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THE CHANGING REAL ESTATE MARKET

HEARING

BEFORE THE

SUBCOMMITTEE ON
HOUSING AND COMMUNITY OPPORTUNITY

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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THE CHANGING REAL ESTATE MARKET

Tuesday, July 25, 2006

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HOUSING AND
COMMUNITY OPPORTUNITY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:08 p.m., in room 2128, Rayburn House Office Building, Hon. Robert Ney [chairman of the subcommittee] presiding.

Present: Representatives Ney, Miller of California, Baker, Brown-Waite, Neugebauer, Campbell, Oxley, Waters, Lee, Miller of North Carolina, Scott, Davis of Alabama, Cleaver, and Green.

Also present: Representatives Sherman and Watt.

Chairman NEY. The subcommittee will come to order. This afternoon, the Subcommittee on Housing and Community Opportunity meets to discuss the changing real estate market, and how these changes have affected brokers and consumers alike.

Since the advent of the Internet, changes to the real estate market have become frequent and far reaching. The nature of real estate transactions and the effect on home ownership and consumers are a growing interest not only to this subcommittee but to the financial services industry as a whole.

To understand changes to the market, we must first look at what is known as the traditional brokerage model. Traditional brokers offer a bundle of services that can include everything from marketing the seller's home to preparing offers and assisting in negotiations.

Those traditional brokers belong to a multiple listing service or MLS, as it is called, that pools information about homes on the market so brokers can access a wide array of listings for their customers.

This network of brokers utilizes a commission based pricing model where sellers pay a percentage of the sales price as a brokerage fee.

Recent technological advances have changed the way consumers look for real estate and have facilitated the creation and expansion of alternatives to traditional brokers.

In recent years, the real estate industry has used the Internet to market products and market new types of real estate services. In spite of increasing modernization, most consumers still choose to be represented by a traditional full service real estate broker or agent.

The consumers who do not go with a traditional broker have opted for alternative or discount brokers. These real estate models offer low commissions in exchange for reduced services, and may operate solely or primarily via the Internet.

Many different options are being offered by discount brokers, including flat fees for services, and rebates for buyers, which have been targeted by State laws.

Despite the emergence of Internet based or discount real estate brokerage services, the growth of this segment of the market has not been substantial.

Over the past few years, the real estate market has been met with challenges to MLS practices, minimum service requirements, and the need for competition to benefit consumers.

For many American families, purchasing a home is often the most complex, expensive, and sometimes scary, transaction that they undertake.

Therefore, it is important that the subcommittee continue to raise questions regarding competition and consumer protections within today's real estate transaction process.

On a positive note, more people are owning homes today than ever before. We just passed—I should note and thank Chairman Oxley, who is present, and our ranking member, Maxine Waters and Mr. Frank, for the FHA bill, which I think is really a legacy bill for the chairman and this committee.

If it was not for your work, Mr. Chairman, we may not have had the FHA down the road. I want to thank you for all of the work you have put into that.

We have a rich history in America but it is always incumbent upon the subcommittee and the Full Committee to always look at the whole process of home ownership and how we can dig into the issues and make sure that Americans have the opportunity to own a home.

With that, I will yield to Mr. Oxley, the Chairman of the Full Committee.

The CHAIRMAN. Thank you, Mr. Chairman. Today, we will focus on residential real estate brokerage, a valuable service for millions of Americans each year, and the serious problems that we have recently learned about in the industry that can affect one of the most important financial transactions most people will ever undertake—buying or selling a home.

An increasing number of observers from the Government, to consumer groups, to academics, are asking an important question about residential real estate brokerage, that frankly, Congress has been slow to consider.

Namely, why is it that in an industry with more than 1.3 million competitors, with home prices that vary widely, that brokers from Portland, Oregon, to Portland, Maine, so uniformly charge a 6 percent commission?

Moreover, why has that 6 percent fee remained the same as home prices have soared and new technologies have made brokerage more efficient?

Would not real competition produce varying services and varying prices?

In March of 2005, Ranking Member Frank and I asked the GAO to examine price competition in real estate brokerage. That followed my request in November of 2004, the GAO report on barriers to electronic commerce in real estate.

The GAO's report, the actions over the past 18 months by the Department of Justice and the Federal Trade Commission, as well as scholarly reports, explain what is happening.

Real estate brokerage is self-regulated. Licensing rules are largely set by the brokers themselves, and real estate exchange rules are entirely set by the brokers themselves. The exchanges have become institutions to protect the interest of brokers, not consumers.

Mr. Chairman, the last time we looked at an industry that was self regulated, it was the accounting industry. We know what happened in the accounting industry, with the bankruptcies of Enron, WorldCom, and many others.

We let the stock exchanges in this country set their own rules, but only with the SEC reviewing and approving those rules.

For residential real estate markets, there is no Government regulator to protect the public interest. There is only regulation of the brokers, by the brokers, and for the brokers.

I generally believe that less Government regulation is a good thing. This is because robust markets can police themselves. Innovators with better products and lower prices will beat companies with anti-consumer ways.

When competitors exclude innovators and restrain competition, which is the allegation of the Department of Justice's antitrust lawsuit against the National Association of Realtors, then markets simply cannot work, or at least work effectively.

Congress needs to pay attention and certainly needs to act.

On July 13th, the Federal Trade Commission announced an enforcement action against the Austin Board of Realtors for establishing rules that essentially froze properties out of the market if the seller used a service that traditional brokers did not like.

The Austin Realtors set rules saying that exclusive agency listings, that is homes where the seller used a broker who performed very limited services, could not be listed in Austin's multiple listing service, or MLS, the local exchange for homes for sale.

The settlement with the FTC nullifies the Austin Realtors' rule.

We should wonder, is this going on elsewhere as well? That is not all. Organized real estate brokers are pushing for State laws to outlaw low cost minimum service brokerage, where brokers will charge less, perhaps tens of thousands of dollars less, and in exchange, provide less brokerage service.

Innovative brokers complain of organized discrimination in the markets. If you are a broker who charges less, you might be blackballed in the industry, and other brokers will not show buyers the homes you are listing.

The Wall Street Journal reported last October on an Ohio Realtor who had her listings pulled from the local MLS, in essence because she charged a low flat fee rather than the full 6 percent.

A lawyer for the MLS said, "For sale by owner listings", should not be in the MLS because it creates uncertainty about whether the buyer's broker will get paid for the sale.

We, on this committee, know only too well that the NAR wants to keep national banks from providing real estate services and providing more competition in the industry.

What do all these examples have in common? They show organized real estate brokers setting or using the rules to protect higher fees or stifle competition to the detriment of consumers and to the detriment of new brokerage models.

This is one of the most important issues we have considered because it very directly affects millions of Americans each year, and because consumers could be saving billions of dollars each year.

One industry publication called, "The REAL Trends", reportedly estimates consumers paid a whopping $61 billion in real estate brokerage fees in 2004. Others estimated it as high as $100 billion.

Just think, if real estate brokerage fees were just one percentage point lower, consumers could save tens of billions of dollars per year.

We, on this committee, have an obligation to make sure that markets are fair and open, and to protect consumers.

I want to thank Chairman Ney for his leadership and for holding this very important hearing today. This should be the first step in our inquiry, not the last, and I yield back, Mr. Chairman.

Chairman NEY. Thank you, Mr. Chairman. The gentleman from Missouri, Mr. Cleaver.

Mr. CLEAVER. A short comment, Mr. Chairman. I would just like to congratulate you and Ranking Member Waters for successfully ushering H.R. 5121 through today. It was very, very important that legislation pass. I thank you and Ranking Member Waters for all of the work you did on it.

Chairman NEY. Thank you. I want to thank the gentlemen for his comments.

At this point in time, we will move on. I have for the record, "A Realtor's Guide to Compliance" submitted by the National Association of Realtors; a "Brief History of Agency" submitted by the real estate agents for Real Agency, Inc.; letters from the Missouri Association of Realtors; testimony of Alex Perriello, president and CEO, Cendant Real Estate Franchise Group; testimony of Tom Kunz, president and CEO, Century 21; and a letter from Cendant Corporation, real estate agents for Real Agency, Inc., and American Homeowners Grassroots Alliance.

Without objection, they will be made part of the record.

With that, we will go straight to the witnesses. I want to welcome you today to the Housing Subcommittee.

First, we have Bruce McDonald, who is a Deputy Assistant Attorney General with the Department of Justice's Antitrust Division. Since 2003, he has been one of two deputies in charge of civil antitrust enforcement.

Prior to his appointment in 2003, Mr. McDonald was a partner in the antitrust group of the Houston law firm of Baker and Botts.

Maureen Ohlhausen is Director of the Office of Policy Planning at the Federal Trade Commission. The FTC assures a competitive marketplace for both American consumers and businesses by preventing unfair anticompetitive commercial practices.

David Wood is the Director of Financial Markets and Community Investment at the Government Accountability Office (GAO), an

independent and non-partisan agency that works for Congress. GAO is often called, as we know, the Congressional watchdog, because it investigates how the Federal Government spends taxpayers' dollars and how well Executive Branch agencies do their jobs.

I want to welcome all the members of the panel today. We will start with Mr. McDonald.

STATEMENT OF J. BRUCE McDONALD, DEPUTY ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. MCDONALD. Thank you, Mr. Chairman. Mr. Chairman, and members of the subcommittee, I am pleased to be here on behalf of the Department of Justice's Antitrust Division, to discuss the competitive implications of developments taking place in real estate brokerage markets.

The Antitrust Division has a long history of pursuing enforcement actions to protect competition and consumers in this industry against antitrust violations. Today, we are also working to educate State governments about potential anticompetitive effects of State rules restricting brokerage services.

Competition in these markets is important. Every year, millions of Americans purchase real estate brokerage services. Last year, over eight million homes were sold in the United States. According to the GAO, consumers paid over $60 billion in real estate brokerage fees in 2004.

When the brokerage industry does not function competitively, it can be very expensive for home buyers and sellers.

In the last few years, although the cost of providing brokerage services has if anything decreased, consumers have been paying more. Because commission percentages have remained high, as home prices have climbed, the dollars paid to broker commissions have climbed also.

From 2000 to 2004, fees paid for brokerage services grew much more quickly than the CPI.

As Chairman Oxley pointed out, commission percentages do not seem to vary significantly with house prices, service quality, or geography. This is not how one would expect a competitive market to behave.

Today, the Internet is bringing new possibilities for increased competition to real estate brokerage services, as it has in other industries throughout our economy. Web-based brokers can provide online information to their clients about homes for sale. Home buyers can learn about neighborhoods and explore suitable homes more efficiently on their own time, saving broker time and expense, which can translate into lower broker fees.

By taking charge of some of the services themselves, customers can reduce the services they need to purchase from brokers.

At last year's joint DOJ/FTC hearings on real estate competition, one of the topics discussed was the negative effect that some restrictive State laws and regulations are having on competition in brokerage markets.

Consistent with our practice in other industries, when we learn that significantly anticompetitive State laws or regulations are

under consideration, we approach State officials to advise that they take into account the benefits to consumers of a more competitive approach.

We have had a number of opportunities to do this on proposed measures affecting real estate brokerage services. One example is State practice-of-law rules. Over the last decade, we have advised State legislatures, courts, and bar associations on the implications of proposals to expand the definition of practice of law in ways that would prohibit non-lawyers from providing routine real estate closing services.

The evidence does not suggest that excluding non-lawyers, like most real estate brokers, from providing these services actually protects home buyers and sellers, as real estate lawyers have claimed.

When non-lawyers are allowed to provide these services, consumer complaints actually do not increase. Non-lawyers typically charge lower fees for the same services, and this competition results in lower lawyer fees for these services as well.

Another example is the minimum-services rules that some brokers recently have urged their State legislature or local real estate board to adopt, requiring that all real estate brokers provide a specified minimum package of services.

Some consumers prefer to purchase less than the full array of traditional brokerage services, handling certain tasks themselves, and paying less.

In response, new broker business models have begun to offer smaller packages of brokerage services, often on a menu basis, in exchange for a smaller total fee.

Where this consumer choice is allowed, home sellers and buyers have saved thousands of dollars per transaction.

Some brokers are resisting, seeking imposition of minimum-services rules. This is portrayed as protecting consumers from unwittingly agreeing to substandard service. We have found no evidence of consumer confusion, so it appears that the restrictions do not protect consumers, but just interfere with their freedom to choose and pay for only the services they want.

Over the last few years, the Justice Department and FTC have advised a number of States on the competitive implications of minimum-services proposals. Our efforts have been successful in a number of States.

Restraints by market participants also can be harmful to competition. Of course, they are fully subject to the antitrust laws.

The Justice Department recently brought two enforcement actions against restrictive real estate brokerage rules that violated Section I of the Sherman Act.

Chairman NEY. I am sorry, Mr. McDonald. Your time has expired, but if you would like to conclude, then we will enter the rest for the record.

Mr. MCDONALD. Thank you, Mr. Chairman.

Home ownership is a cornerstone of the American dream. Purchasing a home is the largest financial decision made by most families. Home sellers and home buyers are harmed when Government or private restrictions on real estate broker competition prevents

brokers from offering innovative services or adopting new cost-saving practices.

Therefore, the Antitrust Division will continue to use both law enforcement and competition advocacy tools to protect competition and consumers in real estate markets.

Thank you for the opportunity to testify. I am happy to answer any questions.

[The prepared statement of Mr. McDonald can be found on page 108 of the appendix.]

Chairman NEY. Thank you, sir.

Ms. Ohlhausen?

STATEMENT OF MAUREEN K. OHLHAUSEN, DIRECTOR, OFFICE OF POLICY PLANNING, FEDERAL TRADE COMMISSION

Ms. OHLHAUSEN. Chairman Ney, Chairman Oxley, and members of the committee, I am pleased to present the FTC's testimony on competition in the real estate brokerage industry. The Commission's full testimony has been submitted for the hearing record, and my statement, and any answers I may provide, reflect my own views and are not necessarily those of the Commission.

New technologies have given rise to alternative brokerage models that offer a promise of greater competition and greater savings for consumers. The FTC is committed to using its enforcement advocacy and research capabilities to protect the interests of consumers in this important market.

For buyers, the Internet has become an indispensable source of information on properties, neighborhoods, and the home buying process itself. For example, new alternative brokerage models, such as virtual office Web sites, allow buyers to view detailed MLS information online, and they often also offer a rebate.

For sellers, the Internet has replaced the yard sign as the most used marketing tool. Home sellers can now perform tasks that were once the exclusive domain of brokers, likely spurring the increased demand for non-traditional services, such as limited-service brokerage, or a seller pays the broker a flat fee for listing the home in the local MLS and providing some selling aides while handling the rest of the transaction him- or herself. This option allows the consumer to save potentially thousands of dollars in commissions in exchange for doing more work.

As alternative brokerage models have proliferated, however, we have also become aware of actions by MLS' and State bodies that make it more difficult for alternative business models to compete against traditional brokers.

For example, the Commission recently charged the Austin Board of Realtors with violating the antitrust laws by adopting a rule that prevented properties with non-traditional listing agreements from appearing on important publicly accessible Web sites.

The Commission alleged that this conduct impeded the provision of non-traditional brokerage services to consumers.

The Commission's consent order with the Austin Board which settled the charges prohibits it from adopting or enforcing any policy to deny, restrict, or interfere with the ability of its members to enter into non-traditional listing arrangements.

Over the past 2 years, several State legislatures and real estate commissions have considered or adopted minimum service requirements which effectively force consumers to purchase a set bundle of real estate brokerage services.

Because these measures are likely to harm consumers, the FTC and DOJ have filed advocacy comments opposing their adoption. Our comments concluded that by eliminating many popular limited service options, these laws would reduce consumer choice and competition among traditional brokers and limited-service brokers.

We also noted the lack of evidence that such laws are necessary to protect consumers. Further, at the FTC/DOJ real estate workshop, panelists who represented both traditional brokerages and new business models all stated that they did not see a need for minimum service laws.

It is important to emphasize that the Austin enforcement action and our advocacy efforts do not reflect any attempt by the Commission to favor one form of brokerage business model over another. Rather, the Commission's work is intended to protect competition in the market, not particular competitors, so that consumers can select the services that best meet their needs.

The structure of the real estate brokerage industry appears to exhibit some characteristics of a competitive market, including low market concentration and low barriers to entry.

Despite these structural features, there is a perception supported primarily by anecdotal evidence, that commission rates remain at a super competitive level. This perception arises from the observation that commission rates do not appear to vary with geography, the price of the house for sale, or the agent's experience level or quality of service.

Although relatively recent survey data indicates that average national commission rates have fallen somewhat over the past few years, significant increases in property values over this period appear to have more than offset any such decreases in commission rates.

Our experience in this industry points to several possible factors that may explain why price competition appears to be lacking.

First, private anticompetitive conduct that disadvantages new business model reduces their ability to put downward pressure on commission rates.

Second, State imposed restrictions, such as minimum service laws and prohibitions on rebates, also limit the ability of new business models to compete with traditional brokerage models on price.

Third, disparagement and harassment of non-traditional brokers may deter brokers from engaging in vigorous price competition.

Finally, consumers appear to be uninformed about certain facts critical to price competition, such as the negotiability of commission rates and the duties their broker or agent owes them.

The FTC plans to remain actively engaged in this area through enforcement, advocacy, research, and consumer education, and we are committed to ensuring that consumers can enjoy the benefits of competition in real estate brokerage.

We are willing to assist your committee in any way that we can. Thank you.

[The prepared statement of Ms. Ohlhausen can be found on page 117 of the appendix.]

Chairman NEY. Thank you.

Mr. Wood?

STATEMENT OF DAVID G. WOOD, DIRECTOR, FINANCIAL MARKETS AND COMMUNITY INVESTMENT, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. WOOD. Thank you, Mr. Chairman. I appreciate the opportunity to be here today.

When preparing our report to the committee last year, we found very quickly that our ability to examine price competition was severely limited because there is simply no single place where one can find comprehensive brokerage price data.

Accordingly, our work consisted largely of reviewing the academic literature and interviewing a variety of market participants.

Our findings regarding price competition can be summed up in a few key points. The first is that while real estate brokerage has competitive attributes, a large number of players competing for a limited number of home listings, historically, the competition has been based more on non-price factors, such as quality or level of service.

A principal reason for this view is that within specific local markets, there seems to have been limited variation in commission rates.

The lack of comprehensive data, both historically and currently, makes it difficult to determine the extent of variation in commission rates. However, the picture that emerges from the limited data available is that within a given market, a single rate has predominated.

For example, the Federal Trade Commission examined random samples of properties sold in the late 1970's in several cities. In Boston, 72 percent of listings had exactly the same commission rate. In both Los Angeles and Minneapolis, it was 88 percent, and in Seattle, 90 percent.

In another example, academic researchers reported that of the homes sold in Lincoln, Nebraska, in 1986, 88 percent had exactly the same commission rate.

Academic studies also suggest some causes for the limited variation in rates that was observed. For example, one study found that lower commission rates were associated with more expensive houses, and with houses that were vacant or renter occupied.

Finally, as Ms. Ohlhausen noted, anecdotal data suggests that commission rates have declined from the 6- or 7 percent level that the FTC found in the late 1970's to a typical range of 5- to 6 percent now.

Although the lack of data precluded empirical analysis, we did identify several factors that might inhibit price competition. The first of these is the cooperation among competing brokers facilitated by the multiple listing service or MLS.

While MLS' provide important benefits to both buyers and sellers, practices that encourage cooperation among participating brokers may, in effect, discourage deviations from prevailing commission rates.

For example, MLS listings give brokers information on the commission that will be paid for producing a successful buyer. To ensure that brokers will show prospective buyers their homes, sellers may be reluctant to offer anything less than the standard prevailing commission.

A second factor is certain State laws, as Chairman Oxley and the previous witnesses have noted.

Finally, a third factor is the lack of consumer pressure generally. For many consumers, selling a property is an infrequent event. They may be unaware of alternatives to a traditional broker charging a standard commission. However, this is one factor that is likely being affected by the Internet. Some three-quarters of home buyers now use the Internet during the home buying process.

The Internet has helped provide both buyers and sellers with much information that previously was available only by contacting a real estate broker.

In addition to permitting buyers to easily search for homes on their own, the Internet has facilitated options for consumers, such as fee for service brokerage, and alternatives to MLS listings.

However, some factors may inhibit using the Internet for accomplishing the full range of activities associated with a real estate transaction. For example, even with the availability of virtual tours, consumers still like to visit properties firsthand.

Also, as we noted in our report, a key factor is the extent to which properties listed in an MLS continue to be widely available online.

Mr. Chairman, that concludes my prepared statement. I will be happy to answer any questions you have.

[The prepared statement of Mr. Wood can be found on page 132 of the appendix.]

Chairman NEY. Thank you. I am going to begin questions and yield my time at this point to Chairman Oxley.

Before I do, I want to ask, just for clarification. Ms. Ohlhausen, you have a statement prepared. It says, "Prepared Statement of the Federal Trade Commission." Did you say in the beginning that your comments are your personal comments?

Ms. OHLHAUSEN. My oral remarks are my own. The statement that has been submitted is the official statement of the Federal Trade Commission.

Chairman NEY. The questions?

Ms. OHLHAUSEN. Any answers are again my views.

Chairman NEY. Thank you. Chairman Oxley?

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. McDonald, can you explain, if you can, what regulatory structure for real estate law now exists? What kind of a regulatory structure do we have going forward with real estate sales and commissions?

Mr. MCDONALD. Mr. Chairman, I do not hold myself as an expert on the regulatory structures in the various States that govern real estate transactions or real estate brokerage.

I think I can say generally that real estate brokers are governed almost solely by State laws, including State real estate broker commissions, and in many of those States, the broker commissions are

by law or rule required to be real estate brokers, or some percentage of the board are required to be real estate brokers.

In most States, the real estate commission is set at a market rate and is not specifically controlled by regulation.

The CHAIRMAN. What about the Justice Department and efforts at Antitrust? Is this an effort to try to induce competition in the real estate industry? What was the purpose behind the Justice Department's antitrust activities regarding real estate?

Mr. MCDONALD. Mr. Chairman, we have engaged in two general kinds of activities. One, competition advocacy, in which we encourage State decision makers to not pass laws or regulations that restrict competition in providing brokerage services. One example is the minimum-services rules that you mentioned.

Our other set of efforts are enforcement actions. We have brought two in recent years, although we have a history over the decades of bringing enforcement actions in this area.

One of those recent enforcement actions was against the Kentucky Real Estate Commission, which had passed a rule that prohibited brokers from giving rebates of commissions to their customers.

More recently, we brought an action against the National Association of Realtors, which imposed a set of rules applicable to its local multiple listing services nationwide that allowed brokers to discriminate against fellow brokers who communicate with their customers on the Internet.

These rules discouraged competition from new business models that take advantage of Internet technology and they are anticompetitive and violate the antitrust laws.

The CHAIRMAN. What is the current status of the Kentucky case and the NAR?

Mr. MCDONALD. Mr. Chairman, the Kentucky Real Estate Commission abandoned the rule and settled the case shortly after we brought it.

The action against the National Association of Realtors is pending in Federal court in Chicago.

The CHAIRMAN. In the Kentucky case, does that have any meaning outside of the Commonwealth of Kentucky or is that simply a settlement that would only apply to the Kentucky situation or set of facts?

Mr. MCDONALD. Mr. Chairman, that settlement applies directly only in Kentucky. We did see after that case was brought and it was settled that two other State real estate commissions that had similar rules abandoned them.

The CHAIRMAN. The Kentucky settlement was considered a template for those?

Mr. MCDONALD. Mr. Chairman, I think the Kentucky settlement set an example of the consequences of having such rules.

The CHAIRMAN. The suit that the Justice Department brought against NAR, if the outcome is favorable to the Justice Department, would that precedent then apply nationwide?

Mr. MCDONALD. Mr. Chairman, the rules that NAR has promulgated do apply nationwide. If the Government's lawsuit is successful, those rules would not apply anywhere.

The CHAIRMAN. Thank you.

Ms. Ohlhausen, regarding the Austin Board of Realtors' case with the Federal Trade Commission, as I understand it, that agreement nullifies the Austin Realtors' rule, which basically would not allow all but full service Realtors to list with the MLS; is that correct?

Ms. OHLHAUSEN. That is correct. What the rule did was it prevented the MLS from sending the data for the non-traditional listings to popular, publicly accessible Web sites. They could still have their listings in the MLS, but a lot fewer people saw them.

The CHAIRMAN. Will that ruling or that decision have any application outside of Texas?

Ms. OHLHAUSEN. We are investigating other similar rules. We have other cases in the pipeline. If other MLS' have a similar rule, that is something we would be interested in pursuing.

The CHAIRMAN. That was a settlement, was it not?

Ms. OHLHAUSEN. That is correct.

The CHAIRMAN. You are saying, essentially, even though it is the Federal Trade Commission, those settlements or agreements have to be done State by State?

Ms. OHLHAUSEN. Yes. It would be individual MLS', by individual MLS.

The CHAIRMAN. Mr. Wood, you had indicated, I think, in your initial statement, that you had difficulty obtaining price competition figures in your study. Is that correct?

Mr. WOOD. We had difficulty getting price data. Ideally, what we would have liked to have been able to obtain would be brokerage commission data across markets, across time. There is no one source that you can go to to get that data.

The CHAIRMAN. There is no database and no transparency?

Mr. WOOD. These are private entities. It is their data. They are certainly under no obligation to provide it to GAO. In the timeframe that we were working in last year, we did not seek to survey MLS' or try to obtain data from them because we saw what a giant task that would be.

The CHAIRMAN. The European market, the commissions seem to be much lower, half lower than they are in the United States. Are any of you familiar with the European model and what those commissions are?

Mr. WOOD. I only know from reviewing some of the academic literature. There are one or two articles that look at international brokerage. Basically, the conclusion is that this is an area that needs more study.

I believe there are differences in the commission rates, but there also may be differences in the brokerage models, the types of services that are provided.

Trying to control for all those differences is not something I am sure has been done.

The CHAIRMAN. Mr. McDonald, the effort by the Justice Department heretofore has been on an antitrust enforcement basis; is that correct?

Mr. MCDONALD. That is correct, Mr. Chairman.

The CHAIRMAN. Are there any other tools available to the Justice Department besides the antitrust issue that is being considered or could be considered?

Mr. MCDONALD. Mr. Chairman, that is an interesting question. As I sit here today, I am not aware of any.

The CHAIRMAN. I have no further questions. Thank you, Mr. Chairman.

Chairman NEY. Thank you, Mr. Chairman. Our ranking member, the gentlelady from California.

Ms. WATERS. Thank you very much, Mr. Chairman. I was just sitting here going over some of the statements, and recalling my experiences with buying houses and the last experience that I had purchasing property.

I could not have imagined going through that experience without my real estate agent, and all of the complications of the transaction.

I suppose the general question that I have is what kind of problems do you think the average home buyer would encounter if, in fact, they did not have the kind of real estate services that have served us well over the years?

As I think back through my last experience, and I am thinking about any number of concerns, that I would not have known how to address had it not been for the real estate services that I was receiving.

How do you think an average person would fare without the traditional real estate services that are available to us? Anybody can answer that question.

Mr. MCDONALD. Ranking Member Waters, your question implicates the issue that we have discussed on whether States should impose minimum services requirements on brokers.

As we have mentioned, new business models have developed in which brokers have responded to consumer demand for the provision of limited services.

Certainly, there are home buyers and sellers who for whatever reason do want the full range of brokerage services, everything from listing and marketing the house to communicating buy and sell offers, to being represented at closing, the services that traditional full service brokers provide.

There are also many consumers who, whether it is because they are taking advantage of the Internet or because they are especially comfortable with the home purchase transaction, are comfortable with purchasing only a few services from a broker, and handling the rest of the services themselves.

The point of our criticism of minimum services legislation is that minimum services rules take that choice away from some consumers. With or without minimum services legislation, the home buyer or seller who wants a full range of services can get it. We are trying to preserve the competitive option for consumers who want to buy less than the full range of services, to buy fewer services, handle the rest themselves, and pay less.

Ms. WATERS. Mr. Chairman, I will listen to the responses from questions that will be generated from other members. I am a little partial in all of this because of all of the stories that I have heard year in and year out about what home buyers, in particular, encounter in this very, very complicated and competitive business.

Let me just hear what they are answering to other questions that are coming up.

Chairman NEY. I have a question, and then we will move on to the gentlelady from California, Ms. Lee.

The question I have is for Mr. McDonald. The Department of Justice has not supported State measures that have sought to mandate the minimum service requirements for real estate professionals. What is the methodology of that, of opposing the State measures that seek to mandate minimum service?

Mr. MCDONALD. Mr. Chairman, from our pro-competition perspective, in general, Government regulation where it is not necessary can have a market distorting effect.

As it relates to minimum services rules, those rules limit the ability of limited-service brokers to sell to customers less than the full array of brokerage services. It prevents consumers who would like to purchase less than the full array of brokerage services from doing so.

The option that competition brings is to have various different kinds of brokerage business models, various different kinds of options available to consumers. Some consumers who want more services can buy more services and pay more. Consumers who want fewer services can buy fewer services and pay less. That increases competition throughout the market. Minimum service legislation prevents that consumer choice.

Chairman NEY. It is not a matter of the Federal versus the States. It is a matter of minimum services applied by the States would not create as much competition?

Mr. MCDONALD. That is correct, Mr. Chairman. It undercuts competition.

Chairman NEY. Thank you. I had a question, and if anybody else wants to answer these questions, please feel free.

On the statement from the GAO, do you not believe there is an over saturation of real estate brokers and agents in the market? Is that what GAO has thought?

Mr. WOOD. I do not know that we would characterize it as an over saturation. I think you will see in the testimony from NAR that their membership has certainly grown in recent years.

The lack of data that we have found extends to any kind of measure for the demand for brokerage services. Even though clearly housing prices have gone up, more agents have come to work, we do not have a good measure of the actual demand for broker services.

There is some interesting research in this area. For example, some researchers have looked at this question of agent productivity and found that generally when prices go up, if commission rates stay the same, the number of dollars, of course, is going up, and that tends to attract more people into the business.

Chairman NEY. I guess I should ask it this way. If there was an over saturation of real estate brokers and agents, would that or would that not help because you have more agents, more competition, or does it not run that way?

Mr. WOOD. The picture that emerged from our research was that there is indeed a lot of competition. There is competition to get listings and so forth. It is just that on the basis of the available evidence, which is limited, there does not seem to be much price competition.

Chairman NEY. One question I had actually for all three of you, if you want to answer, do you consider the MLS a public utility, or a private hybrid?

Ms. OHLHAUSEN. I will answer first since we just sued the Austin Board of Realtors, which is an MLS. We have not treated that as a public utility. Instead, it is an association among private competitors, which is a traditional subject of the antitrust laws, agreements among horizontal private competitors.

Chairman NEY. Mr. McDonald?

Mr. MCDONALD. We agree, it's a joint venture among competitors.

Chairman NEY. Mr. Wood?

Mr. WOOD. I think GAO has no opinion and would leave it to the experts.

Chairman NEY. Good answer. In my small remaining time, has there been any discussion amongst any of you in what you have done to look at this issue about total transparency of the MLS? Total transparency, including internal listings? I am going in the direction that you put some private things on there, you do not want somebody in your house because you have a small child, at certain times of the day?

Mr. MCDONALD. Mr. Chairman, I am familiar with that issue. There is some information in the MLS database that is by rule available only to brokers, and not to the public. A very good example is the example we discussed with NAR, information that the children are home alone at a certain time in the afternoons, so buying brokers should not bring potential buyers around.

One of the questions has been, by putting listing information on the Web, do you create a risk that private or secure information might get exposed to the public?

A properly designed Web site will not do that in the same way that a brick and mortar broker, a traditional broker, who is providing information on paper to his or her customers will not provide that information.

Chairman NEY. It is technological?

Mr. MCDONALD. Right.

Chairman NEY. Thank you. My time has expired. The gentlelady from California, Ms. Lee.

Ms. LEE. Thank you, Mr. Chairman. Good afternoon.

Let me ask you, Mr. McDonald, with regard to this question, with regard to States. Have any States reported that consumers have been led to believe they would receive the full broker services when in fact they had to do the actual service themselves? Has there been any type of false advertising?

Mr. MCDONALD. Congresswoman, we have not found any evidence of significant complaints by consumers who thought they were purchasing a full-service package of brokerage services but instead, were misled and were actually purchasing only a limited-service package.

Ms. LEE. Good. Let me ask you on the Internet piece of this, of course, we all recognize that the Internet has really dramatically lowered the costs of services and the way consumers purchase goods and services and the transaction costs go down ultimately.

What happens to those individuals who do not have access to the Internet? Low income individuals. The digital divide is still alive and well in America.

I am concerned whenever we see—this is the way of the world now. Do we lose people if they do not have access to the Internet in terms of their access to the type of services they should be able to benefit from, just as those who have access to the Internet?

Mr. MCDONALD. Congresswoman Lee, that is a question that certainly goes far beyond the issues that we are discussing today on real estate, and it is something that I know Congress has addressed in a number of ways.

What I can offer you in the real estate situation—

Ms. LEE. I am talking about in terms of the real estate situation, with regard to the services, the basic services that are allowed in terms of MLS services.

Mr. MCDONALD. Yes, ma'am. The fact that real estate listing information is available on the Internet has not led to it being unavailable off the Internet, with a brick-and-mortar broker, one can still get information about houses for sale on paper or in a conversation on the telephone.

In a market in which there is increased competition from new broker business models, such as brokers who use the Internet to communicate efficiently and cost-effectively with their customers, that increases competition across the entire market. One would expect that all brokers, those who use the Internet and those who do not, should, in a market that works competitively, work harder to provide better quality and lower cost services. That benefits all consumers, those with access to the Internet and those without.

Ms. LEE. Good. You do not really see a problem there at all, in terms of the type of discounts or broker models or services that are provided. That is a good thing.

In so many instances, for example, where job listings are posted only on the Internet, you are told go to the Internet, go to our Web site, and we will let you know what jobs are out there. That is the only way that those notices are posted.

You are saying with regard to real estate services, the traditional services still are available through non-Internet, non-computer technology approaches?

Mr. MCDONALD. That is correct, Congresswoman.

Ms. LEE. Thank you very much. Thank you, Mr. Chairman.

Chairman NEY. Mr. Campbell?

Mr. CAMPBELL. Thank you, Mr. Chairman.

Mr. Wood, you referenced some statistics in various markets from 1978 and 1986, more than 20 years old. You have no more recent statistics than that?

Mr. WOOD. The most recent empirical data that we could find in the study was from Baton Rouge, Louisiana, and that data series was from like 1987 to 1993. There is just a real scarcity of current data.

Mr. CAMPBELL. That data really is not applicable today. The Internet—

Mr. WOOD. Right. It is very likely, as I think we stated in our report, that commission rates overall seem to have declined. There

is anecdotal evidence that they have declined. One of the factors that might be responsible for that is, in fact, the Internet.

However, we also heard from a number of market participants that the phenomenon of a single rate predominating still exists, but we just do not have empirical data to show that.

Mr. CAMPBELL. That was my next question. You then cited that commissions had been in the 6- to 7 percent range and now they are in the 5- to 6 percent range. Where are you getting that?

Mr. WOOD. The historical data, the studies that we found with actual empirical data, including the FTC's study, which was the most comprehensive, rates of exactly 6 percent and 7 percent were the ones that were most commonly found.

The more recent data comes from an industry source, REAL Trends, which derives the data differently. They take basically an average. They compute an average based on reported sales from the largest brokerages.

Mr. CAMPBELL. Is your data—the things you have cited, is it residential only, or are you including commercial?

Mr. WOOD. No. We focused on residential only.

Mr. CAMPBELL. Why is that?

Mr. WOOD. That is what we were asked to focus on.

Mr. CAMPBELL. Mr. McDonald or Ms. Ohlhausen, has your focus in this regard been only residential or residential and commercial?

Ms. OHLHAUSEN. We focused on residential for the consumer, consumer protection, competition side of things.

Mr. CAMPBELL. Mr. McDonald?

Mr. MCDONALD. Likewise, Congressman, residential only. I believe that is a fairly distinct market from commercial real estate brokerage.

Mr. CAMPBELL. I know in California, at least, if you include multi-family residential as commercial, I think you have more than a third of all property values in commercial.

If we are looking at how a market behaves and how competition behaves, would there really be much distinction? Might not looking at commercial be of some value, at least as a comparison or benchmark? It is still multiple buyers, multiple sellers, and multiple property.

Ms. OHLHAUSEN. I think we would have to examine more closely the different characteristics of the marketplace. For example, in residential real estate brokerage, it tends to be for the buyer or for the seller an infrequent transaction. In the commercial area, it might be very different. It might be something that is done much, much more often.

Mr. CAMPBELL. Mr. McDonald, absent State law, which you have addressed, both you and Ms. Ohlhausen have talked about some situations where perhaps State law was anticompetitive or appeared to be anticompetitive, in most real estate markets, there are thousands of agents and dozens of brokers or brokerage firms, which arguably you would say wow, that is about as competitive as it can get, so there has to be some structure.

If something is not competitive, there has to be a structure in place that is impeding that competition. If it is State law, then it is State law.

Other than that—I think I heard it in your testimony. I would just like to hear, do you disagree with that statement, and if not, what are those vehicles through which competition is impeded?

Mr. MCDONALD. Congressman Campbell, putting aside State regulation, yes, there are some characteristics of residential real estate brokerage markets that would make you think those markets would behave more competitively, and some of those are discussed in some detail in the FTC testimony and in the GAO report.

Of course, there are in most localities a large number of brokers. The brokerages are relatively not large. The markets are unconcentrated.

Despite that, we see aspects of the market that do not behave competitively, and we have discussed some of those. The best example is the fees that home sellers and buyers pay for brokerage services, which are commission-based, and do not seem to fluctuate based on what the consumer is getting, based on the quality of the service, based on the geography, and based on different parts of the country, as Chairman Oxley pointed out.

That suggests, in terms of price competition, that these markets are not behaving competitively. That is one of the reasons, I believe, the GAO was asked to do its report, and one of the reasons that the FTC and the DOJ jointly held hearings on real estate competition last year and are preparing a report on that. The markets do not seem to behave competitively, and we want to know why.

Mr. CAMPBELL. I see my time has expired, Mr. Chairman. I guess that is my question, if multiple competitors, why not? What gets in the way? Thank you.

Chairman NEY. The gentleman from Georgia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. McDonald, you are the Deputy Assistant Attorney General for which area?

Mr. MCDONALD. Congressman Scott, I am a Deputy Assistant Attorney General in the DOJ's Antitrust Division.

Mr. SCOTT. You are familiar with cut rate fees. Do you have concerns that cut rate fees would cause a race to the bottom for real estate services where there would be more focus on selling larger transactions, and where lower income buyers will receive little service?

Mr. MCDONALD. Congressman Scott, that is not a great concern of mine for a couple of reasons. One, even though some brokers are seeking to discount their fees, on average, the fees remain high. Two, there are, today at least, many, many real estate brokers and not that many high-dollar transactions. There are plenty of brokers for all the work that needs to be done.

Speaking more generally, in competitive markets, the price that a provider of services, like a provider of brokerage services, receives is balanced according to supply and demand. You would expect that so long as there is demand for brokerage services involving transactions to sell expensive homes or inexpensive homes, the market still would provide for services up and down the spectrum.

Mr. SCOTT. Has the Department of Justice conducted any type of survey that would determine what services home buyers typically want?

Mr. MCDONALD. Congressman Scott, we have not conducted a survey, per se. We have examined that question and have found that in the past, traditionally that is, home buyers and sellers have purchased a full array of services, everything from listing the home in the multiple listing service database, to marketing the home, to showing prospective buyers around the home, to exchanging of offers, offers to sell, and representing the customer at closing.

Today, we find that many home sellers and buyers would like to purchase fewer services and pay the broker less. That is one of the competitive options that we believe it is important to protect.

Mr. SCOTT. Given the limited resources of the Department of Justice, would you not think that the Department of Justice would not help home owners more by spending their limited resources on discriminatory practices?

There probably is no more pointed area of commerce and transaction in our society today where discrimination is so rampant and obvious. Redlining, you name it, as well as predatory lending practices.

Would you not think that given the limited resources of the Department of Justice, there needs to be more focus on remedying the discrimination that exists in housing and real estate transactions, and the targeted, predatory lending discrimination? These are targeted areas. We know where they are. They are there.

What is the Department of Justice doing in those areas?

Mr. MCDONALD. Congressman Scott, I am not especially well versed in this area, which is the responsibility of the Civil Rights Division. I do know generally that the Civil Rights Division believes that sort of discrimination is a problem and they are addressing it.

From an antitrust perspective, our view is the more that we can promote competitive options, and the more that we can prevent private restraints on competition, the better off are consumers of all sorts.

Mr. SCOTT. Finally, I want to ask this question. A home buyer has several real estate service options, including looking at homes listed as for sale by the owner, and going to open houses, and working directly with a listing agent.

Do you know what percentage of real estate transactions occur without a licensed buyer's agent?

Mr. MCDONALD. Congressman Scott, I do not have that number.

Mr. SCOTT. Is there any way of getting that number? I think it would be very important to have that number. Is there any way of assessing that number?

Mr. MCDONALD. I am afraid I do not know the answer to that question either, but certainly I will look into it and respond appropriately.

Chairman NEY. The gentleman's time has expired.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman NEY. If you could look into that and get the answer for Mr. Scott.

Mr. SCOTT. And provide it for the committee, too.

Mr. MCDONALD. Yes.

Chairman NEY. The gentleman from Texas, Mr. Neugebauer.

Mr. NEUGEBAUER. Thank you, Mr. Chairman.

Mr. McDonald, are you an attorney?

Mr. MCDONALD. Yes, Congressman, I am.

Mr. NEUGEBAUER. Are there any other people on the panel who are attorneys, also?

Ms. OHLHAUSEN. I am, as well.

Mr. NEUGEBAUER. Would you say that real estate services is a professional service? Mr. McDonald?

Mr. MCDONALD. I have no reason to disagree with that, Congressman.

Ms. OHLHAUSEN. I agree, as well.

Mr. NEUGEBAUER. One of the things about buying a home, it is probably the largest single investment that a lot of people make.

Would you say attorneys' fees over the last 40 or 50 years have gone up or down?

Mr. MCDONALD. Congressman, I have not seen real dollar numbers, but I would not be surprised if they have gone up.

Ms. OHLHAUSEN. I think Mr. McDonald's intuition is correct.

Mr. NEUGEBAUER. Would you say professional services over the last 30 or 40 years in engineering have probably gone up?

Mr. MCDONALD. Congressman, I am sorry. I do not have a feel for that.

Mr. NEUGEBAUER. I think most people would think that those services have gone up. Yet, in fact, the data that Mr. Wood shows is, in fact, that the amount of percentage commission has actually gone down.

If this is professional services, we have a history here where attorneys' fees are going up, and the engineering fees are going up. In fact, the professional services delivered by professional real estate individuals have actually not gone up, over a fairly inflationary period of 40 to 50 years.

Would you say that is a true assumption?

Mr. MCDONALD. Congressman, I think in terms of gauging competition in these markets, you are looking at the right dimension of competition, the price of the fees paid to brokers for brokerage services that they provide.

It is correct that the percentage commission has dropped slightly in the last few years from the traditional 6 or so percent to something between five- and five-and-a-half percent.

Even though the commission percentage has dropped, because the price of homes has increased, the actual dollars paid to brokers for the services they provide have increased. That is not explained by an increase in the cost of providing those services or increase in the number of services provided or an increase in the value of those services, per se.

That is one of the reasons we are looking at these markets, to try to determine why they are not behaving more competitively.

Mr. NEUGEBAUER. The reason they have not is because in those other instances, for engineers and attorneys, physicians, and those kinds of people, they have covered the cost of their increased costs of doing business because their product is defined by a different unit. They have had to raise the hourly rate.

Attorneys, when I got out of school, were getting $25 to $50 an hour, and now they charge $500, $600, $1,000 an hour. They are doing that because obviously there is a market for their services,

and secondly, the cost of doing business in 1972, when I got out of Texas Tech University, and the cost of doing business today in 2006, is remarkably different.

Would you say that is a true assumption? The cost of doing business is more today than in 1972?

Mr. MCDONALD. Congressman, I could not possibly disagree that is true. I am not familiar with—I have not seen any close comparison of the cost of doing business for lawyers and real estate brokers.

Mr. NEUGEBAUER. Call some of your buddies who have been in private practice for a while and ask them what they were billing their hours out when they came out of school and what they are today.

I think the issue here is that there are discount brokerages available in just about every market in this country today. Evidently, the market place, people that are making the largest single investment decision, are not choosing as much for those people that want to list your house for $500 and that is all they are going to pay you.

In fact, every one of these Realtors, they are individual business people. They are independent contractors, as defined by the Internal Revenue Service.

Each one of those has a cost of doing business. Some have chosen to be a consolidator of information. That is a prevalent situation in the Web business. I have all this information, I will assemble it for you, and I will make it available to you, and I will charge you a fee for that.

Some people when they are making an investment decision want to know about the soil conditions of that particular home. Is this house in a special assessment district? What is the history of this neighborhood as far as re-sale? Some people who are spending that kind of money want that kind of information.

Then we have the State legislatures that have increasingly every time they meet, and sometimes frequently, have increased the amount of risk that it takes for independent business people, because of more and more consumer protectionism.

In fact, passed laws that you are, in fact, opposing in saying when somebody is representing an individual or on one side of the transaction or the other of making this very large purchase, we want to make sure that they are getting the right information so they do not make a poor decision.

I think the marketplace is very clear and transparent here. You can pick up the phone book or a newspaper, and if you want discount real estate services in this country, they are available to you.

Chairman NEY. Your time has expired.

Mr. NEUGEBAUER. Thank you.

Chairman NEY. Mr. Cleaver?

Mr. CLEAVER. Thank you, Mr. Chairman.

I received a letter from the Missouri Association of Realtors. They raised an issue. I could have answered the question about the legal fees rising. I am not a lawyer. I have some empirical evidence. That is not what I wanted to ask.

The question I received from the Missouri Association of Realtors, they raise an issue that they received complaints when a li-

censee abandons a listing. They would take the listing, place it in the MLS, and then walk away, leaving others to sell the property.

Is that something that is prevalent? Is it something that is growing? Is that something you have ever heard of?

Ms. OHLHAUSEN. We have asked a number of States about that. Thus far, we have not heard from State officials that this is a prevalent problem. I do not know the background of that letter. I do not know if that involved the limited-service broker or not. Perhaps it did.

In our inquiries thus far, we have not gotten systematic evidence that there seems to be a lot of consumer harm, a lot of these problems occurring in the markets where limited-service brokerage is permitted.

Mr. CLEAVER. Thank you. I am going to ask the Missouri Association of Realtors if they would provide some detailed information, if they have it available.

I would like, if possible, to submit it to you some time after the hearing. If this is something that is growing, certainly it is something that the Federal Trade Commission would need to know about.

Ms. OHLHAUSEN. Yes. We certainly would be happy to receive that.

Mr. CLEAVER. My final question is based on what has happened in the Gulf Coast area, have there been any particular problems or practices that have developed in the aftermath of Katrina and Rita, and as survivors begin rebuilding and redeveloping?

What kind of activities are going on in that area? There is a lot of anecdotal information that comes to us about all kinds of practices going on, where poor people are having their property essentially stolen. The real estate agents come in and offer a small amount of money for homes, to people who are desperate to sell.

What is the activity in the Gulf Coast Region?

Ms. OHLHAUSEN. I would say I have not heard those reports personally. I would say that the FTC is always concerned about any kind of fraud that is going on.

Certainly, if there seems to be some sort of fraud happening, we would definitely welcome receiving that information.

Mr. CLEAVER. Ranking Member Waters—we had a hearing a few months back where residents came to Washington from the region. Sometimes, in the midst of a lot of pain, which they are in, many of them are not getting the proper insurance response, "proper", defined by me, then it becomes easier to see conspiracy and rip off's.

I do not know if we had those people here, that they could say this happened on February 3rd, and this is the agent who did this. I do not know. My curiosity was whether or not complaints were coming your way as a result of the massive displacement and people now trying to go back and rebuild or people who have been displaced from their properties.

Ms. OHLHAUSEN. I know the FTC has been involved with Katrina recovery efforts, and has been involved in trying to ameliorate any kind of fraud problems that are going on down there.

I just do not know whether there have been any particular associations with real estate kinds of transactions.

Our Bureau of Consumer Protection has been very heavily involved, as I said, with fraud. They have done it after a number of hurricanes in certain areas.

Mr. CLEAVER. Do you have any knowledge of what they found thus far?

Ms. OHLHAUSEN. I could certainly ask them and get back to you with that.

Mr. CLEAVER. I would appreciate that. Thank you. Thank you, Mr. Chairman.

Chairman NEY. Thank you. The gentlelady from Florida, Ms. Ginny Brown-Waite. I am sorry, if you could suspend for a second, the gentleman from Texas.

Mr. NEUGEBAUER. I failed to ask for unanimous consent. I have two documents to submit for the record. One from the Texas Association of Realtors, another is a white paper by Mr. Wayne Thornburn on, "Public and Private Restraints to Alternative Business Models for Consumers."

Chairman NEY. I thank the gentleman. Without objection.

The gentlelady from Florida, Ms. Brown-Waite.

Ms. BROWN-WAITE. I thank the gentleman. I also would ask for unanimous consent to be able to submit my remarks, my opening remarks, for the record.

Chairman NEY. Without objection.

Ms. BROWN-WAITE. Thank you, Mr. Chairman.

Recently in the newspapers in Florida, there was a headline that said something like Florida home buyers pay much more for title insurance than in any other State.

I would just like to ask Mr. McDonald, Ms. Ohlhausen, and Mr. Wood, representing DOJ, FTC, and GAO, have you all ever been concerned about say mortgage insurance, PMI, title insurance costs?

Ms. OHLHAUSEN. There is a slight complication with the FTC because under our jurisdiction, under the McCarran-Ferguson Act, there are certain protections for insurance. A number of years ago, we did prosecute a suit called Tycor Title Insurance, that had to do with competition in this market. It is a market where we have had some involvement.

Mr. MCDONALD. Congresswoman, I am not familiar with any recent allegations of anticompetitive conduct in title insurance markets in Florida, but would be interested if you have some information on that.

Ms. BROWN-WAITE. I think you can just do a Google search of the "title insurance, Florida." I think you will certainly be able to find it.

Mr. Wood?

Mr. WOOD. We do have some work currently underway looking at title insurance. I am not familiar with the details because I am not personally involved. I would be glad to find out and supply it for the record when we expect a report on that.

Ms. BROWN-WAITE. The reason I asked is I hear from people about these issues. I was a State senator for 10 years. Now, I have been in Congress for 4 years. I have not heard complaints about Realtors. What I have heard complaints about is the fact that people who sign up with a discount or one cost broker end up going

to the closing without anyone there. The discount broker person expects just his or her commission check to be mailed to them.

When questions come up at a closing, Realtors, let's say one of the parties is represented by a Realtor, who shows up at the closing, and the other one is represented by a discount company, the concern is that the person who is the Realtor is there answering questions that the discount broker who is getting a commission certainly should be there to answer.

They are the kinds of concerns that I hear from constituents. Just this past week, actually, on talk radio, one of the financial advice shows, was saying exactly this same phenomenon, that it is a very dangerous thing when both of the parties do not have a real estate person at the closing. People are finding this out sometimes not until the closing, that you are going to be there by yourself.

There seems to be some concern over that. I do not know about the other members, but I am not hearing complaints about the regular "Realtors."

As the housing market, and if the housing market nationwide cools off, I think you will see people saying, "Okay, I have my house listed for $200,000. I am only going to get $150,000. If I am taking this lower amount to sell my house, Mr. or Ms. Realtor, you are going to have to take a lower amount."

Would all of you agree that may very well be a phenomenon, as the housing market cools off from that which it was maybe a year ago?

Mr. McDONALD. Congresswoman, that is what one would expect in a market that behaves competitively. One of the curiosities that we have tried to report in this hearing is that we have not seen such price competition in real estate brokerage.

If I may speak to your earlier question, it is a question we have considered, the consequences of the two parties to a real estate transaction appearing at closing and only one of them is represented by a real estate broker because the other has hired a limited-service broker, purchased fewer services, not including appearance at the closing, and was able to pay a lower fee.

Certainly, it can put the other broker in an awkward position of being asked advice by a person to whom that broker does not owe any fiduciary duty.

The two approaches to that could be either to ban limited-service brokers, that is to require that every broker provide the full array of services, including appearing at closing, which of course, increases the broker's costs, increases the price that all consumers pay, and takes away from consumers the limited choice option.

The other way to approach that is through regulation that requires full disclosure to the person buying a limited package of brokerage services, so that the consumer is not under the impression that he or she is going to have a broker at the closing when in fact he or she has contracted not to have a broker at the closing.

Ms. BROWN-WAITE. I think that is exactly the problem.

Mr. McDONALD. Congresswoman, if that is a problem, then full-disclosure regulations seems, from a competitive perspective, to be the right way to approach it. It leaves the competitive option open for all consumers, but addresses this disclosure question for those who need it.

We have not found evidence that a significant number of consumers buying limited-service options have faced this problem, but if there are reports of additional problems out there, we would like to know.

Chairman NEY. Time has expired. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I thank the ranking member as well, and the members of the panel for the information you have imparted.

Let me ask you about the Austin case, if I may, the restraint of trade action that was placed against the Austin Board of Realtors.

In that case, there seems to be an indication that the discount brokers were excluded from the MLS listings. Is that true?

