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Working Party No. 2 on Competition and Regulation

IMPROVING COMPETITION IN REAL ESTATE TRANSACTIONS

-- United States --

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The attached document is submitted by the delegation of the United States to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 19 February 2007.

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1. Introduction

1. In 2005, over 7.4 million new and existing single-family residential homes were sold in the United States.¹ The vast majority of home buyers and sellers use a real estate broker to complete their transaction, and consumers spent over \$65 billion on brokerage fees in 2005.² As Internet use has grown, so has the ability of consumers to gather information that previously was available only from traditional real estate brokers. For example, several web sites offer information on homes for sale, neighborhood characteristics, recent sales data, and automated home valuation tools. The Internet also has given rise to brokerage models that are different from traditional full-service brokers (“FSBs”), who provide consumers assistance in all aspects of the real estate transaction. Real estate professionals are increasingly incorporating the Internet into their business models in a variety of ways that allow consumers to search for houses on their own, such as offering potential buyers the option to view selected multiple listing service (“MLS”) information online.³ The Internet has allowed limited-service brokers (“LSBs”) to market their services and their listings to a wider audience and several websites provide home sellers with information to help them take on more of the transaction without broker assistance. Further, some websites gather “lead” information on customers who seek real estate services and then selling those leads to real estate professionals. Still other business models use the Internet directly to match home buyers and sellers.

2. As new business models have proliferated, so have anticompetitive attempts to squelch them. In response to these threats to competition, the Agencies have undertaken a variety of actions. First, we have engaged in competition advocacy to persuade states not to adopt laws that would restrict competition between non-traditional and traditional brokers. Further, the Agencies filed antitrust suits against several MLSs and the National Association of Realtors (“NAR”) addressing rules that allegedly discriminate against non-traditional brokers. In addition, to further educate ourselves and the public about the substantial changes occurring in the real estate brokerage marketplace, the Agencies held a workshop to address competition policy in the real estate brokerage industry, and will issue a report this year.⁴

3. This paper provides overviews of the U.S. real estate market, the typical U.S. residential real estate transaction, and the emergence of new business models. We discuss recent state and private actions

¹ The National Association of Realtors reports that 6.179 million existing single family homes were sold in 2005. See Nat’l Ass’n of Realtors, Existing Single-Family Home Sales, at [http://www.realtor.org/Research.nsf/files/singlefamilyreport.pdf/\\$FILE/singlefamilyreport.pdf](http://www.realtor.org/Research.nsf/files/singlefamilyreport.pdf/$FILE/singlefamilyreport.pdf). The U.S. Census Bureau reports that 1.28 million new single-family homes were sold in 2005. See U.S. Census Bureau, Houses Sold by Region, at <http://www.census.gov/const/soldann.pdf>. NAR also reports that 896,000 existing condominiums and coop units were sold in 2005, but the Census Bureau has no data on sales of new condominiums and coop units, so these sales have not been included in the above calculation. See Nat’l Ass’n of Realtors, Existing Single-Family Home Sales, at [http://www.realtor.org/Research.nsf/files/condoreport.pdf/\\$FILE/condoreport.pdf](http://www.realtor.org/Research.nsf/files/condoreport.pdf/$FILE/condoreport.pdf).

² See GAO Testimony Before the Subcommittee on Housing and Community Opportunity at 1 (Jul. 25, 2006).

³ The MLS is a local or regional joint venture of real estate brokers, typically operated by a local group of brokers affiliated with NAR, who pool and disseminate information on properties available for sale in their particular geographic areas. See pages 6-7, *infra* for more detail.

⁴ See Competition Policy in the Real Estate Industry, at <http://www.ftc.gov/bc/realestate/workshop/index.htm>. Throughout this submission we draw on testimony and comments received from the workshop. Testimony is cited as “[Speaker], Tr. [page number]” from the official transcript of the Workshop. Comments are cited as: “[Commenter], [comment number]”. The transcript is available at <http://www.ftc.gov/opp/workshops/comprealestate/051209transcript.pdf>. Comments are available at <http://www.ftc.gov/os/comments/realestatecompetition/index.htm>.

that threaten competition in the real estate brokerage industry and the Agencies' responses to these actions. We also briefly touch upon state restrictions on the ability of non-attorneys to perform certain tasks related to the closing of real estate transactions.

2. The U.S. Residential Real Estate Market and Typical Real Estate Transaction

2.1 Home-Buyers and Sellers

4. The Census Bureau estimates that in 2006, 69 percent of U.S. housing units are occupied by their owners, but this rate varies by region as well as by age and income of the householder.⁵ Home ownership rates are higher in the Midwest and South than in the Northeast and West.⁶ Over 80 percent of householders over 55 own the home in which they live, whereas only 43 percent of those under 35 own their residence.⁷ Further, not surprisingly, homeownership rates are markedly higher for those with income greater than or equal to U.S. median family income than for those who earn less than the U.S. median (84.4% versus 53%).⁸

5. According to a NAR survey, recent home sellers were in their previous home a median tenure of six years, with 54 percent of those surveyed having lived in their previous home between 3 and 10 years. Job related reasons and a desire for a larger home are the most likely reasons for most homeowners to sell their current home, although for those over 65, moving closer to friends and family and wanting a smaller home are the most popular reasons cited for leaving their existing home.⁹

2.2 Overview of the Real Estate Transaction

6. At its most basic, real estate brokerage is about matching a home seller with a home buyer.¹⁰ Home sellers want to negotiate the highest possible price in the quickest possible time and home buyers want to find the best possible house at the lowest possible price.¹¹ Most buyers and sellers work with real estate professionals – who have access to private marketplace information and experience in handling real estate transactions – to economize on the costs of finding a match and for assistance in other areas related to the transaction.

2.2.1 Description of Real Estate Brokers and Agents

7. Although the terms may vary by state, there are two principal categories of real estate brokerage professionals: “agents” and “brokers.” Generally speaking, agents work directly with consumers and brokers supervise agents. Typically, agents solicit listings, work with homeowners to sell their homes, and show buyers homes that are likely to match their preferences. Instead of working with customers directly, brokers often provide agents with branding, advertising, and other services that help the agents complete transactions. In terms of branding, the broker may invest in and create a brand or affiliate with a national

⁵ See United State Dep't of Commerce, Commerce News, Census Bureau Reports on Residential Vacancies and Homeownership at 4 (Oct. 27, 2006), at <http://www.census.gov/hhes/www/housing/hvs/qtr306/q306prss.pdf>.

⁶ *Id.* at 6.

⁷ *Id.* at 7.

⁸ *Id.* at 9.

⁹ NAR 2005 survey at 56.

¹⁰ See 1983 FTC Report at 9.

¹¹ Kunz, tr. at 103:12-14.

or regional franchisor that provides a brand with certain reputational value and an advertising campaign.¹² As for services, brokers may provide agents with computers, website hosting, office space, training, and marketing. States establish licensing requirements for both agents and brokers, and state commissions, frequently composed of real estate brokers, enforce compliance with state laws and regulations.

8. Brokers and agents (hereinafter, brokers) usually are more informed about the local real estate market and the process of a real estate transaction than most home buyers and sellers.¹³ This informational advantage derives from two sources. First, only brokers and other MLS members have full, direct access to the entire MLS database, which provides information both on the houses currently for sale in a particular geographic area, as well as past sales data, which typically are used in determining a property's listing price or a buyer's offer price. Second, most brokers have been involved in many more real estate transactions than their clients; this experience builds expertise in gauging market conditions and knowledge of the details involved in completing a real estate transaction.¹⁴

9. Although there is no legal impediment to consumers buying and selling homes on their own, the large majority of consumers choose to work with a real estate broker. For example, a recent NAR survey finds that 85 percent of consumers employ a real estate broker to help them sell their home, and the vast majority of these sellers appear to contract for assistance on all aspects of the transaction.¹⁵ Another NAR survey found that nine out of ten buyers use a real estate professional during their home search.¹⁶ The U.S. Government Accountability Office estimates that consumers paid approximately \$65.7 billion in brokerage fees in 2005.¹⁷

2.2.2 *The Seller's Agreement with the Listing Broker*

10. If the seller chooses to hire a real estate professional rather than selling the house on his or her own, the seller contracts with a "listing broker." Although some home sellers may contact a number of possible listing brokers, NAR's most recent industry survey notes that the majority of sellers contact only one listing broker.¹⁸ Once the seller has selected a listing broker, he or she enters into a contractual relationship called a "listing agreement" by which the broker agrees to market and sell the home in exchange for a set fee, typically in the form of a commission based on the sales price of the house. This contract specifies the commission the homeowner will pay the listing broker if the home is sold within a specified length of time, how the home is to be listed in the MLS, the type and amount of advertising and other marketing effort the listing broker will undertake, and, as discussed below, the share of the

¹² Century 21, ReMax, and Coldwell Banker are examples of national franchise brands.

