *See, e.g.*, Glenn Roberts, Jr., *"Secret Agents" Quietly Offer Real Estate Rebates*, INMAN NEWS, Mar. 7, 2006 (describing secret real estate agent referral service operating in Maryland, Virginia, and the District of Columbia that offers – outside of the settlement and thus off the books – sellers a 1.5% rebate and buyers all of the commission received by the agent above 1.5%).

[70] Henderson, Tr. at 155.

2. *Fee-For-Service Brokers*

Fee-for-service brokers – sometimes also referred to as "flat-fee" brokers or "limited-service" brokers – represent a departure from traditional full-service brokers who typically charge a commission based on the sales price in return for a bundle of services. Fee-for-service brokers offer home sellers the option to purchase less than the full bundle of services traditional brokers provide. Different fee-for-service brokers may offer different arrays of services, and home sellers can pick and choose the services they wish to procure from the provider or providers of their choice. Most fee-for-service brokers offer sellers two or more service packages, and many offer an additional itemized list of optional services. This business model is likely to benefit consumers who do not want to forgo broker assistance completely but who feel comfortable handling many aspects of the transaction without such assistance.

Fee-for-service brokers often offer an MLS-only package, which allows consumers, who are not permitted by MLS rules to list their homes in the MLS on their own, to list their homes in the MLS by contracting with a broker who is a member of the local MLS.[71] For a flat fee (*e.g.*, $500), the broker would list the home in the local MLS and make an offer of compensation in the MLS to other brokers who may cooperate in the sale of the home. The broker typically would retain the flat fee whether or not the home ultimately sells. If a cooperating broker ultimately secures a buyer for the home, he or she would receive the cooperating commission.[72] A seller who finds a buyer without the help of a cooperative broker, however, would not pay this compensation.

MLS-only packages offered by fee-for-service brokers typically include other services provided via the MLS. These include advertising the seller's listing on Internet websites that home buyers search directly (*e.g.*, Realtor.com[73]) and on other MLS members' websites. Additionally, fee-for-service brokers typically provide the client additional selling aids, such as yard signs, online advertisements, and a lock-box to allow buyers' agents to show the home when the seller is not present.

In addition to the MLS-only package, many fee-for-service brokers offer other services. The Agencies' review of fee-for-service broker websites indicates that most

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[71] *See, e.g.*, *Rules and Regulations of North Texas Real Estate Information Systems, Inc*. §§ 5.01-5.02 (amended Sept. 21, 2005), *available at* http://www.ntreis.net/documents/Documents_262006124924.

[72] *See, e.g.*, FSBOAdvertisingService.com, Houston Texas Realtor Flat Fee MLS, http://www.fsboadvertisingservice.com/flat-fee-mls-MLSTX3.asp (last visited April 20, 2007) (2-3 percent commission for broker that finds a buyer); ifoundahome.net, http://www.ifoundahome.net/Listingwork/SBasicListing.htm (last visited April 20, 2007) (allowing home sellers to offer "a 3% commission or more" to buyers' brokers); TexasDiscountRealty.com, Flat Fee Listing, http://www.texasdiscountrealty.com/flatfee.htm (last visited April 20, 2007) (3 percent commission for a broker that finds a buyer).

[73] REALTOR.com, http://www.realtor.com (last visited April 20, 2007) (according to its website, REALTOR.com is the "Official Site of the National Association of REALTORS").

offer at least two tiers of service and the complete array of traditional services at a reduced commission. Thus, consumers who purchase the MLS-only package, but later feel they need more assistance with their transaction, typically can obtain it from their broker for an additional fee. For example, one Workshop participant who operates a flat-fee brokerage stated that about 30 percent of his clients who sign up for a flat-fee listing eventually purchase additional brokerage services.[74] This panelist's website offers the flat-fee listing at $595, but also offers two other packages: "flat-fee plus," which costs an additional $1,500 and includes negotiation and post-contractual assistance, and full-service brokerage for a discounted percentage fee.[75] Further, many fee-for-service brokers allow their clients to cancel their listing agreement at any time, leaving consumers free to pursue other brokerage or non-brokerage options if they become dissatisfied with the broker's service.

Although many brokers who specialize in the fee-for-service option are not affiliated with major national brokerage chains, some brokers who are affiliated with such chains offer fee-for-service or flat fee brokerage options.[76] Although brokers using these models have existed since the 1970s, industry participants told GAO that the Internet has allowed such brokerages to grow in numbers and size in recent years, in part because they can market their services to a larger population of buyers and sellers.[77]

3. Virtual Office Website Brokers

VOWs are Internet websites through which brokers offer brokerage services online to their registered clients.[78] The unique feature of VOW operators is that these brokers offer their clients the ability to search online the same MLS information that other brokers provide to their clients through other delivery methods, such as hand delivery, mail, fax, or email.[79] Under NAR rules, VOWs may provide clients with more MLS information than can be provided by publicly accessible broker websites that are governed by NAR's Internet Data Exchange ("IDX") policy, discussed in Chapter II.

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[74] *See* Farmer, Tr. at 107-08.

[75] *See* TexasDiscountRealty.com, Home Sellers, http://www.texasdiscountrealty.com/sellers1.htm (last visited April 20, 2007).

[76] *See* Kunz, Tr. at 101 (noting that several types of business models operate under the Century 21 franchise).

[77] *See* GAO REPORT, *supra* note 3, at 19-20.

[78] *See Testimony Summary of Russell Capper, President and Chief Executive Officer, eRealty, Inc. before Federal Trade Commission Office of Policy and Planning Public Workshop on E-Commerce* 2 (2002), *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/capper.pdf.

[79] *Id.*

Access to the VOW and its listings search features is limited to prospective buyers or sellers who have entered into an agreement with the VOW operator that includes a terms-of-use agreement.[80] The VOW permits clients to search the database at their leisure until they are ready to contact their broker for assistance in viewing the home, making an offer, etc. While many buyers may see this as a benefit that allows them greater control over their home-buying process, brokers may also benefit. For example, brokers may reduce the time they spend servicing each customer face-to-face because customers conduct a portion of the time-consuming listings searches on their own.[81] Although brokers offering VOWs differ from other brokerages in their innovative uses of the Internet, in other respects they operate like other brokers. VOW brokerages typically maintain physical offices in the markets in which they operate, staff those offices with licensed brokers who participate in their local MLSs, and represent both buyers and sellers.[82]

One panelist who worked with eRealty, an early discount broker that operated a VOW,[83] described aspects of its business model. eRealty was a licensed brokerage and employed licensed agents.[84] It provided the ability to search MLS data online to bona fide buyers who had registered for a password, monitored the MLS, and reported to its clients when any listing came up that fit a profile that the client had pre-established.[85] In this way, the VOW model allows consumers to substitute their search effort for that of a broker:

> The e-Realty model . . . allows the client to initially bypass the Realtor by becoming a client of e-Realty and conducting his own search. . . . Therefore e-Realty can often charge a lower commission than traditional Realtors since there has been no time expended searching through the MLS.[86]

eRealty also would "communicate instantly through email or any device [clients] needed to assist [them] with scheduling of appointments and the whole scheduling of the

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[80] *Id.*

[81] *Id*. at 1.

[82] *Id.*

[83] Prudential Real Estate purchased eRealty. *See* Blanche Evans, *Prudential Neutralizes eRealty, Buys Technologies*, REALTY TIMES, Jan. 29, 2004, *available at* http://realtytimes.com/rtapages/20040129_erealty.htm.

[84] DelBianco, Tr. at 182.

[85] *Id*. at 182-83.

[86] *Austin Bd. of Realtors v. E-Realty, Inc.*, No. Civ. A-00-CA-154JN, 2000 WL 34239114, at *2 (W.D. Tex. Mar. 30, 2000).

transaction all the way through to close."[87] eRealty gave a 1 percent rebate to buyers and also took listings from home sellers.[88]

The panelist emphasized that this business model took the MLS "a step beyond" cooperation and compensation in a business-to-business exchange and used the "power of the information in [the MLS] to better serve consumers."[89] As he explained, consumers "expect systems, servers, to do the grunt work of searching for homes, gathering data on schools and neighborhoods, monitoring new listings, and the reporting whenever a listing fits their profile, [and] scheduling appointments . . . to help them see the home."[90]

4. Websites that Provide Advertising and Other Services to FSBO Sellers

Some consumers choose to sell their homes without any assistance from a real estate broker. These sellers are referred to as "for-sale-by-owners" or "FSBOs," and they market their homes themselves by placing ads in local media, posting signs, and conducting their own open houses. MLSs do not allow FSBO homes to be listed in the local MLS because a listing broker member is not involved. FSBOs often offer payment to a broker representing a buyer.

Several companies offer services to help FSBO sellers. For example, there are several websites devoted to advertising FSBO homes.[91] One Workshop panelist representing a major FSBO website explained that his company allows home sellers to post color photos, virtual tours, and 3,000-word descriptions that are searchable by potential home buyers.[92] According to this panelist, the industry average price for this service is a flat fee of approximately $300. These websites often will also provide potential home buyers with general information on neighborhoods, such as demographics, crime rates, and school quality. Further, many provide links to ancillary service providers, such as title insurance companies, escrow services, and home

[87] DelBianco, Tr. at 182.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 186.

[91] Examples of FSBO websites include: ForSaleByOwner.com, http://www.forsalebyowner.com (last visited April 20, 2007); FSBO.com, http://www.fsbo.com (last visited April 20, 2007); craigslist.org, http://sfbay.craigslist.org/hhh (last visited April 20, 2007); and HomesByOwner.com, http://www.homesbyowner.com (last visited April 20, 2007). *See* Thorburn, Tr. at 97-98 (noting the variety of tools available to FSBOs). *See also* GAO REPORT, *supra* note 3, at 20.

[92] Sambrotto, Tr. at 86.

inspectors, and also provide sample forms related to real estate transactions, such as sample purchase or lease agreements.[93]

5. Broker Referral Networks

Some national Internet websites aggregate some of the MLS data from across the country and allow potential home buyers to search the databases. After the potential buyer has searched the information online and is ready to visit homes in a particular area, the website refers him or her to a local broker. This broker pays a referral fee – typically a portion of the commission – to the referral website that aggregated the MLS data. The referral website may then rebate a portion of its referral fee to the consumer, if state law or regulations do not prohibit rebates.

Other referral websites do not display aggregated listings, but use Internet marketing to advertise their referral services and rebates to consumers. One panelist represented RealEstate.com, a business that uses the Internet to build a network of local brokers and agents.[94] Participating brokers and agents pay a cooperative brokerage fee to the company for referrals, and RealEstate.com cultivates buyers by using online tools and information and, where permitted, by offering the buyer a rebate.[95] The buyers are then referred to the local broker for further assistance.[96] As this panelist noted, the Internet and the new business models are "about unleashing brokers to have the ability to use new methods and tools to expand, to succeed and to succeed in this market that is competitive."[97]

6. Consumers' Use of Nontraditional Models and FSBOs

According to NAR's 2006 Profile of Home Buyers and Sellers, 83 percent of home sellers who retained a broker used one who provided the traditional "full" array of services; 8 percent hired a broker who listed the seller's home in the MLS and performed few, if any, additional services; and 9 percent hired a broker to provide a broader array of services, but short of full-service.[98]

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[93] *See ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 870-71 (E.D. Cal. 2004) (providing a general description of the ForSaleByOwner.com business model).

[94] Henderson, Tr. at 154.

[95] *Id*. at 155.

[96] This assistance can include: locating and arranging for inspection of properties by prospective buyers; providing prospective buyers with information such as relative property values and most recent selling prices; helping in the negotiation process; and helping to schedule and prepare for closing of the transaction.

[97] Henderson, Tr. at 156-57.

[98] NAR 2006 SURVEY, *supra* note 4, at 77.

NAR data show that the number of FSBOs – consumers who sell their homes without the assistance of a real estate professional – has been declining. NAR's 2006 Survey estimated that FSBOs account for about 12 percent of home sellers, with an additional 5 percent of sellers first trying the FSBO route, but then retaining a broker to complete the sale.[99] NAR's 2005 data estimated FSBOs at approximately 13 to 14 percent, and noted that this number has been steady since 2001, and is lower than it was for the 1990s: 19 percent in 1991; 17 percent in 1993; 15 percent in 1995; 18 percent in 1997; and 16 percent in 1999.[100]

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[99] *Id*. at 80, 68.

[100] NAR 2005 SURVEY, *supra* note 38, at 59.

II. THE INTERNET'S ROLE IN REAL ESTATE BROKERAGE

The Internet has had a significant impact on the real estate industry, leading to a diversification of business models to serve consumers. Some have suggested, however, that the industry has not yet experienced the sort of sweeping benefits to consumers in the form of cost savings and service enhancements that have been seen in other industries from the use of the Internet and other technology.[101] This Chapter examines how the Internet has increased consumer access to information about real estate and how this increased access has in turn affected consumer behavior. This Chapter also discusses the Internet as a means of providing real estate brokerage and related services to consumers. Finally, this Chapter addresses gaps in consumer knowledge that may exist despite the extensive information now available on the Internet.

A. Increased Consumer Access to Real Estate-Related Information

By reducing the cost of transmitting and searching information, the Internet has enabled consumers more easily to educate themselves about all facets of home buying and selling. For example, before the introduction of the Internet, consumers had to learn about homes for sale through real estate brokers, or through various offline marketing vehicles, such as yard signs, newspaper advertisements, or real estate magazines. These techniques are still important and commonly used, but consumers now have access to listing information from a variety of online sources as well. Many brokers market listings online through their own websites and give their MLSs permission to place their listings on Realtor.com.[102] Consumers can view these listings before contacting or forming a relationship with a particular broker.

The source of listings for many of these advertising websites is the MLS. In accordance with NAR rules, the MLSs create an "Internet Data Exchange ("IDX"), a datafeed that participating brokers may use for their individual advertising websites. Broker IDX websites enable home sellers to get greater exposure for their listings, and enable home buyers to search listings, both on national IDX websites (*e.g.*, Remax.com), and on broker websites focused in a local area. According to a NAR survey of home buyers and sellers, broker IDX websites were among the top three most popular websites searched by buyers, with 40% of buyers conducting their home searches on these websites.[103] In addition, many MLSs contribute the IDX datafeed to some of the most popular publicly accessible websites like Realtor.com, a national website that NAR owns.

Although these IDX websites, as explained more fully below, provide critically important avenues for brokers to advertise their listings to potential buyers and their

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[101] *See* Hahn, Tr. at 29-30; AEI-Brookings Paper, *supra* note 3, at 13 n.49; Nadel, *supra* note 25, at 4-5.

[102] *See* Perriello, Tr. at 149; Lewis, Tr. at 174 (noting that all traditional companies "have a significant online presence").

[103] NAR 2006 SURVEY, *supra* note 4, at 44.

agents, these websites are not a substitute for the MLS. In contrast to VOWs and to brokers' "brick and mortar" offices, websites that rely on an IDX datafeed contain less information than the actual MLS database, and that information may be out of date.[104] If a broker opts to not participate in the IDX, which NAR's rules allow, none of the broker's listings are included on the IDX datafeed, and he or she cannot operate a website based on an IDX datafeed. Therefore, IDX datafeeds may contain listings on fewer than all of the homes listed for sale in the MLS's area. IDX datafeeds can also be less complete than the full MLS listings database because each MLS determines which datafields to include in the IDX datafeed. For example, it is not uncommon for MLSs to withhold the home address, a critical piece of information for brokerage clients, from the IDX datafeed. Some MLSs also withhold such datafields as the detailed description of the home or the property disclosures. Finally, IDX-based websites often will be missing some homes that recently have been listed for sale and include some that are no longer for sale because there often is a delay between an update of MLS data and when those changes are reflected in the IDX datafeed.

Panelists representing traditional brokers acknowledged that the listings information provided via an IDX datafeed is limited. For example, one panelist explained that "what you see in the MLS is more detailed information [than is displayed on IDX websites], but again, [brokers] have access to that [information in the MLS], and [brokers] can provide that to the consumer."[105] The same panelist elaborated on the advantages of MLS data:

> Anyone who is a member of the realtor organization, whether they are a discount broker, a limited service broker or a full-service broker, have their listings in the Multiple Listing Service, and in that broker-to-broker cooperative environment, that is real time information for me to be able to deliver to my customer or client, the buyer, and real time is important, especially if you happen to be in a seller's market, because the advertising vehicles [*i.e*. IDX websites] that are out there on the internet are not real time, and by the time even that a consumer might be able to see something online, it could be gone.[106]

As this panelist explained, access to full MLS, rather than limited IDX datafeeds, is "extremely valuable" because it allows agents to tell consumers "the minute that something is listed, 'Let me tell you, there was a new listing that just popped up, it's matched your criteria, I think we ought to go out and look at it.'"[107]

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[104] *See* Whatley, Tr. at 160-61.

[105] *Id.* at 210-11.

[106] *Id*. at 161.

[107] *Id*.

In addition to listing information derived from MLSs, consumers also can view homes for sale on third-party advertising websites such as Craigslist.com, and on a variety of websites that promote homes that are for-sale-by-owner.[108] Further, the Internet helps consumers to educate themselves about other areas of home buying and selling. For example, consumers can use the Internet to research brokers,[109] mortgage and lending options,[110] and recent home sales and home valuations in their community.[111] Consumers also can find information about schools, crime, and other variables related to home purchase decisions through a host of online sources, including websites hosted by their municipalities.