Ms. OHLHAUSEN. The traditional, the exclusive right to sell listings and exclusive agency listings, which are typically associated with non-traditional services, were both allowed into the MLS database. What the rule that we objected to did was it prohibited the MLS from sending the information about the non-traditional listings, of the data on it, to a number of publicly accessible Web sites, where there was a lot of exposure for these properties.

Everything was allowed into the MLS, but only the traditional listings got this important Internet kind of exposure through the MLS.

Mr. GREEN. Who produces the MLS?

Ms. OHLHAUSEN. The MLS is a private association of real estate agents in certain areas.

Mr. GREEN. Is there a proprietary right in the product, the work product?

Ms. OHLHAUSEN. I believe there is, but I am not an expert on that in particular.

Mr. GREEN. Mr. McDonald?

Mr. MCDONALD. The question has been raised whether Realtors have a copyright in the listing information, and from an antitrust law perspective, that actually does not matter.

The MLS is a joint venture among brokers. They all contributed their listing information, copyrighted or not, to that joint venture. Because the joint venture is necessary to compete in that market, they are not free to exclude other competitors because of the way they compete.

Mr. GREEN. We have talked about consequences, and sometimes it is difficult to talk about unintended consequences. In making this change, are we putting ourselves at risk of having some unintended consequences that might be adverse to the best interest of the consumer?

Ms. OHLHAUSEN. By the, "change," do you mean limited-service brokerage, or do you mean the Austin—

Mr. GREEN. By putting consumers in a position where notwithstanding full disclosure, they find themselves at closings without the aid, use and benefit of a broker, where they find themselves without the use and benefit of the advice that a broker gives along the way that can be of great importance in making a decision about the whole process of home purchase.

Is there not a possibility of some unintended consequences developing as we eliminate the advice that is being conferred right now?

Ms. OHLHAUSEN. There would certainly be a possibility that consumers could be injured, but what we have found is in the markets where limited-service brokerage has been allowed, we have not seen evidence or been presented with evidence that consumers who choose this option are being harmed.

Mr. GREEN. Have we seen any evidence or do we have empirical data to support the notion that the Realtors are being complained against to the extent that they merit this additional competition?

I have not heard you respond to the notion that the gentlelady from Florida raised about complaints against Realtors. Do you have complaints against them that have been quantified such that we can conclude that their services are not up to standard?

Ms. OHLHAUSEN. Our inquiries have not approached it in that way. What we have seen is that regardless of the current competitiveness of the market, we are concerned when a new business model, particularly one that offers a lower cost, is being kept out of the market, that would reduce competition.

It is not necessarily that we are saying—we are certainly inquiring about the level of competitiveness currently in the market, but our concern is when a competitive business model is being foreclosed from the market and consumers are being denied that choice, without any indication that having that choice harms consumers.

Mr. GREEN. What about the quality of the competitiveness? I think competition is great. By the way, I want to see the prices down. My concern is the quality of service that is going to be imparted.

Have you looked at the quality of the service in the new model? Have you quantified any opinions about the quality of service?

Ms. OHLHAUSEN. We have not measured the quality of service directly. Instead, what we have tried to discern is whether consumers are being harmed by choosing this lower package of services. Certainly, we believe that the higher level of services should also still be available in the market, that it should not be that the market is all one thing or the other, it should really reflect the diversity of consumer needs in the marketplace.

Mr. GREEN. Given that we have some other examples, and I will try to be nebulous, but at least give you some ideas of what I am talking about, where consumers have big businesses that move in, they drive prices down. They drive other businesses out of business, and then the prices go up.

Competition can sometimes eliminate competition to the extent that what you really need is no longer available to you.

Are we concerned about those unintended consequences?

Chairman NEY. Time has expired. If you would like to answer the question, go ahead.

Ms. OHLHAUSEN. What I would say is to the extent that you are concerned about something like predatory pricing or something, that is something that the antitrust laws are equipped to address.

Mr. GREEN. Mr. McDonald, do you have a response?

Mr. MCDONALD. Congressman, we have not seen any evidence that discount brokers have significantly changed the quality of service provided by brokers in any locality.

I will add that our enforcement actions are not in response to complaints about the quality of services provided by any type of broker, but instead, are in response to restraints on competition by new broker models. It is competition to provide different kinds of services, perhaps even different quality of service. We are trying to protect that competition, so consumers can purchase the range of services or the quality of service they choose and can pay a price appropriate for that.

Mr. GREEN. Thank you.

Chairman NEY. Our ranking member has some time she is reclaiming.

Ms. WATERS. Mr. Chairman, I may be asking the wrong question here, but all of this is a non-issue now; is that right? The suit was settled; is that right?

Ms. OHLHAUSEN. The Austin case?

Ms. WATERS. Yes.

Ms. OHLHAUSEN. Yes, that was settled in Austin. We do have other cases that we are looking at, in other MLS'.

Ms. WATERS. In what way? As I understand it, when the suit was first filed, it was over a policy basically that no longer exists, and then there was just one other issue having to do with the listings in these MLS' that got resolved.

What else is left?

Mr. MCDONALD. Ranking Member Waters, in the *U.S.* vs. *National Association of Realtors'* lawsuit, there are two sets of rules at issue. The first set of rules is the one that the National Association of Realtors had in place previous to our action.

Ms. WATERS. I know that. When you filed, it no longer existed. You went onto the second problem that you saw, which got worked out?

Mr. MCDONALD. On the morning that we filed the action, NAR revised its rules, didn't eliminate its rules, but revised them. Our amended complaint addresses both the original rules and the revised rules. Neither set of rules in our view complies with the antitrust laws. Both, we think, violate the antitrust laws.

The problem has not gone away because, as to the first set of rules, there are some local MLS' that did adopt them, and those are in place, and as to the second set of rules, those, I believe, are in abeyance but, but for the lawsuit, would be put in place.

Ms. WATERS. Having said all that, the lawsuit was settled?

Mr. MCDONALD. To be clear, the Austin lawsuit was settled, and that deals with—

Ms. WATERS. What is pending now?

Mr. MCDONALD. The lawsuit that is pending in the Federal District Court in Chicago is the Justice Department's suit challenging the National Association of Realtors' rules, which apply nationwide. That has not been settled.

Ms. WATERS. Is it calendared? Where is it?

Mr. MCDONALD. It is in a pre-trial stage. There is a motion to dismiss that the National Association of Realtors has filed that is briefed and ready for decision by the Federal judge.

Ms. WATERS. As I understand it and what you are telling us is the case that you just dealt with, that dealt with that area, that jurisdiction, and now you want to make sure that the rules that

were adopted by the National Association of Realtors are applicable to all this country; is that right?

Mr. MCDONALD. Ranking Member Waters, you are correct that the Austin lawsuit, which the Federal Trade Commission brought, dealt only with Austin, with a particular kind of rule that applied only in Austin.

The Department of Justice's lawsuit—sorry, we have two agencies here working on the same kind of matters—the Department of Justice's lawsuit addresses a slightly different kind of rules that apply nationwide.

The Austin matter has been resolved. The nationwide matter has not been resolved.

Ms. WATERS. It seems to me that the settlement of the Austin lawsuit indicates that the Realtors have been very cooperative in working with you.

Was there some discussion and an attempt to walk through whatever rules you are concerned about nationally prior to going back to court?

Mr. MCDONALD. Preceding the Department of Justice's filing the lawsuit against the National Association of Realtors, there were extensive settlement discussions that did not lead to a satisfactory result.

Ms. WATERS. Because you did not get the results that you desired, you went back into court, and it is not about the rules, it is about settlements that you were not able to get?

Mr. MCDONALD. In the National Association of Realtors' matter, NAR did not agree to change its rules in a way that we thought would bring those rules into compliance with the Federal antitrust laws. Therefore, we proceeded to file that lawsuit.

In the Austin matter, which came up after, I believe, the National Association of Realtors' lawsuit was filed, in the Austin matter, the Federal Trade Commission investigated a different kind of rule, and announced a challenge to that rule. Announced it would bring a lawsuit, did so, and the Austin Board of Realtors backed down.

Ms. WATERS. Mr. Chairman, I do not know, because I was a little late in coming, whether or not they have described to you exactly what it is they are challenging at this point.

Have you heard that today? Has anybody heard exactly what it is they are challenging with the Realtors nationally?

What is it you do not like about what they are doing?

Mr. MCDONALD. Ranking Member Waters, let me explain that and refer you, if I do not give you enough detail, to my prepared testimony.

The National Association of Realtors' rules authorize broker members of the local MLS', traditional brokers, to discriminate against their fellow brokers who communicate with their customers using the Internet, Web-based brokers.

Ms. WATERS. That has all been solved. I just want to know what it is that you are going after now nationally. You solved the local issue with Austin; is that right?

Mr. MCDONALD. Forgive me. I was not clear. The National Association of Realtors' rule—put aside the Austin rule. It was a different kind of rule that was challenged.

The National Association of Realtors' rule applies nationwide. It applies nationwide in that it requires that each local MLS adopt that rule. The rule allows a broker to withhold his customer's listings from the Web site of competing brokers.

Ms. WATERS. Mr. Chairman, it seems to me that the same kind of work that was done with the National Association of Realtors relative to Austin has not been done to resolve whatever the Justice Department and others—questions they may have.

I just do not quite understand what it is they are saying. They are saying in essence that the National Association of Realtors disagreed to do this in any other jurisdiction other than Austin. Is that what you are saying?

Mr. MCDONALD. That is not what I am saying, Congresswoman. The National Association of Realtors' rules that are challenged in the Department of Justice's lawsuit are a different kind of rules than the rule that was imposed by the Austin Board of Realtors in Austin.

Ms. WATERS. I asked you to tell me what it was, and you still have not told me what the difference is.

Mr. MCDONALD. In Austin, if I understand it correctly, the local Board of Realtors prevented certain kinds of brokers from putting their listing information on some public Web sites.

Ms. WATERS. I got that.

Mr. MCDONALD. That is the Austin action. The National Association of Realtors' rule allows brokers, members of the MLS, to withhold their listing information, to withhold it from the Web sites of competing brokers. That undercuts competition from brokers who use Web sites to communicate with their customers, limits competition from that new business model, and we believe violates the antitrust laws.

That rule, NAR has not agreed to—

Ms. WATERS. I thought there was some kind of opt-out agreement that everybody basically agreed to, to say that if the Web site does not want to participate, they do not have to participate, they cannot use the other person's listing, and they can opt out. I thought that was worked out.

Mr. MCDONALD. You are correct that the rule that I described is called an "opt out." You and I are talking about the same rule. It is an agreement among competitors, which is part of what makes it unlawful. There has not been an agreement to eliminate those rules. Therefore, our lawsuit—

Ms. WATERS. What you are arguing about now is the opt out so-called agreement between the Realtors and the Web site owners?

Mr. MCDONALD. The opt-out rule is not an agreement between the brokers and the Web site owners. It is a rule imposed by the NAR, a trade association, which itself is an organization of competitors, it is a rule that might be favored by traditional brokers and opposed by brokers who use Web sites to communicate with their customers.

Ms. WATERS. You still see it as an antitrust issue?

Mr. MCDONALD. That is correct.

Ms. WATERS. They are working with it okay, it is all right with everybody but you?

Mr. MCDONALD. I think it is probably okay with the National Association of Realtors.

Ms. WATERS. Nobody is asking you to do this. You just think it is not quite what you would like to see; is that right?

Mr. MCDONALD. It is not our view that we get to decide what kinds of competitors get to participate in the market, and what kind do not. It is our view that this rule, which undercuts competition from one kind of competitor, is anticompetitive and does violate the antitrust laws.

Ms. WATERS. It seems to me you are the only one unhappy.

Chairman NEY. Time has expired.

Ms. WATERS. Thank you.

Chairman NEY. Chairman Baker?

Mr. BAKER. I thank the chairman for the time and for calling this hearing.

Mr. McDonald, I want to come back at it one more time. I know you are enjoying this immensely.

Is the view by your agency, as best I can understand it, that parties ought to be free to contract on terms they negotiate for services that are described by terms of the contract, for whatever price may be deemed appropriate by both consenting parties?

Mr. MCDONALD. As a general matter, that is correct, Congressman.

Mr. BAKER. Where you find people who are prescribing the terms that say on the one side, all house painters in America get together and say if you are going to give a quote on painting any portion of a house, the quote must be for painting the entire house; is that correct?

That would be a collaborative violation of free market principles?

Mr. MCDONALD. And very likely an antitrust violation.

Mr. BAKER. If I wanted to hire a guy to paint my front porch, and I assume it will cost $200, and he says the price is $1,000, and I am going to paint the whole house. I am then constrained if I want the porch fixed. I have to pay for this entire service whether I want it or not.

What I have heard members say or represent, I believe, is that those who are on the lower rungs of the financial ladder, who may not have resources, would be better protected if they have a full service agent, because that enables them to pay more of the money they do not have.

Is that the argument?

Mr. MCDONALD. That is the way I see it, Congressman.

Mr. BAKER. Let me see if I can understand the way the market is working. If I want to sell my home and I am going to refer—because I know they are going to come up in a little bit and you are going to be absent, I suspect, to the Realtors' testimony, which I think goes at issue with the pending litigation—on page one, the statement is, "NAR welcomes all professionals engaged in various aspects of the real estate industry." That is a terrific statement.

On page 14, there is an accusation NAR rebuts saying, "NAR discriminates against non-traditional discount limited-service brokerages. Such assertions are absolutely not true." That is on page 14. I think that is a terrific statement.

On page 17, the real estate industry is recognized as, "The most enthusiastic users of the Web." Again, a great statement of technology utilization.

On page 19, running over to 20, there is the statement that, "All real estate professionals have access to the MLS." That is terrific.

"In some cases, it may be limited to those who hold membership in the Realtor association." That is understandable, perhaps.

As I read those statements and put them together, it would seem to me that if a real estate broker was an Internet operative business, advertising limited service at a low price, was a member of the Realtor organization, there should be no impairment with that individual Realtor having access to the MLS.

Have you found that to be the case?

Mr. MCDONALD. Congressman, I could not agree more that there should be no impediment to that Realtor having full access to the MLS. Our lawsuit challenges a rule that limits the Realtor's access, in that the Realtor may not be allowed to post on his Web site all of the listings that are in the MLS.

Mr. BAKER. I got it. My point is if you read the statement here and the testimony about to be given, it would create the view that anyone engaging in any entrepreneurial method of lawfully selling real estate, who is a licensed Realtor, who abides by the rules of the State jurisdiction in which they are licensed, should have access to the MLS.

What I hear you saying is, well, that may be the case, but we will enable the local broker by operation of national Realtor rule to preclude Mr. Campbell's listings from being given to me for whatever reason he may deem. One of the precursors might be that I am an Internet user and he may not share his listings with Internet users.

In another instance, I may be a discount broker. He may not do business with discount brokers.

Is that a fair assessment of the facts?

Mr. MCDONALD. That is a fair assessment, and our lawsuit challenges one of those situations.

Mr. BAKER. If one is to get into the real estate business and offer a product with lower service charge, with a clear understanding up front of what those services are, then it is really left up to the individual broker organization and the business community in which he resides to determine who is in the club and who is not.

Mr. MCDONALD. Subject to violations of the antitrust laws, that is correct.

Mr. BAKER. What you are trying to do is enable people to enter into agreements for services they choose from a licensed professional in the trade who may have a different way of doing business than the full service organization?

Mr. MCDONALD. I could not have said it better myself, Congressman.

Mr. BAKER. Thank you. I yield back my time.

Chairman NEY. Mr. Sherman?

Mr. SHERMAN. Thank you, Mr. Chairman, for letting me participate in these hearings. Given the weather outside, I thought I was in Sacramento, California. Given the issues here, I wonder whether I am in the State legislature.

I kind of wonder what the Federal/Congressional role is here, given the fact that professional regulation, whether it is taxidermists or lawyers or real estate agents, is traditionally done at the State level. Consumer protection is primarily done at the State level.

Real estate is the least interstate of all commerce. In fact, everything we deal with in life, except real estate, has probably gone across the State border before we bought it.

One of the methods that I have seen professions use to try to deal with competition is to try to limit entrance, limit licensing. There are those who accused the American Medical Association many years ago of trying to limit the number of doctors in the country, limit entry to the field.

Perhaps the gentleman from Justice could indicate, is there any evidence that the Realtors have tried to limit the number of Realtors in the country or denied a license to those who demonstrated their qualifications? Do we have a shortage of Realtors that is driving up the price?

Mr. McDONALD. Congressman, I am not aware of efforts to limit the number of licensed brokers in the country. Our concern relates more to restraints on the ability of brokers who want to use new business models to compete.

Mr. SHERMAN. The first rule of creating competition is to have enough sellers, and this is a country where we have maybe only two or three companies selling data about the creditworthiness of individuals. We have only four big accounting firms. We have about 1.3 million Realtors. At least, we have a lot of competitors out there.

I have been a bit concerned about the argument that somehow it is wrong for Realtors to petition State legislatures to make their arguments in favor of minimum services.

Is there any reason to think that the State legislatures are somehow gullible, and we here in the Federal legislature are perceptive and brilliant, and for that reason, we should protect State legislatures from the lobbyists of the National Realtors Association or its State affiliates?

Ms. OHLHAUSEN. None of our advocacy comments have been directed at the right or the ability of Realtors to lobby State legislatures.

Mr. SHERMAN. It is not an anticompetitive practice to go to a State capitol and argue in favor of a minimum service law?

Ms. OHLHAUSEN. To a State legislature, no, it is not. It is protected by an antitrust doctrine called the Noerr Doctrine.

Mr. SHERMAN. Not to mention the First Amendment and the right to petition.

Ms. OHLHAUSEN. The Noerr Doctrine is an application of the First Amendment.

Mr. SHERMAN. It is a close call whether if I were in a State legislature, I would be in favor of minimum service requirements or not, when I think of myself as a buyer, I have done a lot of real estate transactions, and I would just as soon not pay for services I do not need, and yet at the same time, I would be concerned that the very most vulnerable in our society are the ones who might pick the cheapest broker and be most in need of professional services.

Is your work at all concerned with the fact that in some States, you have to have an attorney involved in the transaction, whereas, in California, it seems to be working out well to have escrow agents and title insurance companies, not only is it considerably cheaper than in States requiring an attorney, but also in my State, you get a guarantee that your title search was done right, and even if they non-negligently made a mistake, they pay you.

Here on the East Coast, if your careful attorney fails to be able to detect that there is an easement running across your living room, then you have an easement running across your living room.

Are you folks focused at all on whether the Federal Government should tell the States that it is wrong to require an attorney?

Ms. OHLHAUSEN. What we have done is a number of competition advocacies, pointing out to States the competitive effects of requiring an attorney at all real estate closings, and the lack of empirical evidence that States where non-attorney closings are allowed have greater amounts of consumer harm from non-attorney closings.

Mr. SHERMAN. You share your expertise with State legislatures, but generally, leave it to them to decide what their State laws on real estate and real estate transactions would be?

Ms. OHLHAUSEN. That is correct.

Mr. SHERMAN. One of the things that makes it difficult to have a discount in real estate sales is that you are doing business, in effect, not only with your own broker, but with the buyer's broker as well.

I would think you would just negotiate—one of the things that would concern me is that I could find a broker who would do it for 3- or 4 percent, but which buyer's broker is going to come and look at my home if they are only promised 1- or 2 percent commission?

If I am a buyer, am I allowed to pay my broker and say, look, I want to go see all the homes that are for sale by owner, I want to go see all the homes that are for sale by discount brokers that only pay you 1- or 2 percent, and I will pay you the rest?

Is there any law that prohibits that?

Chairman NEY. Time has expired, but if you would like to quickly answer.

Ms. OHLHAUSEN. I am not aware of any law that would prohibit that.

Mr. SHERMAN. Thank you.

Chairman NEY. With that, we will conclude the first panel. One question, and I do not want to prolong this, we have a second panel, but did the inception of the Internet have anything to do with looking at this differently than the old days where the Realtor had the notebook binder and you had to go look at the property? Did the Internet give any different look towards this idea or not of looking into this?

Mr. MCDONALD. Mr. Chairman, the Internet is probably the single most important factor in creating new opportunities for competition, as we have discussed, because it does allow quick and efficient communication of information about homes for sale to customers.

I think it is the confluence of events that has raised these issues, the introduction of Internet technology and the increase in home sale prices.

Chairman NEY. Thank you very much. I want to thank the panel, all of you, for your time. I think it was very interesting testimony. Thank you.

We will take a 5 minute recess.

[Brief recess]

Chairman NEY. Thank you. We will move onto panel two. If you have never testified in Congress, and because at 5:00 p.m., we have H.R. 5121, the FHA bill up on the Floor, when the yellow light comes on, you have about 45 seconds. When the red light comes on, then your testimony will be finished.

Without objection, all of your statements will be entered into the record, and we will have 5 minutes of questions.

We have Stephen Brobeck, executive director of the Consumer Federation of America. The membership includes 300 non-profit organizations. On their behalf, the Federation promotes beneficial Government policies affecting the Nation's consumers.

Aaron Farmer joins us today from Austin, Texas, where he founded Texas Discount Realty. Texas Discount Realty offers a flat fee real estate listing service while employing broker agents in five major Texas cities.

Kimberly Gorsuch-Bradbury is senior vice president for Real Estate Networks at LendingTree, a net loan provider, located in Charlotte, North Carolina. She is also responsible—I think we are going to have a statement in a second here—for developing the company's online real estate loan business, including the Internet site realestate.com.

Glenn Kelman is the chief executive officer at Redfin Corporation located in Seattle, Washington. Redfin is an Internet brokerage business providing online services for real estate consumers.

Geoffrey Lewis is a senior vice president and chief legal officer at RE/MAX International, headquartered in Greenwood Village; they have all those hot air balloons all over the place. The RE/MAX franchise network is a global real estate system of franchisee owned and operated offices.

Pat Vredevoogd-Combs is the 2006 president-elect of the National Association of Realtors, a trade organization representing more than one million members involved in the residential and commercial real estate industry.

Ms. Vredevoogd-Combs is a broker/owner of AJS Realty, a residential real estate company in Grand Rapids, Michigan.

We will defer to Mr. Watt.

Mr. WATT. I am not even on the subcommittee, Mr. Chairman. I appreciate you allowing me to welcome Ms. Gorsuch-Bradbury, one of my constituents from the Charlotte area to the committee, and I am looking forward to hearing her testimony, and I thank her for being here.

Chairman NEY. Thank you, Mr. Watt.

We will begin with Mr. Brobeck.

STATEMENT OF STEPHEN BROBECK, EXECUTIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. BROBECK. Chairman Ney, Ranking Member Waters, and members of the subcommittee, the Consumer Federation of America appreciates the opportunity to share our views on residential

real estate brokerage services, and these views also represent those of the American Homeowners Grassroots Alliance.

From a consumer perspective, this real estate brokerage system seems cockamamie. For most firms, information about prices and services is not readily available. Their prices, in fact, are high and nearly uniform. Brokers offering lower prices and limited services are few and far between in most markets.

Only one comprehensive source of information about houses for sale is available, but buyers are limited in the information available to them from the source, especially if they do not work with a broker.

Moreover, complaints about brokerage services are increasing, yet there is no independent regulation of the $60 billion plus industry. Practicing brokers control almost all State real estate commissions and boards, as a study we released last week demonstrates.

There is a relatively simple explanation for a system that seems cockamamie to consumers. Working through their trade association, many traditional brokers have tried with much success to control prices and services. In most areas, they try to maintain commission rates of either 6- or 7 percent. When they fail, it is mainly because home sellers are increasingly refusing to pay a $24,000 or $28,000 commission on the sale of a $400,000 home.

These traditional brokers have also succeeded in restricting or even banning limited service or discount brokers in some areas. They do so in three ways.

First, they have persuaded a number of State legislatures to pass anti-rebate and/or minimum service laws.

Second, through multiple listing services, they restrict information about homes for sale, not only to consumers, but also to non-traditional brokers.

Third and most importantly, through informal mechanisms, they discriminate against non-traditional brokers, especially those that discount, rebate, or charge fixed fees.

The correct term for an industry that effectively controls prices and services is a "cartel."

Since State regulators have been captured by industry, it is fortunate that the Department of Justice, the Federal Trade Commission, and the Government Accountability Office, have taken the initiative to try to ensure greater real competition and consumer choice in this marketplace.

We urge Congress to give these Federal agencies even stronger mandates, authority, and financial support to ensure freer real estate brokerage markets.

As a first step, Congress could direct one of these agencies, and our preference is the Federal Trade Commission, to study industry practices carefully. In its 2005 report, the GAO noted that, "There is no comprehensive data on brokerage fees."

Both Congress and these agencies would benefit greatly if they had available the results of a study that focused particular attention on prices and multiple listing services.

Our written testimony suggests specific types of information that would be useful to collect.

Mr. Chairman, that concludes my oral statement.

[The prepared statement of Mr. Brobeck can be found on page 70 of the appendix.]

Chairman NEY. Thank you.

Mr. Farmer?

STATEMENT OF AARON FARMER, BROKER/REALTOR, TEXAS DISCOUNT REALTY

Mr. FARMER. My name is Aaron Farmer, and I am a Realtor and broker at Texas Discount Realty in Austin, Texas.

In September of 2002, the Texas Real Estate Commission said, through its filings in the Texas Register, that as a real estate broker, I should charge a full commission, instead of offering a menu of services at reduced fees, and being the first State to pass what is now known as the "minimum services rule."

I filed suit against this rule, aimed at eliminating limited-services listings, and it was eventually overturned.

Again in 2005, Texas became one of 10 States to now pass a minimum-services law, over strong objections from FTC and DOJ, and despite the fact that there has never been a single consumer complaint in Texas about limited-services listings.

My business still takes limited-services listings as part of our unbundled menu of services listing model. While it is still possible to do limited-services listings, the goal of the law, to effectively rebundle the listings, has been somewhat effective. Complying with minimum-services laws takes us much more time and energy than it did in the past.

It has also forced many of my agents who perform limited-service listings to re-think the way they handle this type of listing. Most of my agents will now only offer limited-services listings to experienced investors and/or home owners.

The uncertainty of the effects of this new law over the last 3-plus years has forced me and many other brokers to change the way we operate, what we charge, and how we plan or do not plan for the future of our business.

As any businessperson will tell you, uncertainty is bad for business. Uncertainty in the marketplace also creates barriers to innovation. While the barriers created by changes in MLS rules, changes to data sharing rules and State sanctioned minimum service laws are well documented; many barriers are felt at a more basic level.

All too often, alternative or innovative brokers encounter discrimination, ridicule, and harassment from traditional agents, who are resentful about new competition, new businesses, and new businesses which may have different pricing models, are more technology based, or just have different attitudes and business cultures than their companies have.

I have personally heard traditional agents telling potential customers that our company would be going out of business soon, or that what we are doing is against the law, which is false, of course.

Traditional agents have told sellers that other agents would not show their home if they listed with us. We have yard signs stolen from front yards, and recently, had a whole billboard ripped out of the ground.

I have even seen a traditional agent ridicule one of my agents at a Realtor tour event for being a discount agent and offering reduced fees.

The closest thing I have to a smoking gun to this type of activity is an e-mail sent to one of our agents recently, after he was asked to stop advertising in the Waxahachie Texas Daily Newspaper's HOMES Magazine. Waxahachie is a suburb of Dallas.

The whole e-mail is attached to my written comments as Exhibit 2. The following is an excerpt of the e-mail from the sales department of this newspaper, and I quote:

"I was told by several real estate agents in Ellis County that they would not advertise with HOMES Magazine if we let Texas Discount Realty advertise. I was also told by several agents that our competitors would never let Texas Discount Realty advertise in their products."

These actions of conspiracy and discrimination have prompted my agent to ask if he could operate under a different name and even explore leaving my brokerage altogether.

Fear of these types of bully tactics has the effect of preventing other brokers and agents who might otherwise consider trying an innovative model from doing so, thus, stifling innovation.

In an effort to combat some of these barriers to entry, I have become a founding member of the American Real Estate Broker Alliance, or AREBA. AREBA can be found at areba.org, and is a national alliance of flat fee limited-services real estate brokers and agents formed in 2006 who advocate innovation, free market competition, full disclosure, informed consent, and consumers' rights to choose their level of desired brokerage services.

AREBA believes anticompetitive practices which discriminate against my members must be prohibited.

In conclusion, I would like to applaud the actions taken by the FTC and the DOJ to fight barriers to innovation in the real estate industry. However, I would urge them to take an even closer look and study the bullying that sometimes goes on by agents at companies, which tend to create barriers to innovation on a State and even local level.

Until the attitudes and actions of local brokers and agents change, barriers to innovation will continue to exist.

I would like to thank the committee for asking me to testify today. Thank you.

[The prepared statement of Mr. Farmer can be found on page 82 of the appendix.]

Chairman NEY. Thank you. Your experience of the stolen signs and ripped down billboards—welcome to the world of Congressional campaigns. It is what happens to us—in about 100 days, especially to the incumbents. We do not do that, but they do it to us.

Ms. Bradbury?

STATEMENT OF KIMBERLY GORSUCH-BRADBURY, SENIOR VICE PRESIDENT, REAL ESTATE NETWORKS, LENDINGTREE, LLC

Ms. GORSUCH-BRADBURY. Good afternoon, Chairman Ney, Ranking Member Waters, and members of the subcommittee.

My name is Kimberly Gorsuch-Bradbury, and I am a senior vice president of Real Estate Networks at LendingTree. We appreciate this opportunity to share our views of the changing real estate market.

LendingTree was founded on the idea that better choice and competition can empower both consumers and lenders. We have built relationships with over 300 lenders around the country, with large lenders, such as Citibank and BankOne, but also with many, many smaller lenders who built their businesses around LendingTree.

Here is how it works. A borrower fills out one simple form and almost instantly gets up to four offers from lenders. The consumer uses this information to comparison shop and negotiate the best deal.

While the value to consumers is clear, a key to our success is that it is also valuable to our lender partners. Our partners have funded well over $140 billion in loans through LendingTree since its inception.

We have applied a similar approach to real estate brokerage, enabling choice and competition. We operate RealEstate.com, where we have built a network of over 500 local real estate brokers and 12,000 real estate agents across the country.

Consumers can use our Web site to learn about homes for sale, get an automated home price check, learn about the process of buying or selling a home, and much, much more.

Our goal is to provide consumers with the information, tools and resources they need to be smart and confident buyers, but when the consumer is ready, we also connect them with a local professional on our network.

We firmly believe that the real estate professional is essential. Many consumers want professional assistance for such an important transaction.

Switching gears, today, I would like to talk about two challenges facing our industry. The first relates to fee for service brokerages, which many of the other witnesses have spoken about. These companies offer real estate services that are unbundled. Some of them allow a consumer to choose services from a menu, giving them the flexibility to purchase just the services they need.

For instance, a consumer may ask for a broker to place their home in a multiple listing service, but handle the rest of the transaction on her own, or she might ask for help in pricing the home and handling open houses, but select a lawyer to handle price negotiation and contracting.

The point is that the services are flexible and she has a choice.

While this innovation should be applauded, last year, we saw many States considering new licensing laws that impaired these new brokerages. Unfortunately, around 10 States have adopted new licensing laws that force all brokers to follow the traditional model of providing full service brokerage.

That is like saying when a consumer goes to McDonald's for a coke, the law requires them to buy the burger and the fries.

We believe Government should encourage new competition from innovators and not limit it.

A second challenge to innovation comes from the anti-rebate laws. One of the ways that many brokers, including

RealEstate.com, attract consumers is by offering a rebate on close transactions. This effectively lowers the cost of brokerage for the consumer. Since inception, we have provided nearly $60 million in savings through rebates.

Of course, consumers are delighted with this result, but importantly, it also works for our partners.

Since the year 2000, our brokers have closed almost 40,000 sales with our assistance, and that is a lot of transactions.

As you heard from prior witnesses, the competition authorities view anti-rebate laws as barriers to competition. Consumer advocates report no complaints or problems in the 39 States that allow rebates, and yet 11 States still block or limit them.

Prohibiting rebates means millions of dollars in lost savings for consumers. For example, in New Jersey alone, consumers could have saved nearly $200 million last year if rebates were permitted. That is a lot of money.

In summary, real estate brokerage is a business of enormous importance to both consumers and the economy. Moreover, it is a business in which innovation offers great promise. Removing barriers such as those described today will result in a more efficient and more productive housing market.

We thank the committee for examining competition in real estate, and we hope that your continued efforts will lead to a freer marketplace, with fewer competitive obstacles, where innovation can flourish.

Thank you for the privilege of testifying today, and I will be happy to answer your questions.

[The prepared statement of Ms. Gorsuch-Bradbury can be found on page 91 of the appendix.]

Chairman NEY. Thank you.

Mr. Kelman?

STATEMENT OF GLENN KELMAN, PRESIDENT AND CEO, REDFIN CORPORATION

Mr. KELMAN. Good afternoon, Chairman Ney, Ranking Member Waters, and members of the subcommittee. Thank you for inviting me to testify.

I am Glenn Kelman, president and CEO of Redfin, America's first online national broker of real estate.

I am here today to ask that Congress ensure Internet innovators get equal access to listing data, and that it regulate State laws designed to limit consumer choice.

In 2004, Redfin was the first company to show real estate listings on an online map, like MapQuest. In 2006, we launched Redfin Direct, a service to allow home buyers to buy a home online. Clients find properties to tour on our Web site, draft an offer via our online forms, and rely on us to handle the negotiations.

The average client saves $10,000 because we refund two-thirds of our commission.

As one of the first online brokerages for buyers and sellers, we have a unique perspective on how the industry is stifling innovation. A brokerage that does not employ field agents is a radically new service at a radically new price, and it has engendered resistance on a radically new scale.

Competing agents have threatened us with violence and tried to intimidate our clients, concocting grade school legal mumbo jumbo about the perils of Internet service.

We expected a combative reception, but it is the industry's impunity that has come as a shock.

We have drafted complaints to the State commission, only to realize that the commissioners ran the brokerages we were complaining about. We posted photos of agents who were blocking our customers to a Web site that we called the Hall of Shame, only to have Realtors apply to join.

The industry has failed to regulate itself.

Despite all this, we have represented clients on hundreds of offers over the past 6 months. Our client satisfaction rate is 98 percent. We have been featured in the Wall Street Journal, the New York Times, Business Week, and on National Public Radio.

We are on pace to refund nearly $1 million in commissions in our first 6 months.

This begs the question, if Redfin is so great, why has there not been a Redfin before, a national e-trade of real estate?

The Realtors would have you believe it is because real estate consumers do not want e-commerce, but the truth is different. I came to Redfin as an experienced entrepreneur, having co-founded a software company raising six rounds of financing and taking it public.

Funding Redfin should have been very easy. It was not. Everyone in Silicon Valley knows that Realtors control the listing services, the MLS, and that many States have effectively outlawed online brokerages.

Investors who put $6 million into a Web site in Sweden that lets you dress up a Barbie doll will not touch online real estate.

The only reason we could raise money was because of our friends in the first panel, the Department of Justice. We cited that ruling over and over again, and it became the basis for investors to believe that for the first time, you really could have an online brokerage.

We feel that without Congressional action, the Department of Justice will at some point shift its attention elsewhere, and real estate innovators like Redfin will be left high and dry, without access to the listings because the Realtors have cut us off.

Listing services stifle innovation not just in business models, but in how Web sites share data. I do not think we have focused on this enough today. You can find out more on the Internet about an eBay beanie baby than you can about a $1 million home.

Multiple listing services have told us we cannot allow public commentary on a listing. We cannot let people search by time on market. We cannot display for sale by owner listings alongside commission properties, and that we have to register our users.

Rules like this are a thousand tiny shackles on Internet businesses. Imagine if Amazon got legal threats when a customer published a ho-hum book review. Imagine if Google had to register its users before they could perform a search on some types of data.

The Internet would be a gigantic marketing brochure rather than a useful consumer tool, and it would be a less powerful engine for economic growth.

This is exactly what is happening in online real estate today.

Redfin must ask that Congress act to give brokerages of all types equal and unfettered access to listing data, and authorize the Federal Trade Commission to regulate States' minimum service and anti-rebate laws, so consumers can make their own choices about commissions.

No other proposal before Congress could save American families more money, and none would do more to improve real estate service.

If you let innovators innovate without fear of losing listing access, service will be much better than any of us in this room can say or imagine.

Thank you for letting me testify. It has been an honor.

[The prepared statement of Mr. Kelman can be found on page 97 of the appendix.]

Chairman NEY. Thank you.

Mr. Lewis?

STATEMENT OF GEOFFREY D. LEWIS, SENIOR VICE PRESIDENT AND CHIEF LEGAL OFFICER, RE/MAX INTERNATIONAL, INC.

Mr. LEWIS. Chairman Ney, Ranking Member Waters, and members of the subcommittee, my name is Geoff Lewis, and I am senior vice president of RE/MAX International. Thank you for allowing me to testify today on behalf of RE/MAX.

RE/MAX International is not engaged in the brokerage business, and we do not belong to any MLS. We are a franchiser of real estate brokerages. Neither I nor RE/MAX International claim to speak on behalf of our independent brokers or agents.

Let me address the issue of commission rates. It is often overlooked that full service agents work on a success basis. If the seller does not sell his house, he pays nothing, and the agent gets a zero percent commission. If a buyer does not buy a house, the agent gets a zero percent commission.

When an agent does earn a commission, it often comes several months after he has expended his time and money with no guarantee of a closing on a sale. Realtors drill a lot of dry wells.

In cases where successful transactions are completed, full service commission rates have been trending down over the past decade. They have gone from 6.1 percent in 1991 to the current average rate of 5.1 percent. That is not a 1 percent decrease; it is a 16 percent decrease.

With the rapid rise in housing prices recently, many have questioned why commission rates have not come down further. The answer is that agent income has not increased correspondingly.

The median gross income for real estate professionals in 2004, as reported by the National Association of Realtors, was $38,000 for sales agents and $53,000 for brokers. That is gross commission income, without health care and retirement benefits, which are paid for by the agent. That is also before the agent pays for advertising, Web site hosting, gasoline, and other expenses.

Over the past 2 years, agent gross income is down 6 percent. The lack of increase in agent gross income, despite rising housing prices, is due to the large increase in the number of agents in the industry.

NAR reported a 26 percent increase in membership over the past 2 years, and a 40 percent increase over the past 5 years. In 1995, NAR reported having 1.2 million members.

These agents are being drawn in by the increase in housing prices, but as a result of the increase in the number of agents searching for transactions, the average number of transactions per agent is decreasing.

This countervailing force puts resistance on the ability of commissions to continue to come down further. Nonetheless, as I have described, commissions have been coming down.

Let me address Internet companies and new business models. It is easy to say that the Internet has brought down costs in other industries, so it should do the same for real estate, but not all industries are the same.

The Internet has not decreased prices for doctors, accountants, attorneys, newspaper subscriptions, landscaping contractors, or a myriad of other businesses, nor has it done so for Government services.

Not every business is going to be impacted by the Internet the same as airline ticket vendors, stock brokers, or book sellers. After all, these industries are selling commodities. Real estate agents are selling unique properties and providing individualized service.

The Internet has enabled hundreds of real estate companies with new business models. These companies offer rebates, flat fee services, and discounted commissions.

A quick Internet search will reveal any number of national/regional companies providing these services in every market. New companies appear on a daily basis. Internet giants, Google, Yahoo! and eBay have all jumped into the business of allowing home sellers to list their homes on online classified ads. Media titans, including Tribune Company, Washington Post, Belo Corporation, and Gannett have formed an online classified service that has a primary focus on real estate.

It should also be noted that in the last few years, we have seen one of the hottest real estate markets in history. In parts of the country, sellers have been able to attract multiple offers the instant their home goes on the market. Some sellers receive above their asking price. It is not surprising in these markets that many sellers have been tempted to avoid full service brokers in favor of limited-service providers or discount brokers.

It is these same conditions that have caused the explosion in new business models.

It should be noted that since the beginning of the year, the market has returned to more normal levels. Inventories and time on market have increased considerably over the last year.

Let me conclude by making one comment about the MLS, and that is that the MLS no longer has the exclusivity it once did for real estate listings. The Internet has enabled many new Web sites that allow brokers or individual home sellers to upload property information for free.

Chairman NEY. Time has expired, if you would like to conclude.

Mr. LEWIS. These are all alternatives to the MLS, and with more than 80 percent of consumers using the Internet in real estate transactions, all of these services are available to them.

Thank you very much.

[The prepared statement of Mr. Lewis can be found on page 101 of the appendix.]

Chairman NEY. Thank you.

Ms. Vredevoogd-Combs?

STATEMENT OF PAT VREDEVOOGD-COMBS, 2006 PRESIDENT-ELECT, NATIONAL ASSOCIATION OF REALTORS

Ms. VREDEVOOGD-COMBS. Chairman Ney, Ranking Member Waters, and members of the subcommittee, thank you for the opportunity to testify on the changing real estate market.

My name is Pat Vredevoogd-Combs, and I am a broker/owner and partner of AJS Realty in Grand Rapids, Michigan. I actually sell real estate as my primary income.

As the 2006 President-Elect of the National Association of Realtors, I am here to present the views of our 1.3 million members, who are engaged in all aspects of the real estate industry.

Those who have criticized the real estate industry often oversimplify the issue by looking at real estate as one national market. Real estate is local. With that in mind, I want to highlight three positive developments we are seeing in today's changing market.

First, competition is thriving. A recent study of 12 local real estate markets conducted by Steve Sawyer, associate professor at the Pennsylvania State University, found that competition within each market is fierce, including competition among agents affiliated with the same firm.

The report sends an important message for all industry critics; there is no such thing as a national real estate market. Agents compete fiercely for listings from potential sellers, for potential buyers, and many times for both. Likewise, all brokers compete for the best real estate agents. Their competitive edge is based on a host of factors, including quality, reputation, service, and price.

The overwhelming majority of industry participants are non-salaried, independent contractors. In other words, they are self-employed. Fifty percent of these contractors are affiliated with an independent non-franchised firm.

As home sales slow to a more reasonable pace, competition will likely increase among all service providers. NAR encourages and promotes fair competition.

Our members represent almost every conceivable business model including full service, limited service, so-called discount models, Internet brokers, and others.

Second, the price of real estate services varies. The latest research from REAL Trends, which Mr. Oxley referred to, actually indicates that commission rates decreased 16 percent from 1991 to 2004.

RISMedia's 2006 power broker report and survey confirms this view, noting that the top 500 real estate brokers anticipate the average commission rate will decline to 4.9 percent this year.

NAR has a long-standing antitrust compliance policy, which says that each firm independently decides the price of services provided by Realtors. Again, a lot of factors determine the price for real estate services in a competitive market. There is no national commission rate.

Third, consumers can access more property and transaction information through the Internet, thanks in large part to Realtors. According to our surveys, the number of Realtors with Web sites has increased 129 percent over the past 5 years, and nearly 90 percent of Realtors and their firms have Web sites with searchable property listings.

NAR also created and operates realtor.com, giving consumers national access to local markets through the Internet. More than 900 local multiple listing services are powerful forces for competition. A listing placed by the newest rookie agent can reach just as many other brokers as the seasoned professional.

Participation in an MLS is readily available to all real estate professionals, operating all kinds of brokerage business models.

If the MLS system were restructured to prohibit listing brokers from marketing a property as they and their clients see fit, some brokers would pull out and create their own systems. This would hurt small and new competitors.

Again, NAR favors competition in real estate.

To clarify some of the other testimony, there is no minimum service legislation that only gives one a choice of either no service or full service. Every minimum service legislation out there, and everything that we see, is unbundled. You do not have to either paint the whole house or nothing at all, and you do not have to buy a Coke or a Coke and french fries and a burger. You can unbundle those services wherever you are.

In conclusion, real estate is in many local markets. The best assessment of a competitive landscape is based on the local experience. In an economy in which large national corporations, such as Wal-Mart and Microsoft, increasingly dominate, real estate stands apart. It is one of the best industries for entrepreneurs, and it offers consumers a wide array of choices in both service and the price they pay for the service.

Realtors are proud to be part of a competitive and growing industry that accounts for roughly 20 percent of our Nation's gross domestic product.

Chairman NEY. Your time has expired.

Ms. VREDEVOOGD-COMBS. On behalf of our 1.3 million members, I again thank you for the opportunity to share our views with you. Thank you.

[The prepared statement of Ms. Vredevoogd-Combs can be found on page 153 of the appendix.]

Chairman NEY. Thank you very much.

I want to start with Mr. Kelman. From your point of view, do you see a Federal solution to this vis-a-vis the Congress with a law?

Mr. KELMAN. I am not a legislator, but we feel that there are so many States where we cannot compete, where we have to go market by market, on our hands and knees, and beg the MLS for access to the data; they knock us up with all these ticky tacky rules about what we can and cannot display, and it really limits our ability to compete.

That is why we feel a Federal law that just provides open, unfettered access to the MLS would be really important if you wanted to have a truly free market.

Chairman NEY. Thank you. Mr. Lewis, as I have heard today from the first panel, and I am really frankly so confused on this, if you have more Realtors, you have a surplus of Realtors, or maybe not a surplus but more Realtors, would there not be competition? Would not the commissions go down? They seem to be at 6 percent, unless you have a hot market.

Can you explain that? It does not seem like that variable works.

Mr. LEWIS. I think the number of Realtors in the industry is an indication of what a free and competitive market it is, and that there are no barriers to entry.

When you look at average Realtor income, gross commission income, perhaps one of the factors for why commission rates have not come down lower than they have is that some Realtors would not be able to survive at anything less than current market rates.

Chairman NEY. Let me ask another question for anybody who would like to answer, regarding online services. If you have the online service, your companies you represent, and right now, people look at those as that is where I can go to get my best deal possible, and I know how they operate, if you became part of the listing, the MLS, what happens to the person who wants to have full service from you, be there at the closing, do this, do that? What happens there?

Mr. KELMAN. Maybe I can answer that. First of all, to address your concern and Ranking Member Waters' concern, our goal is to actually provide better service than a traditional Realtor from offer to close. We are at the closing. We negotiate. We handle everything.

What we do not do—

Chairman NEY. I am sorry, not to interrupt you, you would physically have someone show up at the closing?

Mr. KELMAN. That is correct. What we do not do is the taxi service, where we drive you around looking for homes.

The average Internet consumer finds a home 3 times faster than someone who is not using the Internet. Typically, what we hear customers say is that I can find the home on my own, what I want you to do is to win the deal, and protect my interests.

Chairman NEY. How do they get into that house?

Mr. KELMAN. They get into the house in one of three ways. They visit an open house. They contact the seller. They contact the listing agent, or we can provide the tour by their request.

Chairman NEY. There is no open house, say there is no open house. They would have the alternative to directly contact the seller?

Mr. KELMAN. Or the listing agent.

Chairman NEY. Does that not concern you, the direct contact with the seller?

Mr. KELMAN. We understand that when our clients need the listing agent, as an example, who represents the seller, that many times, the listing agent will persuade the buyer just to work with him or her on both sides of the deal.

Many of the folks want our advocacy, want our support.

Chairman NEY. I am sorry. I should clarify. Not so much on the collusion. I just sold our house last year and we moved to the central part of the district. I bought a house.

Sometimes if you get the buyer and seller together, you can have a horrific argument when the buyer says I think you painted this house terribly, what do you mean. Pretty soon, they are at odds and you cannot communicate.

In the absence of a physical person, is what I am saying.

Mr. KELMAN. Generally, the most common ways people see the house are through a listing agent or through an open house. The agent who represents the seller will show the house.

There have been cases where someone has been selling the house on their own, and the buyer and seller meet directly. That is not always the case.

I think the important thing to remember is that it is a choice. There are going to be people who want full service and we direct them to traditional Realtors every week. There are people who want Internet service, who say I can find the home on my own; I want you to close it for me. We feel actually that we do a better job in part because instead of having an agent who is waiting every 2 months to do a deal, we have professional real estate agents working in each market that have really high deal flow.

Chairman NEY. My time has expired. Ranking member?

Ms. WATERS. I was just sitting here thinking about the real estate business, and beginning to ask myself why I have been very pleased with those people I have met and worked with.

First of all, I like it the way it is because it has opened up opportunities for a lot of women to become entrepreneurs and to earn a living. Women who oftentimes find themselves divorced and needing a way to earn some money, or people who oftentimes retire without a lot of retirement income, and so forth have been able to start their careers in real estate. The same thing is true of minorities, being able to get into a business, and through their own initiative earn a living, is a powerful idea.

That is one thing that attracts me to this business and gives me an appreciation for what it has done for a lot of folks who perhaps would not have opportunities in other businesses.

The other thing is, as I started talking earlier today about the complications of some of these sales, I was just sitting here thinking about a purchase that I was involved in where there was damage to the property from water that had not been reported by the seller of the property for a lot of reasons.

When I started to look for insurance, and I started explaining to them about this big hole in the ceiling, they wanted to know if it was water damage, whatever, and then I could not get any insurance.

The real estate agent that I was working with was connected to a lot of people in this industry, and therefore, was able to not only get a contractor to come out and do the evaluation so that I could tell the bank about the cost—they were going to hold back on the cost until I did the repairs—but also they helped to get the insurance.

It was just a lot of convenient assistance from this full service Realtor; I was extremely appreciative for it. It is not to say that everybody needs that. For those people who do, we certainly want to have it available; it is critical.

This claim that there is this exclusion and conspiracy to keep discount brokers from being able to market their product, to sell their products, is incredible. I do not spend a lot of time on the Internet, but I look from time to time, and even before I bought the last house, I looked to see what was available.

It seems to me that it is about what is being described here. There are a lot of real estate opportunities. I liked looking at some of the Web sites of these creative entrepreneur women in particular, sometimes two of them team up on the sales, and they present themselves, and they describe what they do.

There are a lot of Web sites like that. Where is the exclusion and discrimination, Mr. Kelman?

Mr. KELMAN. First of all, we have no animus against real estate agents. We are real estate agents ourselves. We hire women and minorities in the same proportion that you would see in the traditional industry.

The exclusion comes when you apply to enter a new market, there are many agents and many brokerages, but when you are offering your services at a different price point, the listing service is looking for a way to deny you access.

We have gotten multiple calls and letters from every listing service that we belong to trying to prevent us from displaying information.

Ms. WATERS. When they call you, what do they say? You better not do what?

Mr. KELMAN. They will say you cannot publish any commentary about a listing, to which we say but every other broker does what we are doing, why are you coming after us, or they will say you cannot let people search for homes that have been on the market a long time, so we allow you to do a search where you can say show me houses that have not sold in 90 days. The real estate industry does not like that.

Ms. WATERS. If you do a search in the way they do not like, what happens to you?

Mr. KELMAN. Nothing happens to the consumer, but that is the leverage point in this industry, the MLS threatens to cut off access to the brokerage, to us.

Ms. WATERS. Have they cut off access to you?

Mr. KELMAN. No, but we have had to—

Ms. WATERS. Who do you know where they have cut it off?

Mr. KELMAN. Before starting Redfin, we talked to E-Realty, which was the start-up that tried to be Redfin, before Redfin. He said that if it was not for the Department of Justice, we would go out of business in exactly the same way he did.

Ms. WATERS. It is just talk? Someone else came here today and talked about being bullied. You know, that is life. People talk. They threaten. That is the marketplace working. So what?

Mr. KELMAN. When you get a letter that tells you to take down a feature from the site that is very popular and useful for consumers, and then instead of building new features for the site, you have to re-engineer your site, it is material to a small business.

Ms. WATERS. What if you do not take it down?

Mr. KELMAN. If you lose MLS access, you will go out of business.

Ms. WATERS. You have not lost it. I hear a lot of talk about what they say or how they are in collusion against us, and they bully me, and I do not like the way they talk to me, but—

Mr. KELMAN. I am not here to whine. I love my job. I love this business. It is growing like gangbusters.

Ms. WATERS. You want us to stop people from bullying you; is that right?

Mr. KELMAN. All we want is fair, open access to the MLS.

Ms. WATERS. But you have it. You do not like the fact that there are people who do not like what you do, and they may say to you I do not like what you do and you better not do this, and you better not do that, but they have not stopped you, have they?

Mr. KELMAN. There are companies that are out of business that we could have called here. We feel that if we did not comply with their rules, they would pull our access and it would be the third rail for our business.

Ms. WATERS. Unless you have a list, unless you can tell us who those companies are, they do not exist.

Mr. KELMAN. Why don't we produce for the record the letters that we get from the MLS about—

Ms. WATERS. No, that will not do it. I want the result of the letters. I want people who are out of business because they got a letter.

Mr. KELMAN. Since I am in business, I cannot do it.

Ms. WATERS. I know. You are doing okay. They bully you.

Mr. KELMAN. There are States we cannot go into. We would be doing much better. We know 70 percent of consumers, as surveyed by the Wall Street Journal, are angry about their commissions. Fifty percent of the people—

Ms. WATERS. I am really angry about the price I pay for gas. I am really, really angry. There are a lot of prices that I am angry about. I am angry about insurance costs. I am angry about a lot of things.

Mr. KELMAN. I agree.

Chairman NEY. Time has expired.

Ms. WATERS. Thank you.

Chairman NEY. I am going to ditto on that gas part.

Mr. Miller?

Mr. MILLER OF CALIFORNIA. Thank you, Mr. Chairman.

This is really interesting. I have been in the building industry for over 35 years, which means I am older than heck, and I admit it. I have done a lot of real estate transactions over the years. I do not believe I have ever paid 6 percent for anything I ever wanted to list. I would always go to the Realtor and say, I will pay this amount for the listing agent, and this amount for the selling agent. I never had anybody say no.