¹³ See R.C. Rutherford *et al.*, *Conflicts Between Principals and Agents: Evidence From Residential Brokerage*, 76 J. FINANCIAL ECON. 627 (2005); Steven D. Levitt & Chad Syverson, *Market Distortions When Agents are Better Informed: The Value of Information in Real Estate*, NBER Working Paper 11053 (Jan. 2005), at <http://www.nber.org/papers/w11053>.

¹⁴ See Steve Sawyer *et al.*, *Redefining Access: Uses and Roles of Information and Communication Technologies in the US Residential Real Estate Industry from 1995 to 2005*, 20 J. INFORMATION TECH. 213, 213 (2005).

¹⁵ NAR, *The 2006 National Association of Realtors Profile of Home Buyers and Sellers* (November 2006) (NAR 2006 Survey") at 68.

¹⁶ NAR, *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006).

¹⁷ See Statement of David G. Wood, Director, Financial Markets and Community Investments, Government Accountability Office, before the House Subcommittee on Housing and Community Opportunity 1 (Jul. 25, 2006), at <http://financialservices.house.gov/media/pdf/072506dgw.pdf>.

¹⁸ See NAR 2006 Survey at 74 (noting that the majority of sellers surveyed contacted only one agent).

commission to be offered to a “cooperating broker,” who works with the buyer.¹⁹ The listing broker typically markets the property, both within his brokerage firm and to other brokers in the community, by uploading the listing data into the MLS database so that the information can be disseminated to cooperating brokers, who in turn can inform potential buyers of the listing.

11. There are two principal types of listing agreements. In the most common of the two, an “exclusive right to sell” contract, the listing broker receives a payment if the property is sold during the listing period, regardless of who finds a buyer for the home.²⁰ An “exclusive agency” listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

2.2.3 *The Buyer’s Relationship with the Cooperating Broker*

12. The broker who works with the buyer is often referred to as the “cooperating broker,” the “selling broker,” or the “buyer’s broker.” Cooperating brokers typically attempt to find housing from the available stock that match buyers’ preferences, show prospective buyers homes for sale, provide them information about comparable home sales that have occurred in the area, assist prospective buyers in becoming pre-qualified for a certain level of financing,²¹ advise them on making offers, and assist in closing the transaction. Buyers typically do not pay their brokers directly.²² Rather, listing brokers compensate cooperating brokers according to the terms stated in the MLS listing, which usually specifies a split of the listing commission. This split is often referred to as the “commission split” or the “co-broke.” For example, a listing broker who charges a seller a six-percent commission may offer to compensate a cooperating broker three-percent, half of his commission. As one panelist reported, it is common for a listing broker to offer 50 percent of his or her commission to a broker who provides a buyer who closes on the property, although this split may vary according to market conditions. In slow markets, a listing broker may offer a 60:40 split to attract scarce buyers, and the percentage may be reversed in a hot market.²³ Commission split disparities may also arise based on local norms for historical reasons.

13. The legal relationship between the buyer and the cooperating broker varies from state to state and has changed over time. Until the 1990s, it was common for the cooperating broker to be a subagent of the listing broker, working on the seller’s behalf, but during the 1990s, most states revised their laws to allow buyer representation and NAR revised its policies, eliminating seller-subagency as a condition of

¹⁹ See Whatley, tr. at 39; Periello, tr. at 198-99.

²⁰ See Whatley, tr. at 35.

²¹ Sellers often want potential buyers to be pre-qualified for the level of financing required to purchase their home. Often, at the recommendation of their brokers, prospective buyers receive a letter of pre-qualification from a lender or mortgage broker, which is presented at the time of offer. Sellers’ brokers may verify the pre-qualification letter.

²² Although buyers do not pay a direct fee to their brokers, some portion of brokerage fees likely is built into the prices of homes for sale. See Hahn, Robert W.; Litan, Robert E., Gurman, Jesse, “Paying Less for Real Estate Brokerage: What Will Make It Happen?” American Enterprise Institute-Brookings Joint Center for Regulatory Studies, Working Paper 05-11 (June 2005) (“AEI-Brookings Paper”) at 5, n. 14.

²³ See Periello, tr. at 199 (“[W]hen I was in a market that was very, very slow, it was not uncommon to actually have a disproportionate share going to the buyer So, at that point, if it was say a 6 percent commission, I might take 2 percent and offer 4 percent.”).

participation in the MLS.²⁴ Today, after a decade of agency law reform across the country, it is more common for the cooperating broker to owe exclusive fiduciary duties to the buyer.²⁵

2.2.4 *The Buyer's Offer, Contingencies, and Closing in a Typical Transaction*

14. Once a buyer makes an offer on a property, the listing broker may help the seller evaluate offers and formulate counteroffers and may negotiate directly with the buyer or buyer's broker. If the seller accepts the offer, the home is "under contract," and several things must occur during a stated time period before the transaction closes, such as home inspections, appraisals, securing buyer financing, and assuring the title to the property is clear. The listing and cooperating brokers typically work together to assure that all contingencies are removed, and also work to coordinate the other players necessary to the closing, such as the mortgage lender, the insurance agent, the home inspector, the termite inspector, the surveyor, the appraiser, the closing attorney (in some states), the title company, and the escrow agent.²⁶

15. Once all contingencies have been removed, the parties proceed to closing, where they exchange purchase money and title to the property. In the U.S., the HUD-1 form, required by the Real Estate Settlement Protection Act ("RESPA"),²⁷ is a centerpiece of the closing and requires a detailed listing of the flow of funds from buyer to seller, including selling and buying expenses associated with the transaction and the amount of commission paid to each broker. Although brokers typically do not play an active role at this stage, they often accompany their clients to the closing, where they are paid their commission.²⁸

2.3 **The Multiple Listing Service**

16. The MLS is a local or regional joint venture of real estate brokers, typically operated by a local group of brokers affiliated with NAR, who pool and disseminate information on properties available

²⁴ See Whatley, tr. at 40; Ann Morales Olazabal, *Redefining Realtor Relations and Responsibilities: The Failure of State Regulatory Responses*, 40. Harv. J. Legisl. 65, 74-75 (2003). Morales notes that the subagency regime was not a creature of state law, but rather was a result of most MLSs permitting listing brokers to split commissions only with cooperating agents who agreed to be a subagent of the seller. *Id.* at 70. Some have argued that subagency was created by members of NAR in order to restrict access to the MLS. As Miceli, Pankcak, & Sirmans explain:

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

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

²⁵ Whatley, tr. at 38-40. In all states, brokers are required to disclose to buyers the type of relationship that exists so buyers know whom the cooperating broker represents, although the timing of this disclosure varies by state. See Olazabal, *supra* note 24, at 91-100; see also Early, tr. at 169 (discussing the timing of disclosure of agency relationship in many states as having been changed from "first meaningful contact" to "as soon as practical but no later than the writing of an offer," and how this can give rise to procuring cause issues).

²⁶ Whatley, tr. at 26.