Several Workshop panelists and commenters remarked on how the Internet has expanded the amount of information available to consumers, making them more knowledgeable as they enter into real estate transactions. One commenter concluded: "Today's sellers and buyers are more educated and more knowledgeable thanks almost entirely to the growth of the [I]nternet."[112] A panelist described the Internet as "a very highly effective marketing tool as well as a tremendous information resource and communication tool."[113] Another commenter observed:

> More individuals are researching available properties for sale. Buyers can themselves gather key bits of information about property location, flood history, contract status, room dimensions, etc. Sellers are better able to determine comparable prices for similar houses, helping them to gauge the appropriateness of a listing price suggested by an agent.[114]

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[108] *E.g.*, ForSaleByOwner.com, http://www.forsalebyowner.com (last visited April 20, 2007); FSBO.com, http://www.fsbo.com (last visited April 20, 2007); and HomesByOwner.com, http://www.homesbyowner.com (last visited April 20, 2007).

[109] *See, e.g.*, JustRealEstate.org, http://www.justrealestate.org (last visited April 20, 2007).

[110] *See, e.g.*, Mortgage101.com, http://www.mortgage101.com (last visited April 20, 2007).

[111] *See, e.g.*, Zillow.com, http://www.zillow.com (last visited April 20, 2007).

[112] Shortt, Public Comment 311, at 1.

[113] Perriello, Tr. at 149. *See also* Whatley, Tr. at 160-61 (noting that consumers now may research online not only homes for sale, but also the entire buying and selling process).

[114] American Bankers Association, Public Comment 10, at 3 (comment). *See also* Perriello, Tr. at 149 (listing several features of real estate websites, including property photos, virtual tours, rich text, mapping functionality, and neighborhood information); Sambrotto, Tr. at 86 ("The [I]nternet is an ideal platform for marketing real estate. You can post color photos. You can post virtual tours. . . . And you can have that information easily searched and frequently searched by buyers from their own homes on the [I]nternet.").

One panelist opined that "a generation of Americans are now comfortably and constantly connected to the [I]nternet and to [eC]ommerce. They instinctively start with the [I]nternet before they search to buy anything. They do extensive research online."[115]

Industry-produced data appear to support this view. A recent NAR survey of home sellers and buyers concluded that "[t]he most significant trend in the home search process is the increasing importance of the Internet as a source of information about homes and the characteristics of different communities."[116] Among the evidence supporting this conclusion is the finding that in 2006, 80 percent of home buyers used the Internet during their home searches (up from 71 percent in 2003).[117] In addition, in 2005 and 2006, 24 percent of recent home buyers first found the home that they purchased on the Internet – up from only 2 percent in 1997.[118] Conversely, the number of buyers reporting real estate agents as the first source of such information has decreased from 50 percent in 1997 to 36 percent in 2005 and 2006.[119] Among the most popular websites used by home buyers in their searches were Realtor.com (52 percent of respondents), MLS websites (53 percent), and real estate company websites (41 percent).[120] Features ranked as most useful among home buyers searching for a home on the Internet were photos (identified as very useful by 83 percent of home buyers), detailed property information (81 percent), and virtual tours (60 percent).[121] Brokers surveyed by NAR cite the Internet more frequently than any other method, including yard signs, as a way to market homes.[122]

B. The Internet's Effect on the Real Estate Industry

By placing more information in the hands of consumers, the Internet has facilitated the growth of nontraditional business models – such as fee-for-service brokers, VOWs, and broker referral networks – that allow consumers opportunities to substitute their efforts for those of the broker, in many cases in return for lower fees. These lower fees reflect the lower cost of serving consumers who are "easier to serve" because they

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[115] DelBianco, Tr. at 185.

[116] NAR 2005 SURVEY, *supra* note 38, at 29.

[117] NAR 2006 SURVEY, *supra* note 4, at 37.

[118] *Id.* at 38, 29.

[119] *Id*.

[120] *Id*. at 44.

[121] *Id.*

[122] NAR 2005 SURVEY, *supra* note 38, at 65 (Internet cited by 84% of broker respondents, while yard sign cited by 79%).

perform substantial online research themselves.[123] According to one commenter, "With individuals assuming more of the responsibility to gather and assess information, less time and effort is required by real estate agents in assessing market conditions (for sellers) and in identifying and showing houses [(for buyers)]. The cost of an agent's service, therefore, should go down reflecting this shift in burden."[124]

Consumers differ in their willingness, ability and opportunity to use the Internet to perform functions traditionally provided by brokers. While many consumers may be willing to perform search tasks themselves, they may be more likely to continue to rely on brokers for assistance related to the transaction process because it involves expertise derived from broker experience.[125] For buyers, this may mean performing much of their early search by themselves online and contacting a broker only after they have become familiar with market offerings and are ready to start placing offers on homes. For sellers, this may mean setting their own sales price and relying on the wide online exposure of MLS listings rather than broker effort to market their home, and hiring an agent only to list their home in the MLS and for assistance in closing the transaction.

While the Internet clearly has had a significant impact on the real estate industry, one Workshop panelist, an economist, opined that the real estate brokerage industry has not experienced the types of technology gains benefiting consumers that have been seen in other service industries, such as making airline and other travel reservations and buying and selling stocks.[126] Several factors may be limiting wider use of the Internet. The resistance of some traditional brokers to dealing with firms that more fully or innovatively use the Internet is one factor that could limit realization of the Internet's full potential.[127] Restrictions on the availability of real estate listing information can also limit the economic benefits that Internet use provides.[128]

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[123] DelBianco, Tr. at 185.

[124] American Bankers Association, Public Comment 10, at 3 (comment).

[125] *See* Steve Sawyer et al., *Redefining Access: Uses and Roles of Information and Communication Technologies in the US Residential Real Estate Industry from 1995 to 2005*, 20 J. INFORMATION TECH. 213, 217 (2005) (contending that brokers provide value in three areas – information intermediation, process knowledge, and social capital in supporting closing needs of buyers and sellers – and that even though an online MLS gives buyers greater access to relevant information, most buyers will still need assistance in making sense of this information).

[126] *See* Hahn, Tr. at 29-30; AEI-Brookings Paper, *supra* note 3, at 13 n.49; Nadel, *supra* note 25, at 4-5.

[127] *See* GAO REPORT, *supra* note 3, at 13-14, 21. This factor is discussed in detail in Chapter IV of this Report.

[128] GAO found that a "key factor" in the expansion of the Internet is the extent to which information about properties listed in an MLS is widely available. GAO REPORT, *supra* note 3, at 17, 20-21. *See also* AEI-Brookings Paper, *supra* note 3, at 12 (access to the MLS is a "potential bottleneck" in the large positive impact that the Internet could have for home buyers and sellers).

C. Gaps in Consumer Knowledge

Even with the significant amount of information currently available on the Internet, there may be gaps in knowledge by some consumers in several important areas that may result in real estate brokerage markets functioning less efficiently. First, it appears that many consumers are not fully apprised of their marketplace options. For example, the most recent NAR survey of home sellers and buyers found that the majority of home sellers contact only one listing agent before hiring one to assist with the sale of their home.[129] Further, there is evidence that some consumers of brokerage services are not necessarily aware that commission rates are negotiable.[130] This may be especially true of buyers who pay for their brokers' services indirectly via the purchase price of the home.[131] Although some Workshop comments suggest that consumers' awareness of their ability to negotiate over the price and terms of brokerage services is increasing,[132] perhaps due to the increasing numbers of discount brokers that have entered the industry over the past few years, some consumers do not negotiate over commission rates.

Second, consumers may be unaware of the possibility that their brokers may have conflicting interests that lead them not to provide the consumer with the best possible advice. As discussed in more detail in Chapter IV, brokers have certain incentives to "steer" consumers toward those homes that offer the highest cooperating broker commission payment and away from homes listed by brokers known to charge home sellers discounted commission rates. In this manner, brokers can take advantage of their superior knowledge of market conditions by steering clients away from home listings that otherwise match the criteria identified by the consumers, but provide lower financial gains for the broker than other homes.[133]

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[129] NAR 2006 SURVEY, *supra* note 4, at 74 (69% of sellers contacted only one agent; 74% of sellers found their agent through either a referral or a prior relationship with the agent).

[130] *See, e.g.*, Paul Anglin & Richard Arnott, *Are Brokers' Commission Rates on Home Sales Too High? A Conceptual Analysis*, 27 REAL ESTATE ECONOMICS 719, 721 (1999) ("Another factor in sustaining a collusive commission rate is that many sellers do not realize that the commission rate is negotiable."); 1983 FTC STAFF REPORT, *supra* note 9, at 66, 68-69 (reporting that as many as three-fifths of recent sellers and three-fifths of recent buyers may have been unaware of the negotiability of commission rates).

[131] Some commentators have argued that buyers may have the misimpression that their brokers' services are free. *See* Nadel, *supra* note 25 at 23.

[132] *See, e.g.*, Lord, Public Comment 254, at 1 ("The competition is fierce the majority of time that an agent has a listing appointment . . . they are confronted with the question how much can you reduce your commission? It is a standard question now."); Paulsen, Public Comment 364, at 1 ("If the public felt there was a set fee I would not be asked what my rate is to sell a house. And trust me, everyone asks.").

[133] *See* Barry, Public Comment 19, at 57 (reporting that, because the public sources of property listings never show the commission offered by the listing brokers, buyers are unaware that their agents have screened out listings with lower commission offerings); WOODALL & BROBECK, *supra* note 14, at 5 ("home buyers will not have access to this information about the splits, so they cannot check to see whether their broker is steering them away from houses carrying lower splits"); White, *supra* note 47, at 5 n.13 ("in a milieu where there is a great deal of uncertainty as to which house will best fit the demands of a buyer and which buyers are true prospects for a seller, it may be difficult for the client to determine that her agent is

Home buyers' increasing use of the Internet may limit brokers' ability to steer buyers away from discounters' listings without their knowledge. As noted above, 80 percent of consumers use the Internet to search for homes in 2006.[134] To the extent that consumers have greater knowledge of the stock of housing for sale than they used to, brokers will be less able to exclude a particular listing from home buyers' searches without their knowledge. If a home buyer finds a discounter's listing on his or her own that appears to be a good match, a broker likely will either have to show the home buyer the discounter's listing or explain why he or she will not.[135]

In addition, consumers also may be unaware that when they pay their broker a commission based solely on a percentage of the sales price at closing (as most do today),[136] the broker's financial incentives are not necessarily aligned with the consumer's. On the sell side of the transaction, the consumer's interest is to sell the home at the highest possible price. Even though an agent's commission increases with the price of the home, he or she likely retains no more than 1 to 2 percent of the sales price (after paying the cooperating broker and the agent's brokerage firm).[137] Therefore, the agent may be less willing than the consumer to take the risks associated with getting a higher sales price, such as waiting for what might be a better offer and perhaps having to do additional work.[138] Likewise on the buy side of the transaction, the broker may be less

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steering in a disadvantageous way"); 1983 FTC STAFF REPORT, *supra* note 9, at 75 ("Because many buyers think they are seeing all the properties a broker or salesperson knows to be on the market, the practice of steering coupled to the general practice of denying consumers direct access to information from a MLS may mislead buyers.").

[134] *See supra* notes 117-118 and accompanying text.

[135] Another gap in consumers' knowledge – albeit one that does not necessarily affect competition in the real estate brokerage industry – may be that consumers are not fully informed as to what, if any, duties they are owed by their broker. This can occur if the broker fails to disclose such information to the client as legally required. States typically require agents to disclose to their clients the duties that they owe to their clients under state law. *See*, *e.g*., VA. CODE ANN. § 54.1-2131(E) (2007). Without full and timely disclosure a customer may reveal sensitive information, such as the buyer's maximum offer or the seller's minimum price, to a broker who is actually representing the party on the other side of the transaction.

[136] *See* NAR 2006 SURVEY, *supra* note 4, at 78 (75 percent of home sellers surveyed reported that the listing agent was compensated with a percentage of the sales price of the home).

[137] *See* Rutherford *et al*., *supra* note 16, at 629 ("Given that the agent receives a small portion of the transaction price as commission, the agent's goal of maximizing the expected commission may diverge from the seller's goal of maximizing the selling price. Furthermore, given that the targeted selling price will impact the time the asset stays on the market, the agent's desired time on the market may diverge from that of the seller.").

[138] *See* Levitt & Syverson, *supra* note 16, at 6 (noting that if an agent receives 1.5 percent of the sales price and incurred weekly costs of $200 to keep a home on the market, "the agent would be indifferent between selling the house today or waiting one more week and receiving an offer $13,333 higher with certainty."). Both Rutherford *et al*. and Levitt & Syverson find empirical evidence consistent with a principal-agent conflict between sellers and agents. Specifically, both studies find that homes owned by agents sell for more than other homes, even after controlling for housing characteristics that are likely to affect prices.

interested than the consumer in negotiating the lowest possible sales price because a lower sales price translates into a lower commission for the broker, likely requires additional work, and may increase the risk that the transaction falls through with no commission paid to the broker. Consumers may be unaware of these potential conflicts of interest. Some commentators have posited that alternative payment structures may better align consumer and broker interests.[139]

[139] *See* Chang-Tai Hsieh & Enrico Moretti, *Can Free Entry Be Inefficient? Fixed Commissions and Social Waste in the Real Estate Industry*, 111 JOURNAL OF POLITICAL ECONOMY 1076, 1088 n.17 (2003) (suggesting that it is a "puzzle" why brokerage contracts are not "non-linear," where the agent receives a fixed fee and a commission for any price above some minimum value); Levitt & Syverson, *supra* note 16, at 20-21 (suggesting a non-linear compensation scheme, but noting that it may be difficult to implement because the homeowner is less informed than the agent about the home's market value); *see also* Nadel, *supra* note 25, at 43-60 (suggesting a fee-for-service rate structure).

III. COMPETITION AMONG BROKERS

Real estate brokers compete to attract customers in different ways based on price and non-price dimensions. To compete on price, they can offer lower commissions to home sellers and, where permitted, rebates to home buyers. On the service dimension, they can offer more assistance or convenience to customers. Brokers also compete for customers by marketing their services to potential buyers and sellers in various ways.

Although consumers benefit to some extent from all of these forms of competition, the available data suggest that brokers may compete less on price than would be expected in a competitive market. Even though national average commission rates have fallen steadily since 1991 and commission rates appear to vary inversely with housing prices, it appears that rates are sufficiently inflexible to cause commission fees to move in tandem with housing prices. The recent run-up in housing prices illustrates this phenomenon: from 1998 to 2005, housing prices rose 37 percent in real terms and, although national average commission rates appear to have fallen from 5.5 percent to 5 percent, average brokerage fees per transaction rose 26 percent in real terms during the same period.[140] At the same time, the efficiencies generated by the Internet and other technological advances suggest that broker costs should be falling. The evidence also suggests that rising per-sale profits for brokers induce entry by new brokers so that the average number of sales per broker declines.

This Chapter explores evidence concerning competition among brokers. Section A examines the structural features of the real estate brokerage industry. Section B describes the nature of competition among brokers and views about the current state of competition presented by Workshop panelists and commenters. Section C presents the available data on actual commission rates and fees. Section D reports one panelist's attempt to make sense of the evidence presented in Sections A through C.

A. Structural Features of the Real Estate Brokerage Industry

Although a detailed exploration of all industry characteristics was beyond the scope of the 'Workshop, participants focused on a variety of characteristics, including broker concentration and entry into the industry.

1. Broker Concentration[141]

Competition among brokers is primarily local because real estate is fixed in a geographic location, and buyers and sellers often want some in-person interaction with a broker who has experience and expertise relevant to that particular location. For example, a broker in Alexandria, Virginia, competes with other brokers able to meet the

[140] *See infra* Chapter III.C.

[141] Although this section reports a variety of statistics that purport to measure "market share," this Report makes no attempt to define a relevant antitrust market for this, or any other, analysis.

needs of consumers who are buying and selling homes in the area; this is likely to include other brokerage firms located in and around Alexandria, but not those located in California. Recent research supported by NAR states that "the U.S. real estate industry is a collection of many local real estate markets."[142]

Although nationwide market shares provide little information about local market concentration, national-level data do demonstrate that there are many brokerage firms and agents, and that most brokerage offices consist of a small number of agents. According to a Workshop panelist, there are approximately 98,000 brokerage firms operating over 200,000 local offices in the United States.[143] These offices provide potential employment for approximately 2.5 million real estate licensees (of which more than 1.2 million are members of NAR).[144] In 2004, 96 percent of brokerage offices in the United States employed ten or fewer agents.[145] From 1983 to 1999, the portion of brokerage offices with five or fewer agents increased from 51 percent to 60 percent.[146] In contrast, the portion of offices with a sales force of more than 50 agents never exceeded 5 percent during that time period.[147]

There is conflicting information regarding the percentage of home sales nationwide accounted for by the largest real estate firms. NAR reported in its public comment that in 2004 the top ten brokerage firms in the United States had a combined 9.1 percent market share, the top twenty firms had a 10.9 percent share, the top 100 firms had a 17 percent share, and the top 500 firms had a 26.6 percent share.[148] In addition, according to NAR, the two largest brokerage firms in the industry had only 4.1 percent and 1.7 percent market shares, respectively.[149] The market shares reported by NAR

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[142] *See, e.g.*, STEVE SAWYER, LOCAL REAL ESTATE MARKET COMPETITION: EVIDENCE AND INSIGHT FROM AN ANALYSIS OF 12 LOCAL MARKETS 3 (2005), *available at* http://www.realtor.org/publicaffairsweb.nsf/Pages/Sawyer05?OpenDocument (noting existence of "micro-markets" within metropolitan areas. For example, within the Washington, DC metropolitan area, there is little or no competition among buyers, sellers, and real estate agents across the micro-markets of Montgomery County, MD, Fairfax County, VA, and southwest Washington, DC).

[143] Yun, Tr. at 220.

[144] *Id.*; NAR, Public Comment 208, at 3 (comment).