You can go to a Realtor and say I will pay you 2 percent to list, and I will pay you 2 percent to sell, but you know when you say 2 percent to sell, there are some selling agents out there who might say I would rather sell property where I can get 3 percent. You take a chance.

I really enjoyed the testimony and it sounded like LendingTree, you are doing pretty well. I have heard your name. You guys are doing pretty good out there. You have the right to go out and ad-

vertise, I will list your home for 1 percent or I will sell your home for this amount.

Can you not do that today?

Ms. GORSUCH-BRADBURY. No. That is not our business model today. What we do is we cooperate with brokers. We have a network of 500 brokers and 12,000 agents. We provide a marketing service for them.

Mr. MILLER OF CALIFORNIA. What is that marketing service?

Ms. GORSUCH-BRADBURY. A marketing service—LendingTree spends approximately $170 million a year in advertising, and part of that is directed at attracting consumers who need the services of a real estate broker.

Mr. MILLER OF CALIFORNIA. Are you telling me you cannot be flexible in your rates?

Ms. GORSUCH-BRADBURY. We refer those consumers to our broker partners, and part of what we offer—

Mr. MILLER OF CALIFORNIA. Then what do you want? I heard your testimony. I do not know what you want. Do you want free access to the MLS? Is that what you want? What do you want?

Ms. GORSUCH-BRADBURY. Our belief is that real estate is a very important industry, obviously, both to consumers and to the economy. We believe it is too important to be—

Mr. MILLER OF CALIFORNIA. What do you want?

Ms. GORSUCH-BRADBURY. We would like to make sure that the markets are free and there are not—

Mr. MILLER OF CALIFORNIA. That the MLS is available to you free, is that what you are asking for?

Ms. GORSUCH-BRADBURY. We believe—

Mr. MILLER OF CALIFORNIA. Yes or no?

Ms. GORSUCH-BRADBURY. We believe that the rules should be—

Mr. MILLER OF CALIFORNIA. Yes or no, you want it free or you do not want it free? You can join an MLS if you want to as a licensed broker, you can join an MLS?

Ms. GORSUCH-BRADBURY. There are some MLS' who would block our access to it.

Mr. MILLER OF CALIFORNIA. As a licensed broker?

Ms. GORSUCH-BRADBURY. Yes.

Mr. MILLER OF CALIFORNIA. Redfin, you seem to be having no problem participating in MLS'.

Mr. KELMAN. We apply to be in each MLS, and sometimes the application goes through easily. Other times, we have to make changes to our site that we feel are not in the interest of the consumer.

Mr. MILLER OF CALIFORNIA. You are a discount broker?

Mr. KELMAN. We consider ourselves an online broker.

Mr. MILLER OF CALIFORNIA. You could go out and spend all the money in the world you want to and advertise, we are going to offer you this online service and we are going to save you money, we are going to cut the rates for listings, we are going to cut the rates for the selling agent, you can do that currently, can you not?

Mr. KELMAN. We would just say that within the industry, it is indisputable that—

Mr. MILLER OF CALIFORNIA. I am having trouble getting the answer to a simple question.

If I want to come and list a house with you and give you 2 percent to list and 2 percent to sell, you can accept that or you can deny that?

Mr. KELMAN. Of course, we can.

Mr. MILLER OF CALIFORNIA. You can advertise that.

Mr. KELMAN. Of course, we can.

Mr. MILLER OF CALIFORNIA. What do you want then?

Mr. KELMAN. What we want is to be able to go into States where that is not legal.

Mr. MILLER OF CALIFORNIA. Let's talk about California. How are you doing in California?

Mr. KELMAN. We are doing well.

Mr. MILLER OF CALIFORNIA. What corrections do you want made in California?

Mr. KELMAN. The main issue is that you can display far more information about every product except a home on an Internet site.

Mr. MILLER OF CALIFORNIA. There should be some restrictions as to telephone numbers and addresses and stuff. Those should not be necessarily on an Internet site.

Mr. KELMAN. We agree completely that for privacy concerns and security concerns, but there are other reasons that the MLS restricts access to information.

Mr. MILLER OF CALIFORNIA. What information?

Mr. KELMAN. For example, they do not want you to search by how long a house is on the market. They do not want people to be able to add commentary on a house.

Mr. MILLER OF CALIFORNIA. They do not want you to search?

Mr. KELMAN. They do not want a consumer to be able to find houses—

Mr. MILLER OF CALIFORNIA. They do not want you to list on your Web site that these are homes that have been on the market for over 90 days, so you are probably going to get a better deal on the price. Who would want that?

Mr. KELMAN. Consumers definitely want that.

Mr. MILLER OF CALIFORNIA. If I was selling my property, I certainly would not want it, because then you become distressed property.

Mr. KELMAN. We understand it is not in the seller's interest, but it is in the buyer's interest.

Mr. MILLER OF CALIFORNIA. You are telling me that an individual who contracts with a Realtor expecting his information to be put on an MLS and being treated fairly has no rights to what you should do with that information?

Mr. KELMAN. I would not go that far.

Mr. MILLER OF CALIFORNIA. That is what you just told me. It might not be in the seller's interest, but it is in the buyer's interest. You are going to put a seller in a situation where they own a home and that home has been on the market for over 90 days, somebody who might advertise it says oh, I have a home, they probably want to sell it in a bad way because it has been listed for a long time and we can probably get a better deal on this property.

I would not want my home listed like that.

Mr. KELMAN. If I could respond to that, I have been an executive at a publicly traded company. We sold our stock on the market.

There was plenty of information that we did not want buyers to have, but for free market to function effectively, we feel that just because the seller does not want to expose certain types of information, it does not mean that the information should not be available.

Mr. MILLER OF CALIFORNIA. Do all of you discount brokers—this is a stupid question—you have an opportunity to form your own listing service. You could call it Cut Rate Listing Service. You could get every broker who wants to be involved and every individual out there who sells real estate to list with Cut Rate Listing Service, could you not?

Mr. KELMAN. We could, and if it was practical, we would.

Mr. MILLER OF CALIFORNIA. Why not do that? At some point in time, some Realtor came up with an idea, hey, let's start working together because when you list a piece of property, I do not know about it. When I list a piece of property, you do not know about it. There is going to be a cost associated with developing some type of a service, but let's do that, and we will all pay for advertising and we will list it and then pay to be a member of that and we will set guidelines and rules to be a participant in that.

Somebody did that. What it sounds like is you are coming along today and saying yes, they did that and yes, they set up guidelines, I just do not like them.

The nice thing about America is if you do not like what somebody is doing, you can do something different. Why would you not go out, if there is going to be this huge demand out there for your service, based on you are going to give them a better deal, but you are going to provide all these services, but you are going to tell them that if your home is on the market over 90 days, we will probably let people know you have distressed property, why not go out to the American people and start advertising like some Realtor did at some point in time, and create your own service?

If it really is as good as you are telling me, you are going to have more business and make more money than you are ever going to be able to spend.

Mr. KELMAN. What we are disagreeing about, with all due respect, is whether or not the MLS asserts monopoly power. In our view and in the view of everyone, I think, at this table, people on either side of this issue, not having access to MLS data—

Mr. MILLER OF CALIFORNIA. You do have access to data. What you do not have is the ability to use that data in a negative way that would impact a seller, and you have real estate brokers and agents that acted in good faith when they signed an agreement to sell somebody's property that now they are being impugned in some fashion, their property is being impugned, because their property might be categorized as distressed, and you think that you have a right that supersedes the right of that seller who should have some control over the property they listed.

That is where you and I disagree. That is why I think if you want to come up with a service that lists all those things, that people know they can take a chance at having their property categorized as distressed, and you think the American people want that, I think you would do really well.

I do not believe people in this country who are selling their homes want their homes listed like that, to be put in categories

that makes it appear that it is distressed property, and they cannot sell it. I do not think they want that.

If I was going to sell my house, I darn sure would not sign with somebody who was going to do that with my property.

You are saying, irrespectful of the understanding that a seller has with an agent or broker they listed with, that you want to go out and change the rules under which they entered into an agreement, and create your own rules, that you think benefits somebody who is not even a participant in the original contract.

I have a real problem with that. That is just me as an individual saying if I was selling a property—if I was going out and trying to steal property, maybe as a shark, I think that is cool, because then I know who is hurting.

The person who should have some control and some rights is the person who signed the original contract.

Chairman NEY. Time has expired.

Mr. MILLER OF CALIFORNIA. I think you are trying to supersede that. Good luck in the future.

Chairman NEY. Time has expired. We have to move on. Would you like to answer?

Mr. KELMAN. Just briefly.

Mr. MILLER OF CALIFORNIA. I am not your enemy. I just disagree with you.

Mr. KELMAN. I am shaking in my boots. I am a little nervous about this. All I was going to say is that an example that is proseller would be we have sellers who volunteer information about how the roof is and how the furnace is, and what their favorite room in the house is, and they provide enriched information around the listing, and the MLS has asked us to stop doing that.

Mr. MILLER OF CALIFORNIA. Mr. Chairman, I ask unanimous consent to submit a letter for the record.

Chairman NEY. Without objection.

Mr. Davis?

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. Kelman, some of the frustration is a function of the fact that some of your testimony has been a little bit nebulous, so let me try to clarify a little bit.

How many States right now, Mr. Kelman, would you contend contain restrictions against your access to the MLS?

Mr. KELMAN. Arguably, a dozen.

Mr. DAVIS. Twelve. Presumably, in all those dozen States, you have the capacity to either go in and file a conventional legal claim under State law, or I suppose in some cases, under Federal law, or you have the capacity to go to the State legislatures in those States.

The root of the problem, as I see it, given that Congress has frankly just not gotten that involved in this area, Congress has just not waded into regulation of the real estate industry, it is something that for years upon years has been essentially the province of State law, given the ample number of options that you have politically and legally, I do not see a strong case for Congress to intervene.

Where am I wrong?

Mr. KELMAN. We are a 30 person business that has five law firms. I do not have an administrative assistant. There is no P.R. agency.

Mr. DAVIS. The problem with that argument, Mr. Kelman—this is how I understand your argument. You are saying that you do not have the ideal perfect access to this market that you would desire. All of us can attest that there are third parties in America who do not have the ideal access to the political market they desire.

There are small mom and pop retail stores in Birmingham, Alabama, who do not have the ideal access to the market they would desire. That is just kind of the tough breaks of capitalism sometimes.

I understand you do not have all that you desire and do not have the playing field that you want. That is a common right in this society.

Tell me the case for Congressional intervention in this instance as opposed to all those others.

Mr. KELMAN. First of all—

Mr. DAVIS. Why should we guarantee a perfect access or market so you can do exactly what you want to do the way you want to do it?

Mr. KELMAN. First of all, I do not think any legislation should be crafted to benefit Redfin or any other online broker, discount broker. It just seems like we are having a conversation today about how the real estate industry will be affected instead of how the consumer will be affected.

It seems self evident to us that if you were to lower the barriers to entry for companies operating at a different price point and prevent blackballing and prevent discrimination—

Mr. DAVIS. Those are all good goals, Mr. Kelman. Tell me why the current antitrust laws and all kinds of legal remedies available at the State level do not accomplish exactly that goal right now.

Mr. KELMAN. They do not prevent discrimination from buyers that are working with low fee brokerages. They do not nationally apply to allow low fee brokerages to compete in different States.

Mr. DAVIS. Let me raise a different set of concerns. One of the policy rationales that Congress has to consider is whether doing what you want would serve a pro-competitive agenda, and second of all, would it open up the real estate markets to people who are not a part of it right now.

What is the economic profile from an income standpoint of people who utilize your service?

Mr. KELMAN. In our case, it is actually people who are buying houses more expensive than the median, and other types of discounters that do not operate through the Internet primarily, it is below the median. In our case, it is above the median price. Zip Realty would be an example of a company that operates well below the median.

Mr. DAVIS. Is there any identifiable class of people you are reaching who you think are somehow not being served by the conventional Realtors in this country?

Mr. KELMAN. People who can find homes on their own using the Internet.

Mr. DAVIS. People can find homes on their own using the paper right now. I am trying to identify some class of consumers who are not being served.

Presumably, the individuals you talk about also can find access and service through the conventional real estate market and make the same range of choices they want, can they not?

Mr. KELMAN. All I am trying to do is characterize how we think about our market, and what we hear from the people who buy our service is, I found the home on my own, and I did not want to pay an agent 3 percent. They come to us and they use our online service to draft the offer, and to handle negotiations and closings.

Mr. DAVIS. Right. The response to that would be that is exactly right, you have provided this alternative service to people who want to take advantage of it. It still raises the question of what extra regulatory tilt you want.

Let me ask another set of questions. What is the default rate? Have you monitored default rates of people who engage your service?

Mr. KELMAN. We do. Generally, it is 3 percent and 3 percent. Just to respond to your other question, it seems like Congress is not sensitive to the amount of blackballing that is going on.

Our customers, as we testified, and as you have heard Mr. Farmer testify, feel like they are going through an experience that is completely extra legal, where there is no remedy for them when people refuse to show them properties, when they get hostile messages and things like that. It is just a very difficult climate for a consumer to operate in.

Mr. DAVIS. For the consumer to operate in or for your industry to operate in? I guess there is a difference.

Mr. KELMAN. We are trying to take the point of view of the consumer here.

Mr. DAVIS. Let me follow along those lines. One of the arguments you heard raised by Mr. Green in the earlier panel and by others is obviously, do not consumers often benefit from having to go through brokers, do they not benefit from going through a third party. Does that not give them information they would not have?

You have dismissed that and you said if someone wants the physical presence at closing, we will provide that.

Let's say you do that, you provide a physical presence at the closing.

Mr. KELMAN. We do.

Mr. DAVIS. What duty of care do you owe in that instance to the buyer?

Mr. KELMAN. In that case, our duty is to offer better service from offer to close than a traditional agent. We specialize in the legalities, in the negotiations.

I think in the more general case, I would refer to the testimony earlier today that you should disclose what you do and then give people the choice to buy what they want.

Mr. DAVIS. Let me try to wrap this up. The concern that I think some of us have is, I think all of us would acknowledge that no, the real estate market does not work perfectly in terms of reaching underserved populations, in terms of reaching people who may be victimized by predatory lending, all those kinds of things.

What is completely unclear to me is how your service does any better, or how your service meets any of these gaps. I am not trying to run you out of business. For the Federal Government to weigh in on these issues, when frankly they seem to be somewhat peripheral, somewhat limited to a few instances and in a few States, I do not see a compelling Federal rationale for that, when you cannot identify to me a population of people that you would reach or who are not reached by the conventional market, and frankly, when you do not indicate to me that you would mitigate any wrong that is happening in the current market.

That is just my two cents' worth.

Mr. KELMAN. Current market—the current market is served by agents in a comprehensive way. People just pay too much. When they try to get a discount, there is anticompetitive behavior that is hostile.

Mr. DAVIS. Mr. Kelman, what is a little bit bizarre about your argument, you are saying you want to cut some of the transactional layers that are involved in the real estate transaction. The real estate transaction is probably one of the most acute financial decisions someone can make over the course of his or her economic life.

It would seem that, given how acute that risk is, you would want, frankly, as many guardrails built into the process as possible, and as much intermediation built into the process as possible.

If you do not want to shorten steps, because if you shorten steps, you may cut information out. People may make enormously erroneous choices.

Mr. KELMAN. We would hold there are people who need those guardrails, and want those guardrails, but we also believe in free markets rather than a paternalistic approach, and we would just suggest there are people who feel confident to find the home—

Mr. DAVIS. I am not saying you should go out of business. The ultimate question is whether the Federal Government ought to weigh in and do more than we are doing. I think all of us conservatives and liberals believe if you are coming to Congress wanting something, the burden is on you to tell us why we need it.

I am getting mean looks from my chairman.

Chairman NEY. Actually, I have to tell you something. This is the second time this has happened. The majority staff over here, I think they liked your questions. They accidently bumped the clock and you re-set for 5 minutes. I kind of think they favor you.

Mr. Cleaver?

Mr. CLEAVER. Thank you, Mr. Chairman. I did think that was lengthy.

I would just like to ask the panel, I am a Democrat, and I am very much interested in getting access to the Republican mailing list for contributors in my district. I want to know what you think should be done to allow me access.

Mr. KELMAN. We do not contribute to Republicans or Democrats. We read an article in the New York Times and called Clinton.

Mr. CLEAVER. There is nothing that would cause me to believe that I deserve to get that access.

Mr. BROBECK. Can I respond to that question?

Mr. CLEAVER. Yes, please.

Mr. BROBECK. The problem today is that sellers are under enormous pressure to list with a multiple listing service. If they do not list with the local multiple listing service, they are going to be disadvantaged in trying to sell their home for an adequate price.

It is sort of a critical mass question. Microsoft and others tried to develop alternative listing services and failed because they could not reach the critical mass.

We would like nothing better than to have every seller list on two or three different listing services. If that were the case—you probably saw the article in the New York Times several months ago that in Madison, Wisconsin, and it just surprised me a great deal, they achieved critical mass with 20 percent of the market. I would have guessed you would have needed 40 percent.

Maybe it is much lower. We need some alternatives to the multiple listing service. Now that we do not have them, it is essentially functioning as a monopoly.

We are not criticizing the Realtors. They worked very hard to build it up and it is an extraordinary useful information source. It does have a monopolistic character.

Either we need alternatives or we need some kind of oversight.

As our report we released last week indicated, the practicing brokers are controlling virtually all of the State commissions, so we would prefer, as in insurance, independent commissioners to regulate the industry.

If in fact the States turned around and decided to regulate this effectively, and I have to say for the ranking member that California is relatively independent of the industry—it is one of two or three States that has the most effective, not really effective, but the most effective State regulation.

Absent that, there needs to be a Federal regulatory role. We propose the fairly modest step of a careful study of prices and the way multiple listing services function, so that this committee would have available information, adequate information, to make sound decisions about policies.

Mr. CLEAVER. Thank you. Mr. Farmer, I am from Waxahachie. I read the e-mail. My colleague, Mr. Davis, was a prosecutor before he became a Member of Congress. I just asked him a few questions before he left.

I do not understand why you could not, or the Daily Light did not, simply contact the Texas Attorney General's Office. I have a cousin who actually works in that office. I was trying to e-mail him from here on my Blackberry to find out would they investigate that kind of charge.

I do not understand why this cannot be dealt with by the State Attorney General or is there a request for greater oversight by the Federal Trade Commission, or do you need some kind of involvement from the Department of Justice.

Mr. FARMER. I am not asking anyone to do anything. I am just showing this as evidence of the things we go through on a daily basis. To be honest with you, I am not asking Congress—I do not think there should be any Federal regulation of the real estate industry. I think it should stay on a State level.

Mr. CLEAVER. I do, too.

Mr. FARMER. As far as this letter, we got this back in November. DOJ, I told them about it, and then DOJ actually asked me about it. I talked to my agent about it. He was kind of in fear of any kind of reprisal.

As you know, Waxahachie is still a pretty small town. He was born and raised there, grew up there. It is still kind of a good old boy system. He is in fear of kind of what might happen when this came out. I did convince him, hey, this is the right forum for me to present this.

I am not asking anybody to do anything. I have never asked anybody to do anything about it.

Chairman NEY. Time has expired.

Mr. CLEAVER. Thank you, Mr. Chairman.

Chairman NEY. Mr. Sherman?

Mr. SHERMAN. Thank you, Mr. Chairman. Mr. Lewis, we have Mr. Brobeck here suggesting that we get this big investigation and report. What would be the advantage or disadvantage of implementing his suggestion?

Mr. LEWIS. There are over 800 multiple listing services in the country today. It is a very fragmented market. The point I made earlier, any home seller, whether it is a for sale by owner, using a fee for service provider, a discount broker, a full service broker, today, they can up load their property listing to Google, to Yahoo!, to eBay, to Craig's List, PropsMart, and Trulia. There are new Web sites popping up every day.

There is no limit on the amount of exposure that a home seller gets. The MLS is no longer the exclusive preserve that it once was.

Mr. SHERMAN. He wants us to do this study. Are you saying it is just unnecessary because it would be a study of the MLS which is kind of like studying Yahoo! and Google is taking over anyway?

Mr. LEWIS. I do not think it is as relevant as he is suggesting.

Mr. SHERMAN. First of all, I want to thank all the panelists for coming to us, in large part, I guess, on the theory that wisdom and justice will come from Washington when it has not come from State legislatures. I am dumbfounded by such a belief, and doubt very much whether we are going to do or could do any better job.

I have run out of specific questions. I do want to make the point that this price competition, I have seen not so much in the middle class district I represent now, but I used to represent Malibu, and as you might know, nobody gets 6 percent in Malibu, never got 6 percent in Malibu. We have seen Realtors compete on the basis of price.

I am just going to refer to Ms. Vredevoogd-Combs, whether you have any additional comments.

Ms. VREDEVOOGD-COMBS. Yes. Thank you very much.

One of the things that is just so obvious to me as I am listening to this, because I sell real estate every day and because I am in a marketplace in Grand Rapids, Michigan, that is just a little bit different than the California market, we have been seeing a down market for the last few years.

It has been very interesting.

Mr. SHERMAN. Even the last few years when the whole country is going up?

Ms. VREDEVOOGD-COMBS. Yes. Welcome to Michigan. We have some great values for you over there. Waterfront property.

Mr. SHERMAN. Does this mean you are raising your percentage rates so you can make as much on each sale? It has been suggested that we should cut the rate when house prices go up. Your house prices are going down. Are you raising your rates?

Ms. VREDEVOOGD-COMBS. Our house prices are going down and we are not raising rates. I will tell you, in Grand Rapids, Michigan, every conceivable type of brokerage is out there.

The first thing anyone asks you, even in a down market, is what is your commission rate, and what are you going to charge, and what are you going to co-op that with?

I will tell you that there are discount brokers. There are Internet brokers.

The other thing is I have to spend more money because I am on the Internet than I ever did just because I was doing print advertising.

Mr. SHERMAN. The Internet is more expensive than print advertising?

Ms. VREDEVOOGD-COMBS. It is an additional thing that I have to pay for. I have my own Web site. In the mid-1980's, I had my own Web site built. I was the first person in Grand Rapids to have a Web site. Of course, nobody saw it because nobody had the Internet.

I also had an e-mail address, and nobody e-mailed me because nobody had e-mail.

I started in that. I have been selling real estate since 1971. I have seen a lot of changes in the marketplace. It costs money to be on the Internet. Those of us who are in brokerage have to take into consideration not only the fact that we are in brokerage and we earn a commission and we are independent contractors, but we also have to pay for our own advertising. We have to pay for our own Internet. It is just an added cost.

The other part is that there are a lot of free places you can go on the Internet. We can put them, just as Mr. Lewis said, I can put my listings up free on a number of sites. The listings that I have right now probably are on 15 or 16 sites. People can find them all over the place, in addition to the MLS, and our MLS happens to be open to the public, so people can go on our MLS site and search for houses.

I think the market is much more open than it ever has been. We work with and cooperate with people who are doing all sorts of brokerage business.

Mr. SHERMAN. I do not know which person to address this question to, but if you have a menu of services rather than the one fixed rate, I think one of the witnesses testified that they offer a menu of services, what is on that menu? What service would I buy independently of another, and what are the entrees that sell well, and what are the side dishes that sell poorly?

Mr. FARMER. We have three different listing options when you list your home with us. We have a limited-service listing that used to be our most popular, now after the new State laws, it is not the most popular any more. It can still be done, but it is much more tedious.

The most popular one is the one where we actually help with contract negotiations and basically, from the time a buyer is found, all the way through closing. It is essentially a full service listing. We charge a flat rate of $1,500, plus $495 at the time of listing for that.

Mr. SHERMAN. That is full service.

Mr. FARMER. We do not do any additional marketing of the property. We do have a full service option. We will do open houses, and we will make flyers, and we will do newspaper ads, and we will do whatever they want.

Chairman NEY. Time has expired.

Mr. SHERMAN. Thank you.

Chairman NEY. By the way, we are waiting for the votes. If you have additional questions, we can do it.

I wanted to also recognize Kara Mundy. It is her last day. Kara, do you want to raise your hand? Thank you. It is her last hearing, it is not her last day, as an intern from Ohio State. I wanted to mention that, a graduate of Ohio State.

The question I had, I want to ask the Realtors. What is wrong with Mr. Kelman or Redfin, LendingTree, why can't they come to the Realtors and say, okay, I want to be part of this MLS and I am going to pay a fee like other Realtors would do to join, and do it nationally instead of going State by State and district by district?

Ms. VREDEVOOGD-COMBS. All of our MLS' are local. They are not national at all. We have MLS rules that are national rules. Some of those, or actually most of those rules are optional.

Chairman NEY. That is what DOJ is objecting to, the national rules, correct?

Ms. VREDEVOOGD-COMBS. We have some national rules, and those are really there to protect our MLS', so they do not get sued by the DOJ.

Chairman NEY. DOJ is objecting to the rules?

Ms. VREDEVOOGD-COMBS. Objecting to some of the optional rules that were set out prior to—those have been changed now—that is what they are objecting to.

Chairman NEY. None of your rules could override a State law, no matter what association?

Ms. VREDEVOOGD-COMBS. No.

Chairman NEY. The State law would come in and undo a rule, and that would be the law of the land?

Ms. VREDEVOOGD-COMBS. You have to abide by State laws, but every one of our MLS' is local. The only thing the National Association of Realtors does is we promulgate various rules and regulations for MLS', and most of them are optional, if they want to do those, they can, and if they do want to do those, we set out the wording for them.

Chairman NEY. Are there any groups, online groups, online companies, that can go all over the entire United States? I think there are 1,000 MLS'.

Ms. VREDEVOOGD-COMBS. All real estate is local. You have to join your local association. That is the beauty of the real estate industry.

Chairman NEY. How much does it cost to join that local, do you know, on average?

Ms. VREDEVOOGD-COMBS. I do not. Maybe these guys do.

Mr. FARMER. I belong to nine different MLS' in Texas. Every one of them has different rules, standards, and practices. Some of them make you go to orientation. I have to drive from Austin to Amarillo, which is about—I do not have to drive but I have to go to Amarillo to go to that board's orientation. Some MLS' have orientation, and some do not. It is very tedious.

I am not here to complain about the MLS rules. I know that is part of the business and part of my job.

Generally, it is going to run you, MLS fees alone will generally run you about $500 to $700 a year, and then additional dues as far as NAR, TAR, and local board dues, another $500 a year or so. Around $1,000 to $1,500, depending on the board, a year to belong to an MLS.

Chairman NEY. Did you want to comment?

Ms. GORSUCH-BRADBURY. I think one of the issues is you need to go and join each of those MLS' individually, which by the way, realestate.com is completely fine with. I think one of the key points that probably several of us have tried to convey is that we are fine joining the MLS' and we are fine abiding by the rules.

What we want to know, or have assurance of, is that when we join, we will not be discriminated against based on our business model. We want to have equal access as long as we are playing by the licensing rules and we are playing by all the MLS rules. We want to have the rules enforced equally so that we have a chance to compete fairly.

What that does is it allows us to innovate knowing that we will have access to the key information, which is the listings.

I think you have to think of an MLS as a market maker. That is where real estate is transacted. It is where buyers and sellers find each other. If, for whatever reason, we are excluded from that, it is very hard to compete.

Chairman NEY. Yes?

Ms. VREDEVOOGD-COMBS. Just a comment. All of our MLS' are independent, and we welcome everybody to join these MLS' if they are licensed in that State, and if they do business as a brokerage, they are welcome. Our arms are open. What we are finding is that we want to do business in every way, but they all have to follow the same rules that we do in our businesses, too. I think they agree with that.

Chairman NEY. Do you agree with that?

Ms. GORSUCH-BRADBURY. We do agree, but with all respect, I do not think the rules are necessarily enforced equally by all the MLS'.

Mr. FARMER. I agree except for when MLS' go—when you create a business model, then they go and change the rules. That is what has happened in Austin. That is what the State of Texas has tried to do with minimum service laws.

When you go and join and then some boards see this new competition and start changing the rules on you. That is what I object to.

Chairman NEY. Mr. Kelman?

Mr. KELMAN. I was only going to reference again E-Realty. That is a company where the CEO testified before Congress saying that he felt his company was being discriminated against by the MLS'.

In conversations with him, we have heard that his business would apply to be in the MLS. The application would be put on a slow boat to China. The MLS would confer with the National Association of Realtors. This was the issue he testified to 4 years ago.

In talking to him now, he said that he did not think Congress would act, but the Department of Justice would at least dampen the bullying effect of the National Association of Realtors.

Chairman NEY. Thank you. Very interesting panel. I appreciate the testimony and look forward to talking with you all in the future.

The Chair notes that some members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 30 days for members to submit written questions to these witnesses, and to place their responses in the record.

The hearing is adjourned.

[Whereupon, at 5:29 p.m., the subcommittee was adjourned.]

A P P E N D I X

July 25, 2006

Opening Statement
Chairman Michael G. Oxley
Financial Services Committee

Subcommittee on Housing and Community Opportunity
Hearing: The Changing Real Estate Market
July 25, 2006

Today, we will focus on residential real estate brokerage -- a valuable service for millions of Americans each year – and the serious problems we have recently learned about the industry that can affect one of the most important financial transactions most people will ever undertake: buying or selling a home.

An increasing number of observers – from the government, to consumer groups, to academics – are asking an important question about residential real estate brokerage that, frankly, Congress has been slow to consider. Namely, why is it – in an industry with more than 1.3 million competitors, with home prices that vary widely – that brokers from Portland, Oregon to Portland, Maine so uniformly charge a six percent commission?
Moreover, why has that six percent fee remained the same as home prices have soared, and with new technologies that make brokerage more efficient? Wouldn't real competition produce varying services and varying prices?

In March, 2005, Ranking Member Barney Frank and I asked the GAO to examine price competition in real estate brokerage. That followed my request in November, 2004 that GAO report on barriers to electronic commerce in real estate.

The GAO's report, as well as the actions over the past 18 months by the Department of Justice and the Federal Trade Commission and scholarly reports, explains what is happening. Real estate brokerage is self-regulated. Licensing rules are largely set by the brokers themselves, and real estate exchange rules are entirely set by the brokers themselves. The exchanges have become institutions to protect the interests of brokers, not consumers.

We let the stock exchanges in this country set their own rules, but only with the SEC reviewing and approving those rules. For residential real estate markets, there is no government regulator to protect the public interest. There is only regulation of the brokers, by the brokers, for the brokers.

I generally believe that less government regulation is a good thing. This is because robust markets can police themselves. Innovators with better products and lower prices will beat companies that cling to anti-consumer ways. But when competitors exclude innovators and restrain competition, which is the allegation of Department of Justice's antitrust lawsuit against the National Association of Realtors, then markets can't work. Congress needs to pay attention, and probably needs to act.

On July 13, the Federal Trade Commission announced an enforcement action against the Austin Board of Realtors for establishing rules that essentially froze properties out of the market if the seller used a service that traditional brokers didn't like. The Austin realtors set rules saying that "exclusive agency listings" – that is, homes where the seller used a broker who performed very limited services, couldn't be listed in Austin's Multiple Listing Service or MLS, the local exchange for homes for sale. The settlement with the FTC nullifies the Austin realtors' rule. We should wonder - is this going on elsewhere as well?

And that's not all:

- Organized real estate brokers are pushing for State laws to outlaw low cost "minimum service" brokerage, where brokers will charge less – perhaps tens of thousands of dollars less – and in exchange provide less brokerage service.

- Innovative brokers complain of organized discrimination in the markets. If you are a broker who charges less, you might be blackballed in the industry, and other brokers won't show buyers the homes you're listing. The Wall Street Journal reported last October on an Ohio realtor who had her listings pulled from the local MLS, in essence because she charged a low flat fee rather than the full six percent. A lawyer for the MLS said "for sale by owner" listings shouldn't be in the MLS because it creates uncertainty about whether the buyer's broker will get paid for the sale.

- We on this Committee know only too well that the NAR wants to keep national banks from providing real estate services.

What do all these examples have in common? They show organized real estate brokers setting or using the rules to protect higher fees or stifle competition to the detriment of consumers and to the detriment of new brokerage models.

This is one of the most important issues we have considered, because it very directly affects millions of Americans each year, and because consumers could be saving billions of dollars each year. One industry publication called "Real Trends" reportedly estimates consumers paid a whopping $61 billion in real estate brokerage fees in 2004. Others estimate it as high as $100 billion. Just think if real estate brokerage fees were 1 percentage point lower. Consumers could save tens of billions of dollars per year.

We have an obligation to make sure markets are fair and open, and to protect consumers. I want to thank Chairman Ney for his leadership in holding this very important hearing today. This should be the first step in our inquiry, not the last.

Opening Statement of the Honorable Bob Ney
Chairman, Subcommittee on Housing and Community Opportunity

Hearing on

"The Changing Real Estate Market"

Tuesday, July 25, 2006

This afternoon the Subcommittee on Housing and Community Opportunity meets to discuss the changing real estate market and how these changes have affected brokers and consumers alike.

Since the advent of the internet, changes to the real estate market have become frequent and far reaching. The nature of real estate transactions and the effect on homeownership and consumers are of growing interest not only to this subcommittee but to the financial services industry as a whole.

To understand changes to the market we must first look at what is known as the tradition brokerage model. Traditional brokers offer a "bundle" of services that can include marketing the seller's home to preparing offers and assisting in negotiations. Most traditional brokers belong to a multiple listing service, or MLS, that pools information about homes on the market so brokers can access a wide array of listings for their customers. This network of brokers utilizes a commission based pricing model in which sellers pay a percentage of the sale price as a brokerage fee.

Recent technological advances have changed the way consumers look for real estate and have facilitated the creation and expansion of alternatives to traditional brokers. In recent years, the real estate industry has used the internet to market products and market new types of real estate services. Despite increasing modernization, most consumers still choose to be represented by a traditional, full service real estate broker or agent.

The consumers who do not go with a tradition broker have opted for alternative or discount brokers. These real estate models offer lower commissions in exchange for reduced services and may operate solely or primarily via the internet. Many different options are being offered by discount brokers, including flat fees for services and rebates for buyers, which have been targeted by state laws. Despite the emergence of Internet-based or discount real estate brokerage services, the growth of this segment of this segment of the market has not been substantial.

The past few years the real estate market has been met with challenges to MLS practices, minimum service requirements, and need for competition to benefit consumers. For many American families, purchasing a home is often the most complex and expensive transaction they undertake. Therefore it is important that this subcommittee continue to raise questions regarding competition and consumer protections within today's real estate transaction process.

Homeownership has a rich history in America. As a public policy, for the good of communities and families across the country, we want to encourage a real estate transaction process that all participants can agree is fair and cost-efficient.

U.S. Congresswoman
Ginny Brown-Waite

Representing Citrus, Hernando, Lake, Levy, Marion, Pasco, Polk, and Sumter Counties

Subcommittee on Housing and Economic Opportunity Hearing
The Changing Real Estate Market
Tuesday, July 25th
Statement for the Record

Thank you Mr. Chairman.

And thank you to the witnesses today.

Since I was a real estate agent in my past life, many things have changed, namely the introduction of the Internet. The Internet empowers potential homeowners and sellers to do more research for themselves, making them better consumers. And with the introduction of the Internet, the choices buyers and sellers have today are seemingly endless. Like many people, I view the Internet as an important and positive addition to the real estate market.

But with any new innovation, nothing is perfect, which is why I am looking forward to hearing from our witnesses today. I hope to learn what Congress can do to ensure that the Internet continues to be a tool that fosters competition and provides knowledge to homeowners.

Thank you, and I yield back the balance of my time.

Opening Remarks, Representative Maxine Waters D-CA 35th

Subcommittee on Housing and Community Opportunity

Hearing

"The Changing Real Estate Market."

July 25, 2006

Good afternoon ladies and gentlemen. I want to thank Chairman Ney for holding this hearing. The issue of competition in the real estate industry has generated a great deal of interest. As many of you know, the issue of competition in the real estate industry reached new heights last year with Department of Justice litigation against the National Realtors Association.

First, I believe that we are all for competition that will benefit the consumer. However, I am not sure that we should be reaching any conclusions about what is the most appropriate real estate services model -- traditional or non-traditional. I can not envision purchasing real estate without my real estate broker and agent. I am sure there are many of you who feel the same as I do. And while there has been tremendous growth in the use of the Internet in real estate transactions, I am not comfortable that the expansion of real estate services via the Internet will afford consumers the opportunity to save money in the long run or to have their interests adequately represented.

The so-called no frills approach to the buying and selling of real estate is at the heart of the current debate about competition in the real estate industry. However, there is no evidence that consumers are seeking to use discount brokerages and Internet based services rather than the traditional services of their trusted real estate broker and agent. Indeed, it is unclear whether a more competitive market structure, with greater participation by innovative, Internet based

brokers, will increase demand for these services, or if consumers will continue to use bundled services and the experience that traditional broker's offer.

This hearing should enable us to determine what is the appropriate role of the discount brokerage, the traditional real estate agent and broker, and the Internet in fostering competition in the real estate market. I would hate for anyone to reach conclusions about how best to foster competition in the real estate industry without the opportunity to assess the various perspectives on this issue. Thank you.

Consumer Federation of America

RESIDENTIAL REAL ESTATE BROKERAGE SERVICES: A COCKAMAMIE SYSTEM THAT RESTRICTS COMPETITION AND CONSUMER CHOICE

Testimony of

Stephen Brobeck
Executive Director
Consumer Federation of America

Before the
U.S. House of Representatives
House Financial Services Committee
Housing and Community Opportunity Subcommittee

July 25, 2006

Chairman Ney, Ranking Member Waters, and members of the Subcommittee: My name is Stephen Brobeck. I am Executive Director of the Consumer Federation of America. We appreciate the opportunity to share our views on residential real estate brokerage services with the committee. These views also represent those of the American Homeowners Grassroots Alliance.

For more than a decade, CFA and the AHGA have sought to advance the interest of home sellers and buyers by promoting greater real competition among providers of residential real estate brokerage services. Ensuring this competition has become increasingly important because of the growing importance of homeownership and related services.

Over the past five years, more than 30 million houses and condos have been sold, a large majority with the assistance of real estate brokers and salespersons. Last year, consumers spent

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www.consumerfed.org

more than $60 billion on these brokerage services. Yet, consumers poorly understand these complex and confusing services. As a recent article in the *Harvard Journal of Legislation* explains, just the concept of "agency" is extraordinarily complicated with different states adopting different approaches.[1] It is not realistic to expect first-time home buyers, or even first-time home sellers, to adequately understand these services. And when consumers sell and buy different properties at the same time, they are usually preoccupied with the timing of these sales, not the price or quality of the brokerage services they are receiving.

Competition and Consumer Choice Restricted

Prices: Despite the importance and poor consumer understanding of these brokerage services, they are not transparent and competitive like those of almost all other consumer service areas. Take the price of these brokerage services. None of the dominant firms in the industry advertises commission rates or ancillary fees. Nor are these prices listed on their websites or in their advertising. In fact, as CFA has learned, it is a challenge for comparison shopping home sellers to even learn what these prices are. There is no other important consumer service in America where it is so difficult to learn about costs.

Why are these prices not advertised or even made easily available to consumers? The simple fact is that, for decades, the dominant real estate firms and their trade association have tried, with much success, to maintain high, uniform prices within different geographic areas. Any real estate broker or salesperson can tell you what the target commission rate is in their area. Depending on average home prices, this rate is usually 6% or 7%, though in high-priced markets such as Southern California it apparently has slipped to 5%. And, despite the rise of home prices

[1] *See* Olazábal, Ann Morales, "Redefining Realtor Relationships and Responsibilities: The Failure of State

over the past decade, where a 6% commission rate now represents a charge of $30,000 on the sale of a $500,000 house, the dominant firms appear to get this rate on the sale of most homes.

The one recent survey of these rates, which concluded that the average rate was 5.1%, has been persuasively shown to be too low.[2] Regardless, even at only 5%, the $15,000 in commission charged on the sale of a $300,000 home represents a higher price than that charged for many new cars or even sophisticated medical procedures.

How are the dominant firms able to maintain high and fairly uniform prices? There are two key factors. The first is a tacit agreement not to advertise or even easily make available price information. The second is "discrimination" against most service providers that offer and advertise lower prices.

This discrimination is facilitated by a pricing system where home sellers ostensibly pay the entire commission, but listing brokers "split" commissions with any separate brokers working with home buyers. This commission split, which is poorly disclosed to sellers and not disclosed to buyers, is made accessible to brokers on various listing services. In a 6% rate area it is typically 3%, and in a 7% rate area, it is typically 3.5%. A listing broker lists a split below this level at their, and their clients', peril because of the risk that traditional brokers working with buyers will avoid this property: These brokers not only want the highest possible commission split but also do not want to support brokers offering lower rates. That is why many low-price listing brokers complain that their properties are not shown, and it is why many rebating buyer brokers complain that listing brokers make it difficult for them to show or sell properties.

This informal discrimination against price competitors is the most important factor that

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Regulatory Responses," *Harvard Journal on Legislation*, Vol. 40, 2003.

[2] Weicher, John C. Director, Center for Housing and Financial Markets, Hudson Institute, "The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such as It Is," November 8, 2005.

allows dominant brokers to maintain high and uniform prices. But in eleven states the problem is made much worse by anti-rebate statutes supported by traditional brokers. These blatantly anti-competitive laws, which have been opposed by the Department of Justice, make it impossible for buyer brokers to introduce price competition through rebating a portion of near-uniform commission splits.

In a rational pricing system, home sellers and buyers would each pay for real estate brokerage services they receive. In this system, there would be no hidden commission splits that propped up rates. In the interim, brokers should be required to clearly disclose these splits to sellers and buyers. That disclosure, as it became understood by consumers, would encourage listing brokers to list lower commission splits and buyer brokers to show properties with these lower splits. The result would be more transparent, varied, and lower average commission rates.

Services: An analogous situation exists in regard to services. The dominant brokers not only claim to offer "full service" but have argued that only brokers offering full services should be permitted to do business. That is why, in many states, they have persuaded state legislatures to pass minimum service laws – challenged by the Department of Justice – that restrict service competition, for example, by requiring all service providers to maintain physical offices or accompany prospective buyers on home visits. The goal of these dominant brokers is to restrict competitors who transact business over the Internet or who offer limited services for a lower price.

The fact is that many of these dominant brokers offer less than "full service." Listing brokers may not aggressively advertise properties or organize open houses. Buyer brokers may try to restrict searches to in-house listings. There is no uniformity of service among so-called

"full service brokers."

But more importantly, why should there not be a range of service options, particularly in light of the opportunities made possible by the Internet to consumers who wish to list or search for properties, and to those who wish to transact business over the Internet? Until relatively recently, one of the most important broker functions was to identify properties that buyers might wish to consider. Because a large majority of home buyers now start their search on the Internet, where they increasingly are finding the house they end up purchasing, this broker function is diminishing greatly in importance.

Accordingly, it is in the interest of both buyers and sellers for there to be complete information on Internet listings and for this information to be easily accessible. Dominant brokers and their trade association, however, have succeeded in restricting consumer access to information through their control of multiple listing services (MLSs) and the national listing service, Realtor.com, which they feed. Home buyers and sellers are attracted to Realtor.com and listings of major firms because they represent, far and away, the most comprehensive set of listings. As a result, most home sellers feel they must contract with a broker in order to have their house listed on the local MLS and on Realtor.com. But there is often insufficient information on these listings – for example, absence of more than one photo or an address – to allow consumers to shop on their own. So, most home buyers feel they must utilize the services of a broker to gain access to complete information about listings.

Furthermore, consumers are denied full information about properties for sale because these listing services discriminate in subtle or not so subtle ways against nontraditional service providers. In some areas, for sale by owner (FSBO) properties are listed on MLSs but cannot

easily be found in Internet searches. In the past several years, the issue has arisen as to whether brokers should be allowed to restrict the access of other brokers – Internet brokers have been the target – to their listings. As they have on anti-rebate and minimum service laws, the Department of Justice has opposed this practice.

Traditional brokers, who control these listing services, argue that they created the services and should be able to control them. Our response is two-fold: First, home sellers who pay 5-7% commissions should be provided the widest possible exposure to information about the homes they wish to sell. And home buyers, who effectively pay a portion of this commission through higher home prices, as authoritative economic studies have shown, should have ready access to as complete information as possible about these houses. Second, because the MLSs and Realtor.com so dominate listing services, they function as a near-monopoly and should be regulated as a public utility. This regulation should ensure, most basically, more complete and accessible home sale information both to all service providers and to consumers.

A Cockamamie System: The term "cockamamie," while rarely used today, is a particularly apt adjective characterizing the real estate system. From a consumer perspective, this system is indeed "ridiculous and nonsensical." In what other product markets in the United States are: prices and related services rarely advertised and even difficult to learn? most prices high and uniform? limited service providers unavailable because of restrictive state laws? widespread covert, and even overt, discrimination against sellers who try to compete on price and/or service? roadblocks to securing key product information through the Internet?

In a report issued in May, CFA characterized this system as a cartel because dominant

sellers have largely succeeded in controlling prices and services. The National Association of Realtors responded that the industry was indeed competitive because there are so many licensed service providers. On the contrary, the huge glut of these providers actually helps maintain the cartel and its control by dominant brokers. Since there are 2.5 million licensed service providers and only about 7 million home sales each year, most brokers are involved in only a handful of sales each year. As a result, most enthusiastically support a system that keeps commission rates high.

Why are there so many licensed providers – from an economist's point of view, a hugely inefficient marketplace? One must start with extremely low barriers to entry, training sessions typically lasting about two weeks. With such modest licensing requirements, it is remarkable that commission rates are so high, and that new licensees are able to charge the same rate as experienced ones. Many have noted that the NAR has absolutely no interest in changing this system that produces about $100 million in income from the membership fees they charge, which service providers must pay in order to get full access to MLSs and Realtor.com.[3] As a broker wrote to us only last week:

> Why have Realtor associations, with all their money and lobbying power failed to demand increased educational requirements to enter or remain in the business? The answer is painfully and sadly obvious. It is $84 in annual fees multiplied by 1.3 million members. National Association of Realtors has nothing to gain and much to lose by raising standards and it will use its powerful lobbying force to ensure that efforts to do so are defeated.

Dominant brokers support this system because they compensate their salespersons using commissions, not salaries, so benefit from having the largest possible sales forces that are at least somewhat productive.

Dominant Brokers Regulate the Industry

State Regulation: In most states, the residential real estate brokerage industry is regulated by state real estate commissions or boards. The primary function of these bodies is to decide on licensing requirements, issue licenses, and ensure compliance with these requirements. That would be fine if the requirements largely served consumers interests. But they do not because, as a study CFA released last week (and featured in Ken Harney's most recent nationally syndicated housing column) reveals, most of these commissions and boards are dominated by practicing brokers.[4]

Our study revealed, first, that more than two-thirds of real estate commissioners are required by statute to be active real estate salespeople, brokers, or licensees. The actual participation of these service providers is even more extensive. We found that nearly four-fifths of all commissioners earn a living through real estate transactions, with seven in ten being real estate brokers or salespeople. Only 13 percent of the commissioners appeared to have no close ties with the industry. (For 8 percent of the commissioners, we could not identify an affiliation.)

Large national and regional firms are well-represented on the real estate commissions and boards. More than one-fourth of all broker commissioners work for one of the four largest national residential real estate brokerage firms – Cendant/NRT (Coldwell Banker, ERA, Century 21, Sotheby's among others), REMAX, Prudential, and GMAC. And nearly one-tenth of all broker commissioners work for large regional firms that often dominate local markets.

This industry domination of state regulation harms consumers both through omission – what they fail to do – and commission – their initiatives that harm consumers. Consumer

[3] National Association of Realtors, 2004 Internal Revenue Service Form 990 at line 3.

complaint services are either not adequately publicized (e.g., Texas) or they do not have adequate resources to handle mounting complaint levels (e.g., California). Furthermore, few states rigorously enforce required disclosure laws. In 2005, according to an NAR report, more than one-half of recent homebuyers surveyed said that they either did not receive any written disclosure or did not receive it at the proper time.[5] In addition, commission efforts to help home sellers and buyers proactively are extremely limited or nonexistent.

On the other hand, some real estate commissions have actually taken the initiative to restrict broker competition. Several commissions, for example, endorsed and even actively supported minimum services laws. Our report contains four case studies – Iowa, Kentucky, New Mexico, and Texas – in which the support of real estate commissions contributed significantly to the passage of regulatory or statutory changes establishing discriminatory minimum services.

To remedy this egregious situation, our report strongly recommends that states prohibit practicing brokers from serving as commissioners. In Illinois, for example, real estate regulation is overseen by the Commissioner of Banks and Real Estate, who hires a Director and Deputy Director of Real Estate.[6] These public officials are advised by a Real Estate Administration Disciplinary Board. But none of these officials or Board members are permitted to be licensed as real estate agents. To serve as an official or Board member, practicing brokers must surrender their license for the duration of their public service. An even more desirable regulatory system would allow brokers to serve on advisory groups but allow fulltime professionals to regulate brokerage services. That would make regulation of these services more like the regulation of other services such as insurance and utilities.

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[4] *See* Consumer Federation of America, "State Real Estate Regulation: Industry Dominance and Its Consumer Costs," July 2006.
[5] Evans, Blanche, "Agent Disclosure Worse than Ever," *Realty Times*, January 24, 2006.

Federal Regulation: Given the domination of state regulatory bodies by the industry, it is fortunate that consumers have federal agencies – particularly the Department of Justice, the Federal Trade Commission, and the Government Accountability Office – that are concerned about their interests. Though somewhat dated, the 1983 study of the industry by the FTC remains the most careful and comprehensive study of the industry and its anti-competitive features. Just last year, the GAO released an excellent analysis of the current residential real estate brokerage system that perceptively identified key barriers to competition. Just last week, the FTC announced a consent agreement with the Austin Board of Realtors to eliminate the practice of segregating non-traditional real estate listings of properties from internet websites.[7] But the acknowledged regulatory leader in trying to prevent dominant brokers and their trade association from increasingly restricting competition through limiting MLS information, anti-rebate laws, and minimum service statues has been the Department of Justice. CFA and AGHA are very grateful to these three agencies who have demonstrated they are committed to ensuring that the American free enterprise system is indeed free.

A Congressional Role: Given the capture of state regulation by the industry, Congress should consider giving federal regulators a more explicit and authoritative mandate for regulating residential real estate brokerage services. After all, increasingly local brokerage markets are dominated by powerful national players, and they work closely with large regional firms to dominate the NAR and its affiliates. Moreover, the Internet is a mechanism that allows these services to more frequently be offered at the national level. Industry-dominated state regulators should not be permitted to retard the progress of Internet-business models that are revolutionizing

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[6] Illinois Real Estate License Act of 2000, 225 ILCS 454, especially Article 25, Administration of Licenses.
[7] *See* Federal Trade Commission, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the*

other product-related marketplaces. As the national regulator of unfair and deceptive sales practices, the FTC is the most logical agency to be given increased responsibility and authority.

Extremely helpful to federal regulators would be a study on key industry practices relating to rates and multiple listing services. In its 2005 study, the GAO reported that "comprehensive data do not exist" on the pricing of real estate services. There is even less information available on the real functioning of multiple listing services.

The following information on rates would assist federal regulators:

- Extent to which rates are advertised and by what types of brokers.
- Any evidence of low-cost brokers being unable to place ads publicizing low rates because of pressure from traditional brokers.
- Extent to which rates are disclosed to potential clients.
- Extent to which home sellers can negotiate rates down.
- Actual commission rates charged, and how they vary by size of firm, by type of firm, by price of home, by specific services provided, by type of representation or facilitation, and by "double-dipping" by individual brokers or in-house sales.

And the following information on multiple listing services would also be helpful to these regulators:

- What is the relation of the NAR and its influential members to these listing services?
- Must a service provider belong to the NAR or its local affiliate in order to gain full access to a MLS?
- Will these MLSs equally list all properties submitted by member brokers, including FSBOs?
- Will these MLSs equally supply information on all listings to all member brokers, including low-price and Internet brokers?

Matter of Austin Board of Realtors, File No. 0510219, July 13, 2006.

- What information on MLSs is not provided in Internet searches? What information is not provided to clients of member brokers?
- Are there are restrictions on lock-box services related to MLS membership?
- How would giving consumers direct access to MLS information on listings for a reasonable fee affect the functioning of the list services?

Such a study would most logically be undertaken by the FTC. This agency has not only good research capacity but also past experience in studying residential real estate brokerage services.

Written Statement for House Subcommittee on Housing and Community Opportunity
Hearing, Tuesday July 25, 2006

By Aaron Farmer, Broker, REALTOR
Texas Discount Realty
Aaron@TexasDiscountRealty.com
512-585-9520

The following is my response to the specific questions asked by the Subcommittee:

- **How have consumers benefited from the integration of the Internet and real estate services?**

The greatest benefit for consumers is that they have free or inexpensive access to data including MLS listings, for sale by owner listings, county tax data, online deeds, home buying and selling advice, and innovative mapping and transaction settlement programs.

They have also benefited by saving time in the areas of offers, counter offers and executing documents. Now, instead of having to drive to an office to sign contracts and documents, receiving blurred faxes (many people still do not have fax machines) or waiting to overnight documents, many times documents can be emailed or sent digitally, generally making for quicker executed agreements.

Today, home buyers use the internet as the dominate tool to find their homes, according to the National Association of REALTORS. Additionally, it is not uncommon that buyers will purchase a home in a market after only one visit or sometimes without visiting the home at all because of the comprehensive data and photos on the web about the home.

For this reason, I believe it is especially important that consumers continue to have access to as much active listing data as possible.