²⁷ 27 U.S.C. §§ 2601 *et seq.*

²⁸ See 2005 NAR Survey at 58 (71% of sellers report that their agent attended the closing).

for sale in their particular geographic areas.²⁹ The MLS combines its members' property listings information into a database, usually in electronic form. Most MLSs require that a broker enter a home into the MLS database within a short period of time (*e.g.*, 24 to 72 hours) after entering into a listing agreement. Although the specific data fields on each listing are determined by the individual MLS, they typically include detailed descriptions of the properties for sale, the asking price, the commission split that will be paid to a cooperating broker,³⁰ and the name of the listing broker. The MLS allows broker-members to search and filter properties based on detailed criteria, including in-depth property and neighborhood information, offers made on the property, prior sales history, and days on the market.³¹ In addition to the database of currently available properties, MLSs maintain an historic database of properties sold through the MLS. According to NAR's 2006 survey of home buyers and sellers, 88 percent of sellers reported that their home was listed in the MLS.³²

17. The MLS allows brokers to serve home buyers and sellers more efficiently by reducing the costs of matching buyers and sellers. Buyers can go to a single broker for information regarding the vast majority of houses for sale within a given area, instead of visiting multiple brokerages to obtain such information, which maximizes buyers' chances of finding a house that most closely matches their desired characteristics.³³ Further, brokers can use this database to provide their clients information on sales of comparable homes so that the clients can more accurately determine the amount to bid on a property. Sellers benefit from exposure of their listings to a wide audience of potential buyers, increasing the probability of selling their properties quickly and at an optimal price (for those sellers).³⁴ Further, sellers, through their brokers, can use the MLS information on comparable properties to decide whether to sell their properties and, if so, at what price.³⁵

18. In addition to reducing the costs of matching buyers and sellers, the MLS reduces transaction costs among brokers. By requiring listings to state upfront the commission being offered to a cooperating

²⁹ According to NAR, there are approximately 900 MLSs in the United States. *See Vredevoogd-Combs Testimony*, at 19. *See also* GAO-05-947 at 6 & 12-13; NAR, *MLS Handbook*, § 1 (2006).

³⁰ The MLS facilitates the offering of unilateral offers of compensation to cooperating brokers, according to NAR. NAR, *MLS Handbook*, § 1 (2006); NAR's President-Elect stated:

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

Vredevoogd-Combs Testimony at 18-19 (emphasis in original).

³¹ *See Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006) (finding that the features and information available through the MLS at issue are not available through any other service).

³² *See* NAR 2006 Survey at 77.

³³ 1983 FTC STAFF REPORT at 31.

³⁴ NAR, Public Comment 208 at 5 (white paper). *See also* Whatley, *tr.* at 60-61 (that although the Internet provides useful information to buyers and sellers of real estate, by the time properties are advertised on the Internet, they may be gone already; thus, the MLS is crucial).

³⁵ *See* J. Crockett, *Competition and Efficiency in Transaction: The Case of Residential Real Estate Brokerage*, 10 J. AM. REAL ESTATE & URBAN ECON ASS'N 23, 211 (1982).

broker, the MLS can reduce the costs associated with listing brokers negotiating separately with each potential cooperating broker.³⁶ Further, the MLS also operates an arbitration mechanism to resolve compensation disputes between listing and cooperating brokers.³⁷

3. The Internet and Nontraditional Business Models

19. By reducing the cost of transmitting and searching information, the Internet has enabled consumers more easily to gather information related to all facets of home buying and selling. For example, before the introduction of the Internet, consumers had to learn about homes for sale through real estate brokers or various offline marketing vehicles, such as yard signs, newspaper advertisements, or real estate magazines. Consumers now have access to listing information from a variety of online sources as well. Many brokers market listings online through their own websites and give their MLS permission to place their listings on Realtor.com.³⁸ Consumers can view these listings before contacting or forming a relationship with a particular broker. Further, some brokers operate virtual office websites (“VOWs”) through which they deliver brokerage services to their clients. Consumers also can view homes for sale on third-party advertising sites such as Craigslist.com and on a variety of websites that promote homes that are for-sale-by-owner.³⁹

20. In addition to giving consumers access to information about homes for sale, the Internet helps consumers to educate themselves about other areas of home buying and selling. For example, consumers can use the Internet to research brokers, mortgage and lending options, and recent home sales and home valuations.⁴⁰ Consumers also can find information about schools, crime, and other variables relevant to home purchase decisions through a host of online sources, including websites hosted by municipalities.

21. Industry-produced data appear to support the view that consumers increasingly are turning to the Internet to begin their search for a home. In 2006, 80 percent of home buyers used the Internet during their

³⁶ See Whatley, tr. at 40-41.

³⁷ For example, if a cooperating broker secures a buyer for a transaction and he can establish that he was the “procuring cause” of the sale through arbitration, then the listing broker is liable for the cooperative compensation. “Procuring cause” refers to the actions of the primary broker who brings a buyer to the listings and causes the transaction to be completed. To enforce his right to payment, the cooperating broker may bring a complaint to the MLS’s arbitration system. See NAR, *Code of Ethics and Standards of Practice of the National Association of Realtors*, Standard of Practice 17-4 (rev. Jan. 1, 2006). Therefore, even when buyers, sellers, or listing brokers try to evade compensating cooperating brokers, cooperating brokers cannot be deprived of their share of the commission if they are the procuring cause of the transaction.

³⁸ In accordance with NAR rules, the MLSs create a datafeed called IDX (“Internet Data Exchange”) that participating brokers may use for their individual advertising websites. In addition, most MLSs contribute the IDX datafeed to national websites like Realtor.com, which are publicly accessible. Brokers can opt not to participate in IDX. If a broker opts out, none of his or her listings are included on the IDX feed, and he or she cannot operate a website based on an IDX feed. Therefore, IDX datafeeds often contain listings on fewer than all of the properties listed for sale in the MLS’s area. IDX data can also be less complete than the full MLS listings database because each MLS determines which datafields to include in the datafeed. For example, it is not uncommon for MLSs to withhold the property address. Further, there often is a delay between an update of MLS data and when those changes are reflected in the IDX, so that IDX-based websites likely will be missing some properties that recently have been listed for sale and include some that are no longer for sale.

³⁹ E.g., FSBO.com; ForSaleByOwner.com; and homesbyowner.com.

⁴⁰ See, e.g., <http://www.zillow.com>.

home search (up from 71 percent in 2004 and 77 percent in 2005).⁴¹ In addition, in 2005 and 2006, 24 percent of recent home buyers first found the home that they purchased on the Internet – up from only 2 percent in 1997.⁴² Conversely, the number of buyers reporting real estate agents as the first source of such information has decreased from 50 percent in 1997 to 36 percent in 2005 and 2006.⁴³ Among the most popular websites used by home buyers in their search were Realtor.com (52 percent of respondents), MLS websites (53 percent), and real estate company sites (40 percent).⁴⁴ Brokers surveyed by NAR cite the Internet more frequently than any other method, including yard signs, as a way to market homes.⁴⁵

3.1 *Types of New Business Models*

22. By placing more information in the hands of consumers, the Internet has facilitated the growth of new business models that allow consumers opportunities to substitute their efforts for those of the broker, in many cases in return for lower fees. Below we discuss the following new business models: full-service discount brokers; limited-service brokers; VOW brokers; websites that provide advertising and other services to consumers selling their home without the assistance of a broker; and referral networks.⁴⁶

- Full-Service Discount Brokers

23. Discount brokers offer buyers and sellers full-service real estate brokerage services at a price lower than the prevailing commission fees.⁴⁷ For example, a discount broker may offer all of the services provided by a traditional broker for a 3 percent or 4 percent commission in an area where 6 to 7 percent is the prevailing rate. Some discount brokers offer rebates to buyers. For example, 1% Realty offers buyers a rebate of approximately one percent of the purchase price in states that have not prohibited rebates.⁴⁸ Many discount brokers offer lower fees by using the Internet to deliver services to their customers (i.e., using email to communicate) and by working with customers who are easier to serve because they have performed substantial online research themselves.

- Limited-Service Brokers

24. LSBs – sometimes also referred to as “flat-fee” brokers or “fee-for-service brokers” – offer home sellers the option to purchase less than the full bundle of services traditional brokers provide. These brokers typically charge a flat fee – around \$500 – to list a home in the local MLS and to provide the client additional selling aids, such as yard signs, online advertisements, and a lock-box to allow buyers’ agents to show the home when the seller is not present. LSBs’ packages also typically include advertising the seller’s listing on websites, such as Realtor.com⁴⁹ and other MLS members’ websites. LSBs retain the flat fee whether or not the house ultimately sells. The MLS listing must include the offer of compensation to a

⁴¹ See NAR 2005 Survey at 29; NAR 2006 Survey at 34.

⁴² *Id.* at 38; NAR 2005 Survey at 29; NAR 2006 Survey at 38.

⁴³ NAR 2006 Survey at 38; NAR 2005 Survey at 29.

⁴⁴ NAR 2006 Survey at 44.