[145] Lawrence Yun, Ph.D., Senior Economist, National Association of Realtors, Presentation at the Federal Trade Commission & Department of Justice Public Workshop: Competition Policy and the Real Estate Industry, *Real Estate Brokerage Industry: Structure-Conduct-Performance*, at 9 (Oct. 25, 2005)[hereinafter Yun Presentation], *available at* http://www.ftc.gov/opp/workshops/comprealestate/yun.pdf.

[146] *Id.*

[147] *Id.*

[148] NAR, Public Comment 208, at 7 (comment).

[149] *Id.*

appear to be based on the nationwide shares of individual brokerage firms, most of which do not have a nationwide presence. However, in many cases, individual brokerage firms exist under common ownership or as part of a franchise system. For example, Realogy – through its franchises and wholly-owned brokerages – claims to have "participated in approximately one of every four domestic homes sold through a brokerage in 2005."[150]

In any case, competition among brokerages tends to be local, and brokerage shares calculated at the local level can be far higher than those suggested by national data.[151] For example, in *Re/Max International, Inc. v. Realty One, Inc.*, the plaintiff's expert presented "essentially unchallenged" testimony explaining that "[i]n a majority of the 161 cities and towns in northeast Ohio, the [two] defendants' combined market share exceeds 50%."[152] In *Mid-America Real Estate Co. v. Iowa Realty Co.*, the court found that one company accounted for over 50 percent of all residential real estate transactions in Des Moines, Iowa, (when FSBO sales are considered) or approximately 60 percent of all sales completed through the local MLS in Des Moines.[153] In a study of the State College, Pennsylvania, area, researchers found that "the largest brokerage firm maintained 31% of the listings and 30% of the sales. The second largest brokerage firm accounted for 22% of the listings and 20% of the sales. Each of the next four largest firms enjoyed less than 10% of the listings and sales."[154] A study of real estate transactions obtained from the Lincoln, Nebraska, MLS reported that although homes in the sample were listed by fifteen brokerage firms, "[t]wo of these firms listed 75% of the properties in the sample, with the remaining listings fairly evenly distributed between the other thirteen firms."[155]

2. Entry

The requirements for becoming a real estate licensee (*i.e*. an agent) do not appear to be substantial. A 1983 FTC Staff Report on the real estate brokerage industry

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[150] REALOGY, REALOGY BUSINESS OVERVIEW 4 (Dec. 2006), *available at* http://library.corporate-ir.net/library/19/198/198414/items/223251/RealogyDecember06%20Final.pdf.

[151] NAR, Public Comment 208, at 6 ("In a few markets, some firms may have a larger than usual market share, but market shares are known to change measurably from one year to the next.").

[152] *Re/Max Int'l, Inc. v. Realty One, Inc.,* 173 F.3d 995, 1003 (6th Cir. 1999).

[153] *Mid-America Real Estate Co. v. Iowa Realty Co.,* No. 4:04-CV-10175, 2004 WL 1280895, at *8-*9 & n.5 (S.D. Iowa 2004), *rev'd on other grounds,* 406 F.3d 969 (8th Cir. 2005).

[154] Shiawee X. Yang & Abdullah Yavas, *Bigger is Not Better: Brokerage and Time on the Market*, 10 J. REAL ESTATE RES. 23, 27-28 (1995). The authors used a sample of 388 home sales in calendar year 1991 from the multiple listing service. *Id*. at 27.

[155] James E. Larson & Won J. Park, *Non-Uniform Percentage Brokerage Commissions and Real Estate Market Performance,"* 17 JOURNAL OF THE AMERICAN REAL ESTATE AND URBAN ECONOMICS ASSOCIATION 422, 428-29 (1989). The authors use a sample of 669 single family home transactions covering the first nine months of 1986 obtained from the Lincoln, Nebraska MLS. *See id*. at 427-28.

observed that "the nearly universal opinion is that there are no significant barriers to entry, if entry is construed as gaining a license in order to practice."[156] Namely, an individual agent primarily needs to meet state licensing requirements and affiliate with a licensed broker. Several Workshop panelists expressed a similar view. According to one panelist, "there are no significant barriers to entry or expansion in the residential real estate industry. As a result, there has been a dramatic number of new agents and new entrants into the industry in recent years."[157] Another panelist, a NAR economist, stated that in 2004 "253,000 [licensees] entered the market, became realtor members, and 127,000 dropped out, indicating that the market is fairly dynamic, that there's free entry, free exit."[158] He noted that between 1998 and 2005, while the number of home sales increased about 50 percent, the number of NAR members increased about 67 percent.[159]

Some commenters stressed the ease with which one can become an agent. For example, one industry participant stated: "Becoming a real estate agent is far too easy and too fast for what the service contemplates: The sale of what for many people is both their most important asset, and the one thing that physically binds their family together: a home."[160]

Brokerage entry appears to be more difficult than agent entry. At a minimum, an entrant that wants to establish a brokerage must hire or become a licensed broker.[161] Additionally, an entering broker may require an agent workforce, office space, office staff, and advertising of their listings to establish name recognition. Establishing such name recognition could be aided by affiliating with a national franchise (*e.g.*, Prudential or Re/Max). The examples of relatively high local market shares for brokerages described above suggest that agent entry is more common than brokerage entry.

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[156] 1983 FTC STAFF REPORT, *supra* note 9, at 102. As described *infra*, however, this is not necessarily the case with respect to the entry of new business models in the real estate brokerage industry. *See infra* Chapter IV.

[157] Perriello, Tr. at 146. *See also* Lewis, Tr. at 172 ("There are no barriers to entry in our industry . . . ."); Hsieh, Tr. at 235 ("there's relatively free entry into the profession and into the real estate brokerage business . . . ."). The ability of novice entrants to attract clients relative to more experienced agents was not discussed at the Workshop and, likewise, is not addressed in this Report.

[158] Yun, Tr. at 220.

[159] Yun Presentation, *supra* note 145, at 5, 7.

[160] Daniels, Public Comment 92, at 1.

[161] NAR, Public Comment 208, at 5 ("An agent can obtain a broker's license, usually after having been in business for several years, and passing a broker's license exam. The exact requirements vary by state.").

B. The Nature of Competition Among Brokers

Brokers compete for clients on several dimensions by offering the most attractive service and price combination.[162]

1. Service Dimension

Competition among brokers based on service to consumers includes a wide range of possibilities. Brokers can provide varying degrees of assistance to buyers, such as performing MLS searches for homes for the buyer or allowing a buyer on-line access to MLS data to perform such searches on his or her own. They can provide varying levels of service to sellers in marketing their homes, such as holding open houses more or less frequently. To facilitate a particular transaction, "[b]rokers can help sellers (and buyers) to varying degrees throughout the entire transaction process: helping the seller set the asking price, guiding buyers when they formulate their offers, providing guidance through the maze of paperwork faced by buyers and sellers and recommending reliable inspectors, lawyers, mortgage brokers, etc."[163] Additionally, brokers expend varying degrees of effort involving a wide range of activity, including marketing their own services to potential buyers and sellers. Broker marketing can include paid advertisements in television, radio, print, or online media; informal networking to meet potential buyers and sellers; and giving away pumpkins at Halloween.

2. Price Dimension

Competition among brokers on price primarily occurs through lower commission fees and rebates. In the majority of transactions, the commission fee is determined by multiplying the commission rate negotiated in the listing contract by the home's actual selling price. In other cases, brokers may charge a flat commission fee for certain services or bundles of services. Alternatively, brokers may adopt a combination of flat fees and a commission rate. Since cooperating brokers do not directly participate in negotiating listing contracts, rebates offer a way for them to compete on price.[164]

There were contrasting views among Workshop participants and commenters about the extent to which brokers compete on the price dimension. The FTC's last report on real estate brokerage, twenty-three years ago, stated:

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[162] One author has described the service that brokers provide as not merely a completed match of buyer and seller, but rather "a completed transaction at some level of service provided to the parties involved." Geoffrey K. Turnbull, *Real Estate Brokers, Nonprice Competition and the Housing Market*, 24 REAL ESTATE ECONOMICS 293, 295 (1996).

[163] *Id*. The extent to which brokers supply these services "provides the margin for nonprice competition among brokers." *Id*.

[164] As discussed in Chapter I of this Report, rebates are a meaningful component of price competition between brokers in states that do not prohibit rebates. Anti-rebate laws are discussed in more detail in Chapter IV of this Report.

> The evidence indicates that brokerage commission rates are quite uniform within local markets. In most markets, the prevailing rate is either 6 or 7 percent. Furthermore, the dollar value of commission fees per transaction has increased very substantially in recent years when compared to the general rate of inflation or the incomes of other white collar workers. At the same time, there is at least some evidence that brokerage industry productivity apparently has declined in recent years. . . . Available statistics, therefore, strongly suggest that forces other than free competition are affecting the level at which commission rates are set.[165]

Some claim that things have not changed.[166] Some commenters observe that the relative inflexibility of commission rates coupled with rising home prices has caused consumers to pay more in commissions, and that if brokers competed more on commission rates, commission fees would be lower.[167] Moreover, citing consumers' increasing use of the Internet in real estate transactions and the substantial savings that the Internet has brought to consumers across numerous service industries,[168] some

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[165] 1983 FTC STAFF REPORT, *supra* note 9, at 64. *See also id.* at 55 ("[W]e found local markets to consistently have commission modes at either six or seven percent. These are the 'normal' modes for virtually all markets, regardless of how they might vary from one another, and nationwide a very high percentage of real estate brokerage transactions occurred at a commission rate of one or the other. . . . The degree of rate uniformity we found clearly is inconsistent with a market characterized by the particular kind of vigorous competition common in many other markets.").

[166] *See, e.g.*, Hsieh, Tr. at 261 ("[I]f you go back to the FTC report from more than 20 years ago, things really have not changed that much."); Bourgoin, Public Comment 30 at 1 ("[T]he FTC did a study which was completed and published in 1983. [I]t is apparent that the activity within this study is still ongoing within the industry."); Abdullah Yavas, *Impossibility of a Competitive Equilibrium in the Real Estate Brokerage Industry*, 21 J. REAL ESTATE RES. 187, 187 (2001) ("A number of studies have argued that the uniformity of the commission rate across different properties and regions is an indication of collusive behavior."); Richard J. Buttimer, Jr., *A Contingent Claims Analysis of Real Estate Listing Agreements*, 16 J. REAL ESTATE FIN. & ECON. 257, 257 (1998) ("Much of the literature argues that there is . . . some collusion between brokers through the [MLS] . . . The primary evidence presented is the near-uniformity of commission rates in a given market. A common argument is that the effort required to sell a house is not a linear function of the sales price and that if there is not collusion among brokers, there should be, at the very least, variation in commission rates across house price ranges within a given market.").

[167] *See, e.g.*, American Bankers Association, Public Comment 10, at 1 (cover letter) ("[b]y any standard, the real estate brokerage market is considerably less competitive than it should be and commissions are artificially high."); White, *supra* note 47, at 2 ("[A] more competitive outcome would surely mean that average fees would be lower than they are today and that 'the 6% (or 7%) commission' would be unlikely to remain as the modal fee."); John C. Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such At It Is* 1 (presented at AAI Conference on Competition in the Residential Real Estate Brokerage Industry Nov. 8, 2005) (noting "a fairly widespread view that brokerage is not a competitive industry…" based several perceptions, including: (1) excessive commission rates that are "sticky downward" even as technology reduces brokers' costs; (2) commission rates are higher in the United States than in many other developed countries; (3) lobbying efforts by NAR and state Realtor associations in favor of state laws restricting competition; (4) NAR's successful lobbying of Congress to prohibit banks from entering the real estate brokerage business; and (5) NAR-imposed restrictions on discount and Internet brokers' access to the MLS).

commenters maintain that the Internet should also be reducing the costs of providing real estate brokerage services.[169]

In its comment, the American Bankers Association ("Association") observed that "[one] would expect to see variations in brokerage commissions across geographical regions as the supply and demand varies dramatically across the United States, but little if any variation exists."[170] If the market were competitive, according to the Association, commissions could fall as much as by half.[171] The Association calculated that, assuming the standard of living is the same today as it was in 1990, when the average commission was 6.1 percent, the commission rate necessary to generate the same real return today would be only 4.34 percent.[172]

In contrast to the views of the Association, NAR[173] reported in its public comment that the residential real estate brokerage industry is "fiercely competitive" and that commission rates "are set by market forces in order to attract clients."[174] NAR rests its conclusion in large part on particular attributes of the industry, which, according to NAR,

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[168] *See, e.g.*, GAO REPORT, GAO-03-749, *Airline Ticketing: Impact of Changes in the Airline Ticket Distribution Industry* (July 2003) (discussing how Internet distribution lowered transaction costs in the sale of airline tickets), *available at* http://www.gao.gov/new.items/d03749.pdf; GAO REPORT, GAO/GGD-00-43, *Online Trading: Better Investor Protection Information Needed on Broker's Web Sites* (May 2000) (discussing how Internet brokerages charge far less commission per trade on securities), *available at* http://www.gao.gov/new.items/gg00043.pdf.

[169] *See* Hahn, Tr. at 89; American Bankers Association, Public Comment 10, at 3.

[170] American Bankers Association, Public Comment 10, at 3 (comment).

[171] *Id.* at 1.

[172] *Id.* at 4. A 2002 study analyzing commission rates in the United States and several other countries concluded that U.S. commission rates "should equal something closer to 3.0% versus the common 6% or 7% fee." Natalya Delcoure & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry*, 5 INTERNATIONAL REAL ESTATE REVIEW 12, 29 (2002). NAR has cautioned against comparing U.S. and foreign commission rates, claiming that there are too many country-specific factors involved to permit simple comparisons across countries, and the authors of the 2002 study concede that "[d]ata on such differences is not readily available and beyond the scope of this study." *Id.* at 14. The authors did not identify the source of the U.S. commission data. *See* NAR, Public Comment 208, at 15-16; Delcoure & Miller, *supra*, at 15.

[173] Approximately half of the public comments submitted to the Agencies in response to their request for public comments were some variation of a form letter that NAR composed, posted on its website, and encouraged its 1.2 million members to send. This letter praised the competitive nature of the real estate industry. Commenters using this form highlighted local competition between individual agents as an outstanding example of rigorous competition to which the rest of the economy should aspire. In addition, they claimed that the tens of thousands of brokerages, more than two million licensed real estate professionals, and various business models across the country provide consumers with a great deal of choice. *See* the NAR website (http://www.realtor.org/law_and_policy/mls/ild/regulator_letters.html) for more details on the association's instructions and suggested content.

[174] NAR, Public Comment 208, at 1 (comment).

"resemble[] a perfectly competitive industry structure with production at the lowest possible cost and consumers benefiting from competitively determined prices."[175]

Several other commenters claimed that there is vigorous price competition. One broker described the competition that he faces as follows: "In about 95 percent of the leads I get, I have competition from at least one other Real Estate Agent, and on listing appointments, I am often competing against [two] to [three] other Agents, and I lose quite a few [to] those who list with lower commission rates."[176] An agent who has been in the business for less than a year stated: "Realtors are competing fiercely on the price at which they will take listings. In my own experience, I have already lost listings to brokers who have offered to take the listing at a lower brokerage fee."[177]

Several commenters also provided anecdotal evidence regarding falling commission rates in various areas of the country.[178] One commenter, for example, stated: "Real estate is very competitive in Arizona. I see agents advertising commissions as low as 2%. The norm years ago was 7%, then 6% . . . now there is not a norm. It varies greatly."[179] Another commenter observed that "[t]he 6% commission of long ago has decreased to 4 or 5% on the majority of deals."[180]

Some commenters identified discount and fee-for-service brokers as key drivers of price competition. One agent claimed that, due to the prevalence of discount brokers, real estate agents "are confronted with the question how much can you reduce your commission? It is a standard question now."[181] Another agent at a full-service firm reported that "since we go up against limited service firms all the time, we are having to reduce our commission rate to keep the client."[182] These observations are similar to those

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[175] *Id*. at 2.

[176] Blann, Public Comment 250, at 1. *But see* NAR 2006 SURVEY, *supra* note 4, at 74 (69% of sellers contacted only one agent; 74% of sellers found their agent through either a referral or a prior relationship with the agent).

[177] Reppert, Public Comment 294, at 1. *See also* Tradii, Public Comment 340, at 1; Wharton, Public Comment 179, at 1.

[178] *See, e.g.*, Earman, Public Comment 73, at 1-2 (average commission is "well under 6%"); Giorgianni, Public Comment 200, at 1 ("My average commission has dropped over the last ten years from 3% to about 2.25%.").

[179] Paulsen, Public Comment 364, at 1. Several panelists and commenters cited Real Trends estimates of commission rates. *See, e.g.*, Kunz, Tr. at 81-82; Lewis, Tr. at 172; NAR, Public Comment 208, at 12 (comment).

[180] Lord, Public Comment 254, at 1.

[181] *Id*. at 1.

[182] Dwyer, Public Comment 55, at 1. *See also* Blomquist, Public Comment 194, at 1; Forgues, Public Comment 118, at 1 ("Here in Tucson, Arizona, competition amongst real estate agents is fierce. There are

of the GAO, which noted that competition from nontraditional brokers may be partially responsible for a recent decline in commission rates.[183]

C. Commission Rates and Fees: Empirical Evidence[184]

In light of the contrasting views presented above, it is reasonable to ask what empirical evidence reveals about commission rates and fees in recent years. Unfortunately, as one author recently noted, "There is not much empirical evidence on commission rates. The data are usually proprietary and not readily available to the public or to academic analysts."[185] Consistent with this observation, none of the Workshop participants or commenters provided data on commission rates or fees.[186] To our knowledge, REAL Trends is the only source that publishes commission rate data. REAL Trends publishes nationwide average commission rates. Its data are derived from a survey of the top 500 brokerage firms in the country and a group of rising firms just below the top 500.