- **Are state licensing laws generally supportive of brokers with innovative business models and pricing?**

I can really only speak for Texas, since that is the only State I am licensed in. With the exception of the recent minimum service laws passed, Texas licensing laws do not restrict innovative business models.

However, there needs to be some entity that will stay vigilant and watch all state licensing boards to prevent abuse from powerful private entities.

- **Some states have recently passed laws that require a broker to perform a minimum set of services. What impact might these laws have on the real estate market and on consumers?**

Texas is one of 10 states which have passed "Minimum Service" laws despite the fact that there has not been a single consumer complaint about this practice in Texas and over strong objections by the Department of Justice and the Federal Trade Commission. The only complaint has come from the traditional REALTOR community.

My business still takes limited service listings as part of our unbundled menu of service listing model. While it is still possible to do limited service listings, the goal of the laws to effectively "re-bundle" the listings have been somewhat effective. Complying with minimum service laws takes us much more time and energy than it did in the past.

It has also forced many of my agents who perform limited service listings to rethink the way they handle this type of listing. Most of my agents will now only offer limited service listings to experienced investors and/or homeowners. My top agent in the Houston market will no longer do limited service listings at all.

- **What mechanisms are brokers and agents using to modernize the consumer experience in terms of cost, service, and convenience? What barriers are innovative brokers encountering?**

While the barriers created by REALTOR Association's changes to MLS rules, changes to data sharing rules and state-sanctioned Minimum Service laws are well documented; many barriers are felt at a more basic level.

All too often alternative or innovative brokers encounter discrimination, ridicule, and harassment from traditional brokers and agents who are resentful about new competition and new business models which may have different pricing models, are more technology-based or just have different attitudes and business culture than their companies.

I have personally heard of traditional agents telling potential customers that our company would be going out of business soon or that what we are doing is against the law (which is false, of course). Traditional agents have told sellers that other agents would not show their home if they listed with us. We have had yard signs stolen from front yards and recently had a whole billboard ripped out of the ground. I have even seen a traditional agent ridicule one my agents at a REALTOR tour event for being a "Discount Agent" and offering reduced fees.

The closest thing I have to a smoking gun to this type of activity is an email sent to one of our agents recently after he was asked to stop advertising in the Waxahachie Texas Daily Light Newspaper Homes Magazine (Waxahachie is a suburb of Dallas). The whole email is attached as Exhibit 2. The following is an excerpt of the email:

"Just a follow up of my conversations with the Real Estate Agents in Ellis County.

I was told by several Real Estate Agents in Ellis County that they would not advertise with the HOMES Magazine if we let Texas Discount Realty advertise.

I was also told by several agents that our competitors (Homes & Properties Magazine & The Real Estate Book) would never let Texas Discount Realty advertise in there products.

I spoke with our publisher and he said to refer you to the Federal Anti-Trust Law."

While I am not versed in State or Federal Anti-Trust laws, at a minimum this is a clear case of conspiracy, discrimination and intimidation by some agents in that real estate community to prevent one of our agents from advertising in a local publication.

These actions have prompted my agent to ask if he could operate under a different name and even explore leaving my brokerage altogether.

Fear of these types of "Bully" tactics has the effect of preventing other brokers and agents who might otherwise consider trying an innovative business model from doing so, thus, stifling innovation.

There is even discrimination by some of those crying foul. A few years ago, I applied to receive leads from a large public company that I am sure we are all familiar with. Their response to me was that I did not charge enough!

These lead-generating companies, as well as many relocation companies will not work with discount business models unless they charge over a certain amount to the customer. This works to keep commissions higher for consumers who utilize those services by forcing agents who receive referrals from these organizations to charge a higher commission rate in order to get the sales leads.

In an effort to combat some of these barriers to entry, I have become a founding member of The American Real Estate Broker Alliance (AREBA).

AREBA, www.AREBA.org, is a national alliance of flat-fee limited service real estate brokers and agents formed in 2006 who advocate innovation, free market competition, full disclosure, informed consent and the consumers' right to choose their level of desired brokerage services.

Primary membership is restricted to flat-fee real estate brokers and agents who, for a flat fee, typically under $1000, list homes on the Multiple Listing Service, known as the MLS, which provides wide exposure for home sellers through the world's largest real estate web site, Realtor.com.

Affiliate membership is open to brokers, agents and others who provide innovative real estate specialties such as fee-for-service, discount brokerage, counseling, exclusive buyer agency, exclusive seller agency, auction marketing, or other real estate services.

AREBA members believe that anti-competitive practices which discriminate against our members must be prohibited. We are disappointed that our industry has not embraced the

innovative changes that technology can bring to save time and money for us and home sellers. We advocate for full disclosure to consumers and their informed consent for all services. If agents plan to limit the homes they show buyers they should inform the buyers of the 'limits' to their services and explain the fiduciary implications.

Attached to this written statement is the current AREBA "Talking Points".

In summary, flat-fee limited service brokers have brought consumers an option to save on commission expenses when selling their homes and I would encourage the FTC, DOJ and legislators to continue studying the marketplace, the benefits of technology and competition and gather data from sellers so that you will come to understand what we understand: they want to save money and have more control over their home sales!

Part 23. TEXAS REAL ESTATE COMMISSION

Chapter 535. PROVISIONS OF THE REAL ESTATE LICENSE ACT

Subchapter A. GENERAL PROVISIONS RELATING TO THE REQUIREMENT OF LICENSURE

22 TAC §535.2

The Texas Real Estate Commission (TREC) proposes an amendment to §535.2 concerning Broker's Responsibility.

The amendment adds new subsection (d) to §535.2 to define the minimum level of service that a consumer may expect to receive from a broker who represents the consumer. This clarification is proposed based on concerns raised by various real estate industry organizations regarding limited service listing agreements. A limited service listing agreement is an agreement by which a broker provides fewer services than those services provided for in a traditional real estate listing agreement. A limited service agreement may provide for a menu of services or reduced fees for certain specified services rather than a full commission for the complete range of brokerage services generally found in a traditional real estate agency relationship.

In many cases under such listing, a real estate broker may provide no service to the seller except to place the listing in a Multiple Listing Service. Typically, the listing broker instructs the cooperating broker to contact the seller directly for all purposes (showings, presentations of offers, and negotiations).

This practice raises several concerns for brokers who represent buyers interested in properties listed under limited service agreements. Often times the seller does not understand the complexities of the transaction and relies upon the cooperating broker for assistance and advice. The seller is reluctant to approach the limited service broker for assistance at the risk of incurring significant additional fees; in some cases the limited service broker will not provide the additional service. When the cooperating broker represents the buyer, the cooperating broker is uncomfortable about providing assistance or advice to the seller. Cooperating brokers also understand, however, that failing to provide the requested services to the seller may jeopardize the transaction or increase risks associated with the transaction.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Ms. DeHay also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarification of the basic services that a Texas real estate licensee is required to provide under the law. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties. The statute affected by this proposal is Texas Civil Statutes, Article 6573a.

§535.2.Broker's Responsibility.

(a) - (c) (No change.)

(d) A broker who represents a party in a real estate transaction must, at a minimum, provide the following services to the broker's client:

(1) accept and present to the client offers and counter-offers to buy, sell, or lease the client's property or property the client seeks to buy or lease;

(2) assist the client in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and

(3) answer the client's questions relating to the offers, counter-offers, and notices.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on September 18, 2002.

TRD-200206104

Loretta DeHay

General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: November 3, 2002

For further information, please call: (512) 465-3900

Aaron Farmer

From: "RAYCHOATE" <raychoate@texasdiscountrealty.com>
To: <INFO@TEXASDISCOUNTREALTY.COM>
Sent: Friday, July 14, 2006 6:14 PM
Subject: FW: Advertising

-----Original Message-----
From: Dianne Banks [mailto:dianne.banks@waxahachiedailylight.com]
Sent: Wednesday, November 30, 2005 9:40 AM
To: raychoate@texasdiscountrealty.com
Subject: Advertising

Ray,

Just a follow up of my conversations with the Real Estate Agents in Ellis County.

I was told by several Real Estate Agents in Ellis County that they would not advertise with the HOMES Magazine if we let Texas Discount Realty advertise. I was also told by several agents that our competitors (Homes & Properties Magazine & The Real Estate Book) would never let Texas Discount Realty advertise in there products.

I spoke with our publisher and he said to refer you to the Federal Anti-Trust Law.

Please let me know if you need anything else. I tried to make this short & sweet. Remind me of anything else I told you.

Thanks
Dianne Banks

TALKING POINTS

The American Real Estate Broker Alliance, AREBA, www.AREBA.org, is a national alliance of flat-fee real limited service estate brokers and agents formed in 2006 who advocate innovation, free market competition, full disclosure, informed consent and the consumers' right to choose their level of desired brokerage services.

Primary membership is restricted to flat-fee real estate brokers and agents who, for a flat fee typically under $1,000, list homes on the Multiple Listing Service (MLS) which provides wide exposure for home sellers through the world's largest real estate web site, www.REALTOR.com.

Affiliate membership is open to brokers, agents and others who provide innovative real estate specialties such as fee-for-service, discount brokerage, counseling, exclusive buyer agency, exclusive seller agency, auction marketing, or other real estate services.

AREBA members believe that anti-competitive practices which discriminate against our members must be prohibited. We are disappointed that our industry has not embraced the innovative changes that technology can bring to save time and money for us and home sellers. We advocate for full disclosure to consumers and their informed consent for all services. If agents plan to limit the homes they show buyers they should inform the buyers of the 'limits' to their services and explain the fiduciary implications. AREBA members believe that anti-competitive practices which discriminate against our members must be prohibited. We advocate full disclosure to consumers and their informed consent for all services.

Some of the current issues of interest are:

- Minimum Service Legislation in states which mandate additional services
- Multiple Listing Service (MLS) rules and public access to the MLS
- Internet Listing Information Display (ILD) policies
- Disclosure and informed consent (agency relationships and procuring cause)
- Rebate restrictions for consumers involved in real estate transactions

Minimum Service Legislation: Over 10 states have passed new legislation and regulations that restrict flat-fee and limited service real estate brokers. New and innovative business models have been forced out of business or forced to raise their prices to meet the new service requirements. Consumers are forced to buy more services than they may wish to purchase. AREBA advocates for consumers to have a full range of options and not be forced to buy more service than is needed to assist in the sale of their homes.

Multiple Listing Service (MLS) Rules: Some MLSs have changed rules and bylaws to prevent a certain type of listing agreement commonly used by flat-fee brokers from being uploaded to the Realtor.com web site and for their listings to be 'hidden' from the public or on other broker web sites. AREBA advocates that all listings should fully exposed in all venues to better serve home sellers and buyers.

Internet Listing Information Display (ILD) Policies: Proposed ILD policies from the National Association of REALTORS allow brokers to blanket opt-out and not share listings with other brokers or referral companies. AREBA advocates full disclosure to home sellers if their homes will not be provided the widest possible exposure.

Disclosure and Informed Consent: The National Association of REALTORS has acknowledged a serious problem with agent non-compliance as it relates to state-mandated agency relationship disclosures. Consumers need to know who is working for whom, the implications of procuring cause and the potential for dual agency or conflict of interest situations.

If a broker is not willing to show homes that are 'for sale by owner' or listed by flat-fee or discount companies, he should disclose that limitation to potential home buyer customers and clients. AREBA advocates for full disclosure to and informed consent from all parties in real estate transactions including the effect of procuring cause on their decision to view property for sale. AREBA opposes discrimination against flat-fee broker listings in regard to home searches, showings, and data access.

Rebate restrictions: Only a handful of states still make rebates illegal. AREBA advocates for rebates or discounts for all consumers, in support of competition among companies and the free market.

CONTACT: Albert Hepp, BuySelf.com 800-556-3418 or visit www.AREBA.org

Bio for Aaron Farmer, Broker, Texas Discount Realty

Real estate is the only career that Aaron Farmer has known. After graduating in 1995 with a degree in marketing from Texas A&M University in College Station, TX, Aaron obtained a Texas real estate license at the age of 23.

However, he has not always gone down the alternative or discount real estate brokerage path. His first stop was in College Station with the traditional brokerage franchise, Century 21.

In 1997, Aaron moved to San Antonio where he went to work with a top producing team at a large independent full-service brokerage, Bradfield Properties. His main duty there was to solicit business from the "For Sale By Owner" market.

After about a year and half of mixed results, he began to notice that many consumers did not want or need a full service broker. An idea began to take shape.

In 1999, Aaron moved to Austin and in 2000 obtained his real estate brokers license. He then started business as a one-man shop working under the name "Texas Discount Realty". The primary focus of Texas Discount Realty is to provide different listing options to home sellers and rebates to home buyers.

In November of 2002, Texas became the first State to pass what is commonly called a "Minimum Service" rule. Aaron challenged this new rule by filing suit against the Texas Real Estate Commission and was immediately granted a temporary restraining order. The initial rule was eventually repealed by the Commission.

From that day, Aaron has become a vocal leader of the "Alternative" business model movement in Texas and around the country. He has been a frequent guest on various radio, TV, and print media outlets around the country. *(Dallas Morning News, Austin American Statesman, Ft Worth Star-Telegram, San Antonio Express-News, Houston Chronicle, New York Times, Wall Street Journal, Inman News, Realty Times, AP syndicated stories, National Public Radio, various local and nationally syndicated TV programs)*

In 2005, Aaron was named as one of the most influential people in real estate according to *Inman News*. He was also a panelist at the "Competition Policy and the Real Estate Industry" workshop hosted by the Federal Trade Commission and the Department of Justice.

Today, Texas Discount Realty has agents or affiliates in 8 major Texas real estate markets, and sponsors over 100 licensed real estate agents with its sister company, National Agent Network (www.NationalAgent.net), which Aaron founded as well.

Aaron is also a founding member of The American Real Estate Broker Alliance, AREBA, www.AREBA.org, which is a national alliance of flat-fee real estate brokers formed in 2006 who advocate innovation, free market competition, full disclosure, informed consent and the consumers' right to choose their level of desired brokerage services.

Testimony of

Kimberly Gorsuch-Bradbury
Senior Vice President, Real Estate Networks
LendingTree, LLC

Before the
United States House of Representatives
Housing and Community Opportunity Subcommittee of the
House Financial Services Committee

Prepared for Hearing on

The Changing Real Estate Market

July 25, 2006

Good afternoon, Chairman Ney, Ranking Member Waters, and members of the Subcommittee, my name is Kimberly Gorsuch-Bradbury, and I am Senior Vice President, Real Estate Networks, of LendingTree. We at LendingTree appreciate this opportunity to share our views on the changing real estate market.

In this testimony I would like to first describe our company and then highlight several opportunities and challenges related to providing consumers with choice and competition in purchasing real estate brokerage services.

LendingTree was founded in the late 1990's on the idea of empowering both consumers and lenders. We built a system that harnesses the power of the Internet to give consumers access to a network of lenders, which promotes competition among the lenders to the benefit of the consumer. A borrower looking for a loan can come to our website, fill out one simple form, and get up to four offers, nearly instantaneously, which puts the consumer in a terrific position to compare, shop and negotiate. The exchange that we created provides a valuable service in matching consumers with lenders, so that each party benefits. As of today, our lending exchange has facilitated more than 18 million consumer loan requests and has enabled more than $140 billion in consumer loans.

In 2000, we began to apply a similar approach to real estate brokerage services. Just as we did in lending, we built a system that gives consumers access to a network of real estate brokers, which allows them to comparison shop. This unit now operates under the name RealEstate.com.

At RealEstate.com, we offer choice and competition in the service of consumers. RealEstate.com offers consumers valuable services such as access to home valuation information, home listings, photographs of homes for sale, information about home buying and selling and more. When a consumer is ready to engage a local real estate broker, we connect the consumer with a local broker from our network. When these customers are connected with the local broker, they are more knowledgeable and are more realistic about the type of home they can afford. This is a very efficient method of operating, and RealEstate.com and its partners pass a significant portion of the savings to our customers in the form of valuable rebates. We are proud of the fact that our real estate businesses have provided consumers nearly $60 million in savings since their inception. This type of real estate exchange is also beneficial for brokers on our network, as evidenced by the fact that in a recent survey of our broker network, 84 percent of respondents rated us as a trusted partner, and 79 percent reported that they expect their business to grow over the next twelve months as a result of their relationship with RealEstate.com.

Key Challenges and Opportunities

There are numerous changes underway in the real estate brokerage industry, in part spurred by the advent of the Internet. Services such as RealEstate.com have tremendous potential for creating new business models in the real estate brokerage industry. Based

on a survey conducted by the National Association of Realtors®, 79 percent of buyers – and 82 percent of *first-time* homebuyers - used the Internet to search for their home last year.[1] In the same study, the NAR reported that 24 percent of buyers found their home on the Internet, which was twelve times greater than the percentage that found their home online in 1997.[2] Thus, the Internet empowers consumers to search for homes in a very speedy and cost-efficient manner.

Sellers of properties can benefit from efficiencies afforded by the Internet as well. Sellers can enjoy the increased exposure of their home on sites like RealEstate.com and other sites that display homes available for sale, and sellers can find valuable information about pricing their home using online resources.[3]

These new technologies can also be beneficial to brokers. Based on the NAR survey, 21 percent of buyers found an agent to assist in the search or purchase of a home as a result of their Internet search,[4] and 64 percent of homebuyers searching for a home on the Internet found that "real estate agent contact" was either a somewhat useful or very useful feature of the websites they were viewing.[5] Therefore, the Internet can be a tool for brokers, and especially smaller brokers, to find customers that they otherwise would be unlikely to reach.

We believe that new online technology and business methods are poised to improve the real estate brokerage business. Better information leads to higher quality markets, which is good for brokers, agents and consumers. My experience is that real estate brokers are great innovators, and brokers were the early adopters of the Internet. RE/MAX International, Inc., for example, and Realtor.com have built robust national websites, and real estate websites can provide consumers with rich online mapping, local neighborhood information, photographs and "360 degree home tours."

Although emerging technology is creating efficiencies in the process of buying and selling a home, some have concluded that these efficiencies are not being fully realized. The Committee is well aware of this fact. The August 2005 Report of the Government Accountability Office,[6] requested by Committee Chairman Oxley and Ranking Member Frank, discusses the unrealized efficiencies and savings made possible by the Internet.

I do not intend to repeat all of the observations of the GAO, but there are two issues LendingTree has encountered that I would like to discuss before this Subcommittee. First, many states require brokers to provide, and charge for, a full range of services to consumers, rather than allow consumers to choose what services they actually need. Second, a number of states prevent brokers from rebating any savings to consumers.

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[1] *2005 National Association of Realtors® Profile of Home Buyers and Sellers (the "NAR 2005 Profile").*
[2] *NAR 2005 Profile.*
[3] United States Government Accountability Office, Report to the Committee on Financial Services, House of Representatives, *"Real Estate Brokerage: Factors That May Affect Price Competition" (the "GAO Report").*
[4] *NAR 2005 Profile.*
[5] *NAR 2005 Profile.*
[6] The GAO Report.

Both of these measures harm consumers by preventing choice and competition. Let me talk to these issues in turn.

Required Bundling of Services

We at LendingTree believe that today's customer is extremely savvy and comfortable making his or her own decision. While consumers are typically happy with their real estate agent, as evidenced by the fact that 66 percent of sellers and 63 percent of buyers reported that they would definitely use their agent again or recommend their agent to others, only 7 percent of sellers reported that they wanted the agent to help with paperwork, inspections and preparing for settlement, and only 10 percent of buyers reported that they wanted help with price negotiations and paperwork.[7]

We believe that our consumers expect to be able to choose the particular real estate brokerage services they want and need. Many home sellers, for example, might want to purchase only listing services, a yard sign, and maybe one open house from the broker. The seller might opt to perform other sales functions him or herself. Similarly, because 24 percent of home buyers found their home online,[8] they may not need assistance in locating a home, but they may need assistance navigating the home purchase process. This conclusion is supported by the findings that 59 percent of all buyers, and 74 percent of first-time buyers, reported that their real estate agent helped them to understand the process – making this the highest ranked benefit provided by real estate agents to buyers.[9]

However, at least ten states now require real estate brokers to provide a pre-determined bundle of services to their clients.[10] These new measures prohibit consumers from choosing only the real estate brokerage services they want. If the consumer engages a real estate professional, then the consumer is required to accept, and pay for, an entire bundle of services. Obviously this impedes consumer choice and prevents lower-cost alternatives.

We share the concerns of the AEI-Brookings Joint Center for Regulatory Affairs on this subject. Let me quote:

> The argument for maintaining service requirements as a condition for having a license is not persuasive. Licensing exists to ensure a standard of service quality in a given profession, but there is no reason to believe that agents who offer more narrowly tailored services and charge accordingly will do any worse of a job or harm consumers in any way.... In general, consumers can be expected to be willing to pay for different types of services and level of service quality. Some may want an entire bundle that is of very high quality while others may want the bare minimum.... It is

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[7] *NAR 2005 Profile.*
[8] *NAR 2005 Profile.*
[9] *NAR 2005 Profile.*
[10] These states include Alabama, Delaware, Florida, Illinois, Iowa, Michigan, Missouri, Oklahoma, Texas and Utah.

> true that the full service brokerage bundle has prevailed in the market for many years, but it appears to us that more individualized services have become increasingly popular in the wake of soaring housing prices and the emergence of the Internet. Whether or not a la carte-style real estate will catch on more widely remains to be seen, but there is no rationale for preemptively impeding such competition other than to protect the interests of those who feel threatened by it.[11]

In short, we at LendingTree believe in empowering our consumers to choose the services they want and need, and we do not believe state laws should require all consumers to pay for a full range of real estate brokerage services even though some consumers may want something less.

The Laws of Some States Prohibit Rebates

Another significant challenge to innovation comes from state laws that prohibit rebates to consumers in real estate transactions. Eleven states[12] prohibit or limit a real estate broker from passing-on savings in the form of a rebate.

In this regard, in 2005, the U.S. Department of Justice brought suit against the Kentucky Real Estate Commission, which by regulation had banned brokers from passing-on savings to consumers in the form of rebates. In bringing the suit, the Department of Justice asserted that the Kentucky regulation "enabled Brokers to raise, fix, peg, or stabilize the prices and rates at which Brokers are compensated" and that it made it "more difficult for consumers of real estate brokerage services to obtain lower prices for these services."[13] The Kentucky Real Estate Commission ultimately lifted the ban on consumer rebates and Kentucky consumers are now able to enjoy these savings in the form of rebates.

Yet consumers in other states are still prohibited from enjoying these savings. New Jersey, which has been one of the hottest real estate markets of late, is one such state. Let me give an example of the cost to consumers. Last year, there were approximately 160,000 sales of existing homes in New Jersey, and the average sales price of these homes was approximately $365,000.[14] At that sales price, consumers using our service could have each received a rebate of $1,250. Therefore, the potential savings to New Jersey consumers is enormous, nearly $200 million last year alone. Yet the State of New Jersey prohibits such consumer benefits.

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[11] *Bringing More Competition to Real Estate Brokerage, R. Hahn, R. Litan & J. Gurman, AEI-Brookings Joint Center for Regulatory Studies (Nov. 2005).*

[12] The following states prohibit rebates altogether: Alaska, Iowa, Kansas, Louisiana, Mississippi, Missouri, New Jersey and Oklahoma. In addition, Alabama, Oregon and Tennessee place limits on rebates by requiring that they only be given at closing.

[13] *Complaint, United States of America v. Kentucky Real Estate Commission, Civil Action No., 3:05CV188-H, filed March 31, 2005.*

[14] *New Jersey Home Sales Report, New Jersey Association of Realtors®, Fourth Quarter 2005, Prepared by National Association of Realtors® (the "New Jersey Home Sales Report").*

We at LendingTree see little legitimate justification for a prohibition on rebates. The vast majority of states allow rebates in real estate transactions, and we are not aware of any adverse consumer consequences from providing rebates. Instead, our customers confirm overwhelmingly that they want the ability to receive rebates in real estate transactions.

Conclusion

We agree with Chairman Oxley in his statement to the Committee last year, when he said:

> Let's forget about fighting among the various lobbyists and remember what's really important, and that is how can buyers and sellers get the best real estate services at the lowest possible prices? Competition is always the answer to that basic question, choice is always the answer to that basic question. There is not enough competition in these real estate markets, and that is what we seek to remedy.[15]

Thank you for the privilege of testifying today, and I will be happy to answer any questions you may have.

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[15] Opening Statement, Chairman Michael G. Oxley, Committee on Financial Services, June 15, 2005, *"Protecting Consumers and Promoting Competition in Real Estate Services."*

The Subcommittee on Housing and Community Opportunity
The Changing Real Estate Market
Redfin Testimony

Ladies & Gentlemen:
Thank you for inviting me to testify. It is an honor to be here. I am Glenn Kelman, President & CEO of Redfin Corporation, the first online real estate brokerage in the United States.

Just so you know where I stand, I am here today to ask that Congress act:

- to ensure that all licensed brokers get fair and equal access to the multiple listing services used to share listings between brokerages;
- to empower the Federal Trade Commission to monitor and preempt states' minimum-service laws, which are used to protect realtors and limit consumer choice;
- to allow commissions to be refunded at closing, so buyers can take the portion of their own money reserved for commissions and apply it to their down-payment; and
- to ensure that consumers are able to access directly all the relevant information stored by multiple listing services about a property, so they don't have to rely on agents.

In 2004, Redfin was the first company to display real estate listings on an online map like MapQuest. In February 2006, Redfin launched the first service to let people buy a home online. Customers find homes to tour via our Web site, draft an offer using our online forms, and rely on us to handle negotiations. The average customer gets better, data-driven service, and saves $10,000 because we refund two-thirds of the standard brokerage commission.

As the first online brokerage with national aspirations, we believe we bring a unique perspective to the subcommittee on how the industry today is stifling Internet innovations. Discount agents have long offered customers the same in-person service as traditional agents at a marginally lower price. But an online brokerage that doesn't employ field agents is a radically different service at a radically different price, and it has engendered resistance on what seems to be a new scale.

Competing agents have threatened us with violence, intimidated our customers and tried to block their offers. Sixty-three percent of our customers report meddling from other agents, who in the absence of clear consumer law make up grade-school legal mumbo-jumbo to scare our clients. One customer was so upset by an unsolicited hostile call from a competing agent that he sat on the kitchen floor and cried. Many agents have told our clients that the sellers would never see their offer because it came from Redfin.

We expected a competitive, even combative, reception from realtors, but the impunity of those in this self-regulated industry has still come as a shock. We've drafted complaints to state real estate commissions, only to learn that the commissioners worked for the brokerages we were complaining about. It has been like a Western where the cowboy promises to report the desperadoes to the sheriff, only to have the desperadoes whip out their badges.

We posted the photos of agents hostile to our customers on a Web site we called the Hall of Shame, only to have agents immediately apply to appear there. Perhaps no one is surprised that realtors would damage their own clients' interests by discouraging Redfin offers, but that agents are proud of this fact makes it plain this industry has failed to regulate itself.

It's a wonder with all the blackballing that anyone has been able to buy a home through Redfin. And yet many have. We've represented clients on hundreds of transactions. Our customer satisfaction rate is 98%. We've been featured in The New York Times, the Wall Street Journal, Business Week, and National Public Radio.

Our business is based on a startling asymmetry. We discovered in our research that while agents view their jobs as identifying the best home for their customers to tour, 63% of real estate consumers view the agent's most important function as writing a winning offer and closing the deal.

Moreover, a California Association of Realtors report finds that Internet consumers engage an agent for two weeks rather than the traditional seven before finding a home, but pay agents the same amount. By focusing on the offer paperwork for the Internet-savvy consumer we can deliver better service at lower cost.

Whereas the average agent completes seven transactions per year, a Redfin agent completes twice that each month. Redfin sales have been doubling month over month. We will have saved consumers nearly $1 million in commissions in our first six months as a brokerage.

This is the way much of the industry will one day work, and in the dwindling after-hours of industry cocktail parties and trade shows you would be hard-pressed to find any realtor who could deny it. An April Wall Street Journal survey found that over 70% of consumers feel their agents are overpaid. According to our own surveys, over 50% of our Web site users clearly prefer an online home-buying service, but less than 1% of the home-buyers who visit our site end up making an offer through Redfin.

We shouldn't sit here wondering what happened to the other 49%. It seems indisputable that national laws to protect consumers from intimidation would embolden consumers to choose the service they want and make the industry more efficient.

This brings us to the second part of our story. If Redfin is so great, why hasn't there been a Redfin before? Realtors would have you believe that, alone in the American economy, the economics of real estate have been unaffected by the Internet because real estate consumers don't want e-commerce. Our own fund-raising efforts tell a different story: that the rules of real estate are designed to preclude competition from an online brokerage.

I came to Redfin's financing effort as an experienced entrepreneur, having co-founded Plumtree Software in 1997 and worked as an executive at the company through six financings and a 2002 public offering. Because Plumtree had become a profitable, global business, many investors told me I could raise money for almost any venture.

Financing Redfin should have been especially easy. Our management team is experienced, our technology is unique, and the real estate market is large, fragmented and inefficient. Add to that that venture capitalists are investing money these days like it's 1999.

But Redfin nearly got shut out. Investors who put $6 million into a Swedish Web site for dressing up virtual celebrity dolls turned us down as too risky. Pro-agent real estate sites such as Zillow easily raised millions because they didn't compete with traditional brokerages.

Time and again we were told that we were competing against an industry that ran the multiple listing services used to share inventory, and that without access to the listing service for each market, our business would die. The reason there's no national E-Trade for real estate is that everyone in Silicon Valley knows the realtors control the listing services.

To help us understand what we were up against, one venture capitalist introduced us to the CEO of eRealty, an online start-up that had faltered in 2000 where we hoped to succeed.

He said that every time he applied to enter a new market, the local multiple listing service used to share listings called the National Association of Realtors to find a way to gum up his application. His business withered waiting for lawyers to clear the local rules and regulations of each market he entered.

But the eRealty CEO also offered us hope: a 2005 Department of Justice lawsuit against the Kentucky Real Estate Commission for supporting anti-competitive practices had tempered the realtors' tactics. It was that lawsuit and other federal legal action that became the rationale for our eventual investors to believe that anti-competitive real estate rules would ease enough for an Internet startup to take root.

We have since seen this work firsthand. Whenever a multiple listing service challenges our business model, we ask that the challenge be made in writing, and never hear about the issue again. We believe that only the possibility of further federal action has maintained this uneasy truce.

But we fear that if Congress does not enact a law codifying the Department of Justice recommendations, the Department of Justice will at some point shift its attention elsewhere, and real estate innovators like Redfin will again be in jeopardy of losing access to listings.

The realtor industry's rhetoric opposing government action is hogwash. One reason the industry exists as it does today is because of government action at the state level, with minimum-service laws protecting traditional realtors from online brokerages in at least a dozen states. The paternalistic rationale behind these rules, that consumers are incapable of making their own choices, is inimical to free markets.

And the variations in local regulations are themselves already a formidable deterrent to new businesses. We run Redfin on a shoestring, with no public relations agency, lobbyists or administrative assistants, but today we employ five law firms, in large part to keep pace with differences in MLS rules and state minimum service laws. We will never compete in some states unless their minimum-service laws are overturned.

Minimum service laws and MLS rules stifle innovation not just in business models, but in how Web share information with consumers. Realtors want consumers to get real estate information from realtors, not Web sites. You can find out more on the Internet about an eBay beanie baby than you can about a million-dollar home.

We have been told by multiple listing services that we can't publish commentary on a listing, that we can't offer customers the ability to search for homes by time on the market, that we can't display for-sale-by-owner properties on the same page as broker-listed properties, that we can't display key information about a property without first requiring a cumbersome registration process.

MLS rules like this are a thousand tiny shackles on Internet businesses, which are especially sensitive to the free flow of information. The premises of any Internet business are the laws of free markets taken to their extreme: radical openness and instant gratification. Amazon publishes scathing customer reviews of its best-selling products. Google provides immediate service without requiring registration. Consumers love it.

But imagine if Amazon got legal threats when it published a ho-hum book review, or if Google required its customers to call an agent to access certain types of information. The Internet would be a gigantic marketing brochure rather than a useful consumer tool, and it would be a less powerful engine for economic growth. But this is exactly what is happening in online real estate today.

What is needed is a simple set of laws to allow consumers to pursue the best deal without fear of realtor retribution, and to protect consumers' access to data, so they can make free, informed choices. Realtors who oppose this make four arguments:

- **The industry is competitive**: this is like saying a football game is competitive when the score always stays the same. Competition is meaningless without price competition.
- **The industry consists of small businesses**: the size of the multiple listing service, not of the brokerage, is what matters. Each listing service enjoys a virtual monopoly in its area, and every mom-and-pop brokerage has little choice but to join this monopoly.
- **Consumers like real estate agents**: as anyone who has voted for Castro will tell you, consumers express their preferences best when they are given a choice.
- **American real estate is a well-functioning market**: the market functions well only for customers willing to tolerate partial access to information and high commissions.

Redfin thus asks that Congress act to empower the consumer, not the realtor, by giving brokerages of all types fair and equal access to multiple listing services, and empowering the Federal Trade Commission to regulate states' minimum-service and anti-rebate laws.

This very simple law would make the real estate industry far more competitive, saving the average family $10,000 or more on every transaction. We can think of no other action that Congress could take this year that would save more money for the American middle class.

Testimony of

Geoffrey D. Lewis

On Behalf of

RE/MAX International, Inc.

Before the

Subcommittee on Housing and Community Opportunity

Committee on Financial Services

United States House of Representatives

July 25, 2006

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Mr. Chairman, my name is Geoff Lewis. I am Senior Vice President/Chief Legal Officer of RE/MAX International, Inc. Thank you for allowing me to testify today on behalf of RE/MAX. More than 90,000 independent RE/MAX real estate agents in the United States sell more homes in this country than agents affiliated with any other brand. There are 4,100 RE/MAX brokerage offices in the United States. Notwithstanding this, RE/MAX International, Inc. is not engaged in the brokerage business. We are in the business of selling franchises, just like other national real estate brokerage franchising companies such as Coldwell Banker, Century 21, Prudential Real Estate and Help-U-Sell, to name a few.

All but two of the 4,100 RE/MAX franchises are independently owned and operated. I have come to speak on behalf of RE/MAX International. RE/MAX International considers itself to be extremely knowledgeable about the residential real estate brokerage business, but neither RE/MAX International nor I claim to speak on behalf of our independent brokers or agents.

Those who decry the lack of competition in the real estate industry would be prudent to follow the common sense advice applicable to every weather man. Before you broadcast current weather conditions, stick your head out the window to make sure you see what is really going on. In today's real estate market, consumers are bombarded with choices via the Internet and in the physical world. Home sellers and buyers can choose between full service, limited service, discount commissions, flat fees, rebates and other incentives.

RE/MAX knows about competition in the industry. When Dave and Gail Liniger started RE/MAX 33 years ago, they had a revolutionary new business model: let the agent keep all of his or her commissions and give them the freedom to run their business as they see fit. This came at a time when the traditional industry kept up to 50 percent of the agents' commissions and exercised tight control over how they operated.

RE/MAX knows about breaking into an industry. We know about the difficulty of overcoming an established business model. But today, more real estate is sold under the RE/MAX name than any other brand. How did RE/MAX overcome our competition and reach the pinnacle of our industry? We did it because we had a better business model

and we made it successful the old-fashioned American way, through hard work and customer service.

The marketplace recognized the value of the RE/MAX system and rewarded it. It took over ten years for RE/MAX to establish its business model. RE/MAX recognizes that the Internet has accelerated the pace of change, but new business models still take time to succeed. Those businesses who complain their success has been improperly hindered because they have not achieved instant success suffer more from impatience than they do from any alleged unfair efforts to thwart them.

Today, as always, RE/MAX welcomes competition from any legitimate business that can stand on its own merits and its own resources. RE/MAX believes there is no need for Federal Government legal or regulatory intervention in the residential real estate brokerage industry. There are virtually no barriers to entry into our industry, the Internet is enabling new business models and there is no evidence that free market forces are being impeded in any way.

COMMISSION RATES

It is often overlooked that full service agents work on a success basis. If a seller does not sell his house, he pays nothing and the agent gets a 0% commission despite the time and money invested. If a buyer does not buy a house, the agent gets a 0% commission. When an agent does earn a commission, it often comes several months after he has expended his time and money with no guarantee of closing the sale. Realtors drill a lot of dry wells.

In cases where successful transactions are completed, full-service commission rates have been trending down over the past decade. They have gone from 6.1 percent in 1991 to the current average rate of 5.1 percent. That is not a one percent decrease, it is a 16% decrease. How many other industries have experienced that level of decrease in pricing over the same period of time?

With the rapid rise in housing prices recently, many have questioned why commission rates have not come down further. The answer is that agent income has not increased correspondingly. The median gross income for real estate professionals in 2004, as reported by the National Association of Realtors (NAR) was $49,000.[1] That is without healthcare and retirement benefits which are paid for by the agent. That is also before the agent pays for advertising, website hosting, gasoline and other expenses. Over the past two years, agent gross income is down 6 percent.[2] On a net basis, average

[1] The median gross income for sales agents was $37,600 and for brokers it was $52,800. National Association of Realtors. 17 August 2005, Press Release. "NAR Member Survey Shows Income Disparity With Rising Ranks."

[2] National Association of Realtors. 17 August 2005, Press Release. "NAR Member Survey Shows Income Disparity With Rising Ranks."

income is lower than average school teachers' salaries.[3] School teachers receive healthcare and retirement benefits. Agents do not. School teachers get a three month summer vacation. Agents work 24/7, 365 days per year.

The lack of increase in agent income despite rising housing prices is due to the large increase in the number of agents entering the industry. NAR reported a 26% increase in membership over the past two years and a 40% increase over the past five years.[4] In 1995, NAR reported having 1.2 million members. The Association of Real Estate License Law Officials (ARELLO) reported that there are 2.6 million licensed agents in the U.S. (that is one for every 115 people). These agents are being drawn in by the increase in housing prices. Many of these agents are coming from the downsizing that has occurred in corporate America over the past decade. Many of these agents are homemakers working part-time.

As a result of the increase in the number of agents searching for transactions, the average number of transactions per agent is decreasing. That puts resistance on the ability of commissions to continue to come down further. Nonetheless, as noted above, commission rates have decreased significantly.

INTERNET COMPANIES AND NEW BUSINESS MODELS

There is little difference between traditional companies and online companies in terms of Internet use. Traditional companies all embraced the Internet years ago and have a significant online presence. Virtually every broker and most agents have a web site that allows consumers to search all MLS listings in their market.

It is easy to say the Internet has brought down costs in other industries so it should do the same for real estate, but not all industries are the same. The Internet has not decreased prices for doctors, accountants or attorney services, newspaper subscription rates, landscaping contractors or a myriad of other businesses. Nor has it done so for government services. Not every business is going to be impacted by the Internet the same as airline ticket vendors, stockbrokers or book sellers. After all, these industries are selling commodities. Real estate agents are selling unique properties and providing individualized services.

One of the most heralded Internet start-ups in our industry is Zillow.com, a web site that provides a free home valuation service. Zillow was founded by Rich Barton who earlier revolutionized the travel industry with Expedia.com. Mr. Barton raised $32 million in start-up capital for Zillow. This indicates there is plenty of financing available for new business models that wish to challenge the established industry. Nonetheless, Mr. Barton was quoted in *The Wall Street Journal* as saying: "Zillow faces the risk of unrealistically high expectations, as change will come much more slowly in real estate

[3] American Federation of Teachers. 15 July 2004, Press Release. "Teacher Salaries Remain Stagnant but Health Insurance Costs Soar AFT Releases Annual State-by-State Teacher Salary Survey."
[4] National Association of Realtors. 17 August 2005, Press Release.

than it did in travel and other businesses such as stock trading. That is largely because home sales typically involve lots of personalized service from agents who know their local markets and how to solve the many problems that can crop up before a transaction is completed. It isn't simply an order-taking business."[5]

The Internet has enabled hundreds of real estate companies with new business models. These companies offer rebates, flat fee services and discounted commissions. A quick search will reveal any number of national and regional companies in virtually every market. New companies appear on a daily basis. Internet giants Google, Yahoo and eBay have all jumped into the business of allowing home sellers to list their homes in online classified ads. Media titans including Tribune Company, The Washington Post Company, Belo Corporation and Gannett Company recently formed an online classified service that has a primary focus on real estate. In addition, Tribune Company recently bought HomeGain, an Internet start-up that displays property listings and locates agents. Another media heavyweight, Barry Diller's Interactive Corp., owns LendingTree, a popular web site that offers significant rebates to home buyers and sellers who locate a realtor by using the site.

It should be noted that in the last few years, we have seen one of the "hottest" real estate markets in history. In parts of the country, sellers have been able to attract multiple offers the instant their home goes on the market. Some sellers receive offers above their asking price. It is not surprising in these markets that many sellers have been tempted to avoid full service brokers in favor of limited service providers or discount brokers. It is these same conditions that have caused the explosion in these new business models. Since the beginning of this year, the market has returned to normal levels: inventories and time-on-market have increased considerably over last year.

MULTIPLE LISTING SERVICES (MLS)

The MLS was designed as a B2B vehicle, not a business-to-consumer vehicle. It was designed as a mutual sharing of information by industry peers to facilitate the sale of and search for properties. The idea was that cooperating brokers and agents would work to earn their own customers using their own assets and then share listings via the MLS. The concept is simple: you earn a customer, you get to use the MLS with the customer. The concept is not: you get free access to the MLS and then you use it to advertise the properties of your competitors in order to attract customers.

The MLS is a cooperative among brokers. A broker is licensed under state law. A broker, by law, takes on agency and fiduciary duties towards a client to represent the client's best interests through every aspect of the home sale transaction. A business that merely seeks to sell a client a yard sign and enter a property into the MLS is not acting as a broker. A business that merely seeks to attract prospective home buyers and sellers to its Internet site in order to sell the prospect's name to a real broker in exchange for a

[5] The Wall Street Journal, Jan. 13, 2006.

referral fee is not itself acting as a broker. Businesses that are not truly providing brokerage services do not have a right to participate in the MLS which is established by and for brokers.

Third parties who are not acting as brokers do not have an absolute right to display the listings of legitimate brokers in order to advertise them in an effort to attract customers. The MLS is not a public utility. Dave Liniger, Founder and Chairman of RE/MAX, likens these companies to the guy who shows up at a potluck dinner bringing only a fork. These interlopers are essentially asking for a free ride or subsidy from the established industry in order to jump start their dot com business models overnight.

For comparison purposes, look at the automotive industry. When you sell a car, you have a number of options. One is to simply trade it in to the dealer when you buy a new car. Another is to try to achieve a better price by selling it yourself using the newspaper. Another tactic is to park the vehicle in a high-traffic area with a for sale sign in the window. But no one should presume to have the right to park the vehicle on the lot of one of the dealers on auto row with a for-sale-by-owner sign in the window. That lot is proprietary to the dealer, just as the MLS is proprietary to brokers.

Economic theory explains that the result of allowing free riders is that members of a system who are making legitimate contributions may decide to withdraw if they perceive they are not receiving their fair share of benefit. To require the MLS to open up to anybody could jeopardize the viability of a system that has been very beneficial to consumers.

In any event, the MLS no longer has the exclusivity it once did as the source for real estate listings. The Internet has enabled many new websites that allow brokers or individual home sellers to upload property information for free. These are essentially alternatives to the MLS. Since almost 80% of new home buyers use the internet (an increase from two percent in 1995!)[6], home sellers and new business model real estate companies now have a tremendous number of avenues through which they can reach consumers.

LIMITED SERVICE REQUIREMENTS

All 50 states require real estate professionals to be licensed. In order to obtain a license, would-be professionals must become knowledgeable about the intricacies of real estate transactions, including agency, fiduciary obligations, sales contracts, escrow, title, appraisal, survey, property disclosure, environmental hazards, Megan's Law, mortgages, deeds of trust and a number of other subjects.

RE/MAX International has never lobbied for or against minimum service requirements. We feel this is a matter that should be left to the state legislature. Since the purchase or sale of a home is a transaction involving the most valuable asset most

[6] National Association of Realtors. 17 January 2006, Press Release

people own, a state legislature may legitimately determine that the fiduciary duty and agency responsibility of a broker or agent requires a minimum level of representation of the client.

An alternative to minimum service requirements would be to require limited service providers to make a thorough disclosure to their client of all the steps involved in a real estate transaction and identify the aspects of the transaction where the client will be left on their own. Mr. Aaron Farmer of Texas Discount Realty has been a vocal critic of minimum service requirements. At an FTC/DOJ workshop last Fall, Mr. Farmer stated that a disclosure requirement was an acceptable solution. [7] While some consumers may be sophisticated enough to represent themselves in some or all of the steps of a transaction, most are not. Mr. Farmer of Texas Discount Realty stated in that same workshop that because of the importance and complexity of the home sale process, not more than 10 to 15 percent of consumers should use a limited service company.[8]

RESTRICTIONS ON REBATES

Some states have had laws restricting the ability of a broker to provide a customer with a rebate. RE/MAX believes that brokers and agents should be allowed the ability to freely negotiate transaction service pricing with their clients. The RE/MAX business model empowers the agent to do this.

BANKS AND REAL ESTATE BROKERAGE

Given the increased competition in our industry, the new Internet business models and declining commission rates, RE/MAX wonders why banks would want to get into real estate brokerage? Residential real estate brokerage requires a high level of individual service. It has not been our experience that banks are good at this. When RE/MAX entered the Canadian market in 1980, all of the Canadian banks had real estate brokerage operations and dominated with 60% of the market. Today, RE/MAX agents are involved in 50% of the home sales in Canada and the banks are no longer major players in the market. This provides good reason to question whether it is in the best interest of the U.S. banking system to allow banks to expand into real estate services. Nonetheless, RE/MAX knows it can compete against banks and neither opposes nor supports changes to federal laws on this subject.

[7] Competition Policy and the Real Estate Industry – A Public Workship hosted by the Federal Trade Commission and the Department of Justice, Oct. 25, 2005. Official Transcript, p. 115.
[8] *Id.* at p. 109.

Department of Justice

STATEMENT

OF

J. BRUCE MCDONALD
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY
COMMITTEE ON FINANCIAL SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

COMPETITION IN REAL ESTATE BROKERAGE SERVICES

PRESENTED ON

JULY 25, 2006

Mr. Chairman and Members of the Subcommittee, I am pleased to be here on behalf of the Department of Justice Antitrust Division to discuss the competitive implications of developments taking place in the real estate brokerage marketplace.

With the number of U.S. homes sold annually now exceeding eight million, real estate brokerage fees affect millions of American consumers each year. The Government Accountability Office cited figures in its August 2005 Report on Real Estate Brokerage showing that consumers paid about $61 billion in real estate brokerage fees in 2004. When this important industry does not function competitively, it can be very expensive for home buyers and sellers.

The Department of Justice is pursuing enforcement actions to protect competition and consumers in this industry against antitrust violations. And we are working to educate state governments about the competitive effects of rules governing brokerage services so that state officials are aware of any negative impact on consumers.

New Technology and Innovation in Services

New technology is one of the keys to more competitive real estate markets. In industries throughout our economy, the Internet has brought extraordinary new opportunities for increased competition, giving consumers better access to information about products and services and lowering costs and prices. In recent years, web-based business models have emerged in markets such as travel and lodging reservations, stock and insurance purchases, and book and music sales, to name a few. New competition from these new business models has been good for consumers, resulting in increased choice, lower prices, and savings in personal time and effort.

New business models can offer the same kinds of benefits for buyers and sellers of real estate, in competition with traditional "brick and mortar" office brokerages in which customers interact only through individual brokers. For example, some brokers have begun providing

information on homes for sale to their customers through the Internet. Using the Internet can allow web-savvy buyers to become educated about neighborhoods and examine suitable houses more efficiently than using a traditional broker. Home buyers can research neighborhoods and houses working on their personal computers, on their own schedule, and at their own pace, before spending time with an individual broker. This saves time brokers would otherwise spend searching through home listings or showing homes the buyer has not had the chance to explore more fully in advance.

Savings in broker time reduces costs for brokerages, which could translate into lower fees for brokerage services paid by consumers. Thus, by taking charge of some of the services traditionally provided by an individual broker, home buyers can reduce the number of services they buy and should expect to pay less in broker fees.

In real estate, the cost of providing brokerage services appears to have decreased. But consumers are paying more. As the U.S. home sale price has climbed, the dollar amount paid for brokerage services has climbed right alongside it, because commission percentages have remained high. In fact, from 2000 to 2004, fees paid for brokerage services grew by roughly 50 percent, to over $60 billion in 2004.

Joint DOJ/FTC Workshop on Real Estate Services

The Antitrust Division is working to build on our understanding of real estate markets, and why they may not be behaving as efficiently as they could, to aid our enforcement and competition advocacy efforts. Last October, we and the Federal Trade Commission held a joint workshop on competition issues in real estate brokerage. We invited state officials, economists, and other experts and market participants, including representatives of traditional brokers and brokers with

Internet-based and other innovative business models.

The participants publicly debated the relevant issues, covering topics such as the structure of real estate transactions, use of multiple listing services, emergence of new and innovative business models, government and private restraints on real estate competition, minimum-service laws, legal prohibitions on offering rebates and other inducements to consumers, and empirical evidence on competition in the real estate industry.[1] The Division and FTC continue to study the information presented during the workshop, and plan to issue a report later this year.

The Antitrust Division's Competition Advocacy

One thing the workshop participants confirmed was that, as in other industries, laws and regulations in real estate brokerage can impede competition from innovative business models. Our experience in other industries has highlighted the negative effects government restraints can have on markets. Therefore, where it comes to our attention that significantly anticompetitive state laws or regulations are under consideration, we approach state officials to advocate that they take into account the benefits to consumers of a more competitive approach. Our experience analyzing competitive practices in a wide variety of markets often is useful in understanding the effects that state laws or regulations may have on competition and consumers.

The Antitrust Division has had a number of opportunities to offer states our pro-competition perspective on proposed measures affecting real estate services. For example, over the last decade, some states considered expanding the definition of "practice of law" so as to prevent non-lawyers from providing routine real estate closing services. Asked for our view, we

[1] The transcript is available at http://www.usdoj.gov/atr/public/workshops/rew_transcript.pdf.

have advised numerous state legislatures, courts, and bar associations as to the effects on consumers of prohibiting non-lawyers from providing these services.

Proponents of rules that would require hiring lawyers for residential real estate closings argue that the lawyers are there to protect home buyers and sellers. But comparison studies find no greater incidence of consumer complaints in states that have allowed non-lawyers to provide these routine services, suggesting legal training is not needed to provide these services competently and reliably. Further, the facts show consumers benefit when non-lawyers are allowed into this market. Non-lawyers typically charge lower fees, and where lawyers must compete with brokers and others, the lawyers also charge less.

In more recent years, state authorities have been urged by some to adopt so-called "minimum services" rules, which would require that real estate brokers provide a certain minimum package of services. The traditional broker model provides virtually all nonlegal services associated with a home sale transaction, including those related to marketing, negotiating, and closing, in exchange for the broker's percentage commission. Some consumers prefer to purchase fewer services, handling certain aspects themselves and paying less to brokers. In response to this consumer demand, new broker business models offer smaller packages of broker services, often on a menu basis, in exchange for a smaller total fee. Where this consumer choice is allowed, home sellers and buyers have been able to save thousands of dollars on individual home sales.

Some brokers are resisting these developments, encouraging their state legislatures, regulators, or local real estate boards to impose restrictions that prevent any broker from offering less than a specified list of the "minimum services." This is portrayed as protecting consumers

from unwittingly agreeing to substandard service. But we have not found evidence of consumer confusion, so it appears that the effect of these restrictions is not to protect consumers, but to interfere with their freedom to choose, and pay for, only the services they want.

Over the last few years, the Antitrust Division, along with the FTC, has advised a number of states on the competitive implications of minimum service proposals. Last year, for example, we wrote to the Oklahoma Legislature about a proposed bill establishing a minimum services rule. After considering our comments and others', the Legislature amended the proposal to retain more room for consumer choice.

Similarly, the Virginia Legislature took a more targeted approach to assertions of possible consumer confusion with limited brokerage service offerings. Their legislation, signed into law in April, only requires that brokers offering more limited services disclose in writing what services will and will not be provided. This leaves brokers free to choose which services to offer and leaves home buyers and sellers free to choose which services to purchase.

Just two weeks ago, the New Mexico Real Estate Commission announced it was reconsidering some of its restrictive rules in light of concerns we had raised.

In other states, although not all states, with which we have shared our assessment, officials also have responded favorably, with results that benefit consumers.

The Antitrust Division recognizes and respects that state legislatures ultimately decide whether to adopt such restrictive measures. We believe state officials and their constituents benefit when these government officials have more information and can better consider the benefits to consumers from unrestricted competition.

Antitrust Division Enforcement Actions

Like government restrictions on competition, restraints imposed by market participants can harm competition and consumers, and of course such private conduct is fully subject to the antitrust laws. The Antitrust Division recently has brought two enforcement actions against restrictive real estate brokerage rules that violated Section 1 of the Sherman Act.

In March 2005, we filed a lawsuit against the Kentucky Real Estate Commission, which had imposed regulations prohibiting brokers from giving clients rebates on their commissions. There was no procompetitive justification for this rule, an obvious restriction on price competition. Indeed, the brokers themselves recognized the rule had just the effect they desired: that it was "preventing the outbreak of a bidding war. It was preventing consumers from demanding things that would reduce broker profits."

The Kentucky Real Estate Commission settled the case under a consent decree that permits brokers to offer rebates. Since then, real estate commissions in West Virginia and South Dakota likewise have decided to rescind regulatory bans on rebates, without the need for any enforcement action.