⁴⁵ NAR 2005 Survey at 65 (Internet cited by 84% of respondents, while yard sign cited by 79%).

⁴⁶ There is some overlap between the categories because certain business models fit into more than one category. For example, a VOW operator may or may not also be a discount broker.

⁴⁷ See GAO Report at 19.

⁴⁸ See <http://www.onepercentusa.com/buy.htm>. (last visited Sept. 6, 2006). State anti-rebate laws and regulations and their effect on price competition and consumer choice are discussed in Part 5.A.

⁴⁹ According to its website, Realtor.com is “the official site of the National Association of REALTORS.”

cooperating broker.⁵⁰ A seller who finds a buyer without the help of a cooperating broker, however, would not pay this compensation.

25. In addition to the MLS listing package, for an additional fee, many LSBs offer additional brokerage services, such as assistance in negotiation and closing a transaction. Further, many also offer full-service brokerage at a reduced commission.⁵¹ Thus, consumers who purchase the MLS-only package, but later feel they need more assistance with their transaction, typically can obtain it from their broker for an additional fee. Most LSBs allow their clients to cancel their listing agreement at any time, leaving consumers free to pursue other brokerage or non-brokerage options if they become dissatisfied with the broker's service.

26. Although many brokers who specialize in the LSB option are not affiliated with major national brokerage chains, some brokers who are affiliated with such chains offer limited-service or flat fee brokerage services.⁵² Industry participants told GAO that the Internet has allowed such brokerages, which have existed as a business model since at least the 1970s, to grow in numbers and size in recent years, in part because they can market their services to a larger population of buyers and sellers.⁵³

- VOW Brokers

27. VOWs are password-protected websites through which brokers offer their registered clients brokerage services online.⁵⁴ The unique feature of VOW operators is that these brokers offer their clients the ability to search online the same MLS information that other brokers provide to their clients through other delivery methods, such as hand delivery, mail, fax, or email.⁵⁵ In this way, they are different than publicly accessible broker websites like Realtor.com, which provide only limited MLS data.⁵⁶

⁵⁰ See, e.g., American Home Market.com (3 percent commission for a broker that finds a buyer), at <http://www.mlslistingnetwork.com/Nav.aspx/Page=http://MLSListingNetwork.com/PageManager/Default.aspx?PageID=241757>; ForSaleByOwner.com (allowing consumers to offer buyers' agents any commission rate, but noting that "owners should consider that offering less than the traditional 3% could affect these Buyers Agent Realtors [sic] 'degree' of interest in showing your property to their customers"), at <http://www.forsalebyowner.com/perl-bin/showPage.cgi?szNextPage=placead.html&szAction=NEW&szURL=MLS;FSBOAdvertisingService.com> (2-3 percent commission for broker that finds a buyer), at <http://www.fsboadvertisingservice.com/flat-fee-mls-MLSTX3.asp>; ifoundahome.net (allowing home sellers to offer "a 3% commission or more" to buyers' brokers), at <http://www.ifoundahome.net/Listingwork/SBasicListing.htm>; Texas Discount Realty (3 percent commission for a broker that finds a buyer), at <http://www.texasdiscountrealty.com/flatfee.htm>.

⁵¹ In this manner, many LSBs also are full-service discount brokers.

⁵² See Kunz, tr. at 101 (noting that several types of business models operate under the Century 21 franchise).

⁵³ See GAO Report at 19-20.

⁵⁴ See Testimony Summary of Russell Capper, President and Chief Executive Officer, eRealty, Inc. before Federal Trade Commission Office of Policy and Planning Public Workshop on E-Commerce, October 10, 2002 at 2.

⁵⁵ *Id.*

⁵⁶ These websites are governed by NAR's Internet Data Exchange ("IDX") rules, which apply to the online use of MLS data to advertise services. Because IDX datafeeds are used to advertise broker services, they contain less information than a consumer would obtain from a broker who has access to the MLS.

28. Access to the VOW and its listings search features is limited to prospective buyers or sellers who have entered into an agreement with the VOW operator that includes a terms-of-use agreement and a password.⁵⁷ The VOW permits clients to search the database at their leisure until they are ready to contact their broker for assistance in viewing homes or making an offer to purchase. While many buyers see this as a benefit that allows them greater control over their home-buying process, brokers also benefit. Brokers may reduce the time they spend servicing each customer face-to-face because customers conduct a portion of the time-consuming listings searches on their own.⁵⁸ Although VOWs differ from other brokerages in their innovative uses of the Internet, in other respects they operate exactly like other brokers. VOW brokerages typically maintain physical offices in the markets in which they operate, staff those offices with licensed brokers who participate in their local MLSs, and represent both buyers and sellers.⁵⁹

- Websites that Provide FSBO Sellers with Advertising and Other Services

29. Some consumers choose to sell their houses without any assistance from a real estate broker. These “for-sale-by-owners” or “FSBOs” market their homes themselves by placing ads in local media, posting signs, and conducting their own open houses. A FSBO property is not listed in the local MLS because a listing broker is not involved; however, FSBOs often offer payment to a broker representing a buyer.

30. Several companies offer advertising and other services to help FSBO sellers. For example, there are several websites devoted to advertising FSBO property that for a fee, allow sellers to post descriptions of their properties along with color photos and virtual tours.⁶⁰ These websites also often will provide potential home buyers with general information on neighborhoods, such as demographics, crime rates, and school quality. Further, many provide links to ancillary service providers, such as title insurance companies, escrow services, and home inspectors, and also provide sample forms related to real estate transactions, such as sample purchase or lease agreements.⁶¹

- Broker Referral Networks

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

3.2 *Consumer Use of New Business Models*

32. According to NAR’s 2006 Profile of Home Buyers and Sellers, 83 percent of home sellers who retained a broker used one who provided traditional full-services; 9 percent hired a broker to provide a limited set of services, and 8 percent hired a broker who placed the listing on the MLS and performed few,

⁵⁷ *Id.*

⁵⁸ *Id.* at 1.

⁵⁹ *Id.*

⁶⁰ Examples of FSBO Web sties are: ForSaleByOwner.com; FSBO.com; CraigsList.com; and homesbyowner.com. *See* Thorburn, tr. at 97-98 (noting the variety of tools available to FSBOs). *See also* GAO REPORT at 20.

⁶¹ *See ForSaleByOwner.com Corp. v. Zinnermann*, 347 F. Supp. 2d 868, 870-71 (E.D. Cal. 2004) (providing general description of ForSaleByOwner.com business model).

if any, additional services.⁶² Some reports suggest that alternative brokerage models that offer different combinations of prices and services may put downward pressure on commission rates charged for full-service brokerage.

4. State and Private Restraints on Competition in Real Estate Brokerage

33. As alternative brokerage models have grown in prominence groups of real estate professionals, acting through MLSs, industry trade associations, and state regulatory and legislative bodies have engaged in conduct that is likely to make it more difficult for these alternative business models to compete.

4.1 State Restrictions on Competition

34. States sometimes seek to restrain competition to pursue conflicting policy goals. However, state regulation also can be used to transfer wealth from consumers to a favored industry.⁶³ State-imposed restrictions on competition are particularly attractive because unlike illegal cartels that must exist in the shadows, such restraints can exist in the open and compliance is enforced by the state.⁶⁴ Anti-rebate laws and minimum-service requirements threaten competition in the real estate brokerage industry.

4.1.1 Anti-Rebate Laws

35. Rebates (*i.e.*, cash payments) and inducements (*e.g.*, gift certificates, coupons, vouchers, and discounted or free services relating to buying and selling property) are incentives that cooperating brokers offers to home buyers to encourage them to use that broker's services. Rebates typically are cash payments from the broker to his or her client after closing. Rebates and inducements (collectively referred to as "rebates") are important under the traditional structure of real estate transactions because the seller and seller's broker, not the buyer's broker, determine the amount of the commission via the listing agreement. Without the ability to rebate, the buyer's broker has no direct control over the amount of the commission. If the buyer's broker were simply to reduce his commission, the savings would go to the seller's broker, not to the home buyer. Rebates, in contrast, go directly to the buyer; for example, a buyer's broker can offer a prospective home buyer \$1,000 (payable from the broker's commission), if the buyer agrees to hire that broker. Some brokers rebate up to half of their commission to their buyers. Because cooperating brokers typically receive 50 percent of the overall commission, returning half of their commission to their client represents a 25 percent discount on the overall commission payment. This direct-to-consumer benefit means that rebates become powerful tools for price competition between brokers.⁶⁵

36. Rebates are permitted in most states, and brokers in these states may freely advertise their willingness to offer rebates that save consumers hundreds and often thousands of dollars per transaction. Rebates currently are prohibited, however, in the following ten states: Alabama,⁶⁶ Alaska,⁶⁷ Kansas⁶⁸

⁶² NAR 2006 Survey at 77.