Table 1 lists REAL Trends national average commission rates and fees from 1991 through 2005. Fees, measured in constant 2006 dollars, are based on median home prices so as to represent what a typical consumer would pay in real estate commissions to sell his or her home. As illustrated in Figure 1, commission rates have fallen gradually over this time period, from 6.1 percent to just over 5 percent.

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a variety of options available to buyers and sellers from full service agents to very limited service agents with a wide variety of fee structures."); Large, Public Comment 241, at 1 ("our average commission per transaction side has dropped 13% this year compared to last year as a result of competition from discount brokerage business models operating in our market").

[183] GAO REPORT, *supra* note 3, at 12.

[184] As discussed in Chapter I of this Report, the commission "rate" is the percentage of the home sales price that the broker retains as a commission, and commission "fees" are the total dollar amount paid by consumers for real estate brokerage services. A decrease in commission rates does not necessarily imply a decrease in fees.

[185] Weicher, *supra* note 167, at 121.

[186] NAR – a logical source of commission data, given its size and access to MLS data through its local associations – does not study or report commission rates. A NAR economist explained at the workshop that any average commission rate reported by a prominent entity such as NAR could be used by industry participants as a focal point for collusion on commission rates. *See* Yun, Tr. at 225-26. *See also* NAR, Public Comment 208, at 12 (comment) ("[NAR] does not conduct research on commission rates out of concerns that the research results have the effect of setting a 'focal point' for practitioners to set their commissions.").

Table 1
Commission Rates and Real Commission Fees: 1991-2005

		Median Home Prices		Commission Fees	
Year	**Commission Rate**	**2006 Dollars**	**% Change**	**2006 Dollars**	**% Change**
1991	6.10%	$153,925		$9,389	
1992	6.04%	$153,235	-0.45%	$9,255	-1.43%
1993	5.94%	$153,632	0.26%	$9,126	-1.40%
1994	5.88%	$155,145	0.98%	$9,123	-0.04%
1995	5.83%	$155,365	0.14%	$9,058	-0.71%
1996	5.75%	$158,029	1.71%	$9,087	0.32%
1997	5.64%	$162,168	2.62%	$9,146	0.66%
1998	5.48%	$167,881	3.52%	$9,200	0.59%
1999	5.44%	$171,031	1.88%	$9,304	1.13%
2000	5.42%	$172,427	0.82%	$9,346	0.45%
2001	5.12%	$177,939	3.20%	$9,110	-2.52%
2002	5.14%	$188,634	6.01%	$9,696	6.42%
2003	5.12%	$198,557	5.26%	$10,166	4.85%
2004	5.08%	$212,655	7.10%	$10,803	6.26%
2005	5.02%	$230,059	8.18%	$11,549	6.91%

Sources: Commission rates are from *REAL Trends 500*©; real median home prices are from U.S. Department of Housing and Urban Development, *U.S. Housing Market Conditions, 4th Quarter 2006,* Tables 6-9 (Feb. 2007), and are a weighted average of new and existing home prices, based on annual sales; median home prices are converted into 2006 dollar with consumer price index for all goods for all urban consumers (CPI-U) from Bureau of Labor Statistics (http://data.bls.gov/PDQ/servlet/SurveyOutputServlet); commission fees are calculated by multiplying commission rates by real median home prices.

Figure 1
Average Commission Rates: 1991-2005

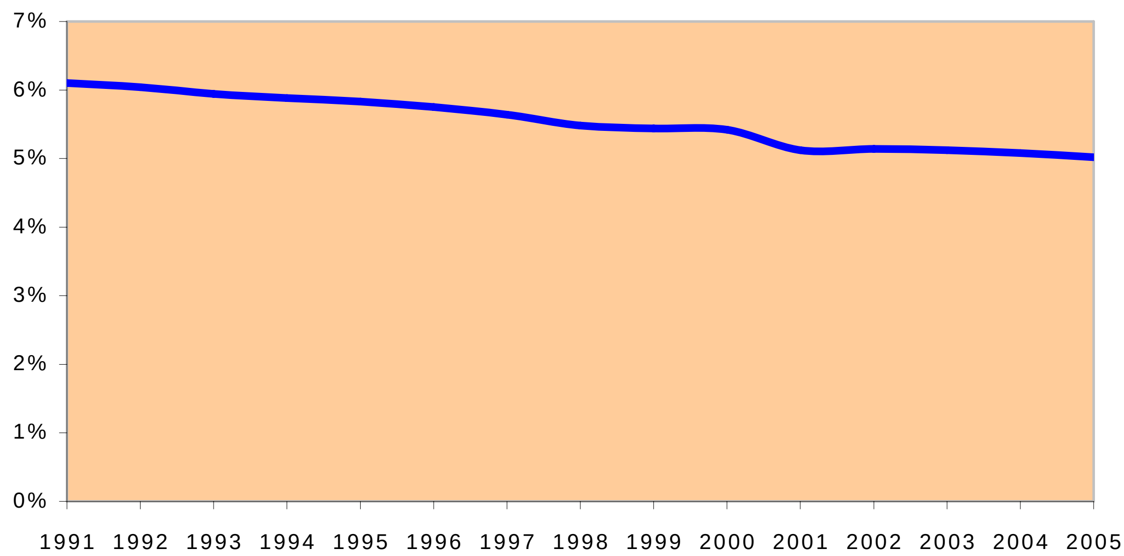


Figure 2, however, shows that despite the downward trend in rates, the dollar amount of commission fees appears to have increased closely in line with rising housing prices. Growth in home prices was relatively flat through most of the 1990s and real commission fees did not surpass their 1991 levels until 2002. At the same time, as housing price growth accelerated from 2001 through 2005, real commission fees rose about 25 percent.

Figure 2
Average Commission Fees and Median Home Prices: 1991-2005
(in 2006 dollars)

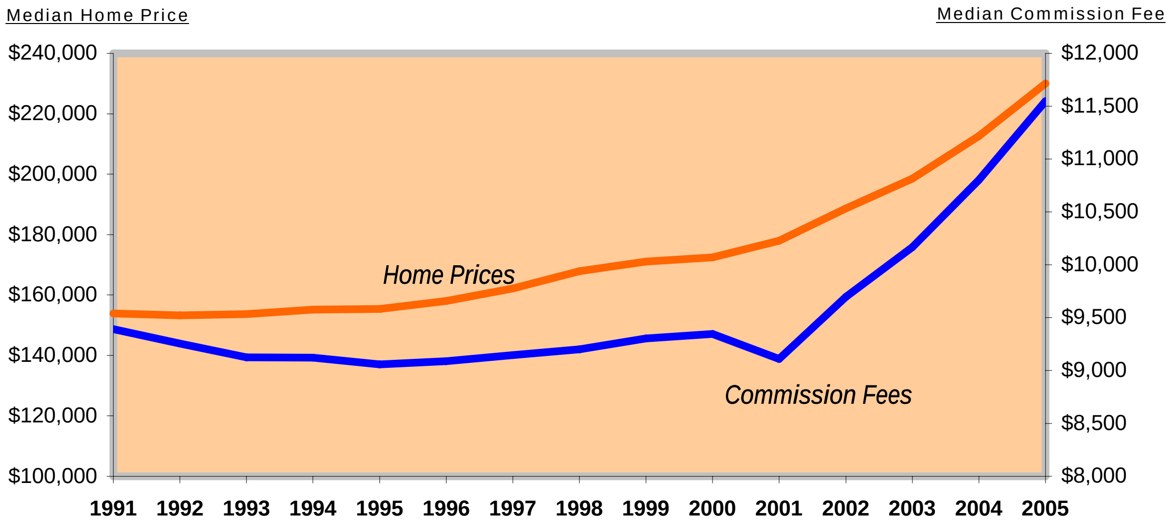
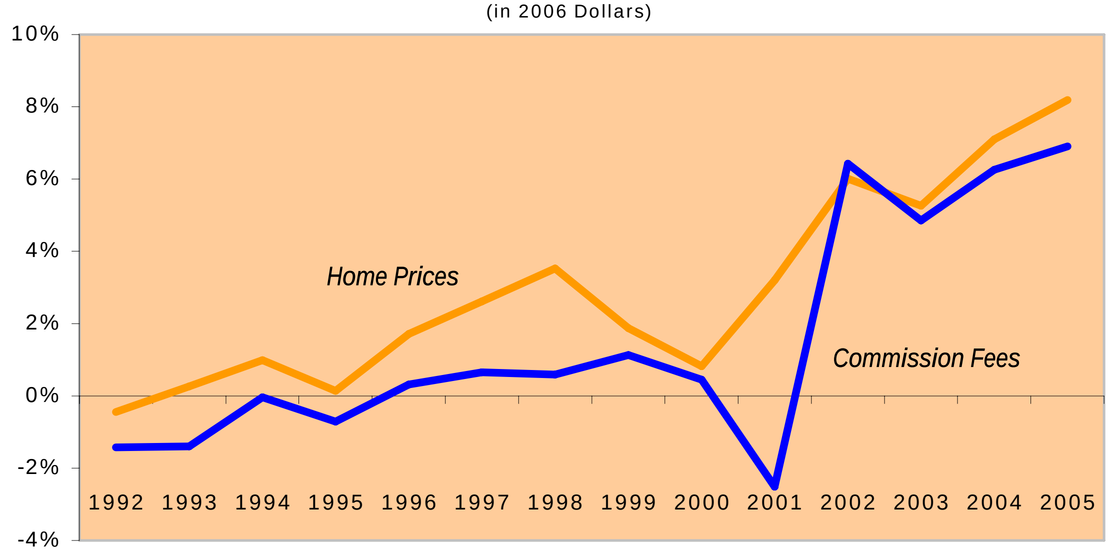


Figure 3 illustrates annual percent changes in real housing prices and commission fees from 1992 through 2005, and provides additional illustration of how fees tend to move in

Figure 3
Annual Percentage Change in Median Home Prices
and Commission Fees: 1992-2005
(in 2006 Dollars)



tandem with housing prices. For most years, the annual percent change in real commission fees is very similar to the annual percent change in real housing prices.

Other studies have examined REAL Trends data and have made the same observations about patterns in commission rates, housing prices, and brokerage fees. For example, Weicher calculates that although the average commission rate as reported by REAL Trends fell by 16 percent (6.1 percent to 5.1 percent), because the average price of existing housing increased during this period ($128,400 to $236,000), the average inflation-adjusted commission per transaction increased by 11 percent in dollar terms between 1991 and 2004.[187] More specifically, Weicher's analysis indicates that inflation-adjusted commission fees per home sale declined by approximately 7 percent between 1991 and 1998, but increased 19 percent between 1998 and 2004.[188] The GAO, also using REAL Trends' commission rate data, reached the similar conclusion that commission rates do not appear to have changed enough to offset rapidly rising home prices in recent years.[189] Specifically, the GAO observed that a decrease in commission rates from the prevalent 5.5 percent in 1998 to an estimated 5 percent in 2005, a 9 percent decrease in commission rates, was more than offset by a 58 percent increase in the median inflation-adjusted home sales price. "Thus, with the increase in housing prices, the brokerage fee (in dollars) for selling a median-priced home increased even as the commission rate fell."[190]

Data reported to the Securities Exchange Commission by Realogy, the largest brokerage firm in the United States, are consistent with these findings. For example, recent Realogy data indicate that between 2002 and 2006 Realogy's average commission rate declined about 7 percent while the average sales price for the homes they sold increased about 30 percent. As a result, Realogy's inflation-adjusted average commission fee increased from about $11,600 in 2002 to about $14,000 in 2006, an inflation-adjusted increase of about 22 percent.[191]

Rather than using REAL Trends aggregated data, some researchers have analyzed commission rates on a transaction-by-transaction basis to determine the extent to which commission rates vary in relation to a variety of market factors. The studies have focused on, among other things, the distribution of commission rates within certain geographic areas and the relationship between commission rates and various property characteristics

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[187] Weicher, *supra* note 167, at 124. Weicher's calculations use average home sales prices, not median home sales prices.

[188] *Id*.

[189] *See Hearing*, *supra* note 1, at 5 (testimony of David G. Wood), *available at* http://financialservices.house.gov/media/pdf/072506dgw.pdf..

[190] *Id.* at 6.

[191] *See* Realogy Corporation 10-K for fiscal year ending Dec. 31, 2006, *available at* http://www.sec.gov/Archives/edgar/data/1355001/000095012307003335/e31090e10vk.htm#tocpage.

(such as the age of the home or the list price), market conditions, and the amount of time that the home spends on the market.[192]

In late 1979 and early 1980, the FTC staff conducted a national survey of recent home buyers and sellers. Each survey participant who had sold through a broker was asked the commission rate that had been quoted by the broker. The staff found that 85 percent of the sellers surveyed were quoted a commission rate of either six or 7 percent by their broker.[193] More specifically, approximately 53 percent were quoted a rate of 6 percent, while approximately 32 percent were quoted a rate of 7 percent.[194] Factoring in after-the-fact reductions in prices (including rebates and gifts provided by the brokers), 78 percent of those surveyed were actually charged commissions at those rates.[195] These results are comparable to those revealed in a sample of HUD-1 forms from the latter half of the 1970s collected by HUD for its own purposes, which showed that 77 percent of sellers were charged a commission rate of 6 or 7 percent.[196] Although the average commission rates based on the HUD-1 forms varied across metropolitan areas, in eleven of the sixteen cities surveyed 80 percent or more of the commission rates actually paid were equal to either 6 or 7 percent.[197]

A 1982 study analyzed the relationship between commission rates and several variables, including the price of the home, whether the home was a new or existing home, and whether the sale involved cooperation from another broker.[198] The sample data included 1,107 transactions drawn from seven cities in 1975, 485 transactions drawn from eight cities in 1978, 1,769 transactions drawn from eight cities in 1979 and 3,895 transactions drawn from all 50 states in 1979.[199] For each transaction, data on actual commission rates paid were obtained from HUD-1 forms. The study found that in 23 percent of the market areas (*i.e*. city or state) under examination, as home prices

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[192] A comprehensive review of the empirical research conducted in the real estate brokerage industry is beyond the scope of this Report. For a review of the literature on such research, *see* Jonathan Dombrow & Geoffrey K. Turnbull, *Trends in Real Estate Research, 1988-2001: What's Hot and What's Not*, 29 JOURNAL OF REAL ESTATE FINANCE AND ECONOMICS 47 (2004); John D. Benjamin, G. Donald Jud & G. Stacy Sirmans, *What Do We Know About Real Estate Brokerage?*, 20 JOURNAL OF REAL ESTATE RESEARCH 5 (2000).

[193] 1983 FTC STAFF REPORT, *supra* note 9, at 45.

[194] *Id.*

[195] *Id.* at 46 (49.6% of sample paid 6%, while 27.9% paid 7%).

[196] *Id.* at 48.

[197] *Id.* at 52.

[198] *See* Michael Carney, *Costs and Pricing of Home Brokerage Services*, 10 JOURNAL OF THE AMERICAN REAL ESTATE AND URBAN ECONOMICS ASSOCIATION 331 (1982).

[199] *Id.* at 335.

increased, commission rates decreased.[200] However, despite a lower commission rate, the results imply the dollar magnitude of the commission fee paid was considerably higher for higher priced homes.[201] The study also found that commission rates associated with sales of existing homes were higher and less varied than rates associated with new homes.[202] On average, the commission rate paid on sales of existing homes was approximately 1.2 percentage points higher than the rate paid on new home sales.[203] Finally, the study found that commission rates in transactions involving cooperating brokers were on average approximately 0.4 percent higher than rates in non-cooperative transactions. According to the author, "[t]he [HUD-1] data clearly reveal systematic variation in the actual home brokerage commission rates according to the three variables examined."[204]

A 1988 study analyzed the relationship between the commission rate offered to cooperating brokers and the selling price of the home.[205] The sample data were comprised of 532 home sales drawn from 1983 and 1987 sales data in the Knoxville, Tennessee, Board of Realtors' MLS.[206] The study found that the cooperative commission rate was negatively related to the sales price of the home and positively related to the percent of the list price achieved by the seller.[207] The authors concluded, "[t]hese results

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[200] *Id.* at 336.

[201] *Id.* at 348 ("[O]n average, a $100,000 rise in the price of the home reduces the commission rate by about 0.5 percentage points"). The average sales price of an existing home in 1980 was $72,800. *See* U.S. Department of Housing and Urban Development, *U.S. Housing Market Conditions* 73 (Nov. 2006) [hereinafter "HUD REPORT"], *available at* http://www.huduser.org/periodicals/ushmc/fall06/USHMC_Q306.pdf. At that price, the study's statistical results predict a corresponding commission rate of 6.25%, leading to a commission fee of $4,550. A home selling for $100,000 more, or $172,000, would pay a commission rate of 5.73%, for a commission fee of $9,901.

[202] Carney, *supra* note 198, at 339 (excluding five areas with insufficient observations for new homes, in 59 percent of the remaining market areas the mean commission rate paid was statistically significantly higher for existing homes than for new homes).

[203] *Id.*

[204] *Id.* at 248.

[205] *See* William C. Goolsby & Barbara J. Childs, *Brokerage Firm Competition in Real Estate Commission Rates*, 3 JOURNAL OF REAL ESTATE RESEARCH 79 (1988).

[206] *Id.* at 84.