In September, the Division filed an antitrust action against the National Association of Realtors trade association (NAR), which had adopted nationwide rules that limit competition by real estate brokers using innovative business models and the Internet to offer better services to their customers.

The NAR rules, which apply to all of NAR's local multiple listings services (MLS), discriminate against brokers that use the Internet to communicate to their customers the listing information about houses for sale in their locality. NAR's so-called "opt out" rules allow

traditional brokers to withhold their listings from the websites of these web-based brokers. There is no comparable restriction on brokers that communicate with customers in person, over the telephone, or otherwise. The opt-out restrictions prevent brokers using the Internet from providing to customers a full picture of the houses available in the community. The NAR rules undercut competition from this innovative business model, discourage discounting, and limit consumer choice.

NAR's original opt-out rule allowed traditional brokers to single out individual web-based brokers for this discriminatory treatment. On the morning the U.S. lawsuit was filed, NAR announced a revised rule, under which traditional brokers can elect a "blanket opt out" and withhold their listings from all broker websites, but cannot choose to withhold listings only from selected web-based brokers. However, this revised rule specifically exempts from a blanket opt out NAR's own official website, Realtor.com; so in practice the opt-out rule targets only the web-based brokers. In our view, neither version of the rule has any procompetitive merit, and both violate the antitrust laws.

Also about the same time as we filed our lawsuit, NAR adopted a new, more restrictive MLS membership rule that excludes brokers that do not provide certain services to their customers. The membership rule change applies to new broker business models in which a brokerage may cooperate with other brokers to separately provide complementary services to common customers. Like the opt-out rule, the new membership rule restricts competition from non-traditional brokerages and, in our view, violates the antitrust laws.

The NAR lawsuit is pending in U.S. district court in Chicago.

Conclusion

Home ownership is a cornerstone of the "American dream." Purchasing a home is the largest financial decision made by most families. But home sellers and home buyers are harmed when government or private restrictions on real estate broker competition prevent brokers from offering innovative services or adopting new, cost-saving practices. Therefore, the Antitrust Division will continue to use both law enforcement and competition advocacy tools to protect competition and consumers in real estate markets.

Thank you for the opportunity to testify. I would be happy to answer any questions.

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

before the

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY
U.S. HOUSE OF REPRESENTATIVES

on

COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY

July 25, 2006

Chairman Ney, Ranking Member Waters, and members of the Committee, I am Maureen Ohlhausen, Director of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning. I am pleased to present the Commission's testimony on protecting the interests of consumers and competition in the real estate brokerage industry.[1] New technologies have given rise to alternative brokerage models that offer a real promise of greater competition (and greater savings) for consumers, and we are committed to using our enforcement, advocacy, and research capabilities to protect the interests of consumers in this important market.

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] The FTC has consistently used four primary tools to carry out our Congressional mandate of ensuring that markets remain competitive. First, the Commission enforces the antitrust laws against those who engage in anticompetitive conduct. Second, the Agency uses its expertise in competition law and economics to provide state and federal policy makers with analysis of the likely

[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any Commissioner.

[2] Federal Trade Commission Act, 15 U.S.C. § 45.

effects on consumers of proposed laws and regulations. Third, the FTC conducts research to increase our knowledge of issues affecting competition and consumers. Finally, drawing on experience from enforcement, advocacy, and research, through reports and speeches, the Agency seeks to educate the public about important issues that affect competition and consumer welfare.

The FTC has a long history of bringing these tools to bear on issues relating to competition in the real estate industry. Since the 1980s, the Commission has actively investigated and challenged anticompetitive practices in the industry, including efforts by private associations of brokers to disadvantage brokers who use non-traditional listing agreements.[3] The competition advocacy program has addressed issues related to real estate transactions, such as laws that restrict non-attorneys from performing certain aspects of real estate closings[4] and minimum-service brokerage laws, which generally

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[3] *See In the Matter of Austin Board of Realtors*, File No. 0510219 (July 13, 2006), *at* http://www.ftc.gov/os/caselist/0510219/0510219.htm; *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, Docket No. C-3461, 116 F.T.C. 972 (1993), *at* http://www.ftc.gov/bc/realestate/cases/UnitedRealEstateBrokersofRocklandLtd116FTC972.pdf; *In the Matter of American Industrial Real Estate Association*, Docket No. C-3449, 116 F.T.C. 704 (1993), *at* http://www.ftc.gov/bc/realestate/cases/AmericanIndustrialRealEstateAssociationetal116FTC704.pdf; *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (F.T.C., Aug. 2, 1990), *at* http://www.ftc.gov/bc/realestate/cases/PugetSoundMultipleListingAssociation113FTC733.pdf; *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C., Aug. 2, 1990), *at* http://www.ftc.gov/bc/realestate/cases/Bellingham-WhatcomCountyMultipleListingBureau113FTC724.pdf; *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 115 F.T.C. 305 (1990), *at* http://www.ftc.gov/bc/realestate/cases/MetroMLS113FTC305.pdf; *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, Docket No. C-3163, 106 F.T.C. 95 (1985), *at* http://www.ftc.gov/bc/realestate/cases/MultipleListingServiceoftheGreaterMichiganCityAreaInc106FTC95.pdf; *In the Matter of Orange County Board of Realtors, Inc.*, Docket No. C-3162, 106 F.T.C. 88 (1985), *at* http://www.ftc.gov/bc/realestate/cases/OrangeCountyBoardofRealtorsIncetal106FTC88.pdf.

[4] *See* Letter from FTC and the Justice Department to Massachusetts State Representative Paul Kujawski (Oct. 6, 2004); Letter from FTC and the Justice Department to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); Letters from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); Letter from the FTC and the Justice Department to President of the North Carolina State Bar (July 11, 2002); Letter from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); Letter from the FTC and the Justice Department to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Letter from the FTC and the Justice Department to the Supreme Court of Virginia (Jan. 3, 1997); Letter from the FTC and the

require all real estate agents, regardless of their fee structure, to provide most of the services supplied by "traditional" full-service agents. In 1983 the FTC released a comprehensive report on the real estate brokerage industry reflecting years of enforcement activity and industry research.[5] In the next few months, the FTC and the Department of Justice plan to release a report based on information gathered in connection with a real estate workshop we hosted last October with the Department of Justice. The Commission also has launched a consumer information Web page that allows the public to find all of the FTC's work concerning the real estate industry in one place.[6]

This testimony will focus on the FTC's recent experiences with the real estate brokerage industry, including our recent investigations and enforcement actions, our competition advocacy efforts, and what we have learned from the joint workshop last fall and from our other endeavors. This testimony also outlines our plans for our future work in the sector.

I. Changes in the Real Estate Industry

The real estate industry has undergone a number of substantial changes in recent years. Real estate professionals 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 listing information online or using Web sites to gather "lead" information on

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Justice Department to the Virginia State Bar (Sept. 20, 1996). These letters can be found at http://www.ftc.gov/be/advofile.htm. *See also* Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in *Lorrie McMahon v. Advanced Title Services Company of West Virginia,* 607 S.E.2d 519 (W. Va. 2004) (filed May 25, 2004), *at* http://www.ftc.gov/be/V040017.pdf; Brief *Amicus Curiae* of the Federal Trade Commission and the United States of America in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), *at* http://www.ftc.gov/os/2003/07/georgiabrief.pdf.

[5] *See* THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY, FTC STAFF REPORT (1983), *at* http://www.ftc.gov/bc/realestate/workshop/index.htm.

[6] *See* Competition in the Real Estate Market Place, *at* http://www.ftc.gov/bc/realestate/index.htm.

customers who seek real estate services and then selling those leads to real estate professionals. Still other business models use the Internet to match home buyers and sellers.

For example, we are still watching the emergence of alternative ways that brokers are offering real estate sales services to consumers, such as virtual office Web sites ("VOWs"), which offer potential buyers the option of viewing full, detailed multiple listing service ("MLS") information online. VOWs allow consumers to delay contacting a real estate professional until they are ready to buy, and in exchange for performing less work, many of these brokers agree to rebate a portion of their commission to the customer when the transaction closes.

On the selling side, Web sites have emerged that allow sellers to value their homes more easily, and there are numerous online platforms that allow home sellers to market their homes to potential buyers. The increased ease with which home sellers can perform tasks that once were the exclusive domain of brokers likely has been an important factor in the increased demand for innovative, non-traditional brokerage services. In a typical limited-service brokerage package, a home seller might choose to pay a broker only for the service of listing the home in the local MLS and placing advertisements, and choose to handle negotiations and paperwork himself or herself. This model gives the consumer the choice to save potentially thousands of dollars in commissions in exchange for taking on more work.

As alternative brokerage models have grown in prominence, however, the Agency also has become aware of actions by groups of professionals acting through MLSs, industry trade associations, and state regulatory and legislative bodies that are likely to

make it more difficult for these alternative business models to compete against traditional brokers. For example, on July 13, the Commission charged the Austin Board of Realtors ("ABOR"), an association of real estate brokers in the Austin, Texas, metropolitan area, with violating Section 5 of the FTC Act.[7] The FTC's complaint alleged that ABOR's adoption of rules that effectively prevented consumers with non-traditional real estate listing agreements from marketing their listings on important public Web sites discouraged Austin MLS members from entering into such agency listings with their clients, thus impeding one way of providing unbundled brokerage services to consumers and making it more difficult for home sellers to market their homes. The Commission's consent order with ABOR, which settled the charges, prohibits ABOR from adopting or enforcing any policy to deny, restrict, or interfere with the ability of its members to enter into non-traditional listing arrangements. It is important to emphasize that the ABOR enforcement action does not reflect any attempt by the Commission to favor one form of brokerage business model over another. Rather, the Commission's enforcement action, and all of its work in the sector, is intended to protect competition in the market (not competitors) so that consumers can select the services that best meet their needs.

The Commission also engages in substantial competition advocacy work in the industry. Over the past two years, several state legislatures and real estate commissions – at the urging of state Realtor® associations – have considered or adopted minimum-service requirements, which would have the effect of forcing consumers to purchase a state-mandated bundle of real estate brokerage services. Because these measures are likely to harm consumers, the FTC and DOJ have been active in advocating against them.

[7] *See* Austin Board of Realtors, File No. 0510219 (July 13, 2006), *at* http://www.ftc.gov/os/caselist/0510219/0510219.htm.

In 2005, the Agencies sent letters to the Texas Real Estate Commission,[8] the Alabama Senate,[9] Missouri Governor Blunt,[10] and to Michigan state Senator Alan Sanborn[11] providing analysis of the likely competitive effects of proposed minimum-service laws. We concluded that by effectively eliminating many of the most popular packages offered by limited-service brokers, these minimum-service laws would reduce consumer choice and competition among traditional brokerage models and limited-service models. Further, we noted the dearth of evidence that such laws are necessary to protect consumers; throughout our advocacy efforts staff was never presented with evidence of actual consumer harm from the limited-service brokerage model. In the end, Texas, Alabama, and Missouri adopted minimum-service laws, while the Michigan proposal currently appears to have stalled.

II. FTC/DOJ Real Estate Workshop

Critical to the FTC's work in protecting competition and consumer choice is careful analysis of the marketplace, as well as educating the public on its workings. In an effort to further educate ourselves and the public about the substantial changes occurring in the real estate brokerage marketplace, and given consumers' strong interests in competitive real estate brokerage service markets, the FTC and DOJ held a workshop addressing competition policy and the real estate industry on October 26, 2005. This

[8] Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), *at* http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm.

[9] Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), *at* http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf.

[10] Letter from the FTC and the Justice Department to Governor Matt Blunt (May 23, 2005), *at* http://www.ftc.gov/opa/2005/05/mrealestate.htm.

[11] Letter from FTC and Justice Department to Michigan State Sen. Alan Sanborn (Oct. 18, 2005), *at* http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf.

workshop provided a forum to discuss current issues in real estate competition and to assess how they impact consumers.

We learned a great deal from the workshop. Thirteen panelists, including practitioners, economists, and state administrators, provided their various views on competition in the real estate brokerage industry. In addition, the agencies received almost 400 submissions in response to their request for public comment in connection with the workshop. The information received generally falls into one of the four following categories: (1) economic evidence on competition; (2) insufficiently informed consumers; (3) disparagement of innovative business models by traditional brokers; and (4) lack of support for minimum-service laws. We will now discuss each of these categories separately.

A. Economic Evidence on Competition

There appears to be substantial agreement among workshop panelists and commentators, as well as many others who have analyzed the real estate brokerage industry, that the industry's structure exhibits several characteristics that one would expect to find in a competitive market. First, the industry has a large number of brokers and agents offering various types and levels of brokerage services. The U.S. brokerage industry is comprised of approximately 2.53 million real estate licensees. Approximately 98,000 brokerage firms operate over 200,000 local offices across the country. Second, the industry was described as highly fragmented, with low market concentrations and a predominance of relatively small brokerage firms. Third, there is readily available information for consumers regarding houses for sale, as well as the home-buying and

selling process. Finally, there appear to be low barriers to entry, expansion, and exit in the real estate brokerage industry.

Despite these structural features, there is a perception – supported primarily by anecdotal evidence – that commission rates remain at supra-competitive levels. This perceived lack of price competition is based on the observation that commission rates do not appear to vary across factors that would be expected to affect rates, such as geography, the price of the house for sale, the experience level of the real estate broker, and the quality of the service provided by the broker.[12] There is little current empirical evidence, however, that systematically measures the degree to which real estate brokers and agents compete on price (via commission rates). As a result, more study is needed to determine the level of "competitive" commission rates.

There is relatively recent survey data indicating that average commission rates are declining, as well as anecdotal evidence that discount and limited-service brokers are forcing full-service brokers to compete on price. However, the significant increases in property values over the past few years appear to have more than offset such nominal decreases in commission rates. For example, in markets where home prices have nearly doubled in recent years, even a 20 percent reduction in the average commission rate still represents a substantial increase in the actual dollar value of average brokerage fees.

In contrast to the state of price competition, there appears to be a fairly broad consensus that there is vigorous non-price competition in the brokerage industry. Specifically, there is strong competition among brokers and agents for property listings. In commenting on this competition for listings, a workshop panelist and economist

[12] *See, e.g.*, GAO, REAL ESTATE BROKERAGE: FACTORS THAT MAY AFFECT PRICE COMPETITION 10-11 (Aug. 2005).

described what he calls the "tragedy of the commission." In the absence of price competition, the panelist explained that brokers and agents spend the vast majority of their time and efforts competing for property listings. The panelist referred to this type of competition as "prospecting," which includes activities such as door-to-door canvassing, mailings, and calling on home-owners who are attempting to sell their homes without any broker assistance. As housing values increase, relatively fixed commission rates mean increased profit opportunities for agents. Those profits, however, are diluted as an increasing number of agents enter the industry to chase such profit opportunities. The end result, according to the panelist-economist, is industry overcapacity, low agent productivity (that is, a small number of sales per agent), and flat or falling wages for agents, while consumers pay more for brokerage services as the commissions increase proportionately with property values.

B. Consumers Are Insufficiently Informed

The workshop confirmed that the Internet had a significant impact on the real estate brokerage industry. It has expanded the amount of information available to consumers, as well as the number and types of business models that provide brokerage (and related) services. For sellers, it has replaced the yard sign as the most-used marketing tool. For buyers, it has become an indispensable source of information on properties, neighborhoods, and the home-buying process itself.

Even with the significant amount of information available on the Internet, however, the workshop and the public comments filed with the FTC and DOJ indicate a gap in consumer knowledge in several areas. First, there is evidence that consumers of brokerage services are not necessarily aware that commission rates are negotiable.

Although it appears that consumer awareness of this negotiability is increasing, perhaps due to the increasing numbers of discount brokers that have entered the industry over the past few years, many consumers fail to negotiate commission rates.

Second, consumers often are not fully informed as to what, if any, duties they are owed by their broker or agent. This can occur because the broker or agent fails to disclose such information to the client, as legally required.[13] Lack of full and timely disclosure can result in a customer revealing sensitive information, such as the maximum amount that the buyer is willing to pay for a house or the minimum amount for which the seller is willing to sell a house, to a broker or agent who is actually representing the party on the other side of the transaction.

Third, consumers often are unaware of the possibility that their brokers or agents may be steering them away from property listings that offer lower commissions to the agent but that otherwise match the criteria identified by the consumers. Brokers and agents have a greater incentive to show prospective buyers property listings that offer the prevailing commission rate than listings that offer a lower rate. There is evidence that such steering is one tactic used against brokers and firms whose business models depart from charging customary commission rates.[14]

C. New Business Models Are Being Undermined By Traditional Brokers

In discussing potential factors that may be inhibiting price competition in the real estate brokerage industry, workshop panelists and commentators identified the

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[13] States typically require agents to disclose to their clients the duties they owe to their clients under state law. *See, e.g.*, VA. CODE § 54.1-2131(E).

[14] *See* Real Estate Workshop Public Comment No. 19 at 57 (Barry) (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), *at* http://www.ftc.gov/os/comments/realestatecompetition/518795-00368.pdf.

disparagement and harassment of non-traditional brokers as one such factor.[15] As mentioned above, traditional brokers may discourage price competition by resisting cooperation with brokers utilizing innovative business models. Steering prospective buyers away from listings offered by non-traditional brokers is a subtle way to discourage price competition. A more blatant method reportedly used is to disparage or harass non-traditional brokers.

Several workshop panelists and commentators – including the owner of a discount brokerage firm and the owner of an exclusive buyer brokerage firm – described the treatment that they have received from their competitors. Such treatment has included, among other things: (1) explicit refusals by competitors to show the non-traditional brokers' listings; (2) disparaging comments by competitors to clients or potential clients the effect that the non-traditional brokers are going or have gone out of business; and (3) the filing of baseless complaints with local real estate commissions against the non-traditional brokers.[16]

D. Lack of Justification for Minimum-Service Legislation

Finally, the workshop and public comments filed with the agencies demonstrate a lack of a sound basis for minimum-service legislation, enacted recently in a few states. No workshop panelist provided any evidence of consumer harm from allowing brokerages to provide limited brokerage services. Panelists representing both traditional brokerages – including Coldwell Banker and Century 21 – and new business models all

[15] *See* Real Estate Workshop Transcript at 74 (Farmer); 192 (Early).
[16] *See* Real Estate Workshop Public Comment No. 304 (limited-service broker from Kentucky reporting to be the target of harassing complaints from the Kentucky Real Estate Commission), *at* http://www.ftc.gov/os/comments/realestatecompetition/518795-00331.htm.

stated that they did not see a need for minimum-service laws.[17] As noted earlier, the FTC and DOJ have explained in several advocacy letters sent to states that such laws are detrimental to competition among brokerage service providers and, thus, consumers of such services.[18]

First, minimum-service laws limit consumer choice and harm consumers who would otherwise choose a limited-service option by preventing them from purchasing their most-preferred combination of price and service. Required to provide more services than they otherwise would (in the face of a minimum-service law), a limited-service broker must raise his or her price accordingly.[19] The result is that some consumers will be forced to purchase more real estate brokerage service than they otherwise would prefer – at a higher price than they otherwise would pay.

A second form of consumer harm from minimum-service laws arises because limited-service brokers are likely to provide a competitive constraint on full-service brokers' pricing. A full-service broker who wants the business of a consumer who might otherwise consider limited-service brokerage will need to offer lower commissions and/or higher-quality service to induce such a consumer to pay for the additional services offered by a full-service broker. If limited-service brokers are eliminated as a choice for

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[17] *See Real Estate Workshop Transcript* at 71-72 (Farmer); 82-83 (Kunz); 152 (Perriello), *available at* http://www.ftc.gov/opp/workshops/comprealestate/051209transcript.pdf.

[18] *See* notes 8-11, *supra*.

[19] *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 (Jul. 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).

consumers, and as a check on rates charged by full-service brokers, some consumers who prefer full-service brokers, therefore, are likely to pay higher prices for real estate brokerage services.

The arguments that have been made in favor of minimum-service legislation do not appear to be consistent with consumers' interests. Some justify such legislation on the basis that consumers expect real estate brokers and agents to perform certain tasks, such as assisting in the marketing of the property, presenting offers and counteroffers, and answering questions regarding the transaction. Requiring full disclosure by limited-service brokers to consumers of the tasks that such brokers will and will not provide, however, is a better way to address consumer expectations than an outright ban on the use of such brokers. Notably, a number of states that have considered the issue have adopted such disclosure requirements instead of prohibiting provision of limited service brokerage entirely.[20]

Additionally, some argue that minimum-service laws are necessary because sellers using limited-service brokers shift additional work and responsibilities onto cooperating brokers, who are put into the awkward position of serving a party to whom they do not owe a fiduciary duty in order to insure that the transaction is completed at all. Again, requiring full disclosure to sellers using limited-service brokers that they may not expect any assistance from buyers' brokers is far superior to banning altogether the use of limited-service brokers.

[20] For example, Tennessee, Virginia, and Wisconsin have adopted laws that allow consumers to purchase limited-service packages as long as there is disclosure and consent.

III. Applying What We Learned at the Workshop

The FTC and DOJ plan to issue a joint report this fall setting forth our findings with regard to the state of competition in the real estate brokerage industry. The report will be based on the agencies' review of the testimony provided at the workshop, the numerous public comments filed with the agencies, and other information and industry analyses. In addition, the FTC plans to apply what we learned from the workshop to help ensure competition in this industry.

First, the FTC will continue investigate and bring enforcement actions against, anticompetitive conduct in the real estate industry. Staff currently is investigating MLS practices from around the country that may impair competition between new and traditional brokerage models.

Second, the FTC plans to continue our competition advocacy work. When the Commission is invited to comment on legislation that impacts the industry, we will offer our views as to whether the proposed law appears to benefit or harm consumers.

Third, given the relative lack of current empirical evidence on the state of competition in the real estate brokerage industry discussed above, staff intends to evaluate whether it is feasible to conduct additional empirical analyses to determine more accurately the state of price competition in the brokerage industry. The feasibility of such a study, of course, depends on the availability of current, reliable data on commission rates and other relevant indicia of competition.

Finally, as discussed above, the Commission plans to ameliorate perceived gaps in consumer knowledge regarding the negotiability of commission rates, the timely and appropriate disclosure of agency relationships, and potential steering of buyers away

from listings offered by price-cutting brokers. The Commission intends to develop and issue education materials to help consumers become more knowledgeable about the various ways in which they can save money and protect their interests as they buy or sell a house.

IV. Conclusion

The FTC has a long history of vigilantly monitoring the real estate brokerage industry and taking law enforcement and other actions to insure its competitiveness. We remain committed to ensuring that consumers can enjoy the benefits of competition in this very important industry.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, House of Representatives

For Release on Delivery
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REAL ESTATE BROKERAGE

Various Factors May Affect Price Competition

Statement of David G. Wood, Director
Financial Markets and Community Investment

GAO-06-1005T

July 25, 2006

GAO
Accountability·Integrity·Reliability

Highlights

Highlights of GAO-06-1005T, a testimony before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, House of Representatives

REAL ESTATE BROKERAGE

Various Factors May Affect Price Competition

Why GAO Did This Study

Consumers paid an estimated $65.7 billion in residential real estate brokerage fees in 2005. Observing that commission rates have remained relatively uniform—regardless of market conditions, home prices, or the effort required to sell a home—some economists have questioned the extent of price competition in the residential real estate brokerage industry. Furthermore, while the Internet offers time and cost savings to the process of searching for homes, Internet-oriented brokerage firms account for only a small share of the brokerage market. This has raised concerns about potential barriers to greater use of the Internet in real estate brokerage.

In this testimony, which is based on a report issued in August 2005, GAO discusses (1) factors affecting price competition in the residential real estate brokerage industry and (2) the status of the use of the Internet in residential real estate brokerage and potential barriers to its increased use.

www.gao.gov/cgi-bin/getrpt?GAO-06-1005T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact David G. Wood at (202) 512-8678 or woodd@gao.gov.

What GAO Found

The residential real estate brokerage industry has competitive attributes, but its competition appears to be based more on nonprice factors, such as reputation or level of service, than on brokerage fees, according to a review of the academic literature and interviews with industry analysts and participants. Although comprehensive data on brokerage fees are lacking, past analyses and anecdotal information suggest that commission rates have persisted in the same range over long periods, regardless of local market conditions, housing prices, or the cost or the effort required to sell a home. One potential cause of limited price variation in the industry is the use of multiple listing services (MLS), which facilitates cooperation among brokers in a way that can benefit consumers but may also discourage participating brokers from deviating from conventional commission rates. For instance, an MLS listing gives brokers information on the commission that will be paid to the broker who brings the buyer to that property. This practice potentially creates a disincentive for home sellers or their brokers to offer less than the prevailing rate, since buyers' brokers may show high-commission properties first. In addition, some state laws and regulations may also affect price competition, such as those prohibiting brokers from giving clients rebates on commissions and those requiring brokers to provide consumers with a minimum level of service. Although such provisions can protect consumers, the Department of Justice and the Federal Trade Commission have argued that they may prevent price competition or reduce consumers' choice of brokerage services.

The Internet has changed the way consumers look for real estate and has facilitated the growth of alternatives to traditional brokers. A variety of Web sites allows consumers to access property information that once was available only by contacting brokers directly. The Internet also has fostered the growth of nontraditional residential real estate brokerage models, including discount brokers and broker referral services. However, industry participants and analysts cited several potential obstacles to more widespread use of the Internet in real estate transactions, including restrictions on listing information on Web sites, some traditional brokers' resistance to cooperating with nontraditional firms, and certain state laws and regulations that prohibit or restrict commission rebates to consumers.

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to be here today as you consider issues related to residential real estate brokerage—that is, the bringing together of buyers and sellers of homes and the provision of related services by licensed brokers and agents. My statement today is based primarily on GAO's August 2005 report on the residential real estate brokerage industry.[1]

The fees paid for residential real estate brokerage have increased as home prices have risen in recent years, well beyond the rate of general price inflation. While comprehensive data do not exist, REAL Trends, an industry source, estimated that in 2005 consumers paid about $65.7 billion in real estate brokerage fees related to home sales, up from approximately $43 billion in 2000. Payments to brokers are typically percentage commissions, or a percentage of the sales price of the home. An observed tendency toward uniform commission rates regardless of local market conditions has led many economists and other observers to question the level of price competition—that is, the rivalry among firms to attract clients on the basis of price—in the residential real estate brokerage industry. While the emergence of the Internet offers the potential to reduce costs by generating efficiencies and new ways of doing business, and many consumers now use the Internet to search for homes and related services such as mortgages, Internet-oriented brokerage firms represent a small share of the market.[2] This has raised questions concerning potential institutional, legal, and other barriers to greater "e-commerce" in real estate brokerage.

My statement today discusses (1) factors affecting price competition in the residential real estate brokerage industry and (2) the status of the use of the Internet in residential real estate brokerage and potential barriers to its increased use. In preparing our August 2005 report, we reviewed academic literature and interviewed and obtained documents from industry analysts, the National Association of Realtors® (NAR), residential real estate brokerage firms and franchisors, the Department of Justice (DOJ), the

[1]GAO, *Real Estate Brokerage: Factors That May Affect Price Competition,* GAO-05-947 (Washington, D.C.: Aug. 31, 2005).

[2]For the purposes of this statement, the term "Internet-oriented brokerages" refers to brokerage firms whose business models depend largely on the Internet. Other brokerage firms may also use the Internet to varying degrees.

Federal Trade Commission (FTC), and others. We also reviewed relevant selected state laws and regulations and state and federal court decisions. Academic studies that we reviewed for our work are listed at the end of this statement.

In summary:

- While the residential real estate brokerage industry has competitive attributes—such as a large number of relatively small firms and ease of entry—competition in this industry appears to be based more on nonprice factors, such as reputation or level of service, than on price. Although comprehensive data on brokerage fees are lacking, past analyses and anecdotal information suggest that commission rates have persisted in the same range over long periods, regardless of local market conditions, housing prices, or the cost or the effort required to sell a home. Our review of the academic literature and interviews with industry analysts and participants suggested several potential causes of this apparent lack of price variation. Multiple listing services (MLS)—the local organizations through which residential real estate brokers share information about properties for sale—facilitate cooperation among brokers in a way that can benefit consumers, but may also discourage participating brokers from deviating from conventional commission rates. For example, the practice of showing the commission that buyers' brokers will receive for cooperating in the sale of a property may discourage brokers from offering less than the prevailing commission rate. In addition, some states prohibit brokers from giving clients rebates on commissions, and some states require or are considering proposals to require brokers to provide consumers with a minimum level of service. Although such laws may offer some consumer protections, DOJ and FTC have argued that they can potentially prevent price competition or reduce consumers' choice of brokerage services.

- The Internet has increased consumers' access to information about properties for sale and fostered the growth of Internet-oriented real estate brokerage models, including some discount brokers and services that refer clients to brokers. However, industry participants and analysts cited several potential obstacles to more widespread use of the Internet in real estate transactions. These obstacles include the extent to which property information is made available for brokers to post online, the resistance of some traditional brokers to cooperate with nontraditional firms, and certain state laws and regulations that prohibit or restrict commission rebates to consumers.

Background

Traditionally, real estate brokers have offered a full, "bundled" package of services to sellers and buyers, including marketing the seller's home or assisting in the buyer's search, holding open houses and showing homes, preparing offers and assisting in negotiations, and coordinating the steps to close the transaction. Because real estate transactions are complex and infrequent for most people, many consumers benefit from a broker's specialized knowledge of the process and of local market conditions. Still, some consumers choose to complete real estate transactions without a broker's assistance, including those who sell their properties on their own, or "for-sale-by-owner."

For many years, the industry has used a commission-based pricing model, with sellers paying a percentage of the sales price as a brokerage fee. Brokers acting for sellers typically invite other brokers to cooperate in the sale of the property and offer a portion of the total commission to whoever produces the buyer. Agents involved in the transaction may be required to split their shares of the commission with their brokers.[3] Under this approach, brokers and agents receive compensation only when sales are completed.

In recent years, alternatives to this traditional full-service brokerage model have become more common, although industry analysts and participants told us that these alternatives still represented a small share of the overall market in 2005. Discount full-service brokerages charge a lower commission than the prevailing local rate, but offer a full package of services. Discount limited-service brokerages offer a limited package of services or allow clients to choose from a menu of "unbundled" services and charge reduced fees on a commission or fee-for-service basis.

Most local real estate markets have an MLS that pools information about homes that area brokers have agreed to sell. Participating brokers use an MLS to "list" the homes they have for sale, providing other brokers with detailed information on the properties ("listings"), including how much of the commission will be shared with the buyer's agent. An MLS serves as a single, convenient source of information that provides maximum exposure for sellers and facilitates the home search for buyers. Each MLS is a private entity with its own membership requirements and operating

[3]Brokers who operate as part of a franchise may also be required to share a portion of their commission revenue with the franchise, in payment for using the brand name and other services.

policies and procedures. According to NAR, approximately 900 MLSs nationwide were affiliated with the trade association in 2005. These NAR-affiliated MLSs are expected to follow NAR's model guidelines for various operational and governance issues, such as membership requirements and rules for members' access to and use of listing information. An MLS that is not affiliated with NAR is not bound by these guidelines.

Individual states regulate real estate brokerage, establishing licensing and other requirements for brokers and agents. Of the two categories of state-licensed real estate practitioners, *brokers* generally manage their own offices, and *agents*, or salespeople, must work for licensed brokers. States generally require brokers to meet more educational requirements than agents, have more experience, or both. For the purposes of this statement, I will generally refer to all licensed real estate practitioners as brokers.

Various Factors Can Influence the Extent of Price Competition in Real Estate Brokerage

Some economists have observed that brokers typically compete more on nonprice factors, such as service quality, than on price. While comprehensive price data are lacking, evidence from academic literature and industry participants with whom we spoke highlight several factors that could limit the degree of price competition, including broker cooperation, largely through MLSs, which can discourage brokers from competing with one another on price; resistance from traditional full-service brokers to brokers who offer discounted prices or limited services; and state antirebate and minimum service laws and regulations, which some argue may limit pricing and service options for consumers.

Real Estate Brokerage Is Characterized More by Nonprice Competition Than Price Competition

The real estate brokerage industry has a number of attributes that economists normally associate with active price competition. Most notably, the industry has a large number of brokerage firms and individual licensed brokers and agents—approximately 98,000 active firms and 1.9 million active brokers and agents in 2004, according to the Association of Real Estate License Law Officials. Although some local markets are dominated by 1 or a few large firms, market share in most localities is divided among many small firms, according to industry analysts. In addition, the industry has no significant barriers to entry, since obtaining a license to engage in real estate brokerage is relatively easy and the capital requirements are relatively small.

While real estate brokerage has competitive attributes, with a large number of players competing for a limited number of home listings, much of the academic literature and some industry participants we interviewed

described this competition as being based more on nonprice variables, such as quality, reputation, or level of service, than on price. One reason for this characterization is the apparent uniformity of commission rates. Comprehensive data on brokerage fees are lacking. However, past analyses and anecdotal information from industry analysts and participants indicate that, historically, commission rates were relatively uniform across markets and over time. Various studies using data from the late 1970s through the mid-1980s found evidence that the majority of listings in many communities clustered around the same rate, exactly 6 percent or 7 percent. Although these studies and observations do not indicate that there has been complete uniformity in commission rates, they do suggest that variability has been limited. Many of the industry analysts and participants we interviewed said that commissions still cluster around a common rate within most markets, and they generally cited rates of 5 percent to 6 percent as typical.

Some economists have cited certain advantages to the commission-based model that is common in real estate brokerage, most notably that it provides sellers' brokers with an incentive to get the seller the highest possible price. Moreover, uniformity in commission rates within a market at a given time does not necessarily indicate a lack of price competition. But some economists have noted that in a competitive marketplace, real estate commission rates could reasonably be expected to vary across markets or over time—that is, to be more sensitive to housing market conditions than has been traditionally observed. For example, commission rates within a market at a given time do not appear to vary significantly on the basis of the price of the home. Thus, the brokerage fee, in dollar terms, for selling a $300,000 home is typically about three times the fee for selling a $100,000 home, although the time or effort required to sell the two homes may not differ substantially.[4] Similarly, commission rates do not appear to have changed as much as might be expected in response to rapidly rising home prices in recent years. Between 1998 and 2005, the national median sales price of existing homes, as reported by NAR, increased about 74 percent, while inflation over the same period was about 16 percent, leaving an increase of some 58 percent in the inflation-adjusted price of housing. According to REAL Trends, average commission rates among the largest brokerage firms fell from an estimated 5.5 percent

[4]Some industry participants we met with suggested that it costs more to market expensive homes, in part because the number of prospective buyers is smaller. However, we did not identify any data on brokers' actual costs of marketing homes.

in 1998 to an estimated 5.0 percent in 2005, a decrease of about 9 percent.[5] 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.

Some economists have suggested that uniformity in commission rates can lead brokers to compete on factors other than price in order to gain market share. For example, brokers might hire more agents in an effort to win more sellers' listings. Brokers may also compete by spending more on advertising or offering higher levels of service to attract clients. Although some of these activities can benefit consumers, some economic literature suggested that such actions lead to inefficiency because brokerage services could be provided by fewer agents or at a lower cost.

To the extent that commission rates may have declined slightly in recent years, the change may be the result in part of rapidly rising home prices, which have generated higher brokerage industry revenues even with lower commission rates. However, competition from increasing numbers of discount, fee-for-service, and other nontraditional brokerage models may have also contributed to the decline. These nontraditional models typically offer lower fees, and although NAR consultants estimated that nontraditional firms represented only about 2 percent of the market in 2003, these firms may be putting some downward pressure on the fees charged by traditional brokerages.

Cooperation Facilitated by MLSs and Other Factors May Inhibit Price Competition

Factors related to the cooperation among brokers facilitated by MLSs, some brokers' resistance to discounters, and consumer attitudes may inhibit price competition within the real estate brokerage industry.[6]

First, while MLSs provide important benefits to consumers by aggregating data on homes for sale and facilitating brokers' efforts to bring buyers and sellers together, the cooperative nature of the MLS system can also in effect discourage brokers from competing with one another on price. Because participating in an MLS in the areas where they exist is widely considered essential to doing business, brokerage firms may have an

[5]REAL Trends' data did not address the range of or variation among actual commission rates. REAL Trends estimates average commission rates by dividing the total gross commission revenue reported by the largest brokerage firms by their total sales volume.

[6]We made no judgment on the legality of any actions that may inhibit price competition; such matters were beyond the scope of our work.

incentive to adopt practices that comply with MLS policies and customs. As previously noted, MLSs facilitate cooperation in part by enabling brokers to share information on the portion of the commission that sellers' brokers are offering to buyers' brokers. In the past, some MLSs required participating brokers to charge standard commission rates, but this practice ended after the Supreme Court ruled, in 1950, that an agreement to fix minimum prices was illegal under federal antitrust laws.[7] Subsequently, some MLSs adopted suggested fee schedules, but this too ended after DOJ brought a series of antitrust actions in the 1970s alleging that this practice constituted price fixing.[8] Today, MLSs no longer establish standard commission rates or recommend how commissions should be divided among brokers. MLS listings do show how much sellers' brokers will pay other brokers for cooperating in a sale, according to industry participants. When choosing among comparable homes for sale, brokers have a greater incentive—all else being equal—to first show prospective buyers homes that offer other brokers the prevailing commission rate, rather than homes that offer a lower rate. Therefore, even without formal policies to maintain uniform rates, individual brokers' reliance on the cooperation of other brokers to bring buyers to listed properties may help maintain a standard commission rate within a local area, at least for buyers' brokers. FTC, in a 1983 report, concluded that the cooperative nature of the industry and the interdependence among brokers were the most important factors explaining the general uniformity in commission rates that it had observed in many markets in the late 1970s.

Second, traditional brokers may discourage price competition by resisting cooperation with brokers and firms whose business models depart from charging conventional commission rates, according to several industry analysts and participants with whom we spoke.[9] 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

[7] *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950).

[8] For example, see *United States v. Greater Pittsburgh Bd. of Realtors*, 1973-1 Trade Cas. ¶ 74,454 (W.D. Pa. 1973), and *United States v. Los Angeles Realty Bd.*, 1973-1 Trade Cas. ¶ 74,366 (C.D. Cal. 1973). In 1971, NAR adopted a policy prohibiting its affiliated MLSs from fixing or recommending to their members commission rates or fees to be charged or the percentage division of commissions or fees.

[9] We did not investigate specific instances of alleged resistance to cooperation, nor did we have information to assess how common such practices might be.

showing the homes to prospective buyers) in the sale of those listings. Some discount full-service and discount limited-service brokerage firms we interviewed said that other brokers had refused to show homes listed by discounters. In addition, traditional brokers may in effect discourage discount brokers from cooperating in the sale of their listings by offering discounters a lower buyer's broker commission than the prevailing rate offered to other brokers. This practice can make it more difficult for discount brokers to recruit new agents because the agents may earn more working for a broker who receives the prevailing commission from other brokers.[10] Some traditional full-service brokers have argued that discount brokers often do less of the work required to complete the transaction and, thus, deserve a smaller portion of the seller's commission. Representatives of discount brokerages told us they believed that reduced commission offers are in effect "punishment" for offering discounts to sellers and are intended as signals to other brokers to conform to the typical pricing in their markets.

Finally, pressure from consumers for lower brokerage fees appears to have been limited, although it may be increasing, according to our review of economics literature and to several industry analysts and participants. Some consumers may accept a prevailing commission rate as an expected cost, in part because that has been the accepted pricing model for so long, and others may not realize that rates can be negotiated. Buyers may have little concern about commission rates because sellers directly pay the commissions. Sellers may be reluctant to reduce the portion of the commission offered to buyers' brokers because doing so can reduce the likelihood that their homes will be shown. In addition, home sellers who have earned large profits as housing prices have climbed in recent years may have been less sensitive to the price of brokerage fees. However, some brokers and industry analysts noted that the growth of firms offering lower commissions or flat fees has made an increasing number of consumers aware that there are alternatives to traditional pricing structures and that commission rates are negotiable.

[10]Conversely, officials from one firm suggested that a broker who offers lower commissions to other brokers may have difficulty recruiting or retaining agents because the affected brokers will have less incentive to cooperate with those agents.

Some State Laws and Regulations Can Affect Price Competition

Although state laws and regulations related to real estate licensing can protect consumers, DOJ and FTC have expressed concerns that laws and regulations that restrict rebates to consumers or require minimum levels of service by brokers may also unnecessarily hinder competition among brokers and limit consumer choice.

As of July 2006, at least 12 states appeared to prohibit, by law or regulation, real estate brokers from giving consumers rebates on commissions or appeared to place restrictions on this practice.[11] Proponents said such laws and regulations help ensure that consumers choose brokers on the basis of the quality of service as well as price, rather than just on the rebate being offered. Opponents of antirebate provisions argued that such restrictions serve only to limit choices for consumers and to discourage price competition by preventing brokers from offering discounts. Opponents also noted that offering a rebate is one of the few ways to reduce the effective price of buyer brokerage services, since commissions are typically paid wholly by the seller.[12] In November 2005, DOJ and the Kentucky Real Estate Commission settled a suit in which DOJ had alleged that the commission's administrative regulation banning rebates violated federal antitrust law. In its complaint, DOJ argued that the regulation unreasonably restrained competition to the detriment of consumers, making it more difficult for them to obtain lower prices for brokerage services.[13] Pursuant to the approved settlement agreement, the commission put in place emergency regulations permitting rebates and other inducements as long as they are disclosed in writing.

In addition, as of July 2006, 12 states appeared to be considering or to have passed legislation that requires brokers to provide a minimum level of

[11]As of July 13, 2006, states that appeared to prohibit or place restrictions on real estate brokers giving consumers rebates on commissions included Alabama, Alaska, Iowa, Kansas, Louisiana, Mississippi, Missouri, New Jersey, North Dakota, Oklahoma, Oregon, and Tennessee. At the time of our August 2005 report, West Virginia also restricted rebates, but it no longer does so. We did not review all states' laws and regulations or evaluate how the states interpret and apply provisions, so other states also may prohibit or restrict commission rebates to consumers.

[12]According to economic theory, sellers pass a portion of their brokerage costs to buyers in the price of the home. By offering a rebate to the buyer, a broker is in effect offering to offset this cost.

[13]Complaint, United States v. Kentucky Real Estate Commission, U.S. Dist. Ct., W.D. Ky., Case No. 3:05CV-188H, at 1, 2 (Mar. 30, 2005).

service when they represent consumers.[14] Such provisions generally require that when a broker agrees to act as a consumer's exclusive representative in a real estate transaction, the broker must provide such services as assistance in delivering and assessing offers and counteroffers, negotiating contracts, and answering questions related to the purchase and sale process. Advocates of minimum service standards argued that they protect consumers by ensuring that brokers provide a basic level of assistance. Furthermore, full-service brokers argued that such standards prevent them from having to unfairly shoulder additional work when the other party uses a limited-service broker. Opponents of these standards argued that they restrict consumer choice and raise costs by impeding brokerage models that offer limited services for a lower price.[15] Between April and November 2005, DOJ wrote to state officials in Oklahoma and New Mexico, and DOJ and FTC jointly wrote to officials in Alabama, Michigan, Missouri, and Texas discouraging adoption of these states' proposed minimum service laws and regulations. The letters argued that the proposed standards in these states would likely harm consumers by preventing brokers from offering certain limited-service options and therefore requiring some sellers to buy brokerage services they would otherwise choose to perform themselves. They also cited a lack of evidence that consumers have been harmed by limited-service brokerage. Despite the concerns raised by DOJ and FTC, the governors in Alabama, Missouri, Oklahoma, and Texas subsequently signed minimum service standards into law.

The Internet Has Increased Consumers' Options, but Several Factors Could Limit Its Wider Use

The Internet has increased consumers' access to information about properties for sale and has facilitated new approaches to real estate transactions. Whether the Internet will be more widely used in real estate brokerage depends in part on the extent to which listing information is widely available. Like discount brokerages, Internet-oriented brokerage firms, especially those offering discounts, may also face resistance from traditional brokers and especially may be affected by state laws that prohibit them from offering rebates to consumers.

[14]As of July 13, 2006, Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Missouri, Oklahoma, Texas, Wisconsin, and Utah had enacted minimum service standards. At that time, Michigan was considering adopting such standards.

[15]Minimum service standards would not necessarily prohibit a broker from providing limited advice or service to a client if the broker had not agreed to act as the consumer's exclusive representative. However, an MLS may require brokers to have such an agreement in order to enter a property listing in the MLS.

The Internet Allows Consumers More Direct Access to Information and Facilitates Alternative Service and Pricing Options

The Internet allows consumers direct access to listing information that has traditionally been available only from brokers. Before the Internet was widely used to advertise and display property listings, MLS data (which comprise a vast majority of all listings) were compiled in an "MLS book" that contained information on the properties listed for sale with MLS-member brokers in a given area. In order to view the listings, buyers generally had to use a broker, who provided copies of listings that met the buyer's requirements via hard copy or fax. Today, information on properties for sale—either listed on an MLS or independently, such as for-sale-by-owner properties—is routinely posted on Web sites, often with multiple photographs or virtual tours. Thus, the Internet has allowed buyers to perform much of the search and evaluation process independently, before contacting a broker.[16] Sellers of properties can also benefit from the Internet because it can give their listings more exposure to buyers. Sellers may also use the Internet to research suitable asking prices for their homes by comparing the attributes of their houses with others listed in their areas.

Although Internet-oriented brokerages and related firms represented only a small portion of the real estate brokerage market in 2005, the Internet has made different service and pricing options more widely available to consumers. Among these options are full-service and limited-service discount brokerages, information and referral companies, and alternative listing Web sites.

- *Full-service discount brokerages* offer buyers and sellers full-service real estate brokerage services but advertise lower than traditional commissions, for example between 3 percent and 4.5 percent. These types of brokerages existed before widespread use of the Internet, but many have gained exposure and become more viable as a result of the Internet. In addition, by posting listings online, displaying photographs and virtual tours of homes for sale, and communicating with buyers and sellers by e-mail, some of these companies say that they have been able to cut brokerage costs.

[16]Before the Internet, a buyer could still learn about properties without a broker—for example, through newspaper advertisements or by driving past to view a property. However, the Internet enables consumers to obtain far more extensive information, including, in some cases, complete details on the property from the MLS as well as photographs or a virtual tour.

- *Limited-service discount brokerages* provide fewer services than full-service brokerages but also charge lower commissions or offer their services for flat fees. For example, some firms charge a flat fee for marketing and advertising homes and, for additional fees, will list a property in the MLS and show the home to prospective buyers. The Internet has allowed these firms to grow in number and size in recent years, in part because they can market their services to a larger population of buyers and sellers.

- *Information and referral companies* provide resources for buyers and sellers—such as home valuation tools and access to property listings—and make referrals of those consumers to local brokers.[17] Some of these companies charge referral fees to brokers and then rebate a portion of that fee back to buyers and sellers. The Internet allows these companies to efficiently reach potential consumers and offer those customers services and access to brokers.

- *Alternative listing Web sites* offer alternatives to the MLS, allowing sellers who want to sell their homes themselves to advertise their properties to buyers and giving buyers another source of information on homes for sale. These alternative listing sites include the Web sites of local newspapers, Craigslist, and "for-sale-by-owner" Web sites.[18]

[17]These information and referral companies typically have a network of participating real estate brokers in various markets to which they refer customers. Although some information and referral companies are themselves licensed real estate brokers, they generally do not directly provide services typical of a real estate broker, such as showing homes or negotiating a sales price.

[18]Craigslist is a noncommercial Internet bulletin board that operates in more than 300 communities in more than 50 countries. Among other things, users of Craigslist can post or review information on properties for sale.

Wider Use of the Internet in Real Estate Brokerage Will Depend on the Availability of Listing Information and Other Factors

Several factors could limit the extent to which the Internet is used in real estate transactions. A key factor is the extent to which information about properties listed in an MLS is widely available. Currently, buyers may view MLS-listed properties on many Web sites, including broker and MLS Web sites and on NAR's Realtor.com Web site. The real estate brokerage industry has faced controversy over the public availability of listings on the Internet and over whether brokers can restrict the display of their listings on other brokers' Web sites.[19] Proponents of allowing such restrictions argued that listings are the work product, and thus the property, of the selling broker, who should have control over how the listings are used. Opponents argued that such control would unfairly limit Internet-oriented brokers' ability to provide their clients with access to MLS listings through their Web sites.

Even with few restrictions on the availability of information about properties for sale, Internet-oriented brokerage firms may face other challenges. First, Internet-oriented brokers with whom we spoke described resistance, similar to that previously described, involving some traditional brokerages that refused to show the Internet-oriented brokerages' listed properties or offered them buyers' brokers commissions that were less than those offered to other brokers. However, the online availability of listing information may discourage such behavior by enabling buyers to more easily detect whether a broker is avoiding other brokers' listings that are of interest. Second, some Internet-oriented companies said that state antirebate laws and regulations could affect them disproportionately, since their business models often were built around such rebates. Finally, other factors, such as the lack of a uniform technology to facilitate related processes—such as inspection, appraisal, financing, title search, and settlement—may inhibit the use of the Internet for accomplishing the full range of activities needed for real estate transactions.

[19]On August 31, 2005, NAR's Internet Listing Display policy took effect, replacing the Virtual Office Web site policy that was in place when we completed our August 2005 report. Both policies set out guidelines for how NAR-affiliated MLSs could govern the Internet display of listing information. The Virtual Office Web site policy allowed MLS participants to selectively exclude their listings from display on other participants' Web sites, while the newer policy allows participants to exclude their listings on either all other participants' Web sites, or none of them. DOJ has filed suit against NAR alleging that both policies violate federal antitrust law (Amended Complaint, United States v. National Association of Realtors, U.S. Dist. Ct., N.D. Ill., Case No. 05C-5140 (Oct. 4, 2005)).

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions at this time.

Contacts and Acknowledgments

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Hearing Before The House Financial Services Subcommittee on Housing and Community Opportunity

Entitled

"The Changing Real Estate Market"

Testimony of Pat Vredevoogd-Combs, ABR®, CRS®, GRI, PMN
2006 President-Elect

National Association of REALTORS®
July 25, 2006

REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.

Chairman Ney, Representative Waters, and Members of the Subcommittee, thank you for inviting me to testify on the changing real estate market. My name is Pat Vredevoogd-Combs, and I am the broker-owner and partner of AJS Realty, a residential real estate company in Grand Rapids, Michigan.

As the 2006 President-Elect of the National Association of REALTORS®, I am here to testify on behalf of our more than 1.3 million REALTOR® members who are involved in residential and commercial real estate as brokers, sales people, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. Members belong to one or more of some 1,400 local associations/boards and 54 state and territory associations of REALTORS®. Additionally, they can join one of our many institutes, societies and councils to enhance their expertise and network with other professionals globally. Working for America's property owners, NAR provides a forum for professional development, research and the exchange of information among its members, and to the public and government for the purpose of preserving the free enterprise system and the right to own real property.

Before diving into the substance of the issues that are the subject of today's hearing, I would like to take this opportunity to respond to a number of concerns that policymakers, analysts and media observers have raised regarding the practices and policies of the National Association of REALTORS®.

- **NAR does not limit competition by excluding from membership innovative real estate firms.** The truth is quite the opposite; NAR welcomes all professionals engaged in various aspects of the real estate industry and our members represent almost every conceivable real estate business model.
- **NAR is not a cartel and does not encourage imitative price-setting.** NAR is zealous in avoiding any activity, and encouraging members to avoid activity, that could even appear to constitute agreements on prices. Moreover, it would simply be impossible to implement an agreement on prices among NAR's 1.3 million vigorously competitive members. NAR does not conduct research on commission rates out of concerns that the research results could have the effect of setting a "going rate" or benchmark for

REALTORS® to set their commissions. NAR also has longstanding anti-trust compliance policy stating that the price of services provided by REALTORS® is a decision that should be made independently by each firm. NAR emphasizes that members must take care to present pricing policies to prospective clients in a manner that is consistent with the fact that the fees or prices are *independently established.*

- **NAR does not control or in any manner limit consumers' access to real estate information on the Internet.** In this respect also, the converse is true. NAR created and operates Realtor.com, the largest real estate internet site with over 2.2 million listings available for the public to search and view on a 24/7/365 basis. The reality is that REALTORS® have embraced the Internet because it has helped make the transaction more open and efficient. For example, according to NAR member surveys, the number of REALTORS® with Web sites has increased 129 percent over the past five years. Nearly 90 percent of REALTOR® firms have Web sites with searchable property listings and 71 percent of individual REALTORS® maintain a personal business Web site. REALTORS® are also the driving force behind technological advances in the industry spending more than $1 billion a year on technology.

Real Estate Brokerage

While the world of real estate has changed dramatically over the years, the underlying principle of brokerage remains unchanged – the business of brokerage always has been and still is about bringing buyers and sellers together and independently counseling the principals in the transaction. Real estate brokers and agents are regulated at the state level; all 50 states and the District of Columbia have license laws requiring applicants to satisfy specific professional education qualifications in order to obtain and renew their licenses.[1] "The purpose of real estate license laws is to protect the public from fraud, dishonesty and incompetence in real estate transactions."[2] Furthermore, regulators who grant real estate licenses have the authority to investigate consumer complaints against licensees and discipline these persons for wrongdoing.

[1] Fillmore W. Galaty, Wellington J. Allaway and Robert C. Kyle, *Modern Real Estate Practice* 21 (16TH ed. 2003).
[2] *Id.*

Agency Relationships and Fiduciary Responsibilities

While there are many players with differing opinions in the debate on competition, there is one principle we should all be able to agree on – *good service is good for consumers*. The growth of online information about listings and house value estimates has changed the way real estate professionals approach their customer service, but not diminished their important role as "information consultants, representatives and advocates for their clients."[3] Before elaborating on the valuable service real estate brokers and agents provide to consumers, I would like to briefly address agency relationships and the fiduciary duties for brokers and agents in their relationship with customers and the general public.