⁶³ See James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1099-1102 (2005) (discussing the economic theory of regulation and explaining how regulation is likely to benefit industry more than consumers).

⁶⁴ See Deborah Platt Majoras, Chairman, Federal Trade Commission, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program* (Feb. 8, 2005), at <http://www.ftc.gov/speeches/majoras/050208currebtopics.pdf>.

⁶⁵ All such rebates and inducements will be referred to generally as "rebates," and state laws and regulations prohibiting rebates will be referred to generally as "rebate prohibitions" or "rebate bans."

⁶⁶ ALA. CODE § 34-27-36 (1975).

Louisiana;⁶⁹ Mississippi;⁷⁰ Missouri;⁷¹ New Jersey;⁷² North Dakota;⁷³ Oklahoma;⁷⁴ and Oregon.⁷⁵ In addition, Iowa⁷⁶ prohibits rebates when the customer uses the Services of two or more brokers during a real estate transaction. In states allowing rebates, some brokers operate business models where they rebate up to one-third or one-half of their commission to their buyers.

37. Rebate bans prevent price discounting to the detriment of consumers. For example, in states allowing rebates, some brokers operate business models where they rebate up to one-third or one-half of their commission to their buyers. Because cooperating brokers typically receive 50 percent of the overall commission, returning half of their commission to their client represents a 25 percent discount on the overall commission payment; rebating one-third represents approximately a sixteen percent discount. For example, if a cooperating broker were to earn half of a 5.1 percent commission and he were to offer a 50 or 33.3 percent rebate, a consumer would save \$3,392 or \$2,262 in commission payments, respectively, on the sale of a \$271,267 home.⁷⁷ Consumers in states with rebate bans could enjoy a similar level of savings if such bans were eliminated.

38. At the same time, the Agencies are aware of no evidence that rebate bans prevent any harm to home buyers or sellers that would justify such a restriction to competition. Further, no panelist at the Workshop proffered any justification for these restrictions. A panelist representing several major national brokerage franchises noted that his company has been working with state real estate commissions to repeal prohibitions on rebates, which he characterized as “not necessary” and “antiquated.”⁷⁸ Similarly, another panelist representing a major national brokerage franchise stated that “brokers and agents should be allowed the ability to freely negotiate transaction servicing pricing with their clients in any way they see appropriate.”⁷⁹

39. In March 2005, the DOJ filed a civil antitrust lawsuit against the Kentucky Real Estate Commission (“KREC”), alleging that KREC’s regulations prohibiting Kentucky real estate brokers from offering rebates that restricted competition and caused consumers to pay higher prices for real estate brokerage services.⁸⁰ The lawsuit was settled on July 13, 2005. Under the terms of the settlement, which

⁶⁷ ALASKA STAT. § 08.88.401 (Michie 2005).

⁶⁸ KAN. STAT. ANN. § 58-3062 (2006).

⁶⁹ LA. REV. STAT. ANN. § 37:1455 (West 2006).

⁷⁰ MISS. CODE ANN. § 73-35-21 (2006).

⁷¹ MO. REV. STAT. § 339.150 (2006).

⁷² N.J. STAT. ANN. § 45:15-3.1 (West 2006).

⁷³ N.D. CENT. CODE § 43-23-11.1 (2006).

⁷⁴ OKLA. STAT. ANN. tit 59, § 858-312 (West 2006).

⁷⁵ OR. REV. STAT. § 696.290 (2005).

⁷⁶ IOWA CODE § 543B.60A (2005).

⁷⁷ Based on weighted average sales price of new and existing homes in 2005 (\$271,267), the buyer’s broker’s share of a \$13,563 commission would be \$6,784. A buyer who is rebated half of this would receive \$3,392.

⁷⁸ Perriello, tr. at 151.

⁷⁹ Lewis, tr. at 180.

⁸⁰ See Complaint, *United States v. Kentucky Real Estate Comm’n*, Civil Act. No. 3:05CV188-H (filed Mar. 31, 2005), at <http://www.usdoj.gov/atr/cases/f208300/208393.htm> (“KREC Complaint”).

has been approved by the court, KREC agreed to cease enforcement of its rebate prohibitions.⁸¹ Since the Department and KREC entered into the court-approved consent decree ending KREC's rebate ban, consumers in Kentucky have benefited from new reduced price business models. For example, one realty company offers a 1% cash back rebate program for home buyers; another offers rebates worth up to \$2,250 in the form of HomeDepot or American Express gift cards; and another offers to pay moving costs of up to \$1,500 to consumers who buy particular properties. Two other companies together operate a program that rebates up to \$3,000 for the sale or purchase of a home; that is, a combined maximum rebate of \$6,000 when the customer buys one property and sells another through the program when he or she moves. The discount typically is paid into the customer's 529 college savings account.

40. In addition to the Kentucky lawsuit, DOJ also investigated rebate bans by the South Dakota Real Estate Commission, the West Virginia Real Estate Commission, and the Tennessee Real Estate Commission. In response to these investigations, the South Dakota and West Virginia real estate commissions rescinded their regulations prohibiting rebates, thereby enabling consumers in those states to receive the full benefits of competition.⁸² The Tennessee Real Estate Commission voted to suspend its rules and is in the process of rescinding them entirely.⁸³

4.1.2 *Minimum-Service Requirements*

41. Relatively recently, several states have enacted so-called minimum-service requirements. As the name suggests, these laws enumerate specific tasks that a real estate broker must provide his or her client. These laws typically require a broker to set up appointments for showings, provide assistance and advice on offers, counteroffers, and negotiations, although some also require a broker to provide assistance in closing the transaction as well. Currently, Alabama,⁸⁴ Illinois,⁸⁵ Indiana,⁸⁶ Iowa,⁸⁷ Missouri,⁸⁸ Texas,⁸⁹ and

⁸¹ See Amended Final Judgment and (proposed) Order, *United States v. Kentucky Real Estate Comm'n*, Civil Act. No. 3:05CV188-H, at <http://www.usdoj.gov/atr/cases/f210100/210142.htm>.

⁸² DOJ, *South Dakota Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Inducements* (Aug. 17, 2005), available at http://www.usdoj.gov/atr/public/press_releases/2005/210637.htm; DOJ, *West Virginia Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Other Discounts* (May 4, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/215961.htm.

⁸³ Tennessee Association of Realtors, 12-28-06 Special Notice at <http://www.tarnet.com/digests/122806.html> (noting that the Tennessee Real Estate Commission proposed to remove its ban on cash rebates; The TAR Digest: The Weekly membership newsletter (12-12-06) <http://www.tarnet.com/digest/121206.html> (noting that the proposed rule change was initiated because of DOJ inquiry).

⁸⁴ ALA. CODE § 34-27-84(c).

⁸⁵ 225 IL. COMP. STATS. § 454-15-15(a).

⁸⁶ IN. CODE § 25-34.1-10-9.5 – 10-10.

⁸⁷ IOWA CODE § 543B.56A.

⁸⁸ MO. REV. STATUTES § 339.780(7)(1)-(3). An exclusive brokerage agreement is defined as “a written brokerage agreement which provides that the broker has the sole right, through the broker or through one or more affiliated licensees, to act as the exclusive limited agent, representative, or transaction broker of the client or customer that meets the requirements of section 339.780.” *Id.* § 710(16).

⁸⁹ TEX OCC. CODE § 1101.557.

Utah⁹⁰ have minimum-service requirements.⁹¹ Further, Idaho,⁹² Kentucky,⁹³ Michigan,⁹⁴ Mississippi,⁹⁵ and New Mexico⁹⁶ recently have considered minimum-service provisions.