[207] This finding was significant at the one percent level for each of the equations tested. *See id.* at 83. However, Weicher notes that the magnitude of the sales price effect appears to be small. *See* Weicher, *supra* note 167, at 121 ("Goolsby and Childs find that the commission rate declines about 0.06 to 0.11 percentage points for each $10,000 increase in home price, *e.g.*, from 5.90 percent to 5.84 or 5.79 percent.").

provide strong evidence that the presumption by previous researchers that real estate brokerage firms are unwilling to negotiate differential rates is inaccurate."[208]

In a 1997 study, the authors tested a theoretical model relating commission rates to changes in a local housing market.[209] This study addressed both how the distribution of commission rates varied across home prices within a geographic area and with changes in economic conditions across an entire area over time. The sample data (provided by a local MLS) consisted of 15,608 single-family home sales in the Baton Rouge, Louisiana metropolitan area from 1985 through 1992.[210] Similar to the two studies described above, the authors found that the listing broker commission rate varied statistically significantly with a variety of home characteristics.[211] For example, commission rates declined, albeit at a decreasing rate, with the list price of the home.[212] However, despite a lower commission rate, the authors' estimates showed that the actual commission fee paid rose with housing prices. These authors also considered whether commission rates within the Baton Rouge market responded to market-wide changes akin to housing booms and busts. They found a counter-cyclical pattern for commission rates. In other words, as the demand for housing and sales prices increased, commission rates declined. However, the authors' statistical results suggest commission rates are relatively inflexible.[213] This result is consistent with the findings based on Real Trends data

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[208] Goolsby & Childs, *supra* note 205, at 85. Since the authors only observed the cooperative commission rate, they note that their conclusion rests on the assumption that the cooperative split is a fixed share of the total listing commission. The authors report that interviews with industry members suggest that the cooperative split was almost uniformly 60/40, in favor of the listing broker. *See id.* at 81 n.1.

[209] *See* C.F. Sirmans & Geoffrey K. Turnbull, *Brokerage Pricing under Competition*, 41 JOURNAL OF URBAN ECONOMICS 102 (1997). This study apparently incorporates the data and relevant findings of an earlier study conducted by the authors. *See* C.F. Sirmans, Geoffrey K. Turnbull & John D. Benjamin, *The Markets for Housing and Real Estate Broker Services*, 1 JOURNAL OF HOUSING ECONOMICS 207 (1991).

[210] Sirmans & Turnbull, *supra* note 209, at 111.

[211] *Id.* at 113-115.

[212] *Id.* at 113-14. The authors performed regressions analyzing how the contract commission rate was affected by various market conditions and housing variables. As the authors explain, the commission rate captured in the sample is "the contract rate and therefore does not reflect any adjustment or changes that might be renegotiated between the house seller and the agent at the time of sale." *Id.* at 111.

[213] While it is not possible to quantify the relative inflexibility based on information reported by the authors, supplemental information can be used to compute a rough approximation. Weicher, *supra* note 166, at 121, reports that Sirmans and Turnbull calculated an average contract commission rate of 5.8% in Baton Rouge over the period 1985-1987. Assuming a commission rate of 5.8% in 1985, Sirmans and Turnbull's statistical results imply a commission rate that varies from 5.8% in 1985, upwards to a commission rate of 6.06% at the end of 1989, and downward to 5.95% by the end of 1992. According to the U.S. Census, the median home sales price in Baton Rouge in 1992 was $73,600. *See* U.S. Census Bureau, *Median Sales Price of Existing One-Family Homes by Selected Metropolitan Areas*, *available at* http://www.allcountries.org/uscensus/1202_median_sales_price_of_existing_one.html. Based on the 1992 median price, home sales price indices from the Office of Federal Housing Enterprise Oversight (*see* http://www.ofheo.gov/HPI.asp) imply median home sales prices of $71,920 in 1985, $63,620 in 1989, and $73,600 in 1992. From 1985 to 1989, despite a home sales price drop of about 11.5%, the average

described above: as home sales prices have increased since 1991, commission rates have declined, but not in proportion to increases in home sales prices.

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Overall, the evidence suggests that while commission rates may vary modestly with housing prices and overall market conditions, they do not tend to vary in proportion to changing home prices. As a result, inflation-adjusted commission fees per transaction appear to follow closely movements in home sales prices. In other words, commission rates are relatively inflexible. Although neither commenters nor Workshop panelists presented evidence to explain the cause of relatively inflexible rates, this phenomenon has meant that the price that consumers paid for brokerage services rose considerably during the recent run-up in housing prices.

D. One Explanation of the Seemingly Contradictory Descriptions of Broker Competition

The evidence presented above shows a dramatic increase in agent entry in recent years coupled with claims of intense competition among brokers. Yet, consumers are paying almost 25 percent more for brokerage services, after adjusting for inflation, than they did in 1998. A Workshop panelist, Chang-Tai Hsieh, an academic economist, offered one possible explanation of how, in the presence of relatively inflexible commission rates, the increased entry and non-price competition by brokers can reflect an inefficient constraint on price competition.

According to Hsieh, in a booming real estate market, relatively stable commission rates imply higher commission fees per transaction and an increased profit opportunity for agents. Because becoming an agent is easy, an increasing number of people enter the industry in search of these higher profits. But with more and more agents competing to close transactions, the average number of transactions per agent will decline. Further, if commission rates are relatively inflexible, such that agents do not seek to attract customers by offering lower rates, agents will compete along other dimensions to gain clients.[214] For instance, agents may expend resources "prospecting" for listings by, for

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commission rate increased about 4.5%. From 1989 to 1992, despite a home sales price increase of about 15.5%, the average commission rate decreased about 2%. In short, changes in home sales prices have relatively small effects on commission rates.

[214] Other commentators have observed that if commission rate competition is limited, brokers will likely compete by engaging in marketing activities or offering to provide higher quality services. *See* Turnbull, *supra* note 162, at 293. Thomas J. Miceli, *The Welfare Effects of Non-Price Competition Among Real Estate Brokers*, 20 J. AM. REAL ESTATE & URBAN ECON. ASS'N 519 (1992*);* Crockett, *supra* note 51, at 213. *See also* Hahn, Tr. at 55 ("[I]t's not surprising to me that we observe non-price competition if, in fact, there isn't a lot of price competition." "[C]ompeting over variables other than price[,] . . . that's exactly what we observed in the airline industry before Fred Kahn, Steve Breyer, Ted Kennedy deregulated airlines, got rid of the Civil Aeronautics Board. For those of you old enough to remember, we had things like the sandwich wars on some airplanes to get people to come on.)."

example, door-to-door canvassing, mailings, providing potential clients with free pumpkins at Halloween, and calling on FSBO sellers.[215]

Marketing is often beneficial to consumers and competition,[216] and some consumers may benefit from the enhanced service competition in this market. But when competition occurs primarily along such dimensions, brokers may expend more resources providing additional services than the value of those services to consumers.[217]

According to Hsieh, real estate agents may be competing intensely but do so primarily by expending resources to gain listings rather than competing by lowering their commission fees, a phenomenon Hsieh calls the "tragedy of the commission."[218] The "tragedy" of relatively inflexible commission rates, according to Hsieh, is not just that consumers receive more services and fewer commission fee reductions than many consumers might prefer, but that the agents themselves are no better off.[219] Because the ratio of agents to buyers and sellers has increased, agents have to work harder to find clients and consequently spend less time actually closing transactions.[220] In this manner,

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[215] Hsieh & Moretti, *supra* note 139, at 1088-89 (2003) (cataloging the importance of prospecting in "self-help" books for real estate agents).

[216] *See, e.g.*, J. HOWARD BEALES & TIMOTHY J. MURIS, STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING 7-19 (1993). Indeed, antitrust agencies have challenged private associations' restraints on truthful competitor advertising. *See, e.g.*, *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

[217] *See* Hsieh & Moretti, *supra* note 139, at 1089 ("prospecting" and "farming" are not "entirely socially wasteful," rather "society's gain from free pumpkins for Halloween and from free notepads with the realtor's picture is far less than their cost to the realtor, in terms of the direct cost of these freebies, but particularly in terms of the opportunity cost of the time the realtor puts into such activities."); Turnbull, *supra* note 162, at 296 ("[S]ince no direct pricing of service levels is allowed, the housing market and broker market lose an important channel normally responsible for ensuring that the services are provided to the point where the marginal value to clients equals the marginal cost to brokers.").

[218] Chang-Tai Hsieh Presentation, Associate Professor of Economics, University of California, Presentation at the Federal Trade Commission and Department of Justice Public Workshop: Competition Policy and the Real Estate Industry, *The Tragedy of the Commission* (Oct. 24, 2005), *available at* http://www.ftc.gov/opp/workshops/comprealestate/hsieh.pdf. *See also* Hsieh & Moretti, *supra* note 139, at 1078; Hsieh, Tr. at 233-46.

[219] Hsieh, Tr. at 237. *See also* Bunnell, Public Comment 146, at 1 ("Low barriers to entry and recalcitrance to change have created a situation where the *status quo* makes sense for none of the transaction participants. It's a tragic story where nobody wins, especially the consumer."). Higher profits may accrue to participants in the industry not subject to intense entry and profit dissipation. For example, for each additional agent entering the industry a licensing fee is paid. In most states, there exists a single licensing board. Further, NAR membership is required for all agents and brokers that belong to the vast majority of MLSs in the United States. Such entities are likely to gain financially from increased entry into the brokerage industry.

[220] *See* Hsieh & Moretti, *supra* note 139, at 1089 ("as long as the commission rate is fixed, the amount of time that realtors devote to prospecting and farming relative to actually selling a house or finding an

a larger number of agents dissipates the increased profit opportunities by incurring additional expenses to close transactions. Further, this theory suggests that because agents compete profits away by incurring additional expenses to provide these services, rather than lowering their commission rates, they operate at inefficiently high cost levels.[221]

Hsieh provided empirical evidence at the Workshop consistent with competition in the brokerage industry occurring primarily in non-price dimensions. Drawing on commission rate data from the 1983 FTC Report and examining census data on commissions from the period of 1980 to 1998, Hsieh (and his co-author) found evidence suggesting that regardless of home selling prices, commission rates appear fairly stable around 6 percent over the relevant time period and across markets.[222] Hsieh studied 282 cities over eighteen years and found that in cities with higher housing prices (and thus higher commission fees and higher profit opportunities for agents): (1) there are more real estate agents relative to the city's workforce; (2) these agents are less productive (measured by sales per agent or sales per hour worked); and (3) wages for agents are not higher than they are in cities with low housing prices. He concluded that these empirical findings are consistent with his hypothesis that "higher commission fees in more expensive cities are dissipated by excessive entry of brokers."[223] Hsieh estimated the social waste resulting from such excess entry for the year 1990 – the latest year of their analysis – at between $1.1 and $8.2 billion.[224]

Hsieh's observations using earlier data are consistent with other reported market conditions. Namely, there has been substantial agent entry in recent years[225] and the average number of transactions per agent declined by 20 percent from 2000 through

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appropriate house for a buyer increases as the market becomes more and more competitive, that is, as more realtors are chasing after the same number of customers").

221 *Id*. at 1089 ("the cost of finding a customer increases with the number of realtors in the market, without necessarily generating additional benefits to the consumer").

222 These data come from the "total home selling expense" field in the Bureau of Labor Statistics' annual Consumer Expenditure Survey from 1980-1990. This field also includes selling expenses other than commissions, like closing costs and attorneys fees, so it is likely to overstate the actual commission rate. However, because sellers typically do not pay for title searches, abstracts, and many of the other fees associated with closing a residential real estate transaction, the data in this field are likely to closely represent commissions paid by the seller. *Id*. at 1082.

223 *Id.* at 1118.

224 *Id.* at 1116-17.

225 *See* Hsieh & Moretti, *supra* note 139, at 213 and accompanying text. Yun showed evidence of entry as a result of the recent housing market boom, as well as evidence that NAR membership has varied directly with housing prices for at least the past 20 years. *See* Yun Presentation, *supra* note 145, at 3.

2005.[226] Even though the income available from each transaction increased over the time period, according to NAR, the "typical" income of its members fell from $52,000 in 2002 to $49,300 in 2004, while the income of sales associates (who comprise two-thirds of NAR's membership) decreased from $41,600 to $38,300 during the same time period.[227] A NAR economist appearing on a Workshop panel explained: "That's not surprising. The number of new agents entering the market in the past couple of years has outpaced the home sales growth and even the home price growth. So, given the fact that the Realtor membership has increased far more than actual home sales, it's not surprising that the median income has fallen."[228]

A remaining question, not resolved by Workshop participants or commenters, is why commission rates are relatively inflexible.[229] Regardless of the answer, it is desirable that brokers have the freedom to offer a variety of price and service combinations to attract consumers. In particular, in light of the evidence presented above regarding the relatively limited competition among traditional brokers on the price dimension, innovators should not be discouraged by industry policies or government regulations from offering more flexible commission rates. In the next Chapter, we turn to obstacles innovators may be encountering.

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[226] According to REAL Trends data, the number of transaction sides per agent declined from 12.7 in 2000 to 10.2 in 2005. *See* http://www.remax-cahi.com/esource/marketingmaterials/2005realtrends500.pdf; and http://www.realtrends.com/past_newsletters.asp?article=newsletters/2005_04_6.htm.

[227] NAR, Public Comment 208, at 12.

[228] Yun, Tr. at 225. *See* discussion in Hsieh & Moretti, *supra* note 139, at 1116 (estimating $1.1 billion to $8.2 billion social waste resulting from excess entry in 1990).

[229] *See* Hsieh, Tr. at 233 ("[T]he real puzzle in the real estate business is why does there seem to be this relatively fixed commission structure?"); Salinger, Tr. at 248 ("[A]s Dr. Hsieh and I'm sure many people today have pointed out, the puzzle is why the percentage commission has been so stubbornly persistent."); Hsieh & Moretti, *supra* note 139, at 1086 ("The apparent uniformity of commission rates presents an enormous puzzle, especially if one believes that the cost and effort necessary to sell a house do not increase one to one with the price of housing. Why do commission rates appear to be so insensitive to market forces? We do not have an answer to this puzzle.").

IV. OBSTACLES TO MORE ROBUST COMPETITION

In recent years, the Agencies have become aware of actions taken by state legislatures, industry regulators and private actors that have the effect of restricting competition in the real estate brokerage industry. This Chapter discusses these actions and the Agencies' responses. It also addresses the role that the cooperative nature of real estate brokerage may play in shaping competition in the real estate brokerage industry.

A. Legislative and Regulatory Restrictions on Competition

This Section examines three types of restraints imposed by state laws and regulations that are likely to reduce competition and consumer choice in the real estate brokerage industry: anti-rebate laws and regulations; minimum-service requirements; and overly broad licensing requirements.

1. Anti-Rebate Laws and Regulations

As discussed in Chapter I, rebates can be powerful tools for price competition among brokers. Rebates are permitted in most states, and brokers in these states may freely advertise their willingness to offer rebates that save consumers hundreds and often thousands of dollars per transaction. Rebates currently are prohibited by law, however, in ten states: Alabama;[230] Alaska;[231] Kansas;[232] Louisiana;[233] Mississippi;[234] Missouri;[235] New Jersey;[236] North Dakota;[237] Oklahoma;[238] and Oregon.[239] In addition, Iowa[240] prohibits rebates when the customer uses the services of two or more brokers during a real estate transaction.

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[230] ALA. CODE § 34-27-36 (1975).

[231] ALASKA STAT. § 08.88.401 (Michie 2005).

[232] KAN. STAT. ANN. § 58-3062 (2006).

[233] LA. REV. STAT. ANN. § 37:1455 (West 2006).

[234] MISS. CODE ANN. § 73-35-21 (2006).

[235] MO. REV. STAT. § 339.150 (2006).

[236] N.J. STAT. ANN. § 45:15-3.1 (West 2006).

[237] N.D. CENT. CODE § 43-23-11.1 (2006).

[238] OKLA. STAT. ANN. tit. 59, § 858-312 (West 2006).

[239] OR. REV. STAT. § 696.290 (2005).

[240] IOWA CODE § 543B.60A (2005).

Rebate bans inhibit price discounting and thereby harm consumers. For example, in states allowing rebates, some brokers operate business models pursuant to which they rebate up to one-third or one-half of their commission to their buyers. Because cooperating brokers typically receive 50 percent of the overall commission, a broker who returns half of his or her commission to the client provides a 25 percent discount on the overall commission payment; rebating one-third provides approximately a 16 percent discount. For example, if a cooperating broker were to earn half of a 5.1 percent commission and offer a 50 or 33.3 percent rebate, a consumer would save $3,459 or $2,306 in commission payments, respectively, on the sale of a $271,263 home.[241] Consumers in states with rebate bans could enjoy a similar level of savings only if such bans were eliminated.

While action by a state through legislation is generally immune from federal antitrust enforcement, not every act of a state governmental entity is protected by state action immunity.[242] When actors other than the state itself (*e.g.*, the legislature or state supreme court) unreasonably restrict competition under the guise of state authority, those actions may be subject to antitrust scrutiny.[243] For example, where rebate bans have been imposed by state real estate commissions, DOJ has investigated, and where appropriate challenged, these restrictions in order to bring the benefits of price competition to consumers.

In March 2005, DOJ filed a civil antitrust lawsuit against the Kentucky Real Estate Commission, alleging that its regulations prohibiting Kentucky real estate brokers from offering rebates restricted competition and caused consumers to pay higher prices for real estate brokerage services.[244] The lawsuit was settled on July 13, 2005. Under the terms of the settlement, which was approved by a federal judge, the Kentucky Real Estate

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[241] Based on weighted average sales price of new and existing homes in 2005 ($271,263), the buyer's broker's share of a $13,834 commission would be $6,917. A buyer who is rebated half of this would receive $3,459. *See* HUD REPORT, *supra* note 201.

[242] *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (entity claiming state action immunity from federal antitrust laws must demonstrate that its actions are (1) pursuant to a clearly articulated state policy intentionally displacing competition with an alternative regulatory scheme and (2) actively supervised by the state or a qualified government agency or official). *See also* FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf (analyzing state action immunity doctrine).