"Agency" is the term that describes the special relationship between a licensed real estate professional and the clients (seller/buyer) they represent. Although the laws and regulations that govern agency in real estate transactions differ from state to state, certain basic principles apply in most cases. In real estate transactions, an agency relationship is created when the broker agrees to represent the interest of a seller or buyer in a transaction. For an agency relationship to exist, the seller or buyer must delegate responsibility to the broker, and the broker (agent) must consent to accept that responsibility. An agency relationship may be based on a formal written agreement (express agency) between the broker and client or it may result from the parties' behavior (implied agency). Implied agency means that if you act like the representative of a party, you may in fact be creating an agency relationship, and will be held to satisfy the legal standards applicable to an agent. Additionally, compensation is not required to create an agency relationship, and an agent does not necessarily represent the person who pays his or her commission.

Because real estate brokers are authorized under agency agreements (express or implied) to act for their clients and are put in a position of trust and confidence, they are held to certain specific fiduciary duties.[4] Traditionally, these duties include:

- **Loyalty:** To act at all times in the best interest of the seller or buyer and to put their interests above all others, including your own.

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[3] *Id.* at 39.

[4] Wayne Thorburn, *Remarks Before the Federal Trade Commission and Department of Justice Workshop on Competition Policy and the Real Estate Industry* (October 25, 2006).

- **Obedience:** To obey promptly all lawful instructions of the seller or buyer.
- **Disclosure:** To disclose all known, relevant facts to the seller or buyer.
- **Confidentiality:** To safeguard the seller's or buyer's secrets, unless keeping the confidence would violate disclosure requirements.
- **Reasonable care and diligence:** To diligently use real estate skills and knowledge when pursing the seller's or buyer's affairs.
- **Accounting:** To account for all funds and property entrusted by the seller or buyer.

While all fiduciary duties are equally important, it is worth highlighting the duties of care and loyalty as some media observers and industry critics have implied that agents "boycott" or refuse to show their clients homes listed by discount or flat-fee brokers.[5] The duty of care requires that "an agent who represents a buyer is expected to help the buyer locate suitable property and evaluate property values, neighborhood and property conditions, financing alternatives, and offers and counteroffers with the buyer's interests in mind."[6] The duty of loyalty requires that the agent place the seller's or buyer's interests *above all others*, including the agent's own self-interest.[7] These fiduciary duties are often reflected in state license laws and regulations, giving real estate commissioners the authority to investigate complaints against licensees for breach of their duties and impose penalties if violations are found.

Types of Agency Brokerage Relationships with Consumers

In order to understand who has what responsibility within the context of agency relationships, you must look to the type of representation the seller or buyer has agreed to with the agent. Laws and relationships vary by state, but generally fall into these categories:

1. **Seller's representative** (also known as a listing agent or seller's agent). A seller's representative is hired by and represents the best interests of the seller. The relationship usually is created by a listing contract.
2. **Buyer's representative** (also known as a buyer's agent). This type of licensee is hired by a prospective buyer to represent the buyer in a real estate transaction. The buyer's

[5] Les Christie, *Real Estate: Why are you paying 6%?* (October 26, 2005). http://money.cnn.com/2005/10/26/real_estate/buying_selling/real_estate_waste/
[6] Galaty et al., *supra.* at 43.
[7] *Id.* at 46.

representative works in the buyer's best interest throughout the transaction. The buyer can pay the licensee directly through a negotiated fee, or the buyers' representative may be paid by the seller or by a commission split with the listing broker.

3. **Disclosed dual agent.** Dual agency is a relationship in which the agent represents both the buyer and the seller in the same real estate transaction. Dual agents typically owe limited duties to each of the parties. Because of the potential for conflicts of interest in a dual-agency relationship, all parties must give their informed consent. In many states, this consent must be in writing. Disclosed dual agency is legal in most states.
4. **Designated agency.** This is a brokerage practice that allows the managing broker in a single brokerage firm to designate different licensees in the firm to act as representatives of the seller and the buyer, respectively. Designated agency avoids the problem of dual agency. The designated agents give their respective clients full representation and loyalty. The broker has the responsibility of supervising both licensees.
5. **Nonagency relationship.** These relationships vary considerably from state to state, both as to the duties owed to the consumer and the name used to describe those practicing it (i.e., transaction broker or facilitator).

The majority of brokerage firms are not giant national companies. The majority of firms are small independently owned businesses that are not affiliated with a franchise (like RE/MAX, Century 21 or Help-U-Sell) and serve an essentially local market. Brokers know that in order to compete and thrive in the local market, they have to demonstrate to consumers that they offer a level of service and expertise different from others. Thus, some brokers will choose to specialize in a particular type of consumer representation, e.g. seller's representative or buyer's representative. Some academics have noted that as brokers began to unbundle their services (individually price services) the concept of an agent specialization, particularly buyer's agents, has become more important in local markets.[8] The different types of specializations are an important fact that some observers overlook when criticizing the "entrenched players" for

[8] Steve Sawyer, Rolf T. Wigand and Kevin Crowston, *Redefining Access: Uses and roles of information and communication technologies in the US residential real estate industry from 1995 to 2005,* 20 Journal of Information Technology 218 (2005).

attempting to impede the activities of alterative business models.[9] Specializations were once described as "alternative" long before even the first Internet-only broker launched its website. The so-called "entrenched" recognized the value of specialized agents to consumers and today are highly sought after in local markets.[10]

Real Estate Professionals Add Value

As mentioned earlier, real estate professionals provide today's consumers with access to a vast amount of information about the home buying and selling process and properties on the market. Even with increased access to information, however, most homebuyers and sellers still depend on real estate professionals for their experience and expertise to interpret this information and to assist them with the complex task of completing a real estate transaction. In the home search process, for example, buyers can search Web sites, newspapers and online classifieds such as Craigslist.com. While 77 percent of buyers are using the Internet when searching for a home, the real estate agent remains the trusted advisor and interpreter of information, with 90 percent of buyers using a professional during the home search.[11] Furthermore, homebuyers who use the Internet to search for a home are more likely to use a real estate professional to guide them through the transaction – 93 percent of Internet searchers use real estate agents.[12]

But information analysis is only one of the numerous services real estate professionals provide. An oversimplified description of the services that real estate professionals provide includes:

Seller's Agent

- Research comparable listings, determine appropriate sale price, prepare listing presentation;
- Review and explain all clauses in a Listing Contract;

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[9] Maureen K Ohlhausen, *Competition Issues in Real Estate Brokerage*, 2 The Antitrust Source (November 2005) http://www.abanet.org/antitrust/at-source/05/11/11-05.html.

[10] There are professional associations whose membership is focused on a particular type of specialized agents. The Real Estate Buyers Agent Council, REBAC, for example, promotes superior buyer representation skills and services. REBAC offers professional designations for buyers representatives who meet certain specialized real estate course and professional experiential requirements. REBAC also promotes the advantages of professional buyer representation to consumers.

[11] National Association of Realtors®, *Profile of Homebuyers and Sellers*, 29 (2005).

[12] *Id.* at 33.

- Counsel and oversee activities to make property more attractive;
- Enter accurate information regarding the property in Multiple Listing Service Database;
- Market the listing (including advertising in print and on-line media, virtual tours, open houses, etc.);
- Receive, evaluate, negotiate and counsel clients on all offers to purchase;
- Coordinate appraisal, inspections and testing (radon, lead base paint) with buyer's agent;
- Work with buyer's agent to ensure contingencies (repairs, etc.) are addressed; and
- Ensure a smooth closing.

Buyer's Agent

- Evaluate buyer's needs/wants/financial capabilities
- Find the right home to purchase;
- Counsel clients on offer price;
- Prepare purchase offer and negotiate terms on their behalf;
- Assist in the mortgage application process;
- Arrange for appraisal, inspection and testing;
- Counsel buyer on options based on results of inspections and test;
- Negotiate with seller's agent regarding repairs/remediation and ensure contingencies (repairs, etc.) are addressed;
- Schedule and attend final walk through;
- Coordinate and schedule closing; and
- Ensure a smooth closing.

By all accounts, the general public is not aware of the all the services that agents provide to sellers and buyers during the course of the transaction, probably because most of the important services are performed behind the scenes. For a more complete understanding of the role of the real estate professional, I encourage you to review the attached, which is a list of *nearly 200 typical actions*, research steps, processes and review stages necessary for a successful residential real estate transaction.[13]

[13] Orlando Regional REALTOR® Association (2006).

Not All Real Estate Professionals are REALTORS®

There is a difference between a real estate licensee and a REALTOR®. A REALTOR® is a licensee who is a member NAR and has committed to abide by a stringent, enforceable Code of Ethics that promotes the ethical and honest treatment of all parties in a transaction. Non-member licensees have made no such commitment and are not bound to the ethical practices and principles set for in the REALTORS® Code.

Some of the basic principles of the REALTORS® Code of Ethics include:

Duties to Clients and Customers

- Protect and promote their clients' interests while treating all parties honestly.
- Refrain from exaggeration, misrepresentation, or concealment of pertinent facts related to property or transactions.
- Cooperate with other real estate professionals to advance their clients' best interests.
- When buying or selling on their own account or for their families or firms, REALTORS® make their true position or interest known.
- Do not provide professional services where they have any present or contemplated interest in property without disclosing that interest to all affected parties.
- Disclose any fee or financial benefit they may receive from recommending related real estate products or services.
- Receive compensation from only one party, except where they make full disclosure and receive informed consent from their client.
- Keep entrusted funds of clients and customers in a separate escrow account.
- Make sure that contract details are spelled out in writing and that the parties receive copies.

Duties to the Public

- Give equal professional service to all clients and customers irrespective of race, color, religion, sex, handicap, familial status, or national origin.
- Be knowledgeable and competent in the fields of practice in which they engage or they get assistance from a knowledgeable professional, or disclose any lack of expertise to their client.

- Paint a true picture in their advertising and in other public representations.
- Do not engage in the unauthorized practice of law.
- Willingly participate in ethics investigations and enforcement actions.

Duties to Other REALTORS®

- Make only truthful, objective comments about other real estate professionals.
- Respect the exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with their clients.
- Arbitrate financial disagreements with other REALTORS® and with their clients.

NAR is extremely proud of the fact that it was one of the first professional trade associations to establish a Code of Ethics; it is the foundation of our association and has dramatically influenced the unique history of the real estate industry in this country. For example, how many other professionals can you think of that have an ethical duty to cooperate with their competitors? Yet that's the way REALTORS® do business every day of the week.

Competition in the Real Estate Industry

The Market Participants

There are approximately 2.6 million real estate licensees in the United States, of which approximately 1.3 million are REALTORS®. NAR members are affiliated with real estate brokerage firms that operate using every imaginable business model, including full service, limited service, "discount" (regardless of the level of service), Internet, and others. The overwhelming majority of industry participants are non-salaried, independent contractor sales agents (self-employed), 50 percent of whom are affiliated with an independent non-franchised firm. Real estate professionals have their own work ethic, work hours, marketing plans, business plans and make independent business decisions, regardless of firm affiliation. Real estate agents also manage their own clientele. Most agents' income is commissions-based and they must rely on their own production to succeed. Office profit-sharing is rare and there are few monetary incentives to help other agents from the same company. Therefore, not only is competition intense between firms, but also within firms.

Real Estate Markets are Local

Those who have criticized the real estate industry as anti-competitive are, in our opinion, oversimplifying the issue by looking at real estate as one national market. The problem with this simplified view is that it implies agents in Washington, D.C. are competing with agents Key West, Florida or Anchorage, Alaska, which is for the most part, not the case. Real estate is local and competition should be measured at the local level, as Steve Sawyer, Associate Professor at The Pennsylvania State University, determined when he analyzed data in twelve local real estate markets drawn from local MLSs and one-on-one interviews. Professor Sawyer confirmed that "few patterns of competitive activity are common to all local real estate markets" and that "the [real estate] firms, the franchises, market share, and key players vary" in each local market.[14] The report concludes that *competition within each market is fierce*, including competition among agents affiliated with the same firm.[15] The Sawyer report addresses an important implication that industry critics should pay particular attention to, specifically, "the evidence . . . suggests that it is inappropriate to consider the U.S. real estate industry as a common or singular market. The local variations in firm, franchise level competition varies to a point that there are few, not many commonalities."[16]

Prices Are Competitive

Agents in local markets compete fiercely for listings from potential sellers, for potential buyers, and many times, for both. Brokers compete for the best agents to build their competitive edge and enhance their business (firm and clientele). This competition is based on a whole host of factors, including quality, reputation, service, and price. The August 2005 Government Accountability Office (GAO) report, *Real Estate Brokerage: Factors that May Affect Price Competition,* asserts that the industry "has displayed more evidence of competition on the basis of nonprice factors, such as reputation or level of service, than on price."[17]

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[14] Steve Sawyer, *Local Real Estate Market Competition: Evidence and Insight from an Analysis of Twelve Local Markets*, 7-8 The Pennsylvania State University (2005).
[15] *Id*, at 8.
[16] *Id.* at 10.
[17] U.S. Government Accountability Office, *Real Estate Brokerage: Factors that May Affect Price Competition* 3 (2005).

There are extremely little, if any, up-to-date data available on the extent and nature of price competition to support GAO's suggestion that brokers do not compete on price. In fact, the GAO report itself acknowledges that "there are no comprehensive data on brokerage fees," but then goes on to state that commissions have persisted in a range of 5-7 percent.[18] GAO bases this statement on older studies and anecdotes. What GAO characterizes as persistent commission rates we see as market-determined rates that appear to be in a decreasing trend.

The little data that is available contradicts the GAO's suggestion that commission rates are persistently static. The latest research from REAL Trends indicates that commission rates decreased 16 percent from 6.1 percent in 1991 to 5.1 percent 2004.[19] More recently, RISMedia's 2006 Power Broker Report and Survey confirms this trend by noting that the top 500 real estate brokers anticipate that the average commission rate will continue to decline to 4.9 percent this year.[20] It is also unclear how commission rebates or other consumer benefits (such as free moving trucks or payment by the broker of various closing costs) are computed into these calculations, which means that "real" rates may in fact be even lower. If one assumes a $60 to $70 billion brokerage industry and an existing home sales volume of $1.3 to $1.4 trillion (excluding FSBOs), average commission rates range from 4.3 percent to 5.4 percent.[21]

And in any event, even among those who suggest that real estate commissions are artificially and rigidly high, no one has ever advanced any evidence whatsoever of an agreement among real estate professionals regarding commission rates. Even if it were true that commissions cluster within a narrow range, in a highly atomistic industry that suggests only normal economic behavior: competitors lose market share to an unacceptable extent if they raise rates, and fail to earn enough revenue to thrive if rates are lowered.

There seems to be another monumental misunderstanding about real estate commissions – real estate agents do not set commission rates. Commissions (or the price for real estate services for

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[18] *Id.*
[19] REAL Trends real estate focused company that provides news, research and consulting services to the industry.
[20] RISMedia, *The 2006 Power Broker Report*, 119 and 124 Real Estate Magazine (April 2006). RISMedia RISMedia, the industry's leading independent real estate and relocation news and information source, provides daily real estate news online and publishes a number real estate news and information magazines and reports.
[21] Lawrence Yun, *Structure, Conduct, and the Performance of the Real Estate Brokerage Industry*, 15 The National Association of REALTORS® (2005).

some business models) are *independently established* by each firm, as are the commission splits between the firm and its agents. Some agents are permitted by their broker to establish their own commission rates and have the ability to negotiate the services to be provided to their clients within prescribed limits set by their broker.

Real estate reform advocates and media observers clamor on to the issue of commissions when debating competition, describing them as "overcharges" or "excessive." Yet these same critics neglect to take into account income data for brokers and agents. According to NAR's 2005 Member Profile Report, which presents current information about members of the National Association of REALTORS®, the income of REALTORS® (brokers and agents) fell from $52,000 in 2002 to $49,300 in 2004. Income of REALTORS® working as sales agents, who make up two thirds of the membership of NAR, also decreased, from $41,600 (2002) to $38,300 (2004). This decline in income occurred despite a booming housing market and can be attributed to the competitive nature of the industry. The National Association of REALTORS® experienced an increase in its membership of 225,000 (26 percent) over the same time period. The income of the typical broker of less than $50,000 in 2004 certainly would not qualify as a windfall or excessive profit as some have alleged.[22]

One key point that many critics fail to recognize when making accusations of "excess profits" is the fact that most real estate licensees work as independent contractors who are individually responsible for their business and administrative expenses, which typically include:

- State license fees;
- MLS membership fees;
- Continuing education expenses;
- Professional association dues;
- Advertising and marketing costs and materials such as online ads, brochures, handouts, mailings (and postage), yard signs, flyers and business card;

[22] For a comparison, the incomes of other occupations are: Engineer $70,300; Financial services sales $62,000; Real estate agent $49,300; Elementary school teacher $40,300; Nurse $43,661; Auto sales $47,670; Electrician $41,000; Social worker $30,700. *Sources: Bureau of Labor Statistics, National Association of REALTORS®.*

- Technology expenses such as cell phones, PDA, laptop/desktop computer, website, home-office land line, fax machine, scanner, digital camera, global positioning system (GPS), and e-mail service;
- Franchise fees;
- Fees for company-generated leads;
- Desk fees and other office use costs;
- Vehicle expenses, including purchase or lease, maintenance, and gasoline;
- Premiums for errors and omissions or professional liability insurance;
- Premiums for health insurance; and
- Costs associated with federal and state regulatory compliance requirements such as Do-Not-Call, Do-Not-Fax, CAN SPAM and RESPA.

Finally, any debate on commissions or income should factor in the business cycles that occur in the housing sector. The industry has been subjected to harsh business cycles in the past (sales falling 50 percent in the early 1980s and falling 20 percent in the early 1990s). So a high average income in one particular year may not signal excessive profit wrought through market power. It may simply reflect compensation in up and down years. Real estate professionals undertake business risk for the chance of profit, and profit by its nature will fluctuate from one year to the next. This profit opportunity is open to all.

The U.S. Real Estate Market Cannot Be Compared with Other Countries

Some have asserted that consumers in other industrialized countries pay lower commission rates for real estate transactions. However a word of caution is in order regarding any empirical comparisons among countries. There are simply too many factors involved to permit simple commission rate comparisons. In fact, the authors of a 2002 study on international real estate brokerage fees, which has been recently cited by critics of our industry, admit that they did not control for differences in services provided when concluding that U.S. commissions are high compared to other countries.[23] The study concluded that in most industrial countries' residential

[23] Natalya Delcoure and Norman G. Miller, *International Residential Real Estate Brokerage Feed and Implications for the U.S. Brokerage Industry*, 14 fn. 5 International Real Estate Review (2002). Delcoure and Miller also acknowledge earlier studies that suggested several factors that might be attributable to the differences in commission fees, including agency rules, representation, and potential liability which "[liability] tends to be higher in the United

brokerage fees were at 5 percent or less, with the U.S. being the exception.[24] Finally the authors state, "we agree with many other academic analysts that eventually, US (sic) fees will come down."[25] We have good news for the authors – with sources reporting U.S. commissions now below 5 percent, we are on par with other industrialized countries while maintaining [U.S.] unique license and education requirements, high levels of service, and distinguishing professional services.

The Industry Offers Consumers a Wide Range of Options

Consumers looking to buy or sell a home can select from a broad spectrum of options that best meet their needs. Real estate brokerages operate using a wide variety of creative business models and techniques, including, but in no way limited to:

- Internet or virtual delivery of real estate brokerage services;
- Flat-fee commission formulas;
- MLS-entry-only/limited brokerage service programs;
- À la carte or fee-for-service;
- Rebating a portion of a commission to the consumer; and
- So-called "Full-service".

Among NAR's 1.3 million members are firms employing all of these models and practices and more, in contradiction to some observers' position that NAR discriminates against non-traditional/discount/limited service brokerages. *Such assertions are absolutely not true.* NAR welcomes all professionals engaged in various aspects of the real estate industry and our members represent almost every conceivable real estate business model.

We wholeheartedly agree with observers who have stated, "[t]here is room in the industry for many different business models, and competition among different business models is good for

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States and agency tends to be more clearly separated between buyers and sellers." *Id.* at 15, *referencing* J.D. Benjamin G.D. Jud and G. Stacy Sirmans, *What Do We Know about Real Estate Brokerage?* Journal of Real Estate Research (2000).

[24] *Id.* at 31.

[25] *Id.*

the industry."[26] Unfortunately, these same observers have inaccurately portrayed the debate on alternative business models as a "traditional versus non-traditional" turf battle. Ten years ago, before new technologies like the Internet became commonplace and well accepted in the real estate market and before existing-home sales took off, one could generalize about the "traditional" or "bricks-and-mortar" brokerage firms. This was because, even though personal computers were commonplace, data streams and e-mail were still in their infancy (in 1992, there were only 50 world-wide Web sites, today there are almost 80 million WWW sites[27]). For the most part, if consumers wanted to know about houses on the market, they had to go to a broker's office to view MLS inventory printouts, agents had to drive them around to see houses, or, agents could send them a facsimile print out of listings – if the consumer had access to a fax machine. Today, if you search Google for "real estate listings" you will get more than 18 million "hits," representing every conceivable realty business model, including what some refer to as "traditional." Thus, in today's discussion about the players in real estate market, we argue that there is very little distinction between "traditional" and "non-traditional" as each has had to adapt to the consumer demands in highly competitive local markets. This melding will become more apparent as the market begins to slow and the ratio of buyers to sellers tilts toward the latter.

Recently federal regulators have expressed concern that the "entrenched players" are creating barriers and impeding the activities of "fee-for-service" brokers, which limits consumer choice of real estate services.[28] We don't understand this opinion given the success that many "fee-for-service" firms are experiencing. According to REAL Trends, only 2 percent of sellers used discount or alternative brokers in 2002. In 2005, their seller market share jumped to 11 percent.[29] Help-U-Sell, a fee-for-service firm, was ranked by Entrepreneur magazine 15th in 2005 on its list of the 100 fastest-growing companies.[30] The company says it opens a new office every 48 hours on average and has grown 900% since 1999. Another well-known alternative

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[26] Philip Henderson, LendingTree, LLC, *Rebates: Good for Consumers, Good for Brokers* (October 26, 2005). http://www.usdoj.gov/atr/public/workshops/rewcom/213170.htm.
[27] Robert H Zakon, *Hobbes' Internet Timeline* http://www.zakon.org/robert/internet/timeline/#2000s.
[28] Ohlhausen, *supra.* at 2.
[29] James Hagerty, *Real-Estate War Traps Consumers in the Middle: Full-Service Brokers' Tactics to Rebuff Discount Rivals Sometimes Hurt the Customer*, The Wall Street Journal (June 17, 2006) *citing* REAL Trends data.
[30] Help-U-Sell News Release, *Growth Soars for Preeminent Alternative Real Estate Model* (July 20, 2005) http://www.helpusell.com/Pages/newsGrowthSoars.aspx. Help-U-Sell does not describe itself as a discounter. Rather, Help-U-Sell allows the sellers and buyers to choose and pay for only the services they want.

brokerage is Zip Realty, which over the last five years has seen revenues increase approximately 88 percent annually. In fact, very recently, the CFO of Zip Realty commented, "[w]e have the utmost confidence in our ability to scale nationally. We look forward to the remainder of 2006 and are confident that we can effectively compete in this $60 billion market opportunity."[31] And rounding off the top producers of alternative brokerage services is Assist-2-Sell, which says it is "North America's largest residential discount real estate company."[32] Assist-2-Sell, which was also recognized by Entrepreneur magazine as one of the fastest-growing companies, has more than doubled its number of franchises in just over four years and has reported continued increases in home sales.[33]

The larger-alternative businesses are not the only ones talking about growth and expansion. In 2004, Michael Moore, a broker in Greenville S.C., launched a business in which the only service he provided was to submit a seller's property listing to an MLS, only to have to retool it more akin to à la carte – not because of problems with other brokerages, but due to the demand of customers themselves. In an interview with REALTOR® magazine for an article on competition, Moore indicated, "MLS-entry-only works for people who bring a lot of experience and knowledge to the sale, not for people who are just looking to save money."[34] Mr. Moore has grown his company, Open House Realty, which includes brokerages offering flat-fee pricing, MLS-entry-only, and menu-pricing options, from 18 associates in 2004 to 63 in 2006. "For our market, I think what we have is pretty good competition," said Moore.[35]

Real estate brokerage is a $60 to $70 billion dollar industry and one of the largest sectors of the U.S. economy. The last few years, real estate agents sold 6.6 million existing homes annually; ballpark estimates put sales figures for alternative brokerage listings at more than $130 billion annually. In sum, it is hard to accept the contention that "traditional" brokers are stacking the

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[31] Zip Realty News Release, *ZipRealty, Inc. Announces First Quarter Results; Management Also Announces Planned Entry into Palm Beach & Greater Philadelphia* (May 8, 2006) http://phx.corporate-ir.net/phoenix.zhtml?c=180169&p=irol-newsArticle&ID=853714&highlight.
[32] http://www.assist2sell.com/
[33] Dan Rafter, *Browsing To Buy*, CNN's Money.com (November 1, 2004) http://money.cnn.com/magazines/business2/business2_archive/2004/11/01/8189384/index.htm. Rafter notes that "Assist-2-Sell reported revenue of $4.2 million in 2003, up from $2.8 million in 2002."
[34] Robert Freedman, *Is Real Estate Anticompetitive*, 44 REALTOR® Magazine (February 2006).
[35] *Id.*

rules against alternative business models when they are growing by leaps and bounds. As indicated earlier, NAR welcomes all professionals engaged in the various aspects of the real estate industry and we believe that the expanded market share and increased revenues of the alternative realty businesses evidence a healthy competitive environment with a wide variety of realty service options for consumers.

Technology

The successful real estate brokerage firms of today are the result of experimentation and change. The incentive to better serve more customers leads to constant innovation and improvement in business practices. There is no better example of a commercial sector seeing the "writing on the wall" than the real estate industry's early recognition of the powerful influence that technology would have on the marketplace. Before the wave of technology came upon us, the real estate industry was already heavily investing in advanced information communications and building infrastructure that are today the foundation of the way consumers use the Internet to search for listings. Today, real estate professionals are the driving force behind the continued technological advances in the industry; in fact, REALTORS® spend more than $1 billion a year on technology.

Real Estate Industry Embraces World Wide Web

Real estate brokerages were among the earliest private sector pioneers of Internet.[36] Pre-World Wide Web, real estate professionals were taking advantage of classified bulletin boards by "posting" listings using one of the first online service providers.[37] By all accounts, real estate brokers began making their mark on in the Internet in 1995 (1994 is generally regarded as the inaugural year of the Internet). For example, in 1995, there were 23,500 WWW sites, 4,000 of which were dedicated to real estate brokerage.[38] Today, the real estate industry is recognized as the most "enthusiastic users of the Web," – some academics have indicated that real estate Web sites account for approximately 6 percent of commercial Web sites.[39] One of the best examples

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[36] Ashok D. Bardhan and Cynthia Kroll, *The Real Estate Industry and the World Wide Web: Changing Technology, Changing Location*, 5 University of California (1999).
[37] *Id.*
[38] *Id.* and Zakon, *supra.* http://www.zakon.org/robert/internet/timeline/#Growth.
[39] *Id.* at 6.

is Realtor.com, which was established in 1996, is today the largest real estate internet site with over 2.2 million listings available for the public to search and view on a 24/7/365 basis. Realtor.com attracts 5 to 6 million unique visits monthly and accounts for 68 percent of all the time spent by viewers looking at all Internet real estate sites.

NAR's own research confirms the powerful presence real estate professionals have on the Internet. As mentioned earlier, the number of REALTORS® with Web sites has increased *129 percent* over the past five years, and many of the sites have searchable property listings. Nearly 90 percent of REALTOR® firms have Web sites with searchable property listings and 71 percent of individual REALTORS® maintain a personal business Web site. In addition to property listings, other types of information on agents' websites include:

- Information about home buying and selling;
- Mortgage/financial calculators and current mortgage rates;
- School reports;
- Community information and demographics;
- Links to state/local government Web sites;
- Virtual tours;
- Home valuation and comparative market analysis tools;
- Links to real estate service providers; and
- Requests for more information and appointment scheduler.

As technology continues to evolve, so too will the real estate professionals' use of the Web. Real estate professionals are focusing their attention on expanding use of the Internet, including increased geographic reach to buyers and sellers, innovative visualization technology (e.g. virtual tours), seamless transaction technology, and real time delivery of listing information.[40]

Multiple Listing Service – A Powerful Force in Facilitating Competition

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

[40] *Id.* At 7-8.

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.

In addition to the descriptive information and photos submitted on each property by the listing broker, many MLSs provide members with additional information on listed property-including tax records, school information, community information and maps. The MLS rules ensure the timeliness and accuracy of the listing information, creating a reliable and efficient exchange of information among its subscribers. In addition, as a business operating in the highly competitive and fast-moving real estate environment, MLSs also frequently provide value-add features that help their subscribers market their listings, such as systems to announce open houses or to schedule showings.

Cooperation is key to the success of an MLS. Brokers agree to cooperate by sharing their listing information with one another as the integral component of their participation in an MLS. When brokers cooperate, consumers benefit. When real estate practitioners share their listings with one another, they are able to gain market-wide exposure for that property through the MLS. Consumers seeking to buy property benefit from the practitioners' cooperation by getting access to the listings of all participating professionals – saving them from having to go from office to office to view each broker's inventory of listings. Knowing that listings originate with licensed brokers provides professional accountability for the accuracy of the listing information. Consumers are protected by the extensive body of law and regulation that governs the real estate professional's business practices, as well as by the MLS rules and regulations.

Despite the claims that the MLS is a "closed club" in which participation is unduly restricted, participation in the more than 900 MLSs is readily available. All real estate professionals engaged in the brokerage of real estate, which is the purpose for which the MLS is created and for which participants join the MLS, may have access to the MLS. In some cases participation is

limited to those individuals who hold membership in a REALTOR® association. This membership requirement has been upheld in virtually all cases in which it was challenged, most recently by federal district courts in Kentucky and Washington and by the Seventh Circuit Court of Appeals. Membership in REALTOR® associations is available on reasonable and non-discriminatory terms. Thus, real estate professionals operating all kinds of brokerage business models are entitled to participate in and enjoy the benefits offered by the MLS.

MLSs also now make their listing data available to allow MLS participants to operate real estate Web sites, which include a feature where consumers can search for property listings by both broad (such as zip codes) and narrow (number of bedrooms) categories. Before such technology existed, buyers had to peruse the classified ads or use a broker for information on available properties, but now buyers can start their search on the web before visiting a broker for assistance in completing a purchase transaction.

In short, the efficiencies the MLS affords the home buying and selling process is a powerful force for competition. They level the playing field so that smallest brokerage firm in the local market can compete with the largest. The MLS makes it possible for a listing placed by the newest "rookie" agent reach just as many other brokers as the seasoned professional.

MLS is not a "Public Utility"

Real estate reform advocates maintain that the MLS is a necessary utility, and as such, should be available to the public for use. As indicated above, the MLS is a cooperative that not only operates for the use and benefit of its members in serving their clients and customers, but it is created and operated, and its inventory provided by, the very members it serves. That distinguishes it from public utilities like water, gas or electricity, which are not created and operated by their customers, members of the public. MLSs are generally state-charted corporations governed by their Board of Directors, which adopt governing rules pursuant to the MLSs' bylaws. MLSs establish rules to ensure that they remain true to their mission to facilitate cooperation among brokers. The MLS for the Washington D.C. area, Metropolitan Regional Information Systems, Inc. (MRIS), is the largest MLS in the nation. MRIS is owned by 25 Shareholder REALTOR® Associations, has over 59,000 "customers" (licensed real estate

brokers, agents and appraisers) that currently have access to almost 50,000 active listings, an archive of over 1,325,000 "comparable" and "sold" properties and in excess of 4-million public records containing tax information about properties throughout the region. With all of all of MRIS' participants and the tremendous amount of information, it is essential there be rules governing the conduct of the participants and use of the proprietary information to ensure cooperation.

The pro-competitive benefit of the MLS system has been widely recognized, most recently by the GAO which stated, "[the] MLSs provide important benefits to consumers by aggregating data on homes for sale and facilitating brokers' effort to bring buyers and sellers together."[41] However, we strongly disagree with the GAO's unsupported assertion that the MLS "discourages brokers from competing with one another on price."[42] MLSs do not establish commission rates, and in the case of MLSs associated with NAR they are expressly prohibited from taking any action to establish commission rates or commission splits. As stated earlier, commissions are *independently established* by each firm or broker. The only commission information disclosed through the MLS is the amount of compensation the listing broker is offering to pay to the successful selling broker. This information brings efficiency to the transaction and prevents competing brokers from engaging in daily conversation about commission rates. Absent the MLS system where compensation to cooperating brokers is offered in this way, brokers would spend hours negotiating separate compensation arrangements with every broker in town *before* showing a listing. For an industry of professionals whose income is based on commissions, it is critical to know in advance of spending countless hours on a transaction, what he or she will be paid if a successful transaction is concluded. How many people, when starting a new job, would work for weeks before asking their employer how much they will be paid?

There is another misunderstanding by real estate reform advocates who do not understand the difference between an MLS and a real estate advertising site like Washingtonpost.com or Realtor.com. When a broker enters a listing in the MLS, he includes data ("raw facts" such as

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[41] GAO, *supra.* at 12.
[42] *Id.*

square footage, number of bathrooms, etc.) and creative content (digital photographs, virtual tours, artistic renderings, architectural drawings, descriptive and unique listing remarks). Brokers invest substantial time, effort and money to obtain listings from sellers, and in compiling the data and creating the value added creative content of the listing, for submission to the MLS. They are also entrusted by their seller clients with the duty to responsibly market the listing in a manner that will protect the seller's interest as well as sell the home.

Generally, members of the MLS have permission to show and sell each other's listings to each other's customers. In most cases MLS participants also permit other participants to display their listings on their internet sites. Such display, often for advertising purposes, is subject to the consent of the listing broker, who may elect to withhold such consent if he deems it appropriate. But some brokers and non-brokers want more, specifically, they want to take all the data and value-added content and put it on their [advertising] Web site, whether or not the listing broker consents. They argue that such use will give consumers more access to information and force lower commission rates. NAR believes that such use should be permitted, but only if the listing brokers consents. We believe that brokers' considerable effort to secure listings to submit to the MLS earns them the right, and indeed the duty, to determine whether or not to allow their listings to appear on other brokers and non-brokers Web sites.

No Need for Federal Intervention in the MLS System

As mentioned above, real estate brokers' listings are the foundation of their business – their livelihood. Is it right to force businesspeople to give up control of their livelihood just so that others, such as lead generating companies, can profit unfairly from it? If the MLS system were restructured to take away the rights of the listing brokers to market a property as they and their clients see fit, there could be a significant and harmful disruption to the way real estate is marketed to the widest possible pool of buyers Rather than reducing commissions as hypothesized, another possible scenario is that large brokers and brokers affiliated with franchises would pull out and create their own systems – which the expanding availability and decreasing cost of technology makes more and more feasible. In that event, competition would be significantly reduced because it would be extremely difficult for small, independent brokers and those specializing in buyer representation to succeed if they lose access to the large

inventory of listings currently made available to them through the MLS. They will also be adversely affected by the inability to share their listings with other brokers in the market. And more fundamentally, consumers would be injured by the demise of the MLS. Sellers would be harmed by reduction of the number of potential buyers exposed to their properties, and buyers by increased difficulty in readily identifying the properties on the market.

Real estate reform advocates and federal regulators also fail to understand that not every industry is going to be impacted by the Internet the same as travel agents, stock brokers or booksellers. Real estate agents are not selling commodities, but unique properties and they are providing individualized services in *local* markets. Even homes in the same neighborhood can have important differences such as square footage, floor plan, view, landscaping, colors, floor coverings and items in need of repair. An experienced real estate professional provides value-added service that assists sellers to obtain the best price for their home and buyers to find the best home at the lowest price. While almost anyone with access to the Internet and a credit card can "point and click" to virtually any travel destination in the world, you still need a licensed airline pilot and countless other professionals with specialized services to get you to your destination.

Allowing Banks to Engage in Real Estate Brokerage Creates Unlevel Playing Field

While the question of whether banks should be permitted to engage in real estate brokerage activities is not the subject of today's hearing, we believe it is appropriate to raise this issue because critics of the real estate industry argue that banks should be allowed to engage in real estate in order to "shake up" the industry, open it up to more participants, and cause commission rates to come down.

We disagree with their premise—as I have already shown, commission rates are already coming down and there are more new competitive business models than ever before. The industry is already in the midst of a transformation brought about by its embrace of the Internet. Putting that aside, however, these critics ignore the longstanding national policy that banks should not be permitted to engage in commercial activities. Reversing this policy would give national banks an unfair advantage over commercial, especially small, businesses because of their access to cheap capital due to FDIC insurance, access to the Federal Reserve's discount window, and other

benefits of a bank charter. Moreover, letting banks engage in commercial activities would inevitably result in conflicts of interest when competitors of a bank affiliate or subsidiary seek financial services and would also raise safety and soundness concerns.

In 2001, the Department of the Treasury and the Federal Reserve Board published a proposed rule that would permit financial holding companies and financial subsidiaries of banks (but not banks themselves or their operating subsidiaries) to engage in real estate brokerage and management activities. NAR believes that real estate is an inherently commercial activity and that there is no basis for these agencies to designate real estate brokerage or management as a financial activity permissible for bank conglomerates. Congress apparently agrees and has repeatedly enacted legislative provisions to block this rule from becoming final.

Conclusion

America's residential real estate market is a model of efficiency – real estate brokerage is a $60 to $70 billion industry that directly accounts for 15 percent of the U.S. gross domestic product (GDP). Our residential real estate market is also a model of competition providing significant opportunities for aspiring entrepreneurs as well as cost-efficient mechanisms for consumers when selling or buying a home. In an economy in which large, national corporations such as Wal-Mart or Microsoft increasingly dominate the marketplace, real estate stands apart.

Change in real estate brokerage reflects the following paradox: the more things change, the more they stay the same. Real estate firms use the latest technology to provide sellers and buyers with information about properties, but real estate professionals play the same role in facilitating real estate transactions. Changes in technology, the economy and the competitive landscape are transforming the environment for real estate brokerage. The industry is evolving and creating a wealth of opportunities for all types of real estate brokerages. While the future is never certain, real estate professionals' willingness to adapt and change will help the market participants grow and prosper, which is good for the economy, good for household wealth accumulation and good for every working American family wanting to achieve the dream of homeownership. Thank you for your time and I will be happy to answer any questions you may have.

Attachment

Actions, Research Steps, Procedures, Processes and Review Stages in a Real Estate Transaction[43]

Pre-Listing Activities

1 Make appointment with seller for listing presentation
2 Send seller a written or e-mail confirmation of listing appointment and call to confirm
3 Review pre-appointment questions
4 Research all comparable currently listed properties
5 Research sales activity for past 18 months from MLS and public records databases
6 Research "Average Days on Market" for this property of this type, price range and location
7 Download and review property tax roll information
8 Prepare "Comparable Market Analysis" (CMA) to establish fair market value
9 Obtain copy of subdivision plat/complex lay-out
10 Research property's ownership & deed type
11 Research property's public record information for lot size & dimensions
12 Research and verify legal description
13 Research property's land use coding and deed restrictions
14 Research property's current use and zoning
15 Verify legal names of owner(s) in county's public property records
16 Prepare listing presentation package with above materials
17 Perform exterior "Curb Appeal Assessment" of subject property
18 Compile and assemble formal file on property
19 Confirm current public schools and explain impact of schools on market value
20 Review listing appointment checklist to ensure all steps and actions have been completed

Listing Appointment Presentation

21 Give seller an overview of current market conditions and projections
22 Review agent's and company's credentials and accomplishments in the market
23 Present company's profile and position or "niche" in the marketplace
24 Present CMA Results To Seller, including Comparables, Solds, Current Listings & Expireds
25 Offer pricing strategy based on professional judgment and interpretation of current market conditions
26 Discuss Goals With Seller To Market Effectively
27 Explain market power and benefits of Multiple Listing Service
28 Explain market power of web marketing, IDX and REALTOR.com
29 Explain the work the brokerage and agent do "behind the scenes" and agent's availability on weekends

[43] Orlando Regional REALTOR® Association (2006).

30 Explain agent's role in taking calls to screen for qualified buyers and protect seller from curiosity seekers
31 Present and discuss strategic master marketing plan
32 Explain different agency relationships and determine seller's preference
33 Review and explain all clauses in Listing Contract & Addendum and obtain seller's signature

Once Property is Under Listing Agreement

34 Review current title information
35 Measure overall and heated square footage
36 Measure interior room sizes
37 Confirm lot size via owner's copy of certified survey, if available
38 Note any and all unrecorded property lines, agreements, easements
39 Obtain house plans, if applicable and available
40 Review house plans and make copy
41 Order plat map for retention in property's listing file
42 Prepare showing instructions for buyers' agents and agree on showing time window with seller
43 Obtain current mortgage loan(s) information: companies and & loan account numbers
44 Verify current loan information with lender(s)
45 Check assumability of loan(s) and any special requirements
46 Discuss possible buyer financing alternatives and options with seller
47 Review current appraisal if available
48 Identify Home Owner Association manager if applicable
49 Verify Home Owner Association Fees with manager - mandatory or optional and current annual fee
50 Order copy of Homeowner Association bylaws, if applicable
51 Research electricity availability and supplier's name and phone number
52 Calculate average utility usage from last 12 months of bills
53 Research and verify city sewer/septic tank system
54 Water System: Calculate average water fees or rates from last 12 months of bills)
55 Well Water: Confirm well status, depth and output from Well Report
56 Natural Gas: Research/verify availability and supplier's name and phone number
57 Verify security system, current term of service and whether owned or leased
58 Verify if seller has transferable Termite Bond
59 Ascertain need for lead-based paint disclosure
60 Prepare detailed list of property amenities and assess market impact
61 Prepare detailed list of property's "Inclusions & Conveyances with Sale"
62 Compile list of completed repairs and maintenance items
63 Send "Vacancy Checklist" to seller if property is vacant
64 Explain benefits of Home Owner Warranty to seller
65 Assist sellers with completion and submission of Home Owner Warranty Application
66 When received, place Home Owner Warranty in property file for conveyance at time of sale
67 Have extra key made for lockbox
68 Verify if property has rental units involved. And if so:

69 Make copies of all leases for retention in listing file
70 Verify all rents & deposits
71 Inform tenants of listing and discuss how showings will be handled
72 Arrange for installation of yard sign
73 Assist seller with completion of Seller's Disclosure form
74 "New Listing Checklist" Completed
75 Review results of Curb Appeal Assessment with seller and provide suggestions to improve salability
76 Review results of Interior Décor Assessment and suggest changes to shorten time on market
77 Load listing into transaction management software program Entering Property in Multiple Listing Service Database
78 Prepare MLS Profile Sheet -- Agents is responsible for "quality control" and accuracy of listing data
79 Enter property data from Profile Sheet into MLS Listing Database
80 Proofread MLS database listing for accuracy - including proper placement in mapping function
81 Add property to company's Active Listings list
82 Provide seller with signed copies of Listing Agreement and MLS Profile Sheet Data Form within 48 hours
83 Take additional photos for upload into MLS and use in flyers. Discuss efficacy of panoramic photography

Marketing the Listing

84 Create print and Internet ads with seller's input
85 Coordinate showings with owners, tenants, and other Realtors®. Return all calls – weekends included
86 Install electronic lock box if authorized by owner. Program with agreed-upon showing time windows
87 Prepare mailing and contact list
88 Generate mail-merge letters to contact list
89 Order "Just Listed" labels & reports
90 Prepare flyers & feedback faxes
91 Review comparable MLS listings regularly to ensure property remains competitive in price, terms, conditions and availability
92 Prepare property marketing brochure for seller's review
93 Arrange for printing or copying of supply of marketing brochures or fliers
94 Place marketing brochures in all company agent mail boxes
95 Upload listing to company and agent Internet site, if applicable
96 Mail Out "Just Listed" notice to all neighborhood residents
97 Advise Network Referral Program of listing
98 Provide marketing data to buyers coming through international relocation networks
99 Provide marketing data to buyers coming from referral network
100 Provide "Special Feature" cards for marketing, if applicable
101 Submit ads to company's participating Internet real estate sites
102 Price changes conveyed promptly to all Internet groups

103 Reprint/supply brochures promptly as needed
104 Loan information reviewed and updated in MLS as required
105 Feedback e-mails/faxes sent to buyers' agents after showings
106 Review weekly Market Study
107 Discuss feedback from showing agents with seller to determine if changes will accelerate the sale
108 Place regular weekly update calls to seller to discuss marketing & pricing
109 Promptly enter price changes in MLS listing database

The Offer and Contract

109 Receive and review all Offer to Purchase contracts submitted by buyers or buyers' agents.
110 Evaluate offer(s) and prepare a "net sheet" on each for the owner for comparison purposes
111 Counsel seller on offers. Explain merits and weakness of each component of each offer
112 Contact buyers' agents to review buyer's qualifications and discuss offer
113 Fax/deliver Seller's Disclosure to buyer's agent or buyer upon request and prior to offer if possible
114 Confirm buyer is pre-qualified by calling Loan Officer
115 Obtain pre-qualification letter on buyer from Loan Officer
116 Negotiate all offers on seller's behalf, setting time limit for loan approval and closing date
117 Prepare and convey any counteroffers, acceptance or amendments to buyer's agent
118 Fax copies of contract and all addendums to closing attorney or title company
119 When Offer to Purchase Contract is accepted and signed by seller, deliver to buyer's agent
120 Record and promptly deposit buyer's earnest money in escrow account.
121 Disseminate "Under-Contract Showing Restrictions" as seller requests
122 Deliver copies of fully signed Offer to Purchase contract to seller
123 Fax/deliver copies of Offer to Purchase contract to Selling Agent
133 Fax copies of Offer to Purchase contract to lender
124 Provide copies of signed Offer to Purchase contract for office file
125 Advise seller in handling additional offers to purchase submitted between contract and closing
126 Change status in MLS to "Sale Pending"
127 Update transaction management program to show "Sale Pending"
128 Review buyer's credit report results -- Advise seller of worst and best case scenarios
129 Provide credit report information to seller if property will be seller-financed
130 Assist buyer with obtaining financing, if applicable and follow-up as necessary
131 Coordinate with lender on Discount Points being locked in with dates
132 Deliver unrecorded property information to buyer
133 Order septic system inspection, if applicable
134 Receive and review septic system report and assess any possible impact on sale
135 Deliver copy of septic system inspection report lender & buyer
136 Deliver Well Flow Test Report copies to lender & buyer and property listing file
137 Verify termite inspection ordered
138 Verify mold inspection ordered, if required

Tracking the Loan Process

139 Confirm Verifications Of Deposit & Buyer's Employment Have Been Returned
140 Follow Loan Processing Through To The Underwriter
141 Add lender and other vendors to transaction management program so agents, buyer and seller can track progress of sale
142 Contact lender weekly to ensure processing is on track
143 Relay final approval of buyer's loan application to seller

Home Inspection

144 Coordinate buyer's professional home inspection with seller
145 Review home inspector's report
146 Enter completion into transaction management tracking software program
147 Explain seller's responsibilities with respect to loan limits and interpret any clauses in the contract
148 Ensure seller's compliance with Home Inspection Clause requirements
149 Recommend or assist seller with identifying and negotiating with trustworthy contractors to perform any required repairs
150 Negotiate payment and oversee completion of all required repairs on seller's behalf, if needed

The Appraisal

151 Schedule Appraisal
154 Provide comparable sales used in market pricing to Appraiser
152 Follow-Up On Appraisal
151 Enter completion into transaction management program
153 Assist seller in questioning appraisal report if it seems too low

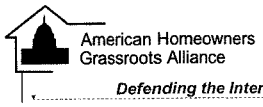
Closing Preparations and Duties

154 Contract Is Signed By All Parties
155 Coordinate closing process with buyer's agent and lender
156 Update closing forms & files
157 Ensure all parties have all forms and information needed to close the sale
158 Select location where closing will be held
159 Confirm closing date and time and notify all parties
160 Assist in solving any title problems (boundary disputes, easements, etc) or in obtaining Death Certificates
161 Work with buyer's agent in scheduling and conducting buyer's Final Walk-Thru prior to closing
172 Research all tax, HOA, utility and other applicable prorations
162 Request final closing figures from closing agent (attorney or title company)
163 Receive & carefully review closing figures to ensure accuracy of preparation
164 Forward verified closing figures to buyer's agent
165 Request copy of closing documents from closing agent
166 Confirm buyer and buyer's agent have received title insurance commitment
167 Provide "Home Owners Warranty" for availability at closing
168 Review all closing documents carefully for errors

169 Forward closing documents to absentee seller as requested
170 Review documents with closing agent (attorney)
171 Provide earnest money deposit check from escrow account to closing agent
173 Coordinate this closing with seller's next purchase and resolve any timing problems
174 Have a "no surprises" closing so that seller receives a net proceeds check at closing
175 Refer sellers to one of the best agents at their destination, if applicable
176 Change MLS status to Sold. Enter sale date, price, selling broker and agent's ID numbers, etc.
177 Close out listing in transaction management program

Follow Up After Closing

178 Answer questions about filing claims with Home Owner Warranty company if requested
179 Attempt to clarify and resolve any conflicts about repairs if buyer is not satisfied
180 Respond to any follow-on calls and provide any additional information required from office files.



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Defending the Interests of 75 Million U.S. Homeowners

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Statement
Of the

American Homeowners Grassroots Alliance

Submitted to the

Subcommittee on Housing and Community Opportunity

Holding hearings on

The Changing Real Estate Market

July 25, 2006

www.AmericanHomeowners.org

The American Homeowners Grassroots Alliance commends the Financial Services Committee and the Subcommittee on Housing and Community Opportunity for holding

this hearing on "The Changing Real Estate Market". Real estate industry lobbying and the conflicts presented by self-regulation are denying homeowners the opportunity to save billions of dollars each year through the use of innovative new brokerage tools and methods. This hearing will document the problems and enable the Committee to begin to explore and potentially address the problems.

Many members of Congress own homes in the metropolitan Washington DC area, where median home prices exceed $500,000. They and other homeowners in Virginia, Maryland and DC are fortunate because none of these jurisdictions have enacted laws or promulgated regulations that restrict home sellers from using very inexpensive flat fee real estate brokers that will place their home for sale in the real estate exchanges for a much lower fee. By "exchange" we include the Multiple Listings Services, which are collectively managed central systems for a home seller's broker to distribute a home listing to other brokers in order to find a buyer. These systems include both the traditional business to business MLS functions and the more recent business-to-consumer functions, the latter reflected in a network of thousands of brokers' consumer-facing websites as well as the National Association of Realtors' www.Realtor.com.

This network, which has evolved into an Internet-based business-to-consumer public utility, is now used by over 70% of home buyers in their home search process! Buyers in the metropolitan DC area have the option of listing their home with a flat fee broker for as little as $200 (of course for that low price the home seller must hold their own open houses and do the other work attendant to selling their home), versus paying the typical 6% commission for full service brokerage services, which would amount to $30,000 on a $500,000 home.

With listed homes in the area often receiving multiple offers in the first several weeks of listing until late last year, it is no wonder that more metropolitan DC home sellers are using this alternative. It is working well here and in other states where this alternative is not restricted – we haven't received complaints from home buyers or sellers using this cost-saving tool. We are unaware of either other consumer organizations or government agencies receiving any complaints from home buyers or home sellers.

Home buyers and sellers in some other states aren't nearly so lucky. There laws and regulations force home sellers to pay for real estate services they neither want nor need, and prohibit consumers from receiving real estate commission rebates. All of us owe a great amount of thanks to the Department of Justice for its lawsuit against the National Association of Realtors to prevent the adoption of their anticompetitive industry regulations that would further limit the benefit and use of the tools of technology in real estate. The proposed NAR rules would hasten the consolidation of real estate brokerages in the U.S. and are adverse to the best interests of the many small and independent real estate brokers who for years have been both the heart of NAR and pillars in their communities. We also owe a great amount of thanks to the Department of Justice and the Federal Trade Commission for their joint efforts to stop state legislative and regulatory initiatives by state real estate associations that have the effect of denying cost saving alternatives to the very same consumers to whom the brokers owe both their livelihood and their fiduciary duty.

Despite the best efforts of the DOJ, the FTC, and consumer advocates, the powerful real estate lobby has them outgunned. Some brokers put their self interest ahead of their clients' interest and principles of free trade to push for laws that limit competition.

Moreover, the state real estate commissions and boards appear to be dominated by active traditional full-service real estate brokers with conflicts of interest. We believe that most of the minimum-service and antirebate regulations come at the behest of the state real estate associations. Upon learning from DoJ and FTC that such regulations would

violate antitrust laws and lead to action by those federal agencies, those same state real estate associations turned their regulatory proposals into state legislation to try to escape antitrust enforcement.

These practices have been uniformly condemned by the media, including the Wall Street Journal and many of the nation's most prestigious newspapers, magazines, TV shows and many, many others. There is clearly a need for Congress to act.