42. These laws restrain consumer choice and are likely to harm competition in the real estate brokerage market. As discussed in Part 2, in an MLS-only package, an LSB typically will not include assistance with offers and counteroffers or negotiations. Thus, minimum-service laws force LSBs either to cease providing the MLS-only package or increase the services provided with it, which will increase costs and force LSBs either to accept lower profits or raise prices on packages that require additional services to meet state requirements. As the FTC and DOJ have explained in advocacy letters to several states, to the extent that minimum-service laws cause brokers to increase the price they charge for limited-service packages to cover costs for providing additional service that the state requires, minimum-service provisions harm consumers in two ways.⁹⁷ First, these laws frustrate consumer choice by reducing the options available to consumers in the marketplace; consumers who would otherwise choose a limited-service option that does not meet state minimum service requirements are harmed because they can no longer choose their preferred option.⁹⁸

43. Forcing consumers who would otherwise prefer a limited service option such as an MLS-only package that does not contain minimum services to choose a less preferred option can significantly increase the amount these consumers will pay for brokerage services. Consider the example of a consumer

⁹⁰ UTAH CODE § 61-2-27(2)(a).

⁹¹ Several states including Delaware, Ohio, Oklahoma, Tennessee, and Wisconsin have less restrictive laws that allow the client to choose if they want the listing broker to perform similar services. *See* DEL. CODE tit.24 § 2973, OHIO CODE § 4735.621, OKLA. STAT. tit. 59 § 858-353, TENN. CODE tit. 62 chap. 13, WI. CODE § 452.133.

⁹² Provision 429-02, at <http://www.irec.idaho.gov/publcs/429-02.pdf>.

⁹³ Kentucky S.B. 43, at <http://www.lrc.ky.gov/record/06RS/SB43.htm>.

⁹⁴ Michigan H.B. 4849, at <http://www.legislature.mi.gov/documents/2005-2006/billengrossed/House/pdf/2005-HEBH-4849.pdf>

⁹⁵ Mississippi S.B. 2782, at <http://billstatus.ls.state.ms.us/documents/2006/html/SB/2700-2799/SB2782IN.htm>.

⁹⁶ *See* Glenn Roberts, Jr., *New Mexico Rescinds Controversial Real Estate Rules*, INMAN NEWS (July 17, 2006), at <http://www.inman.com/InmanNews.aspx?ID=54526>.

⁹⁷ *See* 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>; 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>; Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), at <http://www.ftc.gov/os/2005/05/050512lralabamarealtors.pdf>; 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.

⁹⁸ In the face of minimum service requirements that increase the price of an LSB's base package, consumers may decide to purchase more or less brokerage services than they otherwise would. For example, a consumer may decide to perform the entire transaction on his or her own, sacrificing the brokerage services that he or she otherwise would purchase. Alternatively, a consumer may hire a traditional broker who will assist him or her with every aspect of the transaction or purchase a brokerage package that provides more service than an MLS-only listing, but less than a traditional package. Regardless of which alternative is chosen, home sellers are now worse off because they cannot choose their preferred combination of price and service.

who is likely to sell his or her home for \$271,267⁹⁹ and, absent a minimum-service law, would have paid \$8,638 (\$500 listing fee plus a 3 percent commission for a cooperating broker) for a flat-fee listing. If, due to the minimum-service law, this home seller purchases full-service brokerage at a 5.1 percent commission rate, she will pay \$13,563 for brokerage services – \$4,924 more than she would pay for a flat-fee listing. Similarly, with minimum-service laws in place, the consumer may opt for an augmented MLS-only package that satisfies state requirements or a “flat-fee plus” package. This likely will require an additional expenditure of at least between \$100 and \$500.¹⁰⁰

44. Minimum service laws also are likely to reduce the competitive constraint LSBs impose on FSBs. In states without minimum service laws, a consumer typically can choose an MLS-only package as the lowest price/lowest service level option. LSBs in minimum-service states now must include the enumerated additional tasks in their base-level packages, which often results in a higher price due to the increased costs and time commitments associated with each transaction.¹⁰¹ A FSB who wants the business of a consumer who might otherwise consider limited-service brokerage will need to offer lower commissions and/or increased quality to induce the consumer to choose to purchase the additional services offered by an FSB. Data suggest that consumers who consider limited-service business models ultimately negotiate lower fees with full-service brokers.¹⁰² If LSBs are forced to raise their prices in response to minimum-service laws, consumers who choose FSBs are also likely to pay higher prices for real estate brokerage due to a reduction in the competitive constraint provided by LSBs. Uncertainty over the legality of the MLS-only package also reduces the ability of LSBs to compete against FSBs. LSBs have reported that once minimum service laws are passed, many of their clients will withdraw and use a full-service model due to fears over the legality of the LSB’s business model.

45. Finally, although decisions to buy or sell a home are likely to be driven to a large extent by exogenous factors (e.g., change in work or family situations), the supply and demand for homes are not likely to be perfectly price inelastic. The 2005 NAR Homebuyers and Sellers report finds that forty percent of home sellers decided to sell their homes due to factors that are likely to be within their control: 22 percent of consumers listed wanting a larger house as the primary reason for selling, nine percent listed wanting to move closer to a family member, and nine percent listed the neighborhood having become less

⁹⁹ 2005 weighed average home price for new home and existing home sales.

¹⁰⁰ See *supra* note 16.

¹⁰¹ According to their Web sites, some LSBs located in Alabama, Texas, and Utah, for example, charge a normal flat fee for an MLS-only package, but also include an additional ½ percent commission due at closing. See, e.g., Crawford Realty, at http://www.crawfordrealtyofalabama.com/one_time_fee.htm; Discount Realty, at <http://www.discountrealty.biz/12.html>; Houston My Castle, at <http://www.mycastlefsbo.com>. Press accounts also indicate that LSBs have raised their prices or exited the market altogether in response to minimum-service laws. See Glenn Roberts Jr., *Flat-fee brokers adapt to new real estate law Texas' new minimum-service law enacted Sept. 1*, INMAN NEWS (Oct. 12, 2005), available at <http://www.inman.com/inmannews.aspx?ID=48325>; see also <http://www.texasdiscountrealty.com/laws.htm> (Web site of Texas Discount Realty explaining that “because of the added responsibilities forced on to you, the seller and us the broker, by [the Texas minimum service law], we are forced, as most brokers to adjust our prices); Tracy Donhardt, *New Law Provides Realtors and Edge*, INDIANAPOLIS BUSINESS JOURNAL (July 10, 2006), available at <http://indybiznow.com/Default.aspx?TabId=391&issueyear=2006&issuemonth=07&issueday=10&page=1&article=Ar00101> (noting that Indiana’s minimum service law has caused at least one limited-service broker to exit the market).

¹⁰² See Part 3, *supra*.

desirable.¹⁰³ Thus, an increase in transaction costs associated with selling real estate is likely to reduce the number of consumer real estate transactions that occur.

46. Advocates for minimum-service laws have argued that they are necessary to prevent consumers from being deceived into believing that an LSB will provide more services than they actually do.¹⁰⁴ Similarly, some have expressed concerns that consumers have certain expectations about the services a real estate brokers will provide that are disappointed by limited-service contracts.¹⁰⁵ Others have taken a more paternalistic stance, arguing that minimum-service laws are needed because consumers are unable to handle a real estate transaction without a brokers' assistance.¹⁰⁶ Some commentators also have contended that consumers who hire limited-service brokers are subject to so-called hold-up, because once a consumer has entered into an exclusive agreement with an LSB, she effectively is locked into that broker to purchase all additional brokerage services that she subsequently may need.¹⁰⁷

47. Another line of argument is that these laws are needed to protect cooperating brokers who represent buyers in a transaction where the seller has entered into a limited-service contract. Such sellers foist external costs upon cooperating brokers by jeopardizing the transaction due to their inexperience. In this scenario, a cooperating broker may have to explain aspects of the transaction to the seller or perform some of the tasks related to removing contingencies and closing the transaction typically performed by the listing agent. Further, some brokers state that minimum service laws are necessary because they fear liability for undisclosed dual agency. In situations where the cooperating broker is an agent of the buyer, but provides assistance to a seller, he risks becoming an undisclosed dual agent, which can give rise to legal liability for both the broker and the buyer.¹⁰⁸ At the same time, however, refusing to help an unrepresented seller may jeopardize a transaction that the buyer wants to close.