[243] *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) ("Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorizations."); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985) (public utility commission not the state itself); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (attorney fee schedule established by county bar association was not immune from antitrust liability).

[244] *See* Complaint, *United States v. Kentucky Real Estate Comm'n*, Civil Act. No. 3:05CV188-H (filed Mar. 31, 2005) (hereinafter "Kentucky Complaint"), *at* http://www.usdoj.gov/atr/cases/f208300/208393.htm.

Commission agreed to cease enforcement of its rebate prohibitions,[245] allowing Kentucky consumers to avail themselves of the benefits of increased competition through broker-offered rebates, discounts, and other inducements.[246]

During the course of the investigation, DOJ found evidence that brokers wanted to restrict rebates because they understood that rebates are a form of price competition. As noted in the Complaint, in response to a survey asking brokers whether the Kentucky Real Estate Commission should retain the rebate ban, one broker predicted "[I]f we give rebates and inducements, it would get out of control and all clients would be wanting something. The present law keeps it under control."[247] Another broker predicted: "This [lifting the rebate ban] would turn into a bidding war, lessen our profits and cheapen our 'so-called' profession."[248] Another broker observed: "If inducements were allowed, they could lead to competitive behavior, which would make us look unprofessional in the eyes of the public."[249]

DOJ also investigated rebate bans by the South Dakota Real Estate Commission, the West Virginia Real Estate Commission, and the Tennessee Real Estate Commission. In response to these investigations, the South Dakota and West Virginia Real Estate Commissions rescinded their regulations prohibiting rebates, thereby enabling consumers in those states to receive more benefits of competition.[250] The Tennessee Real Estate

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[245] *See* Amended Final Judgment and Order, *United States v. Kentucky Real Estate Comm'n*, Civ. Action No. 3:05CV188-H, *available at* http://www.usdoj.gov/atr/cases/f210100/210142.htm.

[246] Since the consent decree was entered, consumers in Kentucky have benefited from new reduced price business models. For example, one realty company offers a 1% cash back rebate program for home buyers; another offers rebates worth up to $2,250 in the form of HomeDepot or American Express gift cards; and another offers to pay moving costs of up to $1,500 to consumers who buy particular properties. Two other companies together operate a program that rebates up to $3,000 for the sale or purchase of a home, which can yield a combined maximum rebate of $6,000 when a customer buys one property and sells another through the program when he or she moves. For more on types of rebates offered in Kentucky and nationwide, *see, e.g.*, Mariwyn Evans, *Law: Consumer Rebates*, REALTOR MAGAZINE ONLINE (Jan. 1, 2006), *available at* http://www.realtor.org/rmoprint.nsf/pages/lawjan06; Jessica Swesey, *Internet stock brokerage pioneers enter online real estate*, INMAN NEWS (Apr. 6, 2006), *available at* http://www.inman.com/inmannews.aspx?ID=50907.

[247] Kentucky Complaint at 3.

[248] *Id.* at 3.

[249] *Id.* A few brokers surveyed supported eliminating the rebate ban, recognizing some of the procompetitive benefits that repeal of the ban would foster. One broker observed: "Rebates will increase competition and give consumers more choices in service." *Id.* at 3.

[250] DOJ, *South Dakota Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Inducements* (Aug. 17, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/210637.htm; DOJ, *West Virginia Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Other Discounts* (May 4, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215961.htm.

Commission voted to suspend its rules and is in the process of rescinding them entirely.[251]

No Workshop panelist who commented on rebate bans found any justification for them. A panelist representing several major national brokerage franchises noted that state rebate prohibitions deprive consumers of potential benefits available to consumers in states without prohibitions; rebate prohibitions also limit the competitiveness of real estate brokerages in those states where such prohibitions exist.[252] This panelist's company has been working with state real estate commissions to repeal prohibitions on rebates, which the panelist characterized as "not necessary" and "antiquated."[253] Similarly, another panelist representing a major national brokerage franchise stated that "brokers and agents should be allowed the ability to freely negotiate transaction service pricing with their clients in any way they see appropriate."[254] A panelist representing an online referral network that offers rebates to buyers characterized state rebate prohibitions as "barriers to competition" because rebates facilitate "price competition and deliver value back to the consumer."[255] Another panelist who was an officer in an early VOW operator noted that his company gave a 1 percent rebate to buyers, but explained that rebate prohibitions "immediately slammed the door [in] certain states for [his company]."[256]

One panelist noted that, given the clear benefits of rebates to consumers, it is "hard to find a good articulated defense" of rebate prohibitions.[257] Proponents of such provisions claim that they protect consumers from false and misleading offers of rebates and help ensure that consumers choose brokers on the basis of the quality of the service, rather than price. While states properly are concerned with issues of consumer fraud, there is no evidence that rebates have harmed consumers or that rebate bans improve

[251] In response to DOJ's investigation, the Tennessee Real Estate Commission voted to suspend enforcement of its rebate ban on July 13, 2006, and subsequently voted to repeal the offending regulation. *See* Commission Minutes at 4 (July 12-13, 2006) (suspending enforcement); Commission Minutes at 3 (Aug. 9-10, 2006) (repealing rule). Pursuant to the state's administrative proceedings, the Tennessee Real Estate Commission scheduled a public hearing regarding the rebate ban's final repeal for May 2007. *See* Tenn. Admin. Reg. vol. 33, no. 3 (Mar. 2007), Notice of Rulemaking, *available at* http://www.tn.gov/sos/rules_hearingnotices/2007/1260/1260.20070228.02-37-07.notice.pdf (last updated Feb. 28, 2007).

[252] Perriello, Tr. at 151.

[253] *Id.*

[254] Lewis, Tr. at 180.

[255] Henderson, Tr. at 154-155.

[256] DelBianco, Tr. at 183.

[257] Henderson, Tr. at 157.

service quality. It is clear, however, that rebate prohibitions harm consumers by preventing price competition.[258]

2. *Minimum-Service Requirements*

Over the last two years, several states have imposed so-called minimum-service requirements on brokers. As the name suggests, these laws and regulations enumerate specific tasks that a broker must perform for a client. Missouri's law is representative of these requirements, mandating that all brokers who enter into an exclusive brokerage agreement[259]

> shall provide, at a minimum, the following services:
>
> (1) Accepting delivery of and presenting to the client or customer offers and counteroffers to buy, sell, or lease the client's or customer's property or the property the client or customer seeks to purchase or lease;
>
> (2) Assisting the client or customer in developing, communicating, negotiating, and presenting offers, counteroffers, and notices that relate to the offers and the counteroffers until a lease or purchase agreement is signed and all contingencies are satisfied or waived; and
>
> (3) Answering the client's or customer's questions relating to the offers, counteroffers, notices, and contingencies.[260]

Currently, Alabama,[261] Idaho,[262] Illinois,[263] Indiana,[264] Iowa,[265] Texas,[266] and Utah[267] have minimum-service laws that require licensees to perform tasks similar to those

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[258] Hahn believes that rebating will have a positive impact on consumer welfare, and sees no compelling economic rationale for not allowing rebates since they are a form of price competition that should improve efficiency by putting pressure on brokerages to provide better services at lower prices. *See* AEI-Brookings Paper, *supra* note 3, at 19.

[259] An exclusive brokerage agreement is defined as "a written brokerage agreement which provides that the broker has the sole right, through the broker or through one or more affiliated licensees, to act as the exclusive limited agent, representative, or transaction broker of the client or customer that meets the requirements of section 339.780." MO. REV. STATUTES. § 710(16).

[260] MO. REV. STATUTES § 339.780(7)(1)-(3).

[261] ALA. CODE § 34-27-84(c).

[262] *See* H.B. 135, 2007 Leg., 59th Sess. (2007). This bill, signed into law on March 22, 2007, becomes effective July 1, 2007. On its face, the law is ambiguous as to whether it requires brokers actually to perform the service of receiving and presenting offers and counteroffers or simply requires them to make themselves "available" to their client to do so. The latter reading would ultimately seem to leave the choice up to the client as to who receives or presents the offers and counteroffers.

[263] 225 IL. COMP. STATS. § 454/1-10.

specified in Missouri's law.[268] Further, Kentucky,[269] Michigan,[270] Mississippi,[271] and New Mexico[272] recently have considered but not adopted minimum-service requirements.[273]

a. Competitive Effects of Minimum-Service Requirements

As the FTC and DOJ have explained in letters to several states, minimum-service requirements harm consumers in two ways.[274] First, minimum-service requirements

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[264] IN. CODE § 25-34.1-10-9.5.

[265] IOWA CODE § 543B.56A.

[266] TEX OCC. CODE § 1101.557.

[267] UTAH CODE § 61-2-27(2)(a).

[268] Several states, including Delaware, Florida, Ohio, Oklahoma, Tennessee, and Wisconsin, have less restrictive laws that allow the client to decide whether he or she wants the listing broker to perform such services. *See* DEL. CODE tit.24 § 2973, FLA. STAT. § 475.278, OHIO CODE § 4735.621, OKLA. STAT. tit. 59 § 858-353, TENN. CODE tit. 62-13-403, WI. CODE § 452.133. Virginia also has a less restrictive law that requires the broker who is providing limited services to disclose the services that he or she will perform. *See* VA. CODE § 54.1-2138.1.

[269] Kentucky S.B. 43, *available at* http://www.lrc.ky.gov/record/06RS/SB43.htm.

[270] Michigan H.B. 4849, *available at* http://www.legislature.mi.gov/documents/2005-2006/billengrossed/House/pdf/2005-HEBH-4849.pdf.

[271] Mississippi S.B. 2782, *available at* http://billstatus.ls.state.ms.us/documents/2006/html/SB/2700-2799/SB2782IN.htm.

[272] *See* Glenn Roberts, Jr., *New Mexico Rescinds Controversial Real Estate Rules*, INMAN NEWS (July 17, 2006), *available at* http://www.inman.com/InmanNews.aspx?ID=54526.

[273] At the time of publication of this Report, the Rhode Island legislature is considering minimum-service requirements. The Nevada legislature is considering a bill to allow consumers to waive the minimum-service requirements established by the Nevada Real Estate Commission, all of which is part of a package recommended by a minimum-service task force the Commission established.

[274] *See* Letter from DOJ to Oklahoma Representatives and Senators (Apr. 8, 2005), *available at* http://www.usdoj.gov/atr/public/comments/209203.htm; Letter from FTC and DOJ to Michigan State Sen. Alan Sanborn (Oct. 18, 2005), *available at* http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf; Letter from the FTC and DOJ to Governor Matt Blunt (May 23, 2005), *available at* http://www.ftc.gov/opa/2005/05/mrealestate.htm; Letter from the FTC and DOJ to Alabama Senate (May 12, 2005), *available at* http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf; Letter from the FTC and DOJ to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), *available at* http://www.usdoj.gov/atr/public/comments/209229.htm; Letter from DOJ to the New Mexico Real Estate Commission (Nov. 2, 2005), *available at* http://www.usdoj.gov/atr/public/comments/212656.htm.

frustrate consumer choice by reducing the options available to consumers in the marketplace; consumers who would otherwise choose a lower-cost fee-for-service option are harmed if they can no longer choose their preferred option because it does not comply with state minimum-service requirements. Second, minimum-service requirements can reduce the competitive constraint that fee-for-service brokers pose to full-service brokers.

i. Elimination of Consumer Choice

In states without minimum-service requirements, a consumer typically can choose an MLS-only package as the lowest price/lowest service level option.[275] Minimum-service provisions eliminate the option of buying an MLS-only package, or any other individual service.[276] Fee-for-service brokers in minimum-service states must include the enumerated additional tasks in any package of listing services they provide, which often requires the broker to charge a higher price due to the increased costs and time commitments associated with each transaction.[277]

To illustrate how minimum-service requirements eliminate choice, consider the example of a consumer who is selling his or her home for $271,263 (the average sales

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[275] MLS-only packages are packages where, for a flat fee, the fee-for-service broker agrees to list the seller's home on the MLS by making a unilateral offer of compensation and cooperation to all of the other brokers within the MLS. The seller then assumes responsibility for future tasks related to the sale of his or her home. *See, e.g.*, Your Igloo Real Estate, http://www.yourigloo.com/ (last visited Apr. 16, 2007). Should another broker in the MLS procure the buyer that ultimately purchases the seller's home, the fee-for-service broker is typically obligated under MLS rules to pay the cooperative compensation listed on the MLS to that broker. *See supra* Chapter I.A.3.

[276] The ability to buy individual brokerage services, without purchasing the full package offered by full-service brokers, is increasingly important to consumers. Hahn, for example, suggested that there may be a transition towards "a new era" in the industry in which real estate firms will develop and use a variety of different business models. AEI-Brookings Paper, *supra* note 3, at 12. He anticipated that some firms would specialize in specific parts of real estate transactions – allowing consumers to choose what fits their needs. *Id*. Hahn observed that such specialization and dividing of real estate services into smaller parts could result in "substantial gains for consumers." *Id*.

[277] Press accounts indicate that fee-for-service brokers have raised their prices or exited the market altogether in response to minimum-service laws. *See* Glenn Roberts Jr., *Flat-fee brokers adapt to new real estate law Texas' new minimum-service law enacted Sept. 1*, INMAN NEWS (Oct. 12, 2005), *available at* http://www.inman.com/inmannews.aspx?ID=48325; *see also* http://www.texasdiscountrealty.com/laws.htm (website of Texas Discount Realty explaining that "because of the added responsibilities forced on to you, the seller and us the broker, by [the Texas minimum-service law], we are forced, as most brokers to adjust our prices"); Tracy Donhardt, *New Law Provides Realtors and Edge*, INDIANAPOLIS BUSINESS JOURNAL (July 10, 2006), *available at* http://indybiznow.com/Default.aspx?TabId=391&issueyear=2006&issuemonth=07&issueday=10&page=1&article=Ar00101 (noting that Indiana's minimum-service law has caused at least one limited-service broker to exit the market). A fee-for-service broker in Texas, who was a panelist at the Workshop, has complied with the Texas minimum-service law by providing clients with an electronic "frequently asked questions" sheet, offering to answer questions by fax or email, and communicating with buyers' brokers during negotiations. As a result of the extra time spent with each client, this broker raised the price of his MLS-only option by $100.

price of a home in 2005).[278] A consumer who lived in a state without a minimum-service requirement could choose to purchase a basic MLS-only package from a flat-fee broker for about $7,282 ($500 for the MLS-only brokerage package listing fee plus a 2.5 percent commission for a cooperating broker). A consumer who lived in a state with a minimum-service requirement, however, would not have that option available. Instead, the consumer would have to purchase a traditional package of brokerage services for $13,563 or $16,275 (at 5 or 6 percent commission, respectively) or, depending on what was allowed by state law, purchase an augmented MLS-only brokerage or flat-fee package that satisfies the state requirements, which probably would require an additional expenditure of $100 to $1,500 over the basic MLS-only package – for a total of $7,382 to $8,782, respectively.[279] Alternatively, faced with a higher price for a fee-for-service broker's base level package, a consumer may decide to perform the entire transaction on his or her own. Regardless of which alternative the consumer chooses, the consumer would be worse off because he or she cannot choose the preferred combination of price and service, which brokers would be able to provide in a state without minimum-service requirements.[280]

ii. Decreased Competition for Full-Service Brokers

A second effect of minimum-service requirements is that they reduce the competitive constraint fee-for-service brokers place on full-service brokers.[281] A full-service broker who wants the business of a consumer considering fee-for-service brokerage will need to offer a lower commission rate and/or increased quality to induce the consumer to choose to purchase the additional services the broker offers. To the extent that fee-for-service options cost more, full-service brokers will have less need to offer these incentives. Thus, if fee-for-service brokers are forced to raise their prices in response to minimum-service requirements, consumers who choose full-service brokers

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[278] *See* HUD REPORT, *supra* note 201.

[279] One panelist who is a fee-for-service broker describes this as his "flat-fee plus" option, where, in addition to listing the home in the MLS and placing it on several websites, he provides the seller assistance once the buyer is found. In addition to the flat fee price of $495 paid at time of listing, the "flat-fee plus" option requires the seller also to pay $1,500 at closing. *See* Farmer, Tr. at 68 (describing the option).

[280] In an address at the beginning of the Workshop, (then Acting) Assistant Attorney General Thomas Barnett observed that minimum-service laws and regulations can be viewed as no different from states passing a regulation that says: "When I walk into McDonald's and order a hamburger, I'm told that I also have to buy some french fries, because the state has decided that it might be deceptive or misleading or bad if I only got the hamburger, paid for it and didn't realize I wasn't going to get the french fries." Barnett, Tr. at 20. Similarly, at a recent Congressional hearing on competition in the real estate brokerage industry, Representative Baker analogized minimum-service laws and regulations to requiring a consumer to have his or her entire house painted when he or she only wanted the porch painted. *See Hearing*, *supra* note 1, at 30 (statement of Rep. Richard H. Baker, member House Comm. on Financial Services), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:31541.pdf.