With home equity now one of the largest forms of consumer savings, large amounts of money are at stake for homeowners. In fact American consumers pay more for real estate brokerage services than consumers of any other comparable country.[1] U.S. real estate brokerage fees in real dollars have increased in recent years as housing prices have soared while average commission rates have moved only a tiny fraction of a percent downward. By contrast the Internet has substantially reduced brokerage costs in other industries. With homeowners doing more of the home search work themselves, the real estate agents' work load is reduced, and therefore traditional commissions should be declining, not increasing. And if the dramatic cost savings of the flat fee business model were not limited by real estate industry lobbying efforts, commissions would be dropping even further. Clearly the evidence suggests the market is broken.

All of the problems you will hear about are the result of an overarching reality that we hope this committee will address: the real estate marketplace is self-regulated and currently there is currently no participant in the process looking out for consumers' interests. While broker licensing is managed by state law, the brokerage markets – the Multiple Listings Services (MLSs) -- are self-regulated and have been used to disadvantage both consumers and innovators. Essentially, the national trade association for real estate brokers – the National Association of Realtors (NAR) – is appropriately carrying out its mission to protect the interests of brokers. In so doing it is ignoring the interests of its clients. Indeed it would not be reasonable to expect otherwise, anymore than you could expect one law firm to effectively represent opposing parties in a lawsuit seeking financial damages or expect one real estate broker to effectively represent both the buyer and seller of the same home.

The self-interest of brokers is often contrary to the best interest of their fiduciaries, and the record is clear that the best interest of consumers has not been a consideration of NAR or many of the state real estate associations in their regulation of the industry's business processes. Indeed, they do not consult with stakeholder consumer organizations and some of them take offense at the suggestion that consumers should have any role at all in the process. It is therefore important that Congress examine this area and take action to assure that consumer interests are represented in the management the real estate exchanges.

Markets can generally self-police if innovators are able to enter and compete. A fairly run MLS system is essential to enable innovators to compete. Policymakers must be very concerned when competitors can join together to impair innovation. This is what is so troubling in real estate brokerage. Recent enforcement actions by the Dept. of Justice and the Federal Trade Commission strongly suggest the ability of innovators to compete on service and price is being impaired.

On behalf of the nations' homeowners – and more importantly, on behalf of families who aspire to homeownership – we call upon this Committee and Congress to take concrete actions based on the input from this and earlier hearings. Options include additional studies on the subject in support of legislation to address the problems, legislation

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[1] See paper by Professor Norm Miller, University of Cincinnati, presented at the American Antitrust Institute, www.antitrustinstitute.org/recent2/464f.pdf

outlawing specific types of anticompetitive state legislation or industry regulations; the creation of a federal "Real Estate Commission" that would oversee the regulatory activities of NAR and the state associations (much as the SEC oversees the activities of NASD and the stock exchanges); and providing additional powers and resources to the Department of Justice and the Federal Trade Commission that would be dedicated to this effort. We also believe that there are other problem areas in real estate services – such as dual agency – that deserve a separate set of hearings and separate solutions.

The American Homeowners Grassroots Alliance (AHGA) is a consumer advocacy organization serving the nations 75 million homeowners. More about AHGA is at www.AmericanHomeowners.org

Ladies & Gentlemen:

It's a privilege for me to be here with you today. My name is Tom Kunz, and I am the president & CEO of Century 21 Real Estate LLC.

I hope to share the unique perspective of someone who currently sells franchises to real estate brokers and provides services to affiliated brokers and sales professionals. Previously, I have been president of an independently owned and operated real estate brokerage company in Southern California, and also headed up a software company earlier in my career.

I am here representing the over 137,000 small, independent businessmen and women who are members of the Century 21 franchise system, either as brokers or sales associates. We have more than 7,500 offices worldwide, but half our offices have 17 or fewer sales associates and the median number for closed transactions by office last year was 141. We're a big system, but one that is proud to have so many small to mid-sized businesses in our ranks along with our larger brokers.

I can also speak from a real estate consumer's perspective because within the past year, I sold my primary residence in California, moved across country and purchased a new home in New Jersey. I might add that precisely because of my 31 years of experience in the industry, I made the educated decision to work with a full-service real estate professional on both transactions, using both a seller's agent and a buyer's agent. I got what I paid for, too: excellent marketing, local knowledge, and advice and counsel throughout the process.

[The Listing]
Since this is the seller's panel, I'd like to open by talking about the listing.

The issue of who owns the listing is fundamental to this conversation. I will tell you, in rather certain terms, that a listing is a broker's work product.

It is interesting to hear some people espouse the theory that selling a house is a simple process and that one must only "list" it with an MLS in order to make a sale. Anyone who has ever sold a house fully appreciates that the listing is merely the first of many steps.

A listing is the agreement between a broker and a homeowner that describes the manner in which a home will be marketed and sold. It often defines the manner in which the home will be presented and marketed to the body of prospective buyers. The terms of this agreement are -- and we believe should remain -- a matter for private negotiation between the listing homeowner and the broker of his or her choice, rather than the subject of government regulation at the federal, state or local level. If anything, the increased use of the Internet by potential sellers and buyers of residential real estate has significantly increased the negotiating power of the listing homeowner in setting the terms of such transactions, which was already significant as a result of his or her control of the key asset: the home itself.

It is our firm belief that the federal government should not get involved in dictating to state licensed real estate professionals and homeowners how those individual marketing plans should or should not be implemented.

[Competition in the Real Estate Industry]
Let me ask you, in what other industry do individual service providers negotiate a competitive price for their services and then aggressively market their products to the competition, sharing 50 percent or more of their fee to attract buyers?

And in what other industry do individual competitors voluntarily make their inventory available to other industry participants, empowering the competition to avoid the costs and infrastructure necessary to produce their own inventory?

I'll tell you ... The residential real estate industry is one of the last great industries where entrepreneurs can open up shop next door to the largest brokerage firm in town, join a cooperative group called an MLS and share in their competitor's inventory, invest relatively little in start-up costs and actually make a living.

This industry is dominated by small- to medium-sized family owned and operated firms, many handed down over generations. There are more than 1 million sales associates and brokers operating in nearly 100,000 offices around the country. They are fiercely independent, yet through voluntary efforts unique to the industry, they co-operate with the competition in ways unheard of in any other industry.

And why? Because co-operation best meets the needs of the consumer. This is facilitated through a co-operative known as a Multiple Listing Service or MLS. Depending upon who you ask, there are anywhere between 800 and 2,000 MLSs operating in the country today.

Long ago, the industry recognized that through co-operative efforts brokers and agents could sell a customer's house faster and more efficiently. If you look at the past several years in particular, where many traditional investments and those who manage them have failed, real estate professionals have done their job quite well.

Simply put, the process works and works rather well. In a performance-driven economy, I would say the real estate industry has out-performed.

[The Market: Competitive & Efficient]
The simple fact of the matter is that the U.S. housing market place tends to be very efficient for consumers. When a real estate professional presents herself to a prospective home seller and makes a "listing" presentation, she does so with a full understanding of the very real pricing pressures and competitive issues. She presents her skills, resources, technology and marketing plan for the home. She also presents and explains her fees. Generally the typical homeowner will invite listing presentations from more than one agent.

Through the co-operative efforts of the industry, the Internet empowers home sellers to be well educated on:

- the market
- attributes of various firms and specific sales associates
- pricing
- and the list goes on and on.

Ultimately, the home seller selects a real estate professional and his or her brokerage firm. Each real estate professional competed against the other and ultimately a very efficient process driven by the homeowner determined which fee and which services best met the homeowner's needs.

As you are aware, sales associates are almost always independent contractors and our experience shows that all commission fees are negotiable. This very efficient price/value proposition process takes place thousands of times each day throughout this country. Some sales agents are simply better than others, and they are able to demand and earn higher fees. Some choose to discount their fees, which may or may not be reflected in their service levels.

At the end of the day, it is the homeowner who decides if the price value proposition meets his or her needs. The home seller ultimately controls the listing decision, which gives him a great deal of influence over the price of the services. As my father used to say, "People vote with their cash."

Thus, the marketplace determines what is acceptable. The fact is that the national average broker commission rate over the past dozen or so years has trended down from the 6% to 7% range down 5.1% according to *REAL Trends*, a leading industry consulting and analysis firm. That said, it is almost impossible to determine what the "competitive" price level is in any industry, especially one as dynamic as the residential real estate business where there are highly individualized services and rapid technological change.

[Minimum Service Requirements]
If you are the listing broker, a number of states have determined that you must actually have a physical presence to properly represent the seller and provide the services necessary to manage the sale process.

More than a dozen states have determined that one cannot properly represent a seller's interests while operating out of a call center located two states away. Thus, we have seen a recent spate of Minimum Service Requirement (MSR) laws passed at the state level.

First and foremost, this is a states rights issue. I cannot, nor can you, dissuade the states from doing what they think is best for their respective citizens. They are acting to protect their consumers, not to shield the real estate industry in some way.

For the record, while we have no reason to believe that the states' motives are anything but well intentioned, neither Century 21 nor our parent company Cendant believes that minimum service legislation is truly necessary.

We believe in the consumer's right to choose their real estate representation -- or not -- and we also believe that the full-service real estate model employed by the majority of our brokers presents a compelling value proposition that is recognized on its own merits by today's

increasingly savvy consumers.

That being said, it is important to note that in the past five years, there have been a variety of alternative real estate models launched, which is strong evidence that competition and the ability to innovate are alive and well and thriving in our industry.

And who benefits most from this competition? The consumer. They have more choices than ever before.

At the end of the day, the consumer should determine what is in his or her best interests. In fact, when I look out across residential real estate in America, I see a very dynamic and competitive industry that should be left free of federal government regulatory intervention to sort itself out.

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Good afternoon Ladies and Gentlemen.

My name is Alex Perriello and I am president and CEO of the Cendant Real Estate Franchise Group.

I am here today representing the more than 300,000 real estate sales professionals, managers and brokers associated with one of the four Cendant residential real estate brands:

- Century 21®
- Coldwell Banker®
- ERA® and
- Sotheby's International Realty®

First, I would like to thank our hosts today, the Federal Trade Commission and the Department of Justice. I am pleased to be able to present my comments in this forum, and I am doing so with the intention of helping foster a greater understanding on the topic of "Competition Policy and the Real Estate Industry" as it pertains to homebuyers.

Let me begin by stating my opinion on the heart of the matter, which is competition. The residential real estate industry is extremely competitive.

There are 1.1 million licensed Realtor members of the National Association of Realtors® in the U.S. This figure is at a record high, and speaks volumes as to the levels of competition for residential real estate services in this country.

Moreover, there are no significant barriers to entry or expansion in the residential real estate industry. As a result, there has been a dramatic increase in the number of agents entering the industry in recent years.

Even in areas where a new entrant faces one – or several – long-established competitors, there is a proven ability of such dedicated, hard-working entrants to attract listings and clients on both the "buy" and "sell" sides. This ensures that, to the extent there is local demand for alternative pricing or service models, this demand will be filled, either by incumbent firms that are willing to adapt their business models, or by new firms that step in to fill the void.

Just last week, I was speaking with Brad Halter of Coldwell Banker Caine in Greenville, SC and during our conversation, I mentioned to him that I would be here today as a panel member discussing the competitiveness of the residential real estate business and he said …

"Are you kidding? Have them come to Greenville if they want to see competition. My family has been in the business here for 75 years and during those three generations, we have never experienced competition as intense as it is today …

Not only from traditional competitors, but a host of newcomers offering discounts and limited service platforms. It seems as though a new service model opens up every month."

Accordingly, based on Mr. Halter's comments and similar stories conveyed to me by brokers and sales associates all across the country, I must admit to being puzzled as to statements that the residential real estate brokerage industry either lacks competition, shuns technology or operates in some sort of anti-competitive manner.

The U.S. real estate market thrives today because buyers and sellers have choices and more choices means more competition.

Let's look at the many options a homebuyer has today. A buyer can purchase a home in any one of the following ways:

- Buy direct from a homeowner (For Sale By Owner)
- Enter into an exclusive buyer's agency agreement
- Deal directly with the listing agent (e.g., walk into an open house and tell the agent "I want to buy this house")
- Work with a number of agents, telling them the exact criteria for the desired home, and doing business with the one who finds that property
- Shop the Internet and review agent profiles online
- Go through an intermediary who will refer them to a sales professional, perhaps so that the buyer can receive a rebate on the commission.

As you can see, there are a myriad of choices for buyers to choose representation, or not, as they seek to purchase a home. From personal experience, I can tell you that homebuyers usually end up selecting someone they both like, respect and trust ... someone who is willing to do what it takes to bring the transaction to a successful close.

Real estate ... by its very nature ... is a local business. Sales associates are predominantly independent contractors who only earn a commission when they close a transaction, and they only make a living when they have satisfied customers time and time again. This requires them to be very competitive and to use all the tools at their disposal, including the willingness to negotiate the price and other terms on which their services are offered.

I would now like to address the impact of technology, more specifically the Internet, on the home buying process.

Today, the true value of the Internet, to the residential real estate industry and consumers alike, is that it is a highly effective marketing tool as well as a tremendous information resource and communication vehicle.

Unlike some industries, the residential real estate industry was among the

earliest to adopt Internet technology for the consumers' benefit.

Real estate companies began posting Web sites with property listings in the mid-1990s. Today a broker's Web site will offer multiple property photos, rich text, virtual tours, mapping functionality and neighborhood information just to name a few features.

In so doing, real estate brokers and agents have incurred a variety of new costs associated with technology in an already low-margin business. For example ...

- Online advertising/marketing costs (all while maintaining traditional print media costs)
- Hardware – PCs, laptops, servers, networks
- Software
- Digital cameras
- Virtual tour equipment
- Professional technical support for Web sites and agents
- Personal and office technology products

... and the list goes on and on.

These costs have been absorbed, virtually in their entirety, by the industry itself. Consumers have not realized increased transaction costs due to the adoption of new technology in marketing real estate listings. In fact, online searches are a definite time-saver in the way that they empower consumers to select a buyer's or seller's agent, and narrow their home search process from the comfort of their own home or office.

What the Internet does very well is to act as a marketing tool to promote transactions. It is a search tool for consumers and an advertising and communication tool for real estate professionals.

For both parties, there are numerous potential benefits to the increased use of technology in real estate transactions – primarily revolving around the improved speed of the transaction process. Those efficiencies and cost savings will come as transaction management platforms become more sophisticated and widely used.

But, with that said, real estate is not a commodity.

Unlike an airline ticket from Orbitz or a book from Amazon, a house is a unique item that requires in-person investigation and evaluation. The ultimate cost of the wrong decision is significant.

The future role of technology in our business is, accordingly, very difficult to predict.

Undoubtedly, because of the competitive nature of the business, there will be

winners and losers just as there has been over the past many decades.

Respectfully, I would suggest there is no need for the federal government to intervene to fix what isn't broken.

Let me now turn to the issue of rebates and inducements for a moment.

In today's marketplace, many consumers expect discounts, rewards and other benefits when shopping for everything from a car to a hotel room to a meal in a restaurant.

Still, some states still prohibit all forms of inducements by real estate licensees. This deprives those consumers of the potential advantages and benefits available to consumers in other states and may limit the competitiveness of real estate offices in the state with those prohibitions.

Our parent company, Cendant, has been working with many of these state Real Estate Commissioners to repeal rules that would prohibit the use of incentives, discounts, sweepstakes and other consumer benefits in a real estate transaction.

Simply put, we feel that prohibitions on inducements are not necessary. The remaining "anti-inducement states" should remove these antiquated laws as just occurred in West Virginia and stop denying businesses the opportunity to offer rebates or inducements.

With that said, however, I feel it is incumbent on me to raise a caution flag on the issue of rebates and inducements.

Choosing someone to represent you in a real estate transaction is a very important decision. Making that choice based solely on who will give you a rebate at the closing is akin to buying a car you may not like just for the manufacturer's rebate.

My advice to homebuyers <u>and</u> sellers is to do their homework. Interview several agents from competing firms, ask tough questions and then decide who you feel is the most qualified to represent you in the transaction.

In closing ... choice is important – we believe that consumers – homebuyers <u>and</u> sellers should be able to choose their service model as well as the provider of such services, limited or full service. We encourage free and open competition in the marketplace.

Discount brokerages, referral businesses and lead generation companies have a role to play in the real estate industry. Discounters have been in our business for decades. Some of our brand affiliate brokers participate in referral networks and/or purchase leads from third party marketing companies.

However, we believe that property listings are the work product of the brokers … the MLS industry is a B-to-B relationship and was never intended to be a consumer-direct resource. If an independently owned and operated broker wants to make a business decision to pay someone else for a lead generated off their work product, that's their decision, and we respect their right to run their businesses as they see fit.

Last, but certainly not least, competition is alive and well in the real estate industry today. As Mr. Halter said to me, "Just come to Greenville and see for yourself." There is simply no need for government involvement at this point in time to intervene with the competitive ebb and flow of the free market for residential real estate.

Thank you.

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STATEMENT OF

REAL ESTATE AGENTS FOR REAL AGENCY, INC.

"Working to Keep Real-Estate Agency Clear for Consumers"

www.agencyinformation.org

U.S. House of Representatives
House Financial Services Committee
Housing & Community Opportunity Subcommittee

Testimony for July 25 hearing

Realtors® are *not* monolithic, and the National Association of Realtors® (NAR) absolutely does *not,* in its misguided current anti-competitive policies, speak for all its members.

My name is Fred Meyer. I am a Realtor® and have been running a full-service real estate office, in Harvard Square, Cambridge, Massachusetts, for 43 years now. I've been President of the Greater Boston Association of Realtors®, President of the Massachusetts Association of Realtors®, and a director of the National Association of Realtors®. But I'm now president of a non-profit organization, Real Estate Agents for Real Agency, which is adamantly opposed to NAR on many (but not all) issues. [See our website, www.agencyinformation.org]

Here's the Realtors®' anti-competitive strategy, in a nutshell:

1. Require that consumers (whether or not they use the internet) use an expensive, full-service, non-discount broker (whether they want one or not).
   Achieve this, in states where possible, by so-called 'minimum service' and anti-rebate laws.
   But, in all states, achieve it by requiring a local 'bricks and mortar' office, equipped to accompany buyers (whether they want it or not) to viewings, as a condition of crucial Multiple Listings Service (MLS) membership.

2. Introduce and encourage *dual* agency, so large offices can purport to represent both the seller and the buyer of the same property (despite the obvious conflicts of interest in trying to seek both a higher price and a lower price at the same time.)
   Achieve this by ignoring or repealing common law standards of fiduciary duty, as well as by confusing the public and state regulators about what 'agent' and 'agency' mean and require.

3. Prevent any federal involvement in real estate *agency* (despite very extensive federal involvement, through FIRREA and USPAP, in the area of real estate *appraisal*).

Here are some details on the strategy outlined above..

1. If you want to sell or buy your house, why can't you handle it, if you wish, online...the way you can now purchase a plane ticket?
If you're a seller, you should be able to place your house on the Multiple Listing Service, by choosing an MLS member (whether local or national) who will provide you that service for a low flat fee. You should, if you choose, be able to handle all appointments for showings yourself, without having to have any Realtor® there.

If you're a buyer, you should be able to contract with an MLS member who will agree to rebate to you most of the buyer-side commission, in return for your viewing houses by yourself, unaccompanied.

We are not saying that such self-service in real estate is always wise (just as it's not always wise to book a foreign trip online yourself, without using a travel agency). But it should always be possible and legal. Realtor® MLS membership requirements that a member have a local office equipped to provide accompanied showings may be protective of traditional Realtor® business models, but they not necessarily be at all what the public wants and deserves.

2. NAR, deliberately in my opinion, does not educate, and actively misleads, its membership and the public about the fundamental difference between (a) real estate brokerage and (b) real estate *agency*. In every state, real estate practitioners are licensed as real estate *brokers* or real estate *salespeople*. (A broker supervises salespeople). But they are *not* licensed as real estate *agents*. (There is legally no such category as a 'licensed real estate agent'. Agency is a professional option for licensees, *not* a license status.)

Under common law, brokers have always been able to help people buy or sell property as 'finders' or facilitators without accepting any fiduciary obligation.
But if a licensed broker chooses to act as a fiduciary, accepting a special position of trust to act for a client, that is quite a different matter. The agency then owes a duty of undivided loyalty, along with other fiduciary duties similar to those for attorneys and trust officers. [See our pamphlet on this subject, available at www.agencyinformation.org and also attached here.]

But those fiduciary duties have posed a significant problem for the leadership of NAR, which is strongly influenced by quite large offices, which want to represent both sides of their listings, collecting the fees for 'representing' both the seller and the buyer of the same property.. To get around this undivided-loyalty fiduciary problem, NAR has, through its local lobbying power, introduced into most states the new concept of 'designated agency', which is really a cleverly disguised type of dual agency. The manager may 'designate' one licensee to be agent for the seller, and designate many or all their other licensees to represent various buyers.

This involves a radical dilution of fiduciary responsibility, shifting most responsibility from the company onto just one individual. It's as though you were served a bad hamburger at McDonald's and could then be told by its manager, "That's only the assignment of your designated cook, Joe...and he's not feeling himself today." It's as though Arthur Andersen could, with impunity, have designated some employees to act as a company's accountants, and other employees to act as a company's auditors. Or it's as though a large law firm could routinely designate some lawyers to represent the plaintiff and others, the defendant...in the same lawsuit.

This radical change has been enabled through state laws that dilute and distort also the concept of informed consent. Sellers do not understand that they are no longer getting a whole agency on their side, working to get them a higher price. Buyers do not understand that 'their' agency is preferring to show its own listings, to collect revenue from both sides...and may also be promoting to their clients profitable in-house mortgage, title, insurance and moving companies. Once the consumer signs an innocent-looking state-approved form, informed consent to all such conflicts of interest is 'conclusively presumed'.

The radical nature of the change NAR has successfully promoted is dramatized by a comparison of its present policy *encouraging* dual agency with its 1986 publication, also attached, *deriding* it. This 180-degree about-face in Realtor® fiduciary policy corresponds with the dramatic increase in the number of NAR members who now belong to profitable large dual-agency offices, which promote brand names rather than loyalty to unsuspecting consumers.

As explained in our attached pamphlet, such new loopholes for 'informed' consent contradict centuries of common-law protection, previously given all clients of fiduciaries. Whenever any fiduciary wants to profit from a conflict of interest, the standard has always been *subjective* (You, the client, actually understand the conflict before consenting) not *objective* (You signed some form.) And the burden of achieving clients' understanding had always rested upon the fiduciary benefiting from a conflict of interest...not upon the consumer, who is now essentially required to figure out the substance and meanings of a fundamental conflict of interest for herself.

Realtors® like to tell legislators that they have spent time and money acquiring a listing, and should therefore be able to control what websites their listing appears upon. This is treating a property listing as though it is some sort of intellectual-property right acquired by contract...rather than the clear fiduciary duty every agency listing inherently involves – including the duty to see that information about clients' property is promoted as widely as possible. Realtors® are forgetting that fiduciary duty means always preferring the *clients'* interest over one's own.

3. As a licensed real estate appraiser, as well as a broker, I'm continually struck by the dramatic and obvious involvement of the federal government (in 'federally related' transactions) in specifying high educational requirements and professional standards for state-licensed real estate *appraisers*, but its complete non-involvement in the same areas with state-licensed real estate *brokers and salespeople*. This federal involvement in one aspect of real estate and absence from the other is illogical. At minimum, the federal government should specify and require, for federally related transactions (a) minimum hours of education for all people involved in real estate brokerage, and (b) minimum professional standards for all state licensees who choose to act as fiduciary real estate agents.

I hope you will find this outline helpful, as you proceed with this very necessary and timely hearing.

Sincerely,

Fred Meyer

Fred Meyer, CRB, CRS, GRI, Realtor & R.E. Appraiser

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2000 President, Massachusetts Association of Realtors
1991 President, Greater Boston Association of Realtors
1990 Realtor of the Year, Greater Boston Real Estate Board
1981 President, Cambridge Council of Realtors

Certified Realty Brokerage Manager
Certified Residential Specialist
Graduate, Realtors' Institute
Certified Residential Real Estate Appraiser (MA license #637)

"Public and Private Restraints to Alternative Business Models for Consumers"

Wayne Thorburn
Administrator
Texas Real Estate Commission
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At the present time I serve as the Immediate Past President of the Association of Real Estate License Law Officials (ARELLO) and also as Administrator of the Texas Real Estate Commission. However, my comments in this statement are solely mine and should not be construed as an official position of either ARELLO or TREC. While the issue of competition in real estate is a most important one for regulators and for ARELLO, the organization has not taken any official position on modes of competition or the requirement of providing specified minimum services.

About fifty years ago, a wise man named Richard Weaver wrote a book entitled *"Ideas Have Consequences"* and the title says it all. At the same time, words do have definite and concrete meanings for without broadly accepted definitions, communication become impossible. Two words that I believe need to be focused on and taken into consideration when discussing whether government can require certain actions by its licensees are **agency** and **representation**.

Let me begin by saying that it has been accepted for some time that a real estate broker while acting as an agent for another is **a fiduciary**. As a fiduciary, a real estate broker is held to owe **specific duties** to his or her principal, including loyalty, disclosure, confidentiality, reasonable care and diligence. As an agent, the broker has agreed to **provide representation** to his or her client **throughout a real estate transaction** - not only on the day the agency agreement is signed. Moreover, while not always the situation, in most agreements between client and real estate agent compensation is paid only upon the conclusion of representation that results in a successful transfer of real property from an owner to a purchaser.

In its last regular session in 2005, the Texas Legislature enacted an amendment to the Real Estate License Act whereby a broker who obtains an exclusive agreement to represent a party in a real estate transaction is that party's agent. Such a person must **inform the client if he or she receives material information related to a transaction, must answer the client's questions,**

must present any offer to or from the client and may not instruct another broker to negotiate directly with the first broker's client (Section 1101.557, Texas Occupations Code). Now these seem to be rather basic characteristics and requirements of representation - the kinds of services virtually all consumers would expect when they hire someone **to represent them as their agent.**

In our Federal system of government, the responsibility for licensing and regulating real estate agents has been placed in the hands of the various states and, as regulators, we are required to apply state statutes and set forth the requirements for obtaining and retaining a real estate license. Many jurisdictions have attempted to spell out in more detail the fiduciary duties of an individual who purports to be **an agent of another** and contracts to **provide representation in a real estate transaction.** However, it appears that certain individuals working for the national government do not believe that these basic elements should be requirements for representation. Indeed, they maintain that an individual can claim to be an agent without performing **any** of these duties for the person they are claiming to represent in a real estate transaction. For them, an individual can claim to be an agent of another on one day, receive compensation, and then merrily walk away never to interact with their "client" again, regardless of whether there is a successful transaction of real estate or not.

Perhaps it would be more helpful if the national government's emphasis were placed on preventing false claims by those who sign an agency agreement with a client, promise to provide representation, place the property information on the Internet, and then walk away from any further involvement in the real estate transaction. Frankly, I have no problem with this "alternative business model" as it has been called except that it is **neither agency nor representation**. Simply stated, it is a marketing or advertising agreement. Such marketing agreements for the sale of real estate have existed for decades. Newspapers, promotional brochures and booklets, radio and television, and signs have been used by those seeking to sell real estate. In no instance has a state required a real estate license for these marketers and advertisers because they are not pretending to be **agents** or claiming in any fashion to **represent** either buyers or sellers of real estate.

And that brings us to a related issue which lies beneath the surface of much of the involvement of the Federal agencies and their efforts to support "alternative business models for consumers." Somehow there has developed a belief in Washington that there is only one way of effectively marketing residential real estate - and that is through a private entity called the Multiple

Listing Service (MLS). As state licensing agencies we do not regulate the MLS. It is a private voluntary organization which establishes its own membership criteria. Most recently the Federal Trade Commission has moved to coerce this private entity into changing its criteria to meet their demands - as witness the recent agreement with the Austin Board of Realtors concerning the inclusion of exclusive agency listings on its multiple listing service.

Let's just look for a moment at competition in the marketing of residential real estate. Not only is there this thing called the MLS but there is also:

- every daily newspaper in the country which runs classified and display ads
- free distribution publications available at retail stores and corner display boxes
- billboards, yard signs and other promotional advertising
- radio, cable, and network television
- web pages galore - now even Yahoo, Lycos, eBay are selling real estate.

To pretend that the MLS system is the only way to market real estate belies the reality of the competition present throughout the United States. To purport that an agent who claims to represent another has no fiduciary duty to provide minimal services runs counter to public expectations and negates the ability of states to effectively license and regulate real estate professionals.

I think it is safe to say that most state regulators have no problem with individuals entering into marketing or advertising agreements to provide advice and assistance to clients to promote the sale of real estate. In fact, in most states one does not even need a real estate license to do so. But I do object, and so do many other regulators, to individuals claiming to be an agent and then refusing to perform the most basic duties of representation. The "alternative business model" cannot have it both ways: either it is (1) an agency agreement for representation throughout a real estate transaction with all the concomitant fiduciary responsibilities encompassed in such a relationship or (2) it is merely an advertising and marketing agreement. And that distinction is a matter which should be of interest to the Federal Trade Commission in ensuring that the public is truly receiving the service for which they have contracted when they entered into an agreement for representation by someone claiming to be their agent.

Opposing Teams. Same Locker Room???

FROM HORSES TO HOUSES

A Brief History of Agency And What Real Estate Agency Means for You Today

A Guide, for Sellers and Buyers of Real Estate, to the Professional Standards Governing Real Estate Agents

Sellers and buyers, be aware: what you need to know about real estate salespeople.

When you want to buy or sell your house or apartment, it's natural to feel a little overwhelmed by all the words you may hear or read. What does the term *real estate agent* really mean? Is *agent* the same as a *salesperson*? Is *Realtor* the same as *agent?*

Who are *exclusive agents? Escrow agents? Inspectors*? Does an *appraiser* mean the same thing as an *assessor*?

Understandably, you're only concerned about what you need to know right now, for what is probably the most important financial transaction of your lifetime. But it will be helpful for you to look at the history of how the real estate agency developed, in order to understand its meaning for you today.

The Beginning of Sales Relationships: The Finder

Historians think the rules for salesmen probably started, not with houses, but with *horses*. Centuries ago, in England (where most American law comes from), in the days before both automobiles and agents, a man had a horse to sell. He approached someone else who regularly sold a lot of horses, asking, "Will you find me a buyer for *my* horse? I'll pay you a portion of what I get, if you'll sell mine along with yours."

An arrangement was struck between the two of them. As that selling practice became established, the fee became called a *commission*, and such a salesman was called a *finder.*

The word *finder* continues today in our *common law,* which is the body of law created by decisions of judge, starting in England, and continuing in most American states today. Now we often use more contemporary words for that type of sales relationship. We call such a salesperson a *transaction broker*, a *mediator,* or a *facilitator.* But the concept remains the old one of *finder*: "Find me a buyer, and I'll pay you a commission."

The Beginning of Agency

But, back in old England, some horse sellers quickly found that hiring a finder wasn't nearly enough. The finder was, after all, selling his own horses in competition with theirs! He wasn't trustworthy. How could sellers know he wasn't advancing his own inventory over theirs?

Some sellers decided they needed a more personal and responsible relationship, where the seller would not sell any of his own horses to compete with their own. Instead, a sales *agent* would pledge himself to become dedicated to getting the highest price for his *client,* the seller. This became known as a *fiduciary* relationship. (Our English language descended from Latin; and the Latin word *fiducia* means *trust.*) Such a special salesperson became known as an *agent,* from the Latin *agentis* meaning *acting (for another).*

The Duties of Agents

Various fiduciary duties, of agent to client, became established under common law. There's an acronym today to help you remember the fiduciary duties which, over many years, have become required of an agent: '**O-L-D C-A-R**'.

O is for *Obedience*. The agent was responsible for following the instructions of the horse seller: "Make sure my horse is well fed when you're boarding him." Later, this became, for real estate: "Don't show our house this Saturday afternoon – we're having company." (Obviously, the duty of Obedience only applies to *lawful* instructions. "Don't show the house to any minorities", for example, is not a valid agency duty.)

L is for *Loyalty*. The agent and all his associates were required to be loyal to just one side of the transaction. In representing a seller, the agents had to get the seller the highest price for the horse (or, later, the house). The agent could not promote one of his own horses instead. An agent always has to favor the client's interest ahead of his own. That strong allegiance may seem, at first, very difficult, or even unnatural; but it's vital to understanding what's required of agency.

D is for *Disclosure*. In the course of his business, the horse-selling agent came to learn quite a bit about what horse buyers liked, how much they wanted any particular animal, and how much they might pay for it. The agent was required to disclose all of this to the horse seller: "He's in love with your animal, and may pay a lot for it." Consistent with the duty of loyalty to only one side, the agent must always disclose what he knows about the other side's motivations and financial resources. "They love your house, and they have a lot of money."

C is for *Confidentiality*. Perhaps the English horse owner wanted to ask ten pounds for his horse, but told his agent he'd settle for just eight, if he had to, because he had a debt due next Saturday. As an agent (no longer just a finder), the agent was responsible for keeping that motivation of his client very confidential from the other side.

A is for *Advocacy*. The horse agent had to argue on behalf of his client, telling buyers why the horse might indeed be worth ten pounds. The agent was given duties similar to that of a barrister, a British lawyer defending one side of a law case. Just as lawyers in the same law firm did not represent both the plaintiff and the defendant in a lawsuit, a horse agency could not represent both seller and buyer. Traditional real estate agencies in this country follow the same rule. They advocate a higher price for home sellers, not a lower price for buyers. An agency's advocacy is for one side only. 'A' also stands for *Accountability*. An agency has to account properly for all funds received.

R is for *Responsibility* (sometimes termed Reasonable Care.) The agent had to know what he was doing. He was professionally responsible for knowing the current prices for all the various types and ages of horses, for giving his clients good advice about how much to ask, and how much to take, for each horse, and for describing accurately to the public all the horses he offered for sale. In a word, an agency is responsible for representing a client in a knowledgeable, professional, *responsible* manner.

All of these ancient agency duties have been continually applied, by courts and legislatures, to modern real estate agents. Today, real estate agencies still owe all these same 'OLD CAR' fiduciary duties to their clients.

Your Choice Today: Facilitator or Agent?

Now, if you want to sell your house, you face the same fundamental choice for selling which the horse seller faced centuries ago. Do you want to deal with a facilitator, or an advocate? Do you want a finder, or an agency? There is nothing wrong with either choice. It depends upon what you want. But you must always be aware the fundamental difference. An agency has many more duties to you does than a non-agency facilitator.

Buyer Agency

But what about the buyers? Who represented them? For buying horses in old England, as far as historians can tell, the answer was "nobody". The agents were all paid by and represented horse sellers, and the buyers had to look out for themselves. But, for real estate, in America, a new breed of agency arose, starting in the 1980's: *buyers'* agencies.

Buyer agencies represent buyers, and seek *lower* prices for buyers. They owe all the 'OLD CAR' fiduciary duties to their clients, potential buyers. For example, under the duty of Disclosure, a buyer agent will tell the buyer anything he can learn about the sellers' motivations for selling: "They may want to sell quickly, because this is a divorce situation." (A seller agency would never reveal that fact, without permission of the sellers.) Under Confidentiality duties, a buyer agency would never normally reveal that its client has fallen in love with a particular house and is quite willing to overpay for it.

Because of the new presence of buyer agencies, homebuyers now have a choice. If you are a buyer, you can work with a sellers' agency as a customer, or with a buyers' agency as a client. If you work with a sellers' agency, that agency must describe properties to you honestly and fairly, but it will not owe you any fiduciary duties. If you work with a buyers' agency, that agency will owe you all the 'OLD CAR' fiduciary duties. There is nothing wrong with either choice – it depends upon what you want. But you must always be aware of the fundamental difference.

Strategies for Successful Agency

When an agency represents your interests, that advocacy does *not* equal being impolite or unreasonable, let alone being obnoxious, to the other side of the negotiations. Just as good law firms represent clients forcefully but politely, good agencies are usually diplomatic, as appropriate, when negotiating with your opposing party. Even this phrase 'opposing party' needs to be kept in context. Sellers and buyers do have opposing interests about price; but both do want a transaction to occur. Of course, a good seller's and buyer's agency may often lead their separate clients to agree upon a fair market price, benefiting both sides....just as opposing law firms will often urge their clients to settle a lawsuit. Effective advocacy may sometimes lead to a mutually-satisfactory compromise. Giving your agency a certain amount of discretion to act for you may be in your interests.

A Modern Possibility: *Dual* Agency

Quite recently, real estate agency has become immensely more complicated than it has been in the past, because of the newest variant upon the scene: *dual* agency. In dual agency, the agency, usually a large real estate company will attempt to represent *both* the seller and the buyer of the same property. This is a much diluted form of agency, radically different from anything ever seen in the past.

Since a dual-agency brokerage firm represents both seller and buyer, it must be neutral with regard to all conflicting interests of the seller and buyer. Consequently a dual agent can*not* satisfy fully all the fiduciary duties, including loyalty, disclosure of information learned from the other side, and obedience to lawful instructions, which are required of sellers' agencies and buyer agencies.

Law firms almost never represent both the plaintiff and the defendant in the same lawsuit, because of the inherent conflicts of interest involved. The law firm would have to get the informed consent of both sides, and explain each of the conflicts and practical difficulties involved in detail, and perhaps refer both clients to other law firms to help them decide whether or not consenting to such an unusual dual representation was in their individual interests.

Similarly, dual real estate agencies seeking to represent both seller and buyer must take sufficient time to explain the inherent conflicts and difficulties to their clients, in a way the clients actually understand, and obtain truly informed consent of both sides before such a relationship may proceed.

If you are considering dealing with a dual agency, the following may be a helpful brief checklist of some issues you need to consider before you consent to such a relationship. Any agent, before asking you to consent to any dual agency, must discuss all these issues with you and make sure you understand all their ramifications, before you consent.

Checklist of ten *dual* agency issues, for discussion by dual agencies with clients:

There are many important conflicts inherent in dual agency. This brief checklist is for convenience, but is by no means all inclusive.

1. As a seller or buyer, you are entitled to consult an *attorney* before agreeing to dual agency. You can incur significant risks from the conflicts of interest inherent in dual agency, so you may wish to consult with independent professional legal advice before you agree to it.

In asking for dual agency, the brokerage company is seeking to end any prior full fiduciary relationship it may have had with you and begin a new, limited dual agency relationship with both sides. Dual agency can happen only with (a) your informed consent and (b) the informed consent to the party on the other side. You are *never required* to consent to dual agency.

2. A dual-agency company represents *both* sellers and buyers of the same property. Since sellers prefer higher prices, and buyers prefer lower prices, this company seeks to represent both you and a client with interests directly conflicting with yours. Is that really acceptable to you?

3. Since both seller and buyer will be giving the agency their confidences, there are issues about leakage (even if unintentional and inadvertent) of your confidences to the other side. For example, are there separate files for sellers and for buyers? You are entitled to know, and should ask about, what efforts will the dual agency company be taking to protect your confidentiality. How will the company handle your confidences at its staff meetings? When negotiating, what will it, and what will it not, reveal to the other side?

Any dual agency has directly conflicting duties of (a) confidentiality to you and (b) disclosure of your motivations to its client on the opposing side. The brokerage firm must explain to you what types of information from you it will hold confidential, and what types of information it will disclose to its client on the other side.

In general, the brokerage firm should not disclose to the other side, without your permission, any information you give it that would weaken your negotiating position. It should hold confidences and try very hard to be impartial, discreet and neutral.

However, the brokerage firm will nonetheless be required to disclose information you give it in confidence if failure to disclose the information would be material misrepresentation about either the property or your abilities to fulfill your legal obligations, or as otherwise required by law.

4. If you are a buyer, you need to know whether or not the dual-agency company pays *higher* commissions or other bonuses to its brokers or salespersons for selling properties directly listed with itself. Such intra-company incentives would conflict with impartial representation of you as a buyer, since your needs might be better met by other real estate companies' listings.

Some brokerage firms, when representing buyers, do pay *the same* compensation to their agents for selling in-house inventory as they do for selling the listings of other companies. You need to know whether or not that is the case.

5. Does the dual-agency company refer consumers to mortgage, moving, insurance, title, relocation and/or home improvement firm(s) in which it has an ownership interest? Those interests may conflict with impartial representation of your interests as a consumer. This firm can*not* represent you impartially in the purchase of these products and services. You should be aware that you might find lower rates and/or better service elsewhere.

6. You must be informed about conflicts not only generally, when you are first considering a dual agency relationship, but once again specifically, every time a *specific* conflict of interest begins to occur. You should learn, and the firm must disclose to you, the nature and extent of all current and prior relationships your company has and has had with party opposing you. For example: if you are a buyer, you should be informed how many listings the seller has given to this dual-agency company. If this particular seller/developer has given the brokerage company a *dozen* listings, and is expecting to give it many more, can that company really be as impartial about your interests as a buyer, as if it had received only listing?

In every specific conflict of interest situation, you have the right to refuse to consent, even though you have consented before generally, or to previous other specific conflicts. Each opposing party always retains a continuing right to choose to be fully represented by another brokerage firm which does not have any conflicts of interest.

7. Whenever you choose to proceed with dual agency, you need to understand fully that you are giving up your rights to undivided loyalty, full disclosure of negotiating advantages, and exclusive representation from this real estate company, and to other traditional fiduciary benefits of an agency/client relationship. The brokerage firm must now act impartially and can no longer be an advocate for you. Since you are incurring some risks, you are always entitled to consult your own attorney, at any time, before proceeding or before proceeding further.

8. Only after all such limitations and risks of dual agency have been fully explained to you, in a way you understand, may you be asked to decide whether you wish to consent to dual agency by giving your informed consent. If you agree, you will be ending any prior full fiduciary representation you may have had with the agency and agreeing that your brokerage firm may now act in a new capacity for you, as a limited-service dual agency, representing both sides of your sale/purchase. (If your brokerage firm does not obtain your informed written consent, the brokerage firm cannot represent any other parties with interests conflicting to yours, and, if you wish, you can always then choose another firm to represent your interests with advocacy and undivided loyalty.)

9. Note that all offers written by any brokerage firm acting as a dual agency should be on unbiased neutral forms, favoring neither the seller nor the buyer, specifying terms subject to a later mutually-satisfactory purchase and sale agreement and containing a written recommendation that each side consult its own legal counsel for that agreement.

10. Only after all of these issues have been discussed with both clients may an agency reasonably proceed with asking for informed consent to dual agency. If the client understands and agrees, an agent meeting with a client should memorialize in writing, in an appropriate format, that, to the best of his or her knowledge and belief, the client has actually understood the conflicts of interest inherent in dual agency and has nonetheless given his or her informed consent. In addition, dual-agency firms will then present their own consent forms, seeking the client's written agreement to dual agency.

The newest variant: *designated* dual agency.

In some states, a seller or buyer can engage the services of a particular type of dual real estate agency, whose practice is to *designate* one or more of its agent(s) to represent the seller, and other agents within the same company to represent various potential buyers of the same property. Once so designated, a real estate agent may then be the *only* agent in the company acting for the seller or the buyer. You as a consumer then become the traditional client of *only* that individual licensee. The real estate brokerage firm, its supervising broker, and the appointing broker remain dual agents representing both the seller and the buyer.

Though this type of agency is sometimes called just 'designated agency', it is not a distinct form of agency, but is just a variant of dual agency. A designated dual agency must be neutral with regard to any conflicting interests of the seller and buyer. Consequently a designated dual agency cannot satisfy fully the fiduciary duties, including loyalty, disclosure of information learned from the other side, and obedience to lawful instructions, which are required of seller and buyer agencies.

You should be aware that all other agents in such a dual agency firm may potentially represent the other side of your sale or purchase. Only the individual designated agents owe the buyer or the seller all of the 'OLD CAR' fiduciary duties. However, the individual designated agents must put their client's interest first and negotiate for the best price and terms for that client. Designated dual agency without full presentation of its limitations and risks, in a way each side understands, and obtaining mutual informed consent, is illegal. In seeking your informed consent, dual agencies must provide you with additional information to make sure you understand fully the conflicts of interest involved. See the dual agency checklist above, as well as the one below. You are *never* required to consent to designated dual agency.

Checklist of three special issues of *designated dual* agency, for discussion by designated dual agencies with their clients:

In addition to the ten dual agency issues listed above, your designated agent must discuss some special issues inherent in designated dual agency with you, in order to obtain your informed consent.

First, what efforts, if any, will a designated dual agency company be taking to protect your confidentiality from the opposing designee within the same company? For example, can the buyer's agent walk behind the seller's agent's computer screen? Can phone conversations from one desk be overheard at another? Does the company have *separate* staff meetings, conference rooms, telephone lines, fax machines and computers/internet for the seller's agent and the buyer's agent it is assigning to service you as well as the other side?

Second, are the designated agents assigned to each side equal in ability, training and experience? You need to make sure that your opposing party is not represented by a successful twenty-year veteran, while you are represented by an inexperienced new agent.

Third, the designating broker is required to remain 'neutral' between seller and buyer. Yet this may be the same person who, under your state's licensing law, is responsible for supervising both agents. As a practical matter, how does he or she plan to achieve such neutrality? What if both designated agents need his advice? Is it simple or easy to give 'neutral' advice to both sides? Is having an office manager neutral to your interests really acceptable to you?

Standards of Professional Practice for Dual and Designated Agencies

A dual agent or designated agent is not in compliance with the real estate industry's professional standards unless the agent:

1. fully discloses to the prospective client/principal the conflicts of interest inherent whenever a firm represents both the seller and the buyer;
2. fully discloses the actual conflicts of interest inherent in the *specific* relationship as soon as contemplated, and thereafter as appropriate; and,
3. before entering into the relationship and thereafter, is satisfied by clear and convincing evidence that the consumer actually understands the conflicts of interest inherent in the specific relationship. (If the agent is not so convinced, the agent does not enter into or continue the relationship until the consumer is represented by independent legal counsel.)

Note that it doesn't matter if you, as an unsophisticated client, don't care about conflicts of interest and are ready to sign a seemingly simple disclosure or consent form your trusted agent places in front of you. You must nevertheless be led to *understand* all the implications of all the conflicts of interest before you consent to them. As the *Restatement of Agency* puts it: "The agent's duty of fair dealing is satisfied only if he reasonably believes that the principal understands the implications of the transaction". The burden of achieving your understanding rests not upon you, the consumer, but upon your trusted fiduciary, who benefits from the conflict of interest affecting you.

Advantages and Disadvantages of Each Type of Relationship

Which type of real estate brokerage relationship is best? That all depends upon you, and what you are looking for. It is not at all the purpose of this publication to influence your decision towards one type of real estate relationship over another, or to suggest which may be best for you. Rather, this pamphlet seeks to give you some essential factual information on the different types, so you may make your own choice.

If you are a *seller*, and you only want a company to bring you potential buyers, without expecting anyone to represent or advocate your interests, and you are prepared to do your own negotiating: hiring a facilitator may make good sense for you.

If are a *buyer* and you only want someone to show you properties, without expecting anyone to represent or advocate your interests, and you are prepared to do your own negotiating: working with a facilitator, or with a seller's agency as its customer (understanding that you are *not* its client) may make good sense to you.

If you want more than that: a company to advocate your interests as a seller or buyer, contracting with an undivided seller's or buyer's agency to become its client would be a logical choice.

If you want to deal with a firm which represents both sellers and buyers (often a large firm) and do not require that the company have undivided loyalty to your interests, and you actually understand the conflicts of interest inherent in agency representation of both sides of a transaction, a dual agency may be attractive to you. If the dual agency practices designated dual agency, you will be assigned an individual agent to represent you, including advocating your interests against other agents within the firm who may be representing the other side.

The choice of what you want in a real estate relationship is yours alone.

Choose carefully.

Choose thoughtfully from the different types of agency and non-agency options briefly described here. You may want to consult your attorney about your choices. After you have thought about your needs or had the issues explained to you, it is your own responsibility to choose what you want.

Whether you are a buyer or seller you can always choose to have the advice, advocacy and representation of your own real estate company to serve you, if you wish. But never assume that a real estate firm works solely for you, unless you have a written agreement for that kind of undivided agency relationship.

All real estate licensees must, by law, present properties honestly and accurately. They must also disclose any material defects in real estate which they or their brokerage firm know about. The duties of a real estate licensee do not relieve you of your own responsibility to protect your own interests.

You should *not* tell any real estate agent representing the other side of the transaction anything you would not tell your adverse party directly, especially anything that might weaken your bargaining position.

If you need advice for legal, tax, insurance or land survey matters, it is your responsibility to consult a professional in those areas. Real estate licensees do not have a duty to perform home, lead paint or insect inspections, nor do they perform septic system, wetlands or environmental evaluations.

You are legally responsible for any wrongful actions of your real estate agency, including all its agents and subagents. So it is obviously very important to choose an experienced, responsible and professional firm, with high ethical and business standards.

After you make your decision upon a real estate relationship, you can remember that there is, in most states, a long history of common law tradition standing behind you, providing real substance and clear meaning to the choice you have made.

Think about your costs.

You should expect to pay less for less service, and more for more service. For example, if you are a seller, and you plan to do your own price analyses, showing and negotiating, but you want your property entered into a local multiple listing service, you might ask a facilitation firm to do that for you,

for a nominal fee. If you want the firm to do more, to find you the buyer, the fee might logically be higher.

If you want still more and want an agent who will advise you and owe you fiduciary duties and act on your behalf, the fee might logically be still higher. And if you want not just one individual agent, but an undivided agency working on your behalf, the fee might logically be higher still. A dual or designated dual agency should be able to charge less, since it may be compensated twice, by both sides.

If you are a buyer, who is paying the salesperson or company you are working with? Will the seller always be paying the commission? Under what circumstances will you be obligated to pay a fee?

Read all brokerage contracts carefully. Make sure you understand not only the fees you are responsible for, but its cancellation provisions. If you turn out to be unhappy with the salesperson or company you are working with, how quickly can you get out of that contract you are signing? Commissions must never be standardized, but differ from firm to firm, determined only by what you can negotiate in the competitive conditions of your local real estate brokerage marketplace.

A final word.

We hope this explanatory pamphlet on real estate brokerage and agency has been helpful to you, as you pursue your real estate adventures. But be sure to consult your attorney with your questions. Selling or buying a home is probably the most important financial transaction of your lifetime. Make sure you choose which professionals to work with thoughtfully and carefully.

Other terms used in real estate transactions.

A **client** is the person to whom an agent owes his or her fiduciary duties (the seller for a seller's agent, or the buyer for a buyer's agent). The client may also be referred to as the agent's **principal.**

By contrast, the word **customer** is used for the party to whom the agent does **not** owe any fiduciary duties. So, a buyer is the customer of a seller's agent. And a seller is a customer of a buyer's agent.

An **undivided agency** is an agency which represents only sellers, or only buyers. A **designated agency** is the opposite: a dual agency, which assigns one agent to represent a seller and another to represent a buyer for the same property.

An **exclusive agent** is an agent who has a written contract with a client providing that the client will work only with his agency. If the client is a seller, the contract is called an **exclusive listing.** If the client is a buyer, the contract is called an **exclusive buyer representation** agreement.

The agents and finder/facilitators we have discussed previously in this pamphlet should not be confused with these other players on the real estate scene today:

Appraisers do not act as salespeople or agents, but provide an independent estimate, based upon marketplace data, of the market value (sometimes called most probable selling price) of a property.

Assessors are special types of appraisers, who work for cities and towns. They perform mass appraisals of *all* the properties in a whole community, in order to provide rough estimates of value for taxing very many properties fairly.

Escrow agents are limited special agents whose services are limited to holding and accounting for funds, before and at a property's closing. A regular seller's or buyer's agent may also serve as an escrow agent, if both parties agree. In some states, deposits are held by independent escrow companies. In some areas, lawyers usually serve as the escrow agents. In other areas, real estate agents commonly act as the escrow agents.

A home **inspector** is a professional who inspects, but does not sell properties and issues reports on their condition. An inspector is usually neither a salesperson nor an appraiser; so an inspector will not try to sell you a property nor express an opinion of its value, but will report to you only about the physical condition of the property.

The term **Realtor®** is not identical with real estate salesperson. Realtor® is the trademark of a trade association, the National Association of Realtors®, whose members are subscribe to a written code of ethics. Realtor® firms include facilitators, seller agencies, buyer agencies, and dual agencies.

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House Financial Services
Subcommittee on Housing and Community Opportunity
2129 Rayburn H.O.B.
Washington, D.C. 20515

RE: July 25, 2006, Hearing on "The Changing Real Estate Market"

2006 OFFICERS

VINCE MALTA
President

COLLEEN BADAGLIACCO
President-Elect

JAMES LIPTAK
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JOEL SINGER
Executive Vice President/ State Secretary

Dear Chairman Ney:

As President of the California Association of REALTORS® (C.A.R.) and on behalf of the more than 195,000, members I would like to submit the following Statement to the House Financial Services Subcommittee on Housing and Community Opportunity for their July 25, 2006, hearings on "The Changing Real Estate Market." Two of the changes taking place in today's real estate market are an unprecedented increase in new agents and the application of new technology. C.A.R. would like to dispel any misconceptions about today's ever-changing real estate market by demonstrating how these changes continue to benefit consumers by increasing competition streamlining transactions and opening the door to new business models. In addition, C.A.R. would like to take this opportunity to express their member's concerns with the federal government expanding its regulation and oversight of the real estate industry.

Primary oversight and regulation of the real estate industry is currently and always has been by individual states and the local governments. Because property and real estate markets across the country vary so greatly, lawmakers realized the issue could best be governed and regulated at the local level. Variables that differentiate real estate in one state from another are too numerous to count, but include zoning codes, sprawl, environmental dangers, supply and demand, taxes, chemical hazards, and countless others. Additionally, real estate transactions are by their nature local with the majority of transactions done as intrastate transactions. Taking this into account it stands to reason that regulatory agencies and elected officials at the state and local level would be in the best position to determine and pass laws to ensure consumers are protected and that the real estate market is fair and competitive.