48. Despite these concerns, there is a dearth of empirical evidence to suggest that minimum service laws address any problem. There is no indication that consumers who employ LSBs misunderstand the nature of the contractual relationship into which they enter.¹⁰⁹ Nor is there evidence of an increased prevalence of complaints with state agencies against LSBs. One Workshop participant reported that in 2004 there were over 3,500 complaints filed with the Texas Real Estate Commission against brokers and agents, but there has never been a complaint filed against an LSB.¹¹⁰ This observation is consistent with

¹⁰³ 2005 NAR at 56. 34% of sellers listed change in family situation or job-related move as the reason for selling their home. *Id.*

¹⁰⁴ Thorburn, tr. at 96.

¹⁰⁵ *See, e.g.*, GAO REPORT at 16.

¹⁰⁶ Peter G. Baker, *Hiring a Broker: Should You Expect Less?* Available at http://realtytimes.com/rtcpages/20060411_hirebroker.htm (April 11, 2006).

¹⁰⁷ Darryl W. Anderson, *Minimum Service Requirements in Real Estate Brokerage: A Response to Maureen K. Ohlhausen*, ANTITRUST SOURCE, Jan. 2006, at 3-4 (“the exclusive services agreement makes the LSB a monopoly brokerage provider to the particular customer, and she is subject to monopoly pricing if she seeks to purchase additional brokerage services after she had already had entered into the limited service agreement and signed the exclusive agency agreement.”).

¹⁰⁸ *See* Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL ESTATE L.J. 345, 350 (1997) (noting that agency relationships can be created by actions).

¹⁰⁹ The rhetoric sometimes compares entering into a real estate transaction to surgery. “[Government agencies] argue that with disclosures and waivers consumers should be able to refuse any brokerage service or obligation. . . . We do not, for example, allow consumers to save money by hiring doctors who cut costs by not sterilizing surgical instruments or washing their hands.” Peter G. Baker, *Hiring a Broker: Should You Expect Less?* Available at http://realtytimes.com/rtcpages/20060411_hirebroker.htm (April 11, 2006).

¹¹⁰ Farmer, tr. at 73.

what FTC and DOJ staff have learned in discussions with Texas and other states. Indeed, a recent NAR survey found the vast majority of LSB clients to be satisfied with the service they received.¹¹¹ Not surprisingly, testimony provided at the Workshop suggests that the impetus for these laws comes not from aggrieved consumers, but from state Realtor associations.¹¹²

49. The Agencies also are unaware of any increased incidence of undisclosed dual agency problems associated with limited-service brokerage and there is no indication that the marketplace is not adequate to address concerns that cooperating brokers may face special risks when dealing with sellers subject to a limited-service contract. Buyers use cooperating brokers because they have access to the MLS and experience in closing real estate transactions. Moreover, a cooperating broker's commission is protected by the MLS rules and regulations and cooperating brokers know exactly how much they will be paid if they procure a buyer for a home.

50. Because cooperating brokers can make a choice as to whether or not the compensation offered through a co-broke, or from their buyer, is worth the effort that it will take to close a transaction, there is no need for a minimum-service law to "protect" them from doing additional work. Cooperating brokers are free to take unilateral action to avoid listings that are likely to present special risks, and buyers may need to compensate brokers directly for any additional risk attendant to closing a transaction involving a limited-service listing.¹¹³

51. Although proponents have not demonstrated that limited-service brokerage has given rise to any consumer harm, concerns can be dealt with in far less-restrictive manners than a complete ban of this business model. For example, the Agencies have advocated to states that there is a concern that some consumers who enter into limited-service brokerage arrangements truly do not understand that they are contracting to receive fewer services than a traditional agent typically would provide, requiring disclosure appears to be a far less restrictive solution than a complete ban on limited-service brokerage. Further, such disclosure will inform the seller that they cannot expect any assistance from the cooperating broker. In fact, NAR has agreed that disclosure creates "appropriate expectations" for all parties in the transaction to avoid undisclosed dual agency.¹¹⁴ Further, licensing laws or regulations could be amended to clarify that negotiations with a party who has chosen not to use his broker for such negotiations do not imply an

¹¹¹ See 2006 NAR Survey at __.

¹¹² See Farmer, tr. at 71-72 ("In Texas, the law was filed or the amendment was tacked onto the housekeeping law by a state representative who also happens to be a real estate broker out of El Paso and also happens to be a ranking member in the Texas Association of Realtors. . . . [I]n Utah, a minimum service law recently passed, and it was pushed through by a state senator out of Utah who also happens to be the President this year of the National Association of Realtors"). In response to an FTC questionnaire, respondents from Colorado, North Dakota, Vermont, and Washington noted that complaints against limited-service brokers were minimal or non-existent. Consistent with brokers, not consumers, being behind minimum-service laws, the Consumer Federation of America, a long-standing consumers' rights watchdog organization, issued a report that was critical of minimum-service laws, contending that they "discourage competition" by "making it difficult for internet-based or other limited service firms to function." CONSUMER FEDERATION OF AMERICA, HOW THE REAL ESTATE CARTEL HARMS CONSUMERS AND HOW CONSUMERS CAN PROTECT THEMSELVES (June 2006), available at http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf.

¹¹³ Avoiding limited-service listings without disclosure to buyers may raise issues concerning the fulfillment of fiduciary duties. See Part 5.C. *infra* (discussing the issues related to steering).

¹¹⁴ Blanche Evans, *Where Real Estate Associations Stand On MLS-Entry-Only Listings*. Available at http://realtytimes.com/rtapages/20050224_mlsentryonly.htm, (February 24, 2005).

agency relationship. Ohio,¹¹⁵ Virginia,¹¹⁶ and Wisconsin¹¹⁷ recently have adopted this approach. Finally, although there is no reason to believe that consumers currently cannot ascertain LSBs' prices in advance – they are clearly stated on most LSB Web sites and there appears to be no impediment to consumers asking – concerns over lock-in could be addressed through laws requiring LSBs clearly to disclose all of their prices for subsequent services up-front.

4.2 Use of MLS Rules to Disadvantage Competitors

52. As discussed in Part 2, the MLS provides important efficiencies through aggregating listings in a central location. Because MLS rules represent agreements among competing brokers, they may not be more restrictive than reasonably necessary to bring about these efficiencies. Due to these significant efficiencies and procompetitive features courts have held that MLSs have market power.¹¹⁸ Further, although courts do not treat MLS-related restrictions under a *per se* rule, they typically are judged under a truncated form of the rule of reason.¹¹⁹ The Agencies recently have challenged MLS rules that discriminate against alternative brokerage models as violations of the antitrust laws.

¹¹⁵ OHIO CODE § 4735.75(B) (“A licensee who negotiates directly with a seller, purchaser, lessor, or tenant pursuant to a written authorization as described in division (A) of this section does not violate division (A)(19) of section 4735.18 of the Revised Code and negotiations conducted by a licensee pursuant to the authorization shall not create or imply an agency relationship between that licensee and the client of that exclusive broker.”)

¹¹⁶ See VA. CODE § 54.1-2132(C) (effective Jul. 7, 2007) (“A licensee engaged by a seller in a real estate transaction may, unless prohibited by law or the brokerage relationship, provide assistance to a buyer or potential buyer by performing ministerial acts. Performing such ministerial acts that are not inconsistent with subsection A shall not be construed to violate the licensee's brokerage relationship with the seller unless expressly prohibited by the terms of the brokerage relationship, nor shall performing such ministerial acts be construed to form a brokerage relationship with such buyer or potential buyer.”)

¹¹⁷ WI. CODE § 452.133(6).

¹¹⁸ *Realty Multi-List*, 629 F.2d at 1373-74 (citing A. Austin, *Real Estate Boards & Multiple Listing Sys. as Restraints of Trade*, 70 Columbia L. Rev. 1325, 1346 (1970)); accord *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991) (“Market power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole.”); see also, e.g., *Reifert*, slip op. at 7-8 (“In short, it is impossible to perform the tasks of a real estate agent or appraiser in the relevant geographic area without using [the defendant MLS]. Thus, it possesses sufficient market power to restrain competition.”); *Austin Bd. of Realtors*, 2000 WL 34239114, at *4 n.4 (“It is undisputed that ABOR has significant market power in the relevant product market for residential real estate brokerage services in the Austin metropolitan area and exclusive access to the MLS Data which is essential to effective competition in this market.”); 1983 FTC STAFF REPORT at 37 (“At the MLS level, there is, in fact, no effective competition at the present time, and almost all brokers are, therefore, members of one system in each local community.”). See also Areeda, *Antitrust Law*, paragraphs 2220-2223.