[281] *See* Farmer, Tr. at 105 (noting that he competes against traditional "agents out there that offer little or no value to the transaction.").

are also likely to pay higher prices for real estate brokerage due to a reduction in the competitive constraint provided by fee-for-service brokers.

b. Arguments in Support of Minimum-Service Requirements Lack Justification and Discourage Competition

Proponents of minimum-service requirements typically argue that these requirements purportedly: (1) protect consumers; and (2) protect brokers. As discussed below, evidence presented both at the Workshop and outside the Workshop contradicts these justifications. Rather, minimum-service requirements discourage competition and raise prices for consumers.

i. Argument One: Minimum-Service Requirements Are Necessary To Protect Consumers

Advocates for minimum-service requirements claim that ordinary people are "plainly unable" to handle their real estate transactions, and thus argue that states need to mandate the number of services real estate brokers provide to ensure that consumers receive assistance from an experienced professional.[282] Along similar lines, at least one proponent of minimum-service requirements suggests that they are necessary because consumers who hire fee-for-service brokers are subject to so-called hold-up; once a consumer has entered into an exclusive agreement with a fee-for-service broker, the consumer effectively is locked into acquiring from that broker all of the additional brokerage services that subsequently may be needed.[283]

Another argument is that consumers expect real estate agents to perform certain tasks, and that these laws merely meet consumers' expectations.[284] For example, one panelist, the executive director of the Texas Real Estate Commission, noted that minimum-service requirements can "prevent [] false claims by those who sign an agency agreement with a client, promise to provide representation, place the property on the

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[282] *See* Lewis, Tr. at 179 ("While some consumers may be sophisticated enough to represent themselves in some or all of the steps of a transaction, most are not."). *See also* Blanche Evans, *Remember the Alamo: Limited Service Dust-up Brings Out State's Rights Argument Against DOJ, FTC*, REALTY TIMES, Apr. 22, 2005, *available at* http://realtytimes.com/rtcpages/20050422_dojstepsin.htm (quoting Texas Association of Realtors claiming that minimum-service rules would avoid consumer confusion); Peter G. Baker, *Hiring a Broker: Should You Expect Less?*, REALTY TIMES, Apr. 11, 2006, *available at* http://realtytimes.com/rtcpages/20060411_hirebroker.htm ("[Government agencies] argue that with disclosures and waivers consumers should be able to refuse any brokerage service or obligation. . . . We do not, for example, allow consumers to save money by hiring doctors who cut costs by not sterilizing surgical instruments or washing their hands.").

[283] *See* Darryl W. Anderson, *Minimum-Service Requirements in Real Estate Brokerage: A Response to Maureen K. Ohlhausen*, ANTITRUST SOURCE, Jan. 2006, at 3-4 (arguing that minimum-service requirements are procompetitive because they foster price negotiations before entering a representation agreement over what a fee-for-service broker will charge for all the services required by law).

[284] *See, e.g.*, GAO REPORT, *supra* note 3, at 16.

Internet, and then walk away from any further involvement in the real estate transaction."[285]

The evidence, however, does not suggest that consumers who choose to use fee-for-service brokers are harmed by performing certain aspects of the real estate transaction themselves or misunderstand the nature of the contractual relationships into which they enter. For example, one Workshop panelist who owns a limited-service brokerage noted that in 2004 there were more than 3,500 complaints filed with the Texas Real Estate Commission against brokers and agents, but there has never been a complaint filed against a fee-for-service broker.[286] This observation is consistent with what FTC and DOJ staff have learned in discussions with officials in other states.[287] Evidence also suggests that home sellers are aware of the prices fee-for-service brokers charge for additional services before they enter into contracts with those brokers. Because consumers tend to know the prices of additional services before entering contracts with fee-for-service brokers, they are not likely to suffer from the "hold-up" that minimum-service advocates have asserted as a reason for such provisions.[288]

Further, the origins of these laws suggest that the asserted public interest justifications are not genuine. Comments provided at the Workshop suggest that the impetus for these laws comes not from aggrieved consumers, but from state Realtor associations.[289]

Panelists representing the gamut of real estate business models remarked that they do not see a need for minimum-service laws. For example, the head of a major real estate brokerage franchise stated that "while we have no reason to believe that the states' motives [in adopting minimum-service laws] are anything but well-intentioned, neither Century 21 nor our parent company, Cendant, believes that minimum standards

[285] Thorburn, Tr. at 96.

[286] Farmer, Tr. at 73.

[287] In addition, in response to an FTC questionnaire, respondents from Colorado, North Dakota, Vermont, and Washington noted that complaints against limited service brokers were minimal or nonexistent. The questionnaire is available at http://www.ftc.gov/opp/workshops/comprealestate/questionnaire.htm.

[288] Our review of fee-for-service broker websites reveals that consumers appear to have ready access to prices that fee-for-service brokers charge for additional services beyond the MLS-only option in advance of entering into a contractual relationship. This finding undermines a necessary condition for the hold-up theory to be plausible – that consumers only learn the prices for additional services after they have entered into an exclusive listing agreement. *See* Maureen K. Ohlhausen, *Minimum-Service Requirements in Real Estate Brokerage: A Reply to Darryl Anderson,* ANTITRUST SOURCE, Mar. 2006 (discussing various theoretical and empirical reasons why the hold-up theory does not appear to apply to fee-for-service brokerage).

[289] *See* Farmer, Tr. at 71-72.

legislation is truly necessary."[290] The chief operating officer of a major website that provides selling aids to FSBOs commented that "there seems to be no demand on the part of the consumer for [minimum-service] laws."[291] Further, a discount broker also noted that requiring minimum services runs contrary to the concept of fiduciary duty:

> [F]iduciary duty mean[s] you do what's in the best interests of your client ahead of your best interests. If my client comes to me and says, "I can negotiate my contract better than you. I can sell my house better than you. I just need you to help me with this, this, or this," am I not doing my fiduciary duty by doing what my client is telling me is in his best interests?[292]

Consistent with these panelists' comments, the Consumer Federation of America issued a report in June 2006 addressing competition in the real estate industry.[293] This report criticized minimum-service laws, contending that they "discourage competition" by "making it difficult for internet-based or other limited service firms to function."[294]

Given that under minimum-service requirements choice is reduced and in many cases prices go up, those who favor minimum-service provisions should bear the burden of demonstrating that consumers affirmatively benefit from them. No evidence was presented at the Workshop indicating that consumers are better off with minimum-service requirements, nor have the Agencies been able to find such evidence elsewhere.

Finally, if there is a legitimate concern that some consumers who enter into fee-for-service brokerage arrangements truly do not understand that they are contracting to receive fewer services than a full-service broker would provide, a far less restrictive solution would be to require brokers to disclose in plain terms which services they will and will not be providing. Indeed, several panelists, representing both fee-for-service and more traditional business models, suggested such disclosure as a preferable alternative to minimum-service laws that as practical matter ban fee-for-service brokerage.[295]

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290 Kunz, Tr. at 82-83. *See also* Perriello, Tr. at 152 (speaking for Cendant, and stating that "we believe that consumers . . . should be able to choose their service models as well as the provider of those services, whether they be limited service or full-service").

291 Sambrotto, Tr. at 116.

292 Farmer, Tr. at 72.

293 PATRICK WOODALL & STEPHEN BROBECK , CONSUMER FEDERATION OF AMERICA, HOW THE REAL ESTATE CARTEL HARMS CONSUMERS AND HOW CONSUMERS CAN PROTECT THEMSELVES (June 2006), *available at* http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf.

294 *Id*. at 4-5.

295 *See, e.g.*, Lewis, Tr. at 178-79; Sambrotto, Tr. at 114; Farmer, Tr. at 115.

ii. Argument Two: Minimum-Service Requirements Are Necessary to Protect Brokers

Advocates for minimum-service requirements also claim that when one side of the transaction is a home seller who is a party to a limited-service listing agreement rather than a traditional full-service broker, cooperating brokers who represent buyers may face special risks. This line of argument typically focuses on three types of risks to the cooperating broker.

First, some fear that sellers using fee-for-service brokers foist additional work onto full-service cooperating brokers and jeopardize the transaction due to the sellers' inexperience. For example, these advocates fear that a cooperating full-service broker may be forced to explain aspects of the transaction to the seller or perform some of the tasks related to removing contingencies and closing the transaction typically performed by the listing agent. One panelist, a past president of NAR, stated that an inexperienced seller handling the transaction on his or her own poses several risks to the buyer and the transaction, which cooperating brokers must act to avoid if they want the transaction to close successfully. For instance, the buyer may have locked in a loan, putting his or her interest rate at risk if the sale fails to close, or may have begun arrangements to move out of his or her current living space.[296]

Second, some cooperating brokers claim that minimum-service laws are necessary because those brokers are concerned that work they end up performing when the listing broker is providing a limited set of services may give rise to liability for undisclosed dual agency. In situations where the cooperating full-service broker is an agent of the buyer, but provides assistance to a seller to help close the sale, they claim that the broker risks becoming an undisclosed dual agent. This arguably can give rise to legal liability for both the cooperating broker and the buyer.[297] At the same time, however, the buyer may want his or her agent to help the unrepresented seller just so the transaction can properly close.[298]

Finally, some have argued that the cooperating full-service broker risks not being compensated because the home seller might complete a deal directly with the buyer. Proponents of this argument state that this outcome is more likely to occur with a fee-for-service listing than a traditional listing because the person soliciting buyers is the home seller who is not regulated as a real estate licensee and thus has less concern about attempting to solicit clients who are already represented.

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[296] Whatley, Tr. at 45-46.

[297] *See* Katherine A. Pancak *et al.*, *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL ESTATE L.J. 345, 350 (1997) (noting that agency relationships can be created by actions).

[298] Whatley, Tr. at 48.

The Agencies have not encountered evidence supporting any of these arguments in favor of minimum-service restrictions. We have not found any increased incidence of undisclosed dual agency problems associated with limited-service brokerage. In addition, there is no indication that the marketplace is incapable of addressing situations where cooperating brokers may face additional work to close a transaction. Cooperating brokers can make unilateral choices as to whether or not the compensation offered by the home seller through the MLS, as well as that offered directly by their buyer, is sufficient payment for the effort that may prove necessary to close a transaction.[299] Cooperating brokers may also seek to negotiate higher compensation from the listing broker or from the home buyer. Further, if limited-service transactions do impose additional costs on cooperating brokers, sellers represented by fee-for-service brokers might find that they must offer cooperating brokers a higher commission to induce them to show their homes, and we are aware of no impediments to them doing so. Accordingly, there is no basis for believing that there is a need for a minimum-service law to "protect" cooperating brokers from doing additional work when facing a home seller represented by a fee-for-service broker.

With regard to the risk of a broker not receiving compensation because the home seller deals directly with the buyer, the MLS already protects the cooperating broker through its dispute resolution mechanism. As explained in Chapter I, a broker who secures a buyer for a transaction is entitled to cooperative compensation as offered via the MLS listing. If a listing broker fails to pay a cooperating broker, the cooperating broker can bring a "procuring cause" dispute against the listing broker through the MLS arbitration mechanism.[300] Further, proponents of minimum-service requirements have failed to present evidence that this risk is either unique to fee-for-service brokers or so prevalent as to warrant minimum-service requirements.

Even if some of the proffered justifications for minimum-service laws were valid, there appear to be far less restrictive ways to address them – ways that preserve the benefits of competition for consumers – than implementing minimum-service requirements to address them. First, the full-service broker can disclose his or her responsibilities to both parties in the transaction to make clear the scope of the broker's services. Second, requiring buyers' brokers to disclose the potential for dual agency to the seller (and obtain a waiver) would eliminate the danger of undisclosed dual agency. In fact, NAR has agreed that disclosure creates "appropriate expectations" for all parties in the transaction to avoid undisclosed dual agency.[301] Further, licensing laws or regulations could be amended to clarify that negotiations with a party who has chosen not

[299] Avoiding fee-for-service listings without disclosure to buyers, however, may raise issues concerning the fulfillment of fiduciary duties.

[300] *See supra* Chapter I.B.1.

[301] Blanche Evans, *Where Real Estate Associations Stand On MLS-Entry-Only Listings*, REALTY TIMES, Feb. 24, 2005, *available at* http://realtytimes.com/rtapages/20050224_mlsentryonly.htm.

to use his or her broker for such negotiations do not imply an agency relationship. Ohio,[302] Virginia,[303] and Wisconsin[304] recently have adopted this approach.

c. Conclusion

In sum, it is clear that minimum-service requirements restrict choice by not allowing consumers freely to choose what real estate brokerage services they wish to purchase or not purchase. The evidence indicates that these requirements raise prices by forcing brokers to provide services their customers may not want and reducing competitive pressure on full-service brokers. Additionally, because evidence to date has not shown that minimum-service requirements benefit consumers, any harm they cause is almost certain to greatly outweigh any benefit they might produce.

3. Licensing Requirements for Firms that Advertise FSBOs

Another type of restraint that is likely to reduce competition and consumer choice in real estate brokerage-related services is overly broad licensing requirements, particularly those applicable to firms that advertise FSBO homes. One panelist who represents a FSBO website discussed his company's experience with state laws that require firms that advertise FSBO homes to become licensed real estate agents. He explained that his company had received letters from states demanding that it stop doing business until it became licensed as an agent because "the services that you offer rise to the level of an agent."[305]

In one case, ForSaleByOwner.com sued the State of California for enacting a law purporting to require it to become licensed as a broker, alleging that this action violated the First Amendment because the California statute in question specifically exempted newspapers from licensing requirements.[306] The court held that California's disparate treatment of newspapers and FSBO websites ran afoul of the First Amendment:

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[302] OHIO CODE § 4735.75(B) ("A licensee who negotiates directly with a seller, purchaser, lessor, or tenant pursuant to a written authorization as described in division (A) of this section does not violate division (A)(19) of section 4735.18 of the Revised Code and negotiations conducted by a licensee pursuant to the authorization shall not create or imply an agency relationship between that licensee and the client of that exclusive broker.").

[303] VA CODE § 54.1-2132(C) (effective July 1, 2007) ("A licensee engaged by a seller in a real estate transaction may, unless prohibited by law or the brokerage relationship, provide assistance to a buyer or potential buyer by performing ministerial acts. Performing such ministerial acts that are not inconsistent with subsection A shall not be construed to violate the licensee's brokerage relationship with the seller unless expressly prohibited by the terms of the brokerage relationship, nor shall performing such ministerial acts be construed to form a brokerage relationship with such buyer or potential buyer.").

[304] WIS. CODE § 452.133(6).

[305] Sambrotto, Tr. at 90.

[306] *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 872 (E.D. Cal. 2004).

> Because [ForSaleByOwner.com] unquestionably has speech interest in disseminating real estate information through its website, and because Defendants have not shown any compelling state interest in requiring a real estate broker's license for [ForSaleByOwner.com]'s website but not for virtually identical newspaper websites, the presumption of unconstitutionality triggered by this disparity of treatment has not been overcome.[307]

B. Use of MLS Rules to Disadvantage Competitors

As explained in Chapter I, brokers must have access to the MLS in order to compete effectively. Because brokers usually set the rules for each others' participation in the MLS by agreement, it is possible for one dominant group of brokers to establish MLS rules that favor them and disfavor other brokers who compete in a manner that they dislike. Such rules are illegal if they unreasonably restrict competition,[308] and the Agencies recently have challenged, as antitrust violations, MLS rules that unreasonably restrict competition by brokers who use alternative business models.

1. Discrimination Against Brokers Entering into Exclusive Agency Listing Contracts

Workshop panelists reported how some MLS rules discriminate against brokers who enter into exclusive agency listing agreements, which provide that the broker is entitled to compensation only when the home is sold by an agent, and not in the event the home seller sells the home on his or her own.[309] This is the type of agreement used in most fee-for-service transactions. Specifically, these panelists pointed to rules that keep exclusive agency listings from being uploaded to national real estate websites like Reator.com.[310] Recent NAR data show that 77 percent of home buyers search the Internet for homes, and that 24 percent of home buyers first found online the home they ultimately purchased.[311] Thus, online exposure appears to be crucial to marketing a

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[307] *Id*. at 879.

[308] *United States v. Realty Multi-List*, 629 F.2d 1351, 1374 (5th Cir. 1980) ("[W]hen broker participation in the [MLS] is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable."). Subsequent decisions largely have followed this approach. *See, e.g.*, *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1579-80 (11th Cir. 1991); *Austin Bd. of Realtors v. E-Realty, Inc.*, No. Civ. A-00-CA-154 JN, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000). A discussion of the various private litigation involving alleged MLS-related restraints is beyond the scope of this Report.

[309] For a discussion of exclusive agency contracts and other types of listing agreements, *see supra* Chapter I.A.2.

[310] *See* Farmer, Tr. at 74-75; Sambrotto, Tr. at 90.

[311] NAR 2005 SURVEY, *supra* note 38, at 29-30.

home, and, to the extent that successful marketing tends to lead to a higher selling price and shorter time on the market, it is reasonable to assume that homes without such exposure are likely to take longer to sell or sell at lower prices.

In 2006, the FTC charged six different MLSs – the Austin Board of Realtors, Information and Real Estate Services, LLC, Northern New England Real Estate Network, Inc., Williamsburg Area Association of Realtors, Inc., Realtors Association of Northeast Wisconsin, Inc., and Monmouth County Association of Realtors, Inc. – with violating Section 5 of the FTC Act by adopting MLS rules that limit the publication and marketing on the Internet of certain sellers' homes, but not others, based solely on the terms of their respective listing contracts.[312] The FTC obtained consent agreements with all six MLSs.

The complaints accompanying the consent agreements alleged that each of the six MLSs individually controlled key inputs necessary for a listing broker to provide effective real estate brokerage services, and that each respondent's policy was a joint action by a group of competitors to refuse to deal except on specified terms.[313] The rules or policies challenged in the complaints state that information about homes is not allowed to be made available on popular real estate websites unless the listing contracts are exclusive right to sell listings (*i.e.*, that require compensation no matter how the home is sold). When implemented by each of the respondents, this "Web Site Policy" prevented homes with exclusive agency or other non-traditional listing contracts from being displayed on a broad range of public real estate websites, including Realtor.com. Access to such websites, however, is a key input in the brokerage of residential real estate sales in the respective MLS service areas. Each policy had the effect of discouraging brokers from using exclusive agency listings. In the case of the Austin Board of Realtors, for example, the data showed that three months after the MLS implemented its exclusive agency listing policy, the percentage of all listings that were exclusive agency listings fell from 18 percent to 2.5 percent.[314] The complaints also alleged that the exclusive agency listing policy did not give rise to any plausible or cognizable efficiencies, and was "not reasonably ancillary to the legitimate and beneficial objectives of the MLS."[315]

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[312] *Austin Bd. of Realtors*, FTC Dkt. No. C-4167; *Information and Real Estate Services, LLC*, FTC File No. 061-0087; *Northern New England Real Estate Network, Inc.*, FTC File No. 051-0065; *Williamsburg Area Ass'n of Realtors, Inc.*, FTC File No. 061-0268; *Realtors Ass'n of Northeast Wisconsin, Inc.*, FTC File No. 061-0267; *Monmouth County Ass'n of Realtors, Inc.*, FTC File No. 051-0217.