The success of local supervision of the real estate market can not be overstated. The United States real estate market is the envy of the world. According to the Association of Foreign Investors in Real Estate's (AFIRE) 2005 annual survey, 73.5 percent of respondents stated the U.S. provides the most "stable and secure real estate investments." The survey also concluded that the U.S. provides the "best opportunity for capital appreciation."

Conventional wisdom holds that government intervention is almost always a hindrance on a market. Therefore any regulation or law should only be done when necessary for the benefit of consumers. C.A.R. feels the current real estate market would only suffer from the continued increase in regulatory intervention by the federal government with no benefit to consumers. This intervention would appear to be aimed at a lack of competition in today's

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real estate market. C.A.R. could understand this intervention if there was such a lack of competition, but the market bares a different truth.

The reality is competition has **NEVER** been as strong in the real estate market as it is today. Growth in competition has been spurred by both an unprecedented increase in new agents coupled with new business models utilizing today's technology. Perhaps no state's real estate market is as competitive as California, where there were 500,053 licensed real estate agents at the end of May 2006. This is an increase of approximately 50,000 new agents in the last year. Further proof of this increased competition is the pressure felt by REALTORS® themselves. When asked "What part(s) of the business process do you find the most challenging?" 35.6 percent stated "personal professional marketing." This was second only to "working with buyers." The pressure on new and existing agents to stand out among an expanding pool of real estate agents is growing and will only continue to do so. This increase in competition has led to a direct benefit to consumers' bottom line as commissions decreased from 6.1 percent in 1991 to 5.1 percent in 2004.

Consumers are also benefited by the utilization of technology by entrepreneurs to create new business models. Thirty years ago California led the way in expanding consumer choice in real estate when, in 1976, Help-U-Sell created a new business model that allowed sellers to choose which services they wanted to pay for. Following in their footsteps by using today's technology, ZipRealty.com created a new on-line business model in 1999. Both of these businesses continue to grow year after year as both have found ways to meet consumers' needs.

It has been suggested that new business models and technology are viewed as a threat to the "traditional" real estate agent. The truth is that C.A.R.'s members have not only embraced technology, but have led the way in utilizing it to benefit the real estate market. C.A.R. has taken the real estate transaction–which includes hundreds of papers, forms, disclosures, contracts, and other documents–and turned it into an effortless automated transaction. With C.A.R.'s new RELAY® Transaction Management platform, agents are able to process an entire real estate transaction utilizing safe digital document storage. Additionally, agents today can better communicate with clients by using email, giving virtual tours of homes over the Internet, and placing "for sale" advertisements online at a lower cost than traditional newspaper ads. Information now flows to all parties of a real estate transaction quicker and more efficiently.

With the immense increase in new agents and advancements in technology, REATLORS® are now working harder then ever to help satisfy the needs of consumers. The competition between real estate agents is enhanced further by these factors in addition to today's real estate market welcoming with open arms alternative business models. One needs only to look at the number of new agents and the success of ForSaleByOwner.com, Help-U-Sell, and ZipRealty.com to see that real estate agents are operating in a competitive market. Both the traditional real estate businesses and these alternative models continue to grow and thrive because they have found a way to satisfy the needs of the consumer. The reality is, real estate agents do not belong to a "cartel," but instead are a part of the most competitive industry in America; an industry that works everyday to help make the American dream a reality for millions of satisfied consumers.

Thank you for your consideration of our views. If we may provide you with any additional information, please do not hesitate to contact Matt Roberts, Federal Governmental Affairs Manager, at 213-739-8284 or fax 213-739-7255, or via email at matthewr@car.org.

Sincerely,

Vince Malta
President, California Association of REALTORS®

Samuel H. Wright
Senior Vice President
Government Relations

July 24, 2006

The Honorable Bob Ney
Chairman, Financial Services Subcommittee on Housing & Community Opportunity
United States House of Representatives
Washington, DC 20515

Re: July 25th, 2006 Hearing on The Changing Real Estate Market

Dear Chairman Ney:

On behalf of Cendant Corporation's Real Estate Services Division, I respectfully request that the record of the hearing on July 25th, 2006 entitled "The Changing Real Estate Market" include the attached testimony of Alex Perriello, President & Chief Executive Officer, Cendant Real Estate Franchise Group, and Tom Kunz, President & Chief Executive Officer, Century 21, which was presented at a public workshop hosted by the Federal Trade Commission and the Department of Justice on "Competition Policy and the Real Estate Industry" on October 25th, 2005.

Cendant holds a clear leadership position in the residential real estate industry, and I think you and the Committee will find this testimony very useful in your effort to better understand the changing real estate market.

Cendant's Real Estate Services Division is one of the preeminent and most integrated providers of real estate and relocation services in the world, with leading real estate brands, brokerages and related operations. Last year, approximately one out of four homes bought or sold in the U.S. in a brokerage-related transaction involved one of our franchisees or company-owned brokerages.

The Real Estate Services Division is anticipated to separate from our parent company, Cendant Corporation (NYSE: CD), in July 2006, at which time we will become a stand-alone, publicly traded company known as Realogy Corporation. Realogy has applied to have its common stock listed on the New York Stock Exchange under the symbol "H."

Realogy is comprised of four complementary businesses:

- The Realogy Franchise Group, the leading franchisor of real estate brokerages in the world, with industry-leading brands: **Century 21©**, **Coldwell Banker©**, **Coldwell Banker Commercial©**, **ERA©**, and **Sotheby's International Realty©**
- NRT, the largest owner and operator of residential real estate brokerages in the United States

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- Cartus, a global leader and the largest U.S. provider of relocation services
- Title Resource Group, a provider of title and other settlement services throughout the U.S.
- In addition to the above four core businesses, we also have a joint venture with a large residential mortgage company, PHH Mortgage, which we spun off from Cendant in 2005.

Realogy represents a large segment of the real estate industry with approximately 15,000 offices and 310,000 brokers and independent contractor sales professionals worldwide. We also have more than 15,000 employees.

Thank you for incorporating our views into the committee record and if you or your staff have any questions, please feel free to contact me.

Sincerely,

Samuel H. Wright

cc: Representative Michael G. Oxley, Chairman, Financial Services Committee
Representative Barney Frank, Ranking Member, Financial Services Committee
Financial Services Subcommittee on Housing & Community Opportunity

July 21, 2006

The Honorable Bob Ney, Chairman
The Honorable Maxine Waters
Subcommittee of Housing and Community Opportunity
2129 Rayburn House Office Building
Washington D.C. 20515-6050

Dear Chairman Ney and Representative Waters:

Thank you for the opportunity to submit a letter presenting the views of the Missouri Association of Realtors® in conjunction with the hearing entitled "The Changing Real Estate Market." Our views specifically address the issue of state Minimum Service Legislation and the impact on the real estate industry.

In 2005 HB 174 was introduced in the Missouri House of Representatives by Rep. Dennis Wood, Rep. Wood is a REALTOR® from Kimberling City which is in the Southwest portion of the State. The bill was co-sponsored by Rep. Fred Kratky, a REALTOR® from St. Louis, Rep. David Pearce, from Warrensburg; Rep. Ed Robb, from Columbia; and Rep. Vicky Schneider a REALTOR® from St. Charles.

House Bill 174 did two things, the first it prohibited the Real Estate Commission from issuing a license to persons convicted of certain felonies and, in general, crimes involving children. In addition it requires that if a person enters into an exclusive brokerage agreement the broker must provide certain minimum services to the client or customer, they must keep in communication with the client or customer, and they can't abandon the listing. The language from the regarding minimum services act is reproduced below.

> 4. (1) "Exclusive brokerage agreement", as used in this chapter means a written brokerage agreement which provides that the broker has the sole right, through one or more licensees, to act as the exclusive designated agent or representative of the client that meets the requirements of this subsection;
>
> (2) All exclusive brokerage agreements shall specify that the broker, through one or more licensees, shall provide, at a minimum, the following services:
>
> (a) Accepting delivery of and presenting to the client offers and counteroffers to buy, sell, or lease the client's property or the property the client seeks to purchase or lease;

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(b) Assisting the client 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

(c) Answering the client's questions relating to the offers, counteroffers, notices, and contingencies.

What were the motivations behind this act? The issue dealing with prohibiting the issuance of license to those convicted of certain felonies is easily disposed of, it was motivated by an administrative law judge who, in response to an appeal from a prospective licensee who had been denied a license, required the Missouri Real Estate Commission (the body charged with administration of the licensing process in Missouri) to issue a license to an individual who had been convicted of crimes involving sex with a minor female dependant child.

The minimum services issue is somewhat more complex. We had been receiving complaints from members for several years about licensees who simply abandoned listings. They would take the listing, place it in the MLS and then walk away, leaving others to sell the property. There were a fairly limited number of these complaints but, to a real estate salesperson who's trained to help people and try to make their lives better one unhappy client or customer is one too many.

For the persons whose property was abandoned the normal judicial system was not an answer. Most listings are for a portion of a year, in most jurisdictions, certainly in the metropolitan area, it take six months to a year to get a case on the docket. The other problem is that the damages are difficult to prove and typically the potential loss is so relatively small—generally less than $10,000—that it is not realistic to expect to find an attorney to take the case.

The solution that we agreed on was to follow the lead of several other states who apparently had experienced the same problem. We modeled our act after a similar one in Illinois.

The bill passed both houses of the Missouri General Assembly without a dissenting vote. In the Senate we revealed to the hearing committee that a bill with some similar issues was before the Oklahoma Assembly and that the Department of Justice had sent a letter to all the members of the Oklahoma Senate urging that they vote against the bill. Even knowing this the Missouri Senate approved H.B. 174 on a vote of 33 to 0.

Once the bill was passed and sent to the Governor the Department of Justice began to lobby for a veto. The Association countered with a fairly aggressive campaign for approval and Governor Blunt approved the bill on July 12, 2005.

While the argument from the DOJ revolved around the impact this act might have on so called "limited service brokers" at least one such broker did not agree. Assist2Sell is a

national franchise which offers a varied menu of services dealing with the sale of real property. The co-owner of the Assist2Sell franchise in Columbia, Missouri, Betty Pauley, when interviewed by the Columbia Daily Tribune in a story that ran in late May of 2005 "said the legislation is necessary to define what it means to be a Realtor."

"If a Realtor wants to be a Realtor," she said, "then that person needs to act like one."

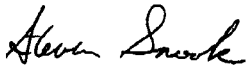
To Realtors such as Pauley, acting like one means representing the seller of a house"

What has happened since then? As best we can tell, not much. We did a poll, looking to test the interest of the public in the legislation, when asked if they thought the new act was important; somewhat important; somewhat unimportant; or not important. 83% of the respondents felt that the law was at least somewhat important (actual numbers were Very Important 57.83% and Some What Important 26.00%).

There has not been a discernable change in the number of internet or limited services brokerage companies operating in Missouri. Remember our act only requires some very minimum services ones that can basically be offered over the phone or even by e-mail. There is no requirement that the company, advertise or show the property, these are two major cost drivers in the real estate transaction. However there has been anecdotal evidence of a reduction in the number of complaints from our members regarding abandoned listings, we feel that this was an important result.

Thank you for this opportunity to comment on our efforts to improve the service provided to the public.

Sincerely,



Steven L. Snook, ABR, ABRM, CRB, GRI
2006 President
Missouri Association of REALTORS®

The Honorable Randy Neugebauer
429 CHOB
U.S. House of Representatives
Washington, D.C. 20515

July 24, 2006

Dear Congressman Neugebauer:

Thank you for providing the Texas Association of REALTORS® (TAR) with the opportunity to provide testimony to the Committee concerning the minimum services standards for real estate brokers under the Texas Occupations Code.

TAR is the state-level organization for the 80,0000 REALTORS® in Texas. All REALTORS® in Texas also belong to the National Association of REALTORS®. The mission statement of TAR is to promote private-property ownership, obtain and exchange ideas, and convert information into knowledge for the betterment of our membership and the real estate industry.

The Texas Occupations Code was amended in 2005 by Senate Bill 810 which clarified the interpretation and application of long-standing statutory and regulatory provisions relating to a broker's obligation to negotiate the best possible transaction for his client and a broker's obligation not to interfere with the agency relationship of another broker. The Code now states that a broker:

- may not tell another broker to violate the law by avoiding the listing broker during negotiations;
- must tell his client that an offer has been received;
- must answer a client's questions about an offer; and
- must present offers to or from the client.

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SB 810 was carefully crafted to be consistent with the proposed rule the Texas Real Estate Commission had been contemplating for more than two years. The final amendment was the product of years of debate within the industry before a governmental agency. It was not a quick or undebated legislative action.

TAR believes that this legislative change has increased consumer rights and eliminated much of the confusion that consumers were experiencing before the legislation was passed. TAR believes that requiring real estate brokers to return their clients' phone calls and communicate with them about the biggest financial transaction in their lives is not unreasonable.

The legislative change ensures that consumers of real estate services receive at least a minimum level of representation for the money they pay. Minimum services laws address what had been a common problem. Before the legislation was enacted, some real estate brokers charged their seller clients a flat fee for putting their home in the local multiple listing service (MLS) – and then did little or nothing else to help the client. These brokers received their money up front, then left the consumer in the lurch. The house didn't sell, even though buyers were interested. Why? Because the seller's broker refused to even let the client know that an offer had been made on the property.

A real estate broker who acts as an exclusive agent for a client is, under statute and common law, a fiduciary with certain corresponding obligations; foremost of which is to keep the client informed and act in the best interest of the client. The legislative change in Texas did not change this. It only clarified specific responsibilities. The limited service brokers simply forgot they were fiduciaries and argued that they had the right not to act in a manner that the law already required of them. They also argued that they had the right to waive those obligations at their own discretion. The limited service broker would claim to be the exclusive agent for the seller, but not want the responsibility of being an agent with fiduciary obligations. TAR believes that if a broker claims to be an exclusive agent, he should, in fact, be an agent and not just a mechanism to place ads for someone.

The Honorable Randy Neugebauer
July 24, 2006
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The minimum service rule does not affect what price brokers can charge to perform brokerage services. All real estate brokers and agents in Texas have always been and remain free to charge whatever commission amount their clients are willing to pay. What a broker cannot do now is disappear in the midst of a complex transaction, when their clients need them most. Requiring real estate brokers to return their clients' phone calls and communicate with them about the biggest financial transaction in their lives is not unreasonable.

TAR believes in the free market and the least possible amount of government regulation. Ensuring that consumers receive a basic level of service from a real estate broker simply makes the free market work in the most efficient manner possible and provides fairness to the consumer.

Thank for the opportunity to provide this information to the Committee.

Sincerely,

Dennis Patillo
Chairman

WHO IS MY CLIENT?

A REALTORS® GUIDE TO COMPLIANCE WITH THE LAW OF AGENCY

First Edition
November 1986

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Sample Notice to Prospective Real Estate Purchasers

PREFACE

There are certain legal concepts with which every practicing real estate broker, appraiser and manager must be thoroughly familiar. These legal concepts establish the transactional framework within which he must function and the limits beyond which he cannot go without serious risk to himself and those he serves.

These legal concepts include, of course, antitrust with its mandate of a competitive marketplace. They also include fair housing with its requirement of a housing market to which all persons have access regardless of their race, color, religion, sex or national origin.

The legal concept of "Agency" with which this booklet is concerned is, however, beyond question the most fundamental of all the legal concepts applicable to the real estate profession and professional. It is the very nature and function of the real estate broker, appraiser and manager to be an agent. The law of agency literally defines the "species" and gives real estate practitioners their identity.

This booklet is one component of a comprehensive effort by the National Association to assure that every REALTOR® understands the Agency relationships available to him and those he seeks to serve. It is an effort overdue but never too late as long as REALTORS® seek to serve others rather than themselves.

—*William D. North*
Executive Vice President
NATIONAL ASSOCIATION OF REALTORS®

I. INTRODUCTION

The concept of an agency relationship began when men agreed to act on behalf of one another. Agency relationships are as diverse as the myriad occasions when we employ the services of another, and can be as complex as the nature and scope of the services that are performed in today's economy and society.

The agency relationship between a real estate broker and sellers and buyers of real estate is not new. One of the reasons that the NATIONAL ASSOCIATION OF REALTORS® was formed at the turn of the century was to enhance the professionalism of real estate brokers by recognizing an agency relationship between the broker and his client, and also by imposing a more general duty on a real estate broker to treat all persons, clients and customers alike, fairly and honestly.

Given the constantly changing needs of sellers and buyers for real estate services, and the resulting change in brokers' capacity to satisfy those needs, there is a crucial need for clarification of traditional agency concepts and assumptions. Many real estate brokers in today's market are experiencing a fundamental "identity crisis" in their relationships with sellers and buyers. This identity crisis results from many factors, including, but by no means limited to:

• The consumer protection movement, which has severely limited the *caveat emptor* ("buyer beware") principle of the early common law and imposed new duties of discovery and disclosure on real estate brokers.

• The increasing complexity of real estate transactions, which has increased the need of sellers and buyers for specialized knowledge and advice.

• The changing perception of a home as an investment as well as a means of shelter.

• The increasing number of marketing systems, arrangements, and services that have a fundamental impact on a broker's involvement with his prospects.

The result of these developments in the real estate market has been a growing confusion of roles, functions, loyalties, responsibilities, and relationships. On some occasions, brokers confuse their function with that of a lawyer, banker, engineer, or architect. On other occasions, brokers confuse the

relationships created by exclusive agency, subagency, and buyer agency. In still other instances, brokers confuse fiduciary duties with general duties of honesty and fairness and a duty not to misrepresent a property's condition.

A broker who is confused about his role, function, or loyalty will inevitably transmit that confusion to the public with whom he deals. Public confusion in turn breeds mistrust and frustration, which eventually results in increased litigation, liability, and regulation.

This Handbook is designed to assist real estate brokers and salespeople in understanding the common law of agency that applies to their dealings with sellers and buyers, and the consequences that can beset a real estate broker who breaches his agency duties, either accidentally or by design. By understanding clearly their agency obligations, brokers will be better able to serve the general public and enhance their own professionalism.

II. WHAT IS AN AGENT?

Every state in the Union licenses real estate brokers and salespeople. A person who acts on behalf of others in selling, buying, or leasing real estate must first secure a real estate license. A person who performs acts on behalf of others is also deemed to be an agent under the common law of every state. An agency relationship is defined under the common law as follows:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is taken is the principal.
>
> (3) The one who is to act is the agent.*

Attorneys, engineers, accountants, and architects are but a few examples of other licensed professionals who act as agents of their clients.

The ability to buy, sell, or rent real estate freely is the linchpin of the American economy and our

* Restatement (Second) of Agency §1 (1958).

democratic form of government. Real estate can be bought and sold freely in this country in large measure because real estate brokers and salespeople are available to act as agents to perform for others the often complex and time-consuming function of marketing and conveying interests in real estate.

III. HOW ARE AGENCY RELATIONSHIPS CREATED?

An agency relationship is, first and foremost, a "consensual" relationship. All that is necessary to create an agency relationship is the principal's delegation to the agent of authority to act and the agent's consent to act. Formalities are not required to create an agency relationship. As a general matter, a writing is not necessary to create an agency relationship, though many states do require listing agreements between real estate brokers and sellers to be in writing.

An agency relationship also need not be a contract, with the elements of offer, acceptance, and consideration. Agency relationships can be gratuitous, without any obligation on the principal's part to pay the agent. By the same token, compensation paid by one party to another party does not necessarily create or confirm an agency relationship. On the other hand, when a judge or a jury is asked to determine whether an agency relationship existed between two parties, whether compensation was paid by the alleged principal to the alleged agent will be given considerable weight, particularly if the party who paid the compensation is asserting that an agency relationship was created.

The elements necessary to create an agency relationship are defined by law. Thus, if a relationship between two parties satisfies the elements of an agency relationship, it will be treated as such, regardless of the label the parties use to describe their relationship. Likewise, simply because the parties call their relationship an agency does not make it one if the relationship does not otherwise satisfy the legal elements of an agency.

Whether the relationship between two parties satisfies the prerequisite of an agency relationship is a question of fact for a judge or jury to decide. Because formalities are not required to create an agency relationship, one can be implied from the conduct of the parties toward each other. This inference of an agency relationship from the conduct of the parties is per-

missible whether or not the parties consciously set out to create one. Likewise, the conduct of the parties can create an agency relationship even if the parties have signed acknowledgment forms denying the existence of an agency. By the same token, the conduct of the parties can defeat the existence of an agency relationship even if the parties have signed documents purporting to create an agency relationship.

To summarize, an agency relationship is created when:

- the principal *delegates* authority to the agent to perform acts on behalf of the principal;
- the agent *consents* to the delegation.

An agency relationship does *not* require:

- a writing
- a contract
- compensation paid by the principal to the agent.

An agency can also be created by the *conduct* of the parties toward each other regardless of what label the parties use, or do not use, to describe their relationship. Thus, agency relationships can result *unintentionally, accidentally,* or *inadvertently.*

IV. DUTIES OWED BY AN AGENT TO HIS PRINCIPAL

A real estate broker who becomes an agent of a seller or buyer, either intentionally through the execution of a written agreement, or unintentionally by a course of conduct, will be deemed to be a *fiduciary.* Fiduciary duties are the highest duties known to the law. Classic examples of fiduciaries are trustees, executors, and guardians. As a fiduciary, a real estate broker will be held under the law to owe certain specific duties to his principal, in addition to any duties or obligations set forth in a listing agreement or other contract of employment. These specific fiduciary duties include:

- Loyalty
- Obedience
- Disclosure

- Confidentiality
- Reasonable care and diligence
- Accounting

1. *Loyalty*—A duty of loyalty is one of the most fundamental fiduciary duties owed by an agent to his principal. This duty obligates a real estate broker to act at all times solely in the best interests of his principal to the exclusion of all other interests, including the broker's own self-interest. A corollary of this duty of loyalty is a duty to avoid steadfastly any conflicts of interest that might compromise or dilute the broker's undivided loyalty to his principal's interests. Thus, a real estate broker's duty of loyalty prohibits him from accepting employment from any person whose interests compete with, or are adverse to, his principal's interests.

A classic example of breach of this duty of loyalty by a real estate broker is a broker who purchases property listed with his firm and then immediately resells it at a profit. Such conduct ordinarily is perfectly appropriate and lawful by persons acting "at arms length." But a fiduciary will be deemed to have "stolen" a profit opportunity rightfully belonging to his principal and thus to have breached his duty of loyalty.

2. *Obedience*—An agent is obligated to obey promptly and efficiently all lawful instructions of his principal. However, this duty plainly does not include an obligation to obey any unlawful instructions; for example, an instruction not to market the property to minorities or to misrepresent the condition of the property. Compliance with instructions the agent knows to be unlawful could constitute a breach of an agent's duty of loyalty.

3. *Disclosure*—An agent is obligated to disclose to his principal all relevant and material information that the agent knows and that pertains to the scope of the agency. This duty specifically obligates a real estate broker representing a seller to reveal to the seller:

- all offers to purchase the seller's property.
- the identity of all potential purchasers.
- any facts affecting the value of the property.
- information concerning the ability or willingness of the buyer to complete the sale or to offer a higher price.

• the broker's relationship to, or interest in, a prospective buyer.

• a buyer's intention to subdivide or resell the property for a profit.

• any other information that might affect the seller's ability to obtain the highest price and best terms in the sale of his property.

Likewise, a real estate broker representing a buyer is obligated to reveal to the buyer:

• the willingness of the seller to accept a lower price.

• any facts relating to the urgency of the seller's need to dispose of the property.

• the broker's relationship to, or interest in, the seller or the property for sale.

• any facts affecting the value of the property.

• the length of time the property has been on the market and any other offers or counteroffers that have been made relating to the property.

• any other information that would affect the buyer's ability to obtain the property at the lowest price and on the most favorable terms.

CAVEAT: An agent's duty of disclosure to his principal must not be confused with a real estate broker's duty to disclose to nonprincipals any known material facts concerning the value of the property. This duty to disclose known material facts is based upon a real estate broker's duty to treat all persons honestly and fairly. This duty of honesty and fairness does not depend on the existence of an agency relationship.

4. *Confidentiality*—An agent is obligated to safeguard his principal's confidence and secrets. A real estate broker, therefore, must keep confidential any information that might weaken his principal's bargaining position if it were revealed. This duty of confidentiality precludes a broker representing a seller from disclosing to a buyer that the seller can, or must, sell his property below the listed price. Conversely, a broker representing a buyer is prohibited from disclosing to a seller that the buyer can, or will,

pay more for a property than has been offered.

CAVEAT: This duty of confidentiality plainly does not include any obligation on a broker representing a seller to withhold from a buyer known material facts concerning the condition of the seller's property or to misrepresent the condition of the property. To do so would constitute misrepresentation and would impose liability on both the broker and the seller.

5. *Reasonable care and diligence*—An agent is obligated to use reasonable care and diligence in pursuing the principal's affairs. The standard of care expected of a real estate broker representing a seller or buyer is that of a competent real estate professional. By reason of his license, a real estate broker is deemed to have skill and expertise in real estate matters superior to that of the average person. As an agent representing others in their real estate dealings, a broker or salesperson is under a duty to use his superior skill and knowledge while pursuing his principal's affairs. This duty includes an obligation to affirmatively discover facts relating to his principal's affairs that a reasonable and prudent real estate broker would be expected to investigate. Simply put, this is the same duty any professional, such as a doctor or lawyer, owes to his patient or client.

6. *Accounting*—An agent is obligated to account for all money or property belonging to his principal that is entrusted to him. This duty compels a real estate broker to safeguard any money, deeds, or other documents entrusted to him that relate to his client's transactions or affairs.

V. WHAT IS A SUBAGENT?

Under the real estate license laws of every state, a real estate salesperson does not have any authority to act independently of his broker. Real estate salespeople can function only if they are licensed with a real estate broker or brokerage firm. As such, real estate salespeople are "agents of an agent." They are agents of the real estate broker, who, in turn, is licensed to act as an agent of the general public in matters relating to real estate.

An agent of an agent is called a subagent. A subagent has been defined under the common law as follows:

> A subagent is an agent of an agent employed to act for the agent in performing functions undertaken by the agent for his principal, and for whose conduct the agent agrees to be responsible to his principal.*

A subagency relationship results when it is understood by the principal that an agent may delegate the performance of some or all of the work to be performed for the principal to the agent's agents. This understanding may be expressed or implied.

Because subagents are agents of an agent, they owe the same fiduciary duties to the broker's principal as does the broker himself. Salespeople are also agents of their broker. Thus, salespeople as subagents owe fiduciary duties to two principals: their broker and their broker's principal.

By the same token, subagents, where properly appointed, have authority to bind the broker's principal to the same extent as the broker himself. The broker is also liable to his principal for any wrongful conduct committed by any of his salespeople as subagents.

In the real estate brokerage industry, subagents are used routinely to market a seller's property. Most active real estate brokers have one or more salespeople affiliated with them, who act as subagents on behalf of the broker's principals. It is also common for real estate listing contracts to authorize the listing broker to appoint as subagents brokers and salespeople in other real estate firms to sell the listed property. This is particularly true when a multiple listing service (MLS) operates in the marketplace and current listing information is systematically shared among MLS participants. Under the Multiple Listing Policy of the NATIONAL ASSOCIATION OF REALTORS®, an MLS is specifically defined as a vehicle through which listing brokers make unilateral subagency offers on a blanket basis to all other MLS participants.*

The practical effect of an MLS operated by a Board of REALTORS® is to increase the number of subagents available to market the seller's property beyond just those salespeople in the listing broker's firm to include all the other MLS participants and their salespeople. These MLS participants and their salespeople, however, stand in exactly the same relation to the seller as do the broker's own salespeople:

* Seavey, *Agency* §7 (1964).

* *NAR Handbook on Multiple Listing Policy*, Section 1.20 (1980).

they are agents of the listing broker and owe fiduciary duties to the listing broker's principal, the seller.

Of course, MLS participants can, if they choose, reject the offers of subagency being made through the MLS and instead represent the buyer. If MLS participants do choose to represent the buyer, they must inform the listing broker that they are agents of the buyer before they attempt to show the listed property. This disclosure is necessary because the listing broker is entitled to know that the broker or salesperson showing the property has rejected the offer of subagency and therefore does not owe fiduciary obligations to the broker's principal. The listing broker can then determine whether further action is necessary to protect his principal's interest.

VI. UNDISCLOSED DUAL AGENCY: A BREACH OF AN AGENT'S DUTY OF LOYALTY

An agent's duty of loyalty compels him to refuse to accept any employment that would require him to act contrary to, or in competition with, the interests of his principal. Buyers and sellers of real estate are deemed by law to "compete" with one another and to have "adverse" interests. Accordingly, a real estate broker who acts as an agent for both a buyer and a seller in the same real estate transaction is a dual agent. A real estate broker who acts for both the buyer and the seller and does not clearly disclose his status to both parties and receive their informed consent to the arrangement is an undisclosed dual agent. Undisclosed dual agency is universally considered to be a breach of an agent's duty of loyalty to his principal. It is also considered to be an act of fraud and is a violation of the real estate license law of many states.

Although disclosed dual agency relationships are technically lawful, there are compelling reasons real estate brokers should avoid creating them. Courts are very strict concerning the degree of disclosure necessary to make a real estate broker's dual agency lawful. For example, a lawful dual agent must explain carefully to both the buyer and the seller that he is also acting as a fiduciary for the other party and owes both of them the full range of fiduciary duties. The real estate broker must also ensure that both the buyer and the seller understand that by consenting to the dual agency arrangement, they each are forfeiting their right to receive their agent's undivided loyalty.

without this comprehensive disclosure and each principal's informed, and preferably written, consent, the dual agency will still be deemed undisclosed and therefore unlawful.

Dual agency is a totally inappropriate agency relationship for real estate brokers to create as a matter of general business practice. Undisclosed dual agency is a clear breach of a broker's fiduciary duty to each of his principals and is generally viewed to be an act of fraud. The disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine.

VII. REMEDIES FOR AN AGENT'S BREACH OF FIDUCIARY DUTY

A real estate broker's principal has three primary remedies available to him if his broker committed a breach of his fiduciary duty.

- Rescission
- Forfeiture of commission
- Damages

Furthermore, these remedies are nonexclusive. A plaintiff can pursue one, two, or all three remedies in the same lawsuit.

1. *Rescission*—A principal has a right to rescind any transaction procured by reason of an agent's breach of fiduciary duty. Rescission is a legal remedy through which the court attempts to restore the parties to their original status before the transaction occurred. In a rescinded real estate transaction, the buyer deeds the property back to the seller, and the seller refunds the purchase price.

A real estate transaction "tainted" by an agent's breach of fiduciary duty is presumed to be unfair to the principal. Therefore, a principal is entitled to rescind such a transaction without showing that the transaction was, in fact, unfair in price or terms or that the agent involved acted in bad faith. In the case of an undisclosed dual agency, whether intentional or accidental, either the buyer or the seller need only establish the existence of the undisclosed dual agency to qualify for rescission.

2. *Forfeiture of commission*—An agent who breaches his fiduciary duty while procuring a transaction for a principal is deemed to have breached the implied terms and conditions of his employment. Fiduciary duties are imposed by implication upon an agent in addition to any express obligations set forth in an employment agreement. Consequently, an agent who breaches his fiduciary duties is not entitled to be paid and can be compelled to return any compensation received, including a real estate brokerage commission.

3. *Damages*—An agent can also be expected to pay any damages caused by his fiduciary breach. In a real estate transaction, such damages would include any difference between the sales price and the price specified in a higher offer the broker failed to reveal, or could include any profits made by a broker who purchased property from his seller-principal and then resold it at a higher price.

The real estate license laws of many states prohibit licensees from acting as undisclosed dual agents, and also prohibit many other forms of conduct that could constitute breaches of a licensee's fiduciary duties to his principal. Thus, a broker who breaches his fiduciary duty also places his real estate brokerage license in jeopardy.

VIII. HOW DUAL AGENCIES CAN RESULT BY "ACCIDENT"

A. A Broker Purchasing Property Listed with His Firm

A real estate broker who purchases property listed with his firm is a classic dual agent. He has not merely undertaken to represent the buyer and the seller; he has become the buyer while representing the seller. Courts tend to view undisclosed dual agency as a form of self-dealing or fraud. Self-dealing is considered one of the capital offenses that a fiduciary can commit

Thus, a real estate broker or salesperson should never purchase property listed with his firm unless the seller consents to the sale with full knowledge that the purchaser is the real estate broker or salesperson or an entity in which they have an interest. This same requirement of full disclosure and consent also applies if the broker is purchasing property listed by another firm, since brokers cooperating in the sale of other brokers' listings are subagents and owe the same fiduciary obligations to the seller as the listing broker.

The inherent conflicts presented by a real estate broker who attempts to purchase property listed with his firm have long been the object of Article 13 of the REALTORS® Code of Ethics, which provides in part that

> The REALTOR® shall not acquire an interest in or buy for himself, any member of his immediate family, his firm or any member thereof, or any entity in which he has a substantial ownership interest, property listed with him, without making the true position known to the listing owner.

B. A Seller's Agent Accepting Future Employment from a Buyer

A real estate broker need not purchase a seller's property himself in order to be accused of self-dealing or acting as an undisclosed dual agent. A broker can fall into the dual agency trap by accepting future employment from an actual or potential buyer of his principal's property. Courts may consider the opportunity for future employment by the buyer as a conflict of interest rendering the broker an undisclosed dual agent.

An example of an opportunity for future employment that could make a broker an undisclosed dual agent is an offer by a potential buyer to manage an apartment building currently listed for sale with the broker's firm. A broker who fails to disclose this employment offer to his seller risks being considered an undisclosed dual agent if the buyer ultimately purchases the property. The same result would occur if the buyer offered the broker an opportunity to list the property for resale.

In short, if a broker is offered any opportunity to profit from a sale to a particular buyer, the broker must disclose that profit opportunity to his principal, or the broker will, in all likelihood, be found to be an undisclosed dual agent if that buyer ultimately purchases the property.

On the other hand, a real estate broker can generally accept a listing on a prospective buyer's property, or can assist a client-seller in finding a suitable replacement property without creating a dual agency relationship. This is true so long as the broker clearly distinguishes between the owner's status as a principal under a listing agreement to sell his property and the owner's status as a prospect when seeking to purchase replacement property.

C. A Broker Representing the Buyer Seeking Compensation from the Seller

Under industry custom, real estate brokers are compensated by commissions paid by sellers or by splits of such commissions paid by listing brokers to other brokers who have cooperated in the sale. Since real estate brokers are traditionally paid a commission by the seller, real estate brokers who arrange a sale are careful to ensure that the seller has agreed to pay a commission at closing, sometimes without any regard to whether the broker represented the seller or the buyer during the course of the transaction.

Dual agency becomes an issue when a real estate broker arranges a sale as an agent for the buyer but then seeks compensation from the seller by inducing the seller to sign a listing agreement or by requesting a commission split from the seller's agent. As discussed, the payment of compensation does not conclusively establish an agency relationship. But the payment of compensation is given considerable weight by a judge or jury when deciding whether an agency or dual agency relationship has been created. This is especially true when the party who paid the compensation is alleging that the agency or dual agency relationship was, in fact, created.

To avoid dual agency allegations based upon the source of a real estate broker's compensation, a broker should do the following:

- seek compensation only from his principal, either the buyer or the seller, or

- seek compensation from the nonprincipal or his agent if and only if the nonprincipal and his agent understand and agree in writing that the payment of compensation will not result in the broker's becoming the agent of the party paying his compensation.

D. The Seller's Agent Leads the Buyer to Believe the Agent Is Representing the Buyer

Real estate brokers representing sellers cannot perform their obligation to procure a ready, willing, and able buyer for their client's property unless they seek out qualified buyers. A real estate transaction by definition requires a seller and a buyer. Thus, it is perfectly natural and necessary for real estate brokers representing sellers to do everything they can to

attract buyers. Buyers are attracted to brokers with whom they feel comfortable and are able to develop rapport and communication. This is no surprise because this is the essence of "selling."

Too often, however, brokers in their zeal to arrange a sale satisfactory to both parties encourage the buyer to believe that the broker is working "for" him rather than "with" him. Simply put, the broker allows or even induces the buyer to believe that he is the broker's client, when, in fact, the broker has already established a client relationship with the seller by executing a listing agreement or by acting as a subagent of a listing broker.

The broker who permits the buyer to believe he is acting as the buyer's agent when the broker has already formed an agency relationship with the seller is a classic example of the "accidental" dual agent. But he is a dual agent, nevertheless. As noted earlier, formalities are not required to create agency relationships. They can be created orally, or they can be implied from the conduct of the parties. The accidental dual agent creates an express agency with the seller by executing a listing agreement, and he creates an implied agency with the buyer by allowing him to believe the broker is acting on his behalf.

Examples of words or phrases often used by real estate brokers or sellers that can create implied agency relationships with buyers are the following:

1. "I'll take care of everything. I'll handle the sale for you."
2. "This listing has been on the market for six months. That tells me it's overpriced. Let's offer $80,000 and see what they say."
3. "Trust me. I'm sure the seller won't counter at that price."
4. "If the seller is going to insist on a full price sale, I think you should tell him no. Then we can try an offer on that Maple Street house your wife liked so much. I'm sure those sellers will be more realistic."
5. "If they insist on the full $100,000, I'll remind them that the furnace is 15 years old and the carpet is fraying. That should justify at least a $3,000 reduction."

CAVEAT: A real estate broker working with a buyer does not automatically become the buyer's agent. The courts have consistently acknowledged that real estate brokers routinely provide buyers with a variety of valuable services and information as a natural by-product of the brokers' marketing function

on behalf of sellers. For example, it is clear that real estate brokers can do the following for buyers without creating an agency relationship:

- show the buyer listed properties meeting the buyer's criteria concerning location, price, and size;
- describe a property's amenities and attributes and make factual representations about the property's condition and status;
- complete a standard "Offer to Purchase" form for the buyer by inserting the terms of the buyer's offer in the blank spaces on the form;
- transmit any offers made by the buyer to the seller or the listing broker on a timely basis;
- inform the buyer about the availability of financing, legal services, home inspection companies, title companies, or other related services desired or required by the buyer to complete the transaction.

The critical distinction is that the information and services described above are provided by brokers working with buyers in the broker's capacity as agent for the seller or as a subagent of the listing broker.

Providing services like these to the buyer does not, in and of itself, create an agency relationship with the buyer. But when a real estate broker does more than provide market information or facilitate the completion of a transaction, and instead becomes an advocate or negotiator for the buyer, then the broker has probably created an implied agency with the buyer. This can result in an undisclosed dual agency if the broker is also the agent of the seller by reason of a listing agreement, or a subagent based upon an offer of subagency from the listing broker that was never expressly rejected.

IX. THE ALTERNATIVES TO DUAL AGENCY: SINGLE AGENCY OR SUBAGENCY

A. Single Agency

As a practical matter, real estate brokers should avoid dual agency relationships. Creation of a lawful

disclosed dual agency relationship is so difficult that a real estate broker who attempts to conduct his day-to-day affairs as a disclosed dual agent is playing the professional equivalent of Russian roulette.

The obvious alternative to dual agency is single agency: A real estate broker should have one and only one principal per transaction; he should loyally and diligently pursue the legitimate interests of his principal; and he should scrupulously avoid accepting or exercising any authority on behalf of the other party to the transaction.

While a real estate broker should have one and only one principal per transaction, that principal can be the seller or the buyer. Of course, whenever a broker signs a listing agreement, he and each of his salespeople become the agent (or subagent) of the seller. The listing agreement is between the seller and the brokerage firm. Therefore, the agency relationship created by the agreement binds every licensee affiliated with the firm.

Consequently, it is impossible for Salesperson A in Firm X to represent the seller, and Salesperson B in Firm X to represent the buyer. Firm X can represent only the seller, or only the buyer, or act as a disclosed dual agent for both the buyer and the seller. Needless to say, this reality requires real estate brokers, especially those operating larger firms, to create internal management controls designed to keep all salespeople informed of the identity of the firm's clients (both buyers and sellers) so that potential conflicts can be minimized.

Real estate brokers are also legally capable of representing buyers, and many brokers do so regularly, especially in commercial or industrial transactions. More recently, certain brokers have begun to offer "client-level" agency services to residential buyers by forming express agency relationships with buyers.

If a real estate broker decides to form an express agency relationship with a buyer, the decision to do so should be made as soon as possible during the transactional process. This will permit the broker to make a timely disclosure of his agency status to brokers with listings on properties that his buyer-client is interested in inspecting. Timely disclosure will avoid any unintended dual agencies from being created because the broker representing the buyer also participates in an MLS. Prompt disclosure will also enable the buyer's agent to raise the issue of commission sharing sufficiently early to determine whether the listing broker or the seller is prepared to compensate

the buyer's agent. Finally, prompt disclosure will permit the listing broker to take appropriate action to ensure that the seller's interests will be represented in any presentation of the property to the prospective buyer.

The agency relationship between the broker and the buyer should be *in writing*. Just as written listing agreements avoid confusion and ambiguity, so does a written agency agreement between a broker and a buyer. Indeed, given the relative novelty of broker-buyer agency relationships, a written agency agreement between a broker and a buyer is even more appropriate to avoid confusion and misunderstanding.

When a real estate broker creates an express agency relationship with a seller or buyer, he avoids dual agency relationships by carefully avoiding any agency relationship with the other party to the transaction or even the appearance of such a relationship. Keeping in mind that an agency is a consensual relationship, the best way to avoid the creation of an unintentional agency relationship is to eliminate any consent, or the appearance of any consent, to act for the person with whom an agency relationship is not intended. The best way to negate consent is to notify the party that authority to act on his behalf is not being accepted. This notice is most effective if *written disclosure* is given to the party sufficiently early in the transaction so that it cannot be said that an agency relationship has already been established. A suggested form of written disclosure developed by the NATIONAL ASSOCIATION OF REALTORS® Agency Task Force to be used by brokers who are representing sellers is attached as an Appendix to this Handbook.

Real estate brokers who have formed express agency relationships with sellers or buyers and disclosed their status to the other party can take additional steps to avoid dual agency claims by refraining from any act or function that is inconsistent with their duty of undivided loyalty to their client, whether the buyer or the seller. A common problem occurs when a real estate broker's buyer client seeks to purchase property listed with the broker's firm. A broker faced with this situation must act quickly and decisively if a dual agency situation is to be avoided.

1. The broker must *disclose* to both the seller and the buyer the existence of the conflict in the broker's fiduciary duties.

2. The broker should consider *renouncing* one agency relationship or the other. The choice of which relationship to renounce is often determined by re-

nouncing the relationship last created. The renunciation should be in writing signed by the former client.

3. If renunciation is not possible or desirable, the broker should secure clear and unambiguous *consents and waivers* from the buyer and the seller permitting the real estate broker to continue in a dual agency capacity. In short, the broker should attempt, as a last resort, to create a lawful disclosed dual agency, taking into account all the attendant difficulties.

Needless to say, the best way to deal with this type of conflict is to avoid it in the first place. This can be accomplished most effectively if a real estate broker elects to function at all times only as a seller's agent, or only as a buyer's agent. If this is not possible or desirable, brokers who act primarily as seller's agents should insist that their salespeople not create agency relationships with buyers without the express prior approval of the managing broker. The reverse, of course, would be true for brokers who act primarily as buyer's agents. They should insist on prior approval before any listing agreement is taken from a seller.

Another common dilemma for real estate brokers who have formed express agency relationships with buyers is the payment of compensation. While the payment of compensation is not necessarily conclusive concerning whether or not an agency relationship has been created, it is a highly significant fact. Thus, the safest course for a buyer's broker is to seek compensation solely from his principal, the buyer.

Brokers, however, are sometimes reluctant to seek compensation directly from buyer principals because of the strong industry tradition of real estate brokers being paid by sellers or through commission splits with listing brokers. Therefore, many brokers who form agency relationships with buyers nonetheless seek compensation in the "traditional" manner by requesting a share of the listing broker's commission.

To avoid dual agency implications, a broker representing a buyer but seeking compensation from the seller's broker should first secure the buyer's express written consent to that compensation arrangement. The buyer's agent should then disclose his agency status at the first encounter with the listing broker and advise the listing broker that he is seeking a share of the listing broker's commission.

If a listing broker agrees to share his commission with the buyer's agent, he has a right to demand proof from the buyer's agent that he has secured the buyer's consent to compensation from the seller, or the listing broker. The listing broker who agrees to share his

commission with a buyer's agent should also secure the seller's express written consent to the commission-sharing arrangement to avoid any later claim by the seller that he was victimized by an undisclosed dual agency by reason of the unauthorized payment to the buyer's agent.

B. Subagency

Frequently, a real estate broker or salesperson has not sought, or received, any authority to act on behalf of a particular buyer who has contacted the broker's firm seeking to acquire a certain type of real estate. It is also common for the broker contacted by the buyer not to have any listings that satisfy the buyer's specific needs. A broker in this situation can, if he chooses, attempt to establish an express agency relationship with the buyer if the buyer is willing to accept such an arrangement.

An alternative for a broker in this situation who seeks to avoid dual agency implications is to act as a *subagent* for other listing brokers who may have properties listed that do meet the buyer's criteria. If the broker participates in an MLS operated by a Board of REALTORS®, the listing information disseminated through the MLS constitutes an offer of subagency to other participants qualified and capable of accepting it. If the offer of subagency is accepted by the production of a ready, willing, and able buyer, the listing broker is obligated to compensate the cooperating broker/subagent according to the subagency compensation shown in the MLS compilation or according to whatever other compensation arrangement may have been negotiated in advance between the two firms.

Subagency status may well be preferable to an agency relationship with the buyer because it does not require the broker to negotiate an agency agreement with the buyer when none may be desired, either by the broker or the buyer. Subagency status also guarantees the broker's right to compensation from the listing broker if he finds the buyer for the listed property, because the listing broker participating in an MLS has expressly agreed to pay compensation for a broker's performance as a subagent. Furthermore, the payment of this compensation by the listing broker does not raise any dual agency issues because the subagent owes fiduciary duties to the listing broker and the seller, and not to the buyer.

But it is precisely because subagents owe fiduci-

ary duties to the listing broker and the seller that brokers who elect to act as subagents must be fully aware of the legal consequences of subagency status. *Subagents owe fiduciary duties to the seller.* Thus, real estate brokers acting as subagents of listing brokers must relate to buyers and sellers exactly as if the listing had been taken by the subagent's own firm. The full spectrum of fiduciary duties a listing broker owes to the seller are also owed by the subagent. By the same token, the subagent's power to bind the seller through factual representations and other commitments is the same as the listing broker's.

Admittedly, the full impact of a subagent's fiduciary duties to the seller may be difficult for some real estate brokers to comprehend because they are not accustomed psychologically to owing fiduciary duties to "someone else's seller" as opposed to "my buyer." But this psychological bias can easily be overcome through education and office management procedures designed to ensure that the agency responsibilities of the firm are clearly understood by all brokers and salespeople affiliated with it.

X. CONCLUSION

Undisclosed dual agency can be devastating to the unwary real estate broker. A real estate broker who permits both a buyer and a seller to believe that he is serving as their agent makes it possible for either the buyer or the seller to rescind the transaction and compel the broker to return his commission. The risks posed by undisclosed dual agency are therefore simply intolerable for any real estate broker to ignore or attempt to assume.

Undisclosed dual agency is a condition created almost always by accident rather than design. These "accidents" can best be avoided if a real estate broker stays in control of the events surrounding a transaction. Control can be maintained by observing three rather simple guidelines:

1. A broker should decide as soon as possible who his principal is in any given transaction. As to those properties listed with the broker, the decision is made at the time of listing: The broker's principal is the seller. As to buyers who ask the broker to assist in procuring a property that is either unlisted or listed with another broker, the broker must decide on whose behalf he is going to act. Needless to say, whom the

broker expects to pay him should be a significant, if not conclusive, factor in reaching this decision.

2. The real estate broker should disclose whom he is representing to the other party as soon as it becomes apparent that serious negotiations are likely to begin that may lead to a contract of sale. This disclosure should be of a nature sufficient to eliminate any misunderstanding concerning whom the broker is, in fact, representing. If such disclosure is given soon enough, it should defeat any claim that the broker consented to act on behalf of the party to whom the disclosure was given.

3. The real estate broker should act at all times consistently with the agency status he has assumed. He should not undertake any efforts on behalf of the party whose interests are adverse to those of his principal that could be construed as creating an agency relationship with that party. Conduct to be avoided, or undertaken only with full and complete disclosure to the broker's principal, would include accepting an economic interest of any type in an entity seeking to acquire property listed with the broker or his firm, or accepting offers of future employment, or a future listing, from an entity acquiring property listed with the broker or his firm.

By applying these simple rules, accidental or inadvertent dual agency can be avoided, and the integrity of a real estate broker's transactions and his source of income will be preserved.

(SAMPLE)

NOTICE TO PROSPECTIVE REAL ESTATE PURCHASERS

As a prospective purchaser you should know that:

- Generally, the listing and cooperating ("selling") brokers are the agents of the seller.
- Their fiduciary duties of loyalty and faithfulness are owed to their client (the seller).
- While neither broker is your agent, they are able to provide you with a variety of valuable market information and assistance in your decision-making process.

For example, a real estate broker representing the seller can:

- Provide you with information about available properties and sources of financing.
- Show you available properties and describe their attributes and amenities.
- Assist you in submitting an offer to purchase.

Both the listing broker and the cooperating broker are obligated by law to treat you honestly and fairly. They must:

- Present all offers to the seller promptly.
- Respond honestly and accurately to questions concerning the property.
- Disclose material facts the broker knows or reasonably should know about the property.
- Offer the property without regard to race, creed, sex, religion or national origin.

You can, if you feel it necessary, obtain agency representation of a lawyer or a real estate broker, or both.

If you choose to have a real estate broker represent you as your agent, you should:

- Enter into a written contract that clearly establishes the obligations of both parties.
- Specify how your agent will be compensated.

If you have any questions regarding the roles and responsibilities of real estate brokers, please do not hesitate to ask.

I have received, read and understand the information in this "Notice to Prospective Real Estate Purchasers."

Name of Prospective Purchaser: _____

Signature: _____

Address: _____

_____

Telephone: _____

Date: _____

I certify that I have provided the Prospective Purchaser named above with a copy of this "Notice to Prospective Purchasers."

Name of Broker or Sales Agent: _____

Signature: _____

Date: _____

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 14, 2006

The Honorable Michael G. Oxley
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find a response to a question that Congressman David Scott asked Mr. J. Bruce McDonald, Deputy Assistant Attorney General, Antitrust Division, at the July 25, 2006, hearing before the Subcommittee on Housing and Community Opportunity entitled, "The Changing Real Estate Market." We hope that you will find the information helpful, and that you will not hesitate to call upon us if we may be of additional assistance in the future.

Sincerely,

James H. Clinger

James H. Clinger
Acting Assistant Attorney General

Enclosure

cc: Congressman David Scott

Answer of Deputy Assistant Attorney General J. Bruce McDonald
To Question for the Record from Congressman David Scott
Hearing on the Changing Real Estate Market
Subcommittee on Housing and Community Opportunity
House Committee on Financial Services
July 25, 2006

Question:

What percentage of houses are bought without the assistance of a buyer's agent?

Answer:

According to the National Association of Realtors' 2005 Profile of Home Buyers and Sellers, 77 percent of home buyers used an agent that year, while 12 percent bought directly from the builder, and 9 percent bought directly from the previous owner. There were also a small number of buyers, less than a percent, who bought through foreclosure or from a trustee.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 5, 2006

The Honorable Emanuel Cleaver
United States House of Representatives
Washington, D.C. 20515

Dear Representative Cleaver,

This letter is in response to a question you asked me when I testified on July 25 at a hearing in the Subcommittee on Housing and Community Opportunity entitled "The Changing Real Estate Market." At that hearing, you inquired about complaints received by the FTC from communities affected by Hurricanes Katrina and Rita.

As part of our ongoing Consumer Sentinel Program, the Federal Trade Commission has been collecting complaints of consumers affected by the hurricanes since August 28, 2005. Consumer Sentinel aggregates consumer complaint information from around the country and serves as an important resource for law enforcement. The complaints logged into Consumer Sentinel can be accessed by law enforcement officials at the local, state, and federal levels, who can work together in a secure on-line environment to investigate fraud artists that may be working across state borders. As of August 28, 2006, the FTC had collected 540 total Hurricane Katrina or Rita related product or service complaints related to such things as charity scams, mortgage lenders, and third party debt collection. The FTC received the majority of these complaints during September 2005 after Hurricane Katrina, with most complaints originating in Louisiana, followed by Texas. The FTC had also received 778 Hurricane Katrina or Rita related identity theft complaints, and the vast majority of these complaints were received in October following the hurricanes.

Beyond collecting complaints, the FTC responded to the storms by launching a website that not only educates consumers about the issues they could face after such a tragedy, but also about what they can do to prepare for another hurricane season. It covers topics ranging from what to do if your car has been flooded, to scams that homeowners may encounter as they rebuild their homes. This website can be found at http://www.ftc.gov/bcp/conline/events/katrina/index.html.

I hope that the information provided is helpful. Please let us know if we can be of future service to you or your constituents. The Director of our Office of Congressional Relations, Jeanne Bumpus, can be contacted at (202)326-2195. Also feel free to contact my office, the Office of Policy Planning, at (202)326-2553 if you have any further questions.

Sincerely,

Maureen Ohlhausen
Director, Office of Policy Planning

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