[313] *See, e.g., Information and Real Estate Services, LLC*, FTC File No. 061-0087, at 6 (2006) (analysis to aid public comment), *available at* http://www.ftc.gov/os/caselist/0610268/0610268consentanalysis.pdf.

[314] *See, e.g., Austin Bd. of Realtors*, FTC Dkt. No. C-4167, at ¶ 17 (2006) (complaint), *available at* http://www.ftc.gov/os/caselist/0510219/0510219AustinBoardofRealtorsComplaint.pdf.

[315] *Id*. at ¶ 27.

Additionally, in October 2006, the FTC charged two more MLSs – MiRealSource, Inc. and Realcomp II Ltd. – with illegally restraining competition by limiting consumers' ability to obtain low-cost real estate brokerage services. The complaint against MiRealSource alleges that it adopted a set of rules to keep exclusive agency listings from being listed on its MLS, as well as other rules that restricted competition in real estate brokerage services. This case resulted in a consent decree, under which MiRealSource is prohibited from adopting or enforcing any rules or polices that deny or limit the ability of MLS members to enter into exclusive agency listings, or any other lawful listing agreements, with home sellers.[316]

The complaint against Realcomp alleges that it engaged in anticompetitive conduct by prohibiting information on exclusive agency listings and other forms of nontraditional listings from being transmitted from the MLS to public real estate websites. Both the MiRealSource and Realcomp complaints allege that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS or significant public websites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along. In litigating its case against Realcomp, the FTC staff will seek to prove that this group of competitors should be prohibited from engaging in such conduct to the detriment of consumers.

The FTC challenged similar conduct in the past. In the 1980s and 1990s, several local MLS boards banned exclusive agency listings from the MLS entirely. The FTC investigated and issued complaints against these exclusionary practices, obtaining several consent orders.[317]

2. Discrimination Against VOWs

In September 2005, DOJ's Antitrust Division sued NAR, alleging that its nationwide rules violated Section 1 of the Sherman Act. DOJ alleged that the rules, embodied in a so-called VOW Policy, limited competition from real estate brokers using innovative business models and the Internet to offer better services to their clients. NAR's rules allowed brokers to direct that their clients' listings not be displayed on any VOW or on particular VOWs designated by the broker.[318] The complaint charges that the rules restrain competition. DOJ's lawsuit is pending in the federal court in Chicago, Illinois.

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[316] *See MiRealSource, Inc.*, FTC Dkt. No. 9321 (2007) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9321/070323decisionorder.pdf.

[317] *See, e.g.*, *United Real Estate Brokers of Rockland, Ltd.*, Dkt. No. C-3461, 116 F.T.C. 972 (1993); *American Industrial Real Estate Ass'n*, Dkt. No. C-3449, 116 F.T.C. 704 (1993); *Puget Sound Multiple Listing Ass'n*, FTC Dkt. No. C-3300 (1990).

[318] *See supra* Chapter I.C.3. for a description of VOWs.

In its complaint, DOJ alleged that NAR's policy was the product of collective action by NAR's members and offers no procompetitive benefit. Specifically, by requiring NAR-affiliated MLSs to adopt rules that will allow brokers to withhold their clients' listings from VOW brokers by means of an "opt out,"[319] it enables traditional brokers to block their competitors' customers from having full on-line access to all of the MLS's listings. When exercised, the opt-out provision prevents Internet-based brokers from providing all MLS listings that respond to a customer's search, effectively inhibiting the new technology.

NAR's policy permits traditional brokers to discriminate against other brokers based on their business models, denying them the full benefits of MLS participation. DOJ's lawsuit seeks to ensure that traditional brokers, through NAR's policy, cannot deprive consumers of the benefits that would flow from these new ways of competing.

In December 2005, NAR filed a motion to dismiss the lawsuit. NAR argued that its VOW policies do not violate the Sherman Act because they merely empower individual brokers to opt out and therefore "restrain" nothing. The court denied NAR's motion, holding that collective action that "purports to regulate how [competitors] will compete in the marketplace" can, if proven, constitute a restraint of trade.[320]

C. Steering As a Possible Obstacle to Greater Price Competition

The obstacles discussed so far in this Chapter represent concerted efforts of real estate incumbents to insulate themselves from new and innovative types of competitors. As such, these obstacles have received particular attention from the Agencies. Even without any impediments presented by state law, regulation or MLS policies, however, those new entrants who seek to compete in a different manner, and who have the potential to make the entire industry more competitive, would still face a significant obstacle inherent in the structure of the industry. Namely, a broker's success typically depends on securing significant cooperation from direct competitors. If that cooperation cannot be obtained, it is possible that an entrant might fail even if it is more efficient and provides a more attractive combination of price and service to consumers.

The antitrust laws generally do not require firms to cooperate with their competitors. One reason is that, if one firm refuses to cooperate with rivals for self-serving reasons when cooperation would have benefited customers, those customers ordinarily would punish the uncooperative firm by taking their business elsewhere. However, that dynamic may not operate as well in industries, like real estate brokerage,

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[319] On the morning the lawsuit was filed, NAR announced a revised policy that contained a blanket opt-out under which the listings of brokers who withheld their listings from a VOW could appear on no brokers' website, except for NAR's website, Realtor.com. DOJ subsequently filed an amended complaint to take the revisions into account. *See* Amended Complaint, *United States v. Nat'l Ass'n of Realtors* (Oct. 4, 2005), *available at* http://www.usdoj.gov/atr/cases/f211700/211751.htm.

[320] *See United States v. Nat'l Ass'n of Realtors*, 2006 WL 34344263 at *14 (N.D. Ill. Nov. 27, 2006), *available at* http://www.usdoj.gov/atr/cases/f219800/219889.htm.

where many consumers have significant limits on their knowledge, thus making it easier for competitors to steer business away from new or maverick brokers, or to otherwise withhold necessary cooperation, without the knowledge of their customers.

1. The Importance of Cooperation in Real Estate Brokerage

The real estate brokerage industry has been characterized by cooperation among brokers and agents for well over a century, going back to the first real estate boards and MLSs.[321] Under the MLS system, listing brokers rely on cooperating brokers to procure a buyer in the majority of transactions.[322] The emphasis on cooperation continues today, as reflected in statements made at the Workshop and in public comments filed with the FTC and DOJ. One panelist observed that "[brokers] are cooperative with the competition in ways unheard of in any other industry that I know of."[323] A commenter further noted that "[a]lthough we all compete for business, there is a need to cooperate in order to bring a transaction to a successful close. … [In w]hat other business can you find that kind of cooperation?"[324]

Although, as noted in Chapter I, cooperation among brokers can lower transaction costs, it may also foster a natural impediment to discount brokers.[325] As one author has explained:

> The cooperation between brokers characterizing many real estate transactions clearly provides incentives for adhering to the "going rate" commission. A brokerage firm that solicits listings by offering lower commissions may find itself disadvantaged since agents from other firms may prefer to concentrate their efforts where higher commissions are available. This tendency may be reinforced by boycotts or other discriminatory practices.[326]

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[321] *See supra* Chapter I.B. *See also* 1983 FTC STAFF REPORT, *supra* note 9, at 87-88.

[322] *See* Yang & Yavas, *supra* note 154, at 23 (1995) (reporting that only 12 percent of listings in the State College, PA MLS in 1991 were sold by the listing broker); 1983 FTC STAFF REPORT, *supra* note 9, at 37 ("approximately 66 percent [of sales] involve more than one broker").

[323] Kunz, Tr. at 79.

[324] Fialkowski, Public Comment 113, at 1.

[325] *See, e.g.*, Thomas J. Miceli, *The Multiple Listing Service, Commission Splits, and Broker Effort*, 19 JOURNAL OF THE AMERICAN REAL ESTATE AND URBAN ECONOMICS ASSOCIATION 548, 564 (1991) ("The MLS is therefore a mixed blessing for consumers of brokerage services. It is clearly beneficial in providing them access to a large amount of information at a minimal cost, but at the same time it permits brokers to coordinate their efforts, possibly at the expense of sellers' interests."); GAO REPORT, *supra* note 3, at 7-8 ("A discount broker may advertise a lower commission rate to attract listings, but the broker's success in selling those homes, and in attracting additional listings in the future, depends in part on other brokers' willingness to cooperate (by showing the homes to prospective buyers) in the sale of those listings.").

[326] Crockett, *supra* note 51, at 218.

As a result, brokers may be deterred from discounting if cooperating brokers threaten to "concentrate their efforts" or steer buyers toward transactions for which higher commissions are available.

2. Reports That Cooperation Has Been Withheld

Commenters and participants in the real estate brokerage industry report steering behavior. Steering refers to any action taken by a broker or agent to avoid cooperating with a particular competitor. An example of steering would be a cooperating broker purposely failing to show his or her client a home listed by a discount broker notwithstanding the fact that the home matches the buyer's stated preferences.[327] Because listing brokers depend on cooperation from rivals, brokers have an opportunity to deter discounting by steering buyers away from discounters' listings.[328] Lack of cooperation will reduce the probability that homes listed by discounting brokers sell.[329]

One of the primary motivations for the FTC's 1983 investigation was "complaints from sources within the brokerage industry claiming harassment and boycotting of brokers who charge lower than 'customary' commission rates . . . ."[330] A Workshop panelist who owns a fee-for-service brokerage recounted his experiences:

> I've personally had brokers, agents tell potential sellers that no one would show my listing. If they listed their house with me, no one would show the house. I have had brokers tell people that, hey, he's gone out of

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[327] Agents also may have incentives to steer buyers toward their listings or homes listed by other agents who are affiliated with the same brokerage firm.

[328] *See* GAO REPORT, *supra* note 3, at 7-8.

[329] The potential negative impacts of steering are not likely to be as pronounced when brokers discount to home buyers via rebates because listing agents do not have the same incentives or ability to steer that cooperating agents have. The reduced susceptibility to unilateral steering of cooperating brokers who rebate underscores the importance of the Agencies' efforts to educate state legislators and regulators about the competitive harms that may be caused by anti-rebate laws.

[330] 1983 FTC STAFF REPORT, *supra* note 9, at 1. As part of its investigation, the FTC conducted a survey of 154 "alternative" brokers in 1979. *Id.* at 150 n.430. The FTC defined alternative brokers as "those who charge and promote a commission rate or fee that is at least 2 percent lower than the fee prevailing in their geographic area, or who offer and promote services that differ significantly from those generally offered in their geographic area." *Id.* at 150. Alternative brokers providing MLS access tended to be "full-service brokers, offering to consumers the same package of services as the traditional brokers." *Id.* at 154. In other words, the alternative brokers surveyed by the FTC were full-service brokers that undercut their rivals' prices. Of the alternative brokers providing MLS access, 84% reported that they either frequently or occasionally experienced "refusals by other brokers to show homes listed by [their] business," with 49% reporting this as a frequent problem. *Id.* at 157. Similar percentages of brokers reported threats or disparagements of their business to clients and prospective clients. *Id.* The FTC also reports that these same alternative brokers succeeded in selling only 62% of their listings compared to 88% for all brokers, and that only 29% of their sales were cooperative sales compared to 66% for all brokers. *Id.* at 154.

> business. I heard he's going out of business soon. You know, I have had signs stolen. I've received hateful emails. I even had one agent who was ridiculed in public for being a discount broker at a public realtor event, and other agents around the country have had frivolous complaints filed against them, have had their listings removed from [the] MLS for no reason, have been asked for every copy of every listing.[331]

Brokers also filed public comments alleging that competing brokers have withheld cooperation with, or engaged in harassment of, discounters. A representative of a self-described "alternative real estate brokerage company" reported: "I have had agents tell me personally they have been instructed by their broker not to show our properties."[332] Such experiences, however, were not reported by all of the nontraditional brokers who testified. One commenter, the owner of a discount brokerage franchise, reported that he has "not experienced any discrimination by agents in the showing or selling of our properties"[333]

3. Limiting the Effects of Steering

The Agencies have responded to allegations of steering in two distinct ways, depending on whether the steering was unilateral or involved an agreement among incumbent brokers. It is well established that the antitrust laws prohibit an unreasonable agreement by a group of brokers that they will withhold cooperation from a particular broker. The Agencies have recently investigated allegations of boycotts by groups of brokers. In those investigations, however, the Agencies have not found evidence sufficient to establish an agreement jointly to steer clients away from or boycott a particular rival and have declined to bring an antitrust case.

Where steering behavior appears to be merely the result of a single firm's unilateral decision not to cooperate with a particular competitor, the Agencies have not pursued enforcement actions. The aim of antitrust law is to preserve competitive markets. Antitrust laws generally do not prohibit unilateral decisions by firms not to deal with a particular listing broker.[334] If consumers have enough information about the

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[331] Farmer, Tr. at 74.

[332] Durham, Public Comment 15, at 1. *See also generally* Hepp, Public Comment 117, at 1-3 (alleging various ways in which MLSs across the country have discriminated against nontraditional real estate firms); 1983 FTC STAFF REPORT, *supra* note 9, at 75 ("Our Consumer and Alternative Broker Surveys suggest the possibility that steering practices may be widely prevalent.").

[333] McCormack, Public Comment 97, at 1.

[334] *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *Cf. United States v. Nat'l Ass'n of Realtors*, 2006 WL 34344263, at *14 (N.D. Ill. Nov. 27, 2006) (denying motion to dismiss where group's collective action enabling brokers to unilaterally withhold listings from innovative competitors **"**is backed up by sanctions and further is alleged to promote, *inter alia*, express and tacit anti-competitive collusion and to provide a [group]-created mechanism to punish overly aggressive competition from any Internet-based broker").

quality of the service they have received, then firms that choose to engage in steering will develop a poor reputation for having done so and will consequently lose future business.

Going forward, the Internet offers consumers increased knowledge of homes available for sale and, consequently, may limit the ability of cooperating brokers to steer buyers away from desirable homes listed by discount and fee-for-service brokers. The marketplace is likely to function more efficiently – and provide greater benefits to consumers – when consumers have direct access to more information about those listings. The important role played by more listing information being made directly available to consumers underscores the benefits of the antitrust actions against collective action to reduce the availability of such information. For example, the FTC sued to prevent MLSs from discriminating as to the listings that are made available on the Internet, and DOJ sued to prevent NAR from establishing rules against VOWs that limit the ability of a broker's client to see via the Internet all the listing information formerly screened by the broker.

CONCLUSION AND RECOMMENDATIONS

The Workshop afforded real estate brokers, state regulators, and academics an opportunity to express their various views on competition in the real estate brokerage industry. Using that information, as well as Agency expertise, the almost 400 submissions filed in response to the Agencies' request for public comment in connection with the Workshop, and other available information, this Report has undertaken a careful examination of the real estate brokerage industry. Our review suggests that although the real estate industry has undergone a number of substantial changes in recent years – in particular as a result of technological advances such as the Internet – competition in the industry has been hindered as a result of actions taken by some real estate brokers, acting through MLSs and NAR, state legislatures, and real estate commissions. In addition, consumers likely would benefit significantly from additional knowledge about the range of options available in brokerage services and fees. Based on the foregoing, the FTC and DOJ recommend the following to help maintain competition and protect consumers in the real estate brokerage industry:

- The Agencies should continue to monitor the cooperative conduct of private associations of real estate brokers, and bring enforcement actions in appropriate circumstances. While cooperation among brokers through a multiple listing service can provide consumers with important efficiencies, cooperation used to adopt rules that hinder rivals can be anticompetitive and, as recent Agency actions indicate, may violate the antitrust laws.

- The Agencies should continue to provide state legislators and industry regulators with information concerning the competitive consequences of state legislation and regulations that threaten to or already do restrict competition and consumer choice in the real estate brokerage industry, and take enforcement action in appropriate circumstances.

- State legislators and industry regulators should consider repealing existing laws, rules and regulations, such as minimum-service and anti-rebate provisions, that limit choice and reduce the ability of new brokerage models (*e.g.*, fee-for-service brokers, discount full-service brokers, virtual office website brokers, and broker referral networks) to compete and that do not appear to provide any consumer benefits that would justify such restrictions. They should also avoid enacting such laws, rules, and regulations in the future.

- The Agencies and industry regulators should promote consumer understanding of marketplace options. Some consumers may not be aware of the range of alternatives available to them when hiring a real estate broker, including the types of business models available and the negotiability of fees, for both home buyers and sellers, and/or may not understand the duties owed by their broker. Competition in the real estate brokerage industry would likely be enhanced if consumers had better access to such information.

- The Agencies and industry regulators should assess the feasibility of an empirical study of the real estate brokerage industry. Transaction-level data on commission rates and fees are not publicly available, but broad national aggregate data suggest that commission rates and fees move in tandem with housing prices. Just as the 1983 FTC study provided valuable information about how real estate brokers competed in the late 1970s and early 1980s, a new study examining how transaction-level commission rates and fees vary based on such factors as market conditions, housing prices, and regulation would provide a better understanding of the current state of competition in the real estate brokerage industry.