¹¹⁹ *Id.* at 1369 (“[W]hen broker participation in the [MLS] is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable.”). Subsequent decisions largely have followed this approach. See, e.g., *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1579-80 (11th Cir. 1991); *Austin Board of Realtors v. E-Realty, Inc.*, No. Civ. A-00-CA-154 JN, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000). A discussion of the various private litigation involving alleged MLS-related restraints is beyond the scope of this Report.

4.2.1 *Discrimination Against Brokers Entering Into EA Listing Contracts*

53. As discussed in Part 3, NAR data show that 80 percent of home buyers search the Internet for homes, and that 24 percent of home buyers first found the home they ultimately purchased online.¹²⁰ Thus, online exposure appears to be a crucial input into marketing a home, and, to the extent that successful marketing is positively related to sales price and negatively related to time on the market, it is reasonable to assume that homes without such exposure are likely to take longer to sell or sell at lower prices. Recently, several MLSs have adopted rules that limit the exposure of exclusive agency listings, which often are used by alternative brokers.

54. Earlier this year, the FTC charged the Austin Board of Realtors (“ABOR”), Information and Real Estate Services, LLC (“IRES”), Northern New England Real Estate Network, Inc. (“NNEREN”), Williamsburg Area Association of Realtors, Inc. (“WAAR”), Realtors Association of Northeast Wisconsin, Inc. (“RANW”), and Monmouth County Association of Realtors, Inc. (“MCAR”), with violating Section 5 of the FTC Act by adopting MLS rules that limit the publication and marketing on the internet of certain sellers’ properties, but not others, based solely on the terms of their respective listing contracts.¹²¹ The FTC obtained consent agreements with ABOR, IRES, NNEREN, WAAR, RANW, and MCAR.

55. The complaints accompanying the consent agreements alleged that ABOR, IRES, NNEREN, WAAR, RANW and MCAR each individually controlled key inputs necessary for a listing broker to provide effective real estate brokerage services, and that each respondent’s exclusive agency listing policy was a joint action by a group of competitors to refuse to deal except on specified terms.¹²² The rules or policies challenged in the complaints state that information about properties will not be made available on popular real estate web sites unless the listing contracts are Exclusive Right to Sell Listings. When implemented by each of the respondents, this “Web Site Policy” prevented properties with non-traditional listing contracts from being displayed on a broad range of public real estate web sites, including Realtor.com.¹²³ Each policy had the effect of discouraging brokers from using exclusive agency listings, which are often used by Listing Brokers to offer low-cost real estate services to consumers. In the ABOR case, the data showed that three months after ABOR implemented its exclusive agency listing policy, the

¹²⁰ 2006 NAR REPORT at 34-38.

¹²¹ *In the Matter of Austin Bd. of Realtors*, Docket No. C-4167 (Final Approval, Aug. 29, 2006); *In the Matter of Information and Real Estate Services, LLC.*; FTC File No.: 061 0087; *In the Matter of Northern New England Real Estate Network, Inc.*; FTC File No.: 051-0065; *In the Matter of Williamsburg Area Association of Realtors, Inc.*; FTC File No.: 061-0268; *In the Matter of Realtors Association of Northeast Wisconsin, Inc.*; FTC File No.: 061-0267; *In the Matter of Monmouth County Association of Realtors*; FTC File No.: 051-0217.

¹²² See Analysis to Aid Public Comment at 4.

¹²³ The conduct challenged recently is similar to conduct that the FTC has challenged in the past. In the 1980s and 1990s, several local MLS boards banned exclusive agency listings from the MLS entirely. The Commission investigated and issued complaints against these exclusionary practices, obtaining several consent orders. See *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, Docket No. C-3461, 116 F.T.C. 972 (1993); *In the Matter of American Industrial Real Estate Association*, Docket No. C-3449, 116 F.T.C. 704 (1993); *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (F.T.C., Aug. 2, 1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C., Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 115 F.T.C. 305 (1990); *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, Docket No. C-3163, 106 F.T.C. 95 (1985); *In the Matter of Orange County Board of Realtors, Inc.*, Docket No. C-3162, 106 F.T.C. 88 (1985).

percentage of all listings that were exclusive agency listings fell from 18 percent to 2.5 percent.¹²⁴ The complaints also alleged that the exclusive agency listing policy did not give rise to any plausible or cognizable efficiencies, and was not “reasonably ancillary to the legitimate and beneficial objectives of the MLS.”¹²⁵

56. Additionally, in October 2006, the FTC charged Realcomp II Ltd. (“Realcomp”) and MiRealSource, Inc. (“MiRealSource”) with illegally restraining competition by limiting consumers’ ability to obtain low-cost real estate brokerage services. The complaint against MiRealSource alleges that MiRealSource adopted a set of rules to keep Exclusive Agency Listings from being listed on its MLS, as well as other rules that restricted competition in real estate brokerage services. This case currently has been withdrawn from administrative litigation to consider a proposed consent order.¹²⁶

57. The complaint against Realcomp alleges that Realcomp engaged in anticompetitive conduct by prohibiting information on Exclusive Agency Listings and other forms of nontraditional listings from being transmitted from the MLS it maintains to public real estate web sites. Both complaints allege that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS or from public Web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along. In litigating the complaints, the FTC staff will seek to prohibit these groups of competitors from engaging in such conduct to the detriment of consumers.

4.2.2 *Discrimination Against VOWs*

58. In September 2005, DOJ’s Antitrust Division sued NAR, the largest trade association in the United States, alleging that its nationwide rules violated Section 1 of the Sherman Act. DOJ alleged that the rules, embodied in a so-called VOW Policy, limited competition from real estate brokers using innovative business models and the Internet to offer better services to their clients. NAR’s rules allow brokers to direct that their clients’ listings not be displayed on any VOW or on a particular VOW. The complaint charges that the rules offer no procompetitive benefit. DOJ’s lawsuit is pending in the United District court in Chicago, Illinois.

59. In most markets, real estate brokers share information about properties for sale, known as listings, through the local MLS, which, as discussed above, is a joint venture among competing brokers. Participation in the local MLS makes it possible for a broker to provide clients with listings for virtually all properties for sale in the community, which is critical to compete in the local market, according to the complaint.

60. Traditionally, brokers provided listings for properties to their customers in a variety of ways, such as by hand at their offices, or by mail, fax, or e-mail. Some brokers began to offer brokerage services to their customers over the Internet, using the so-called VOWs, which allowed the broker’s customers to search the MLS database on their own, using their home computers to obtain the same information that would be available in a broker’s brick-and-mortar office. As alleged in the complaint, because the Internet can be used to deliver brokerage services more efficiently - resulting in better service and lower costs to

¹²⁴ See, e.g., *Complaint, In the Matter of Austin Board of Realtors*, File No. 0510219, at ¶ 17 (July 13, 2006), at <http://www.ftc.gov/os/caselist/0510219/0510219AustinBoardofRealtorsComplaint.pdf>.

¹²⁵ *Id.* at ¶ 27.

¹²⁶ [See *In re MiRealSource, Inc.*, Order Withdrawing Matter from Adjudication for the Purpose of Considering a Proposed Consent Order (Nov, 27, 2006), at <http://www.ftc.gov/os/adjpro/d9321/061128MiRealSourceorderwithdrawing.pdf>.

consumers - brokers who utilize the Internet represent a competitive challenge to traditional brokers. According to the complaint, NAR rules were developed in response to the development of VOWs.

61. In its complaint, the DOJ alleged that NAR's policy restrains competition by requiring NAR-affiliated MLSs to adopt rules that will allow brokers to withhold their clients' listings from other brokers' websites by means of an "opt out."¹²⁷ In essence, NAR's policy enables traditional brokers to block their competitors' clients from having full on-line access to all of the MLS's listings. When exercised, the opt-out provision prevents web-based brokers from providing all MLS listings that respond to a client's search, effectively inhibiting the new technology.

62. NAR's policy significantly alters the rules that govern MLSs by permitting traditional brokers to discriminate against other brokers based on their business model, denying them the full benefits of MLS participation. The DOJ's lawsuit seeks to ensure that traditional brokers, through NAR's policy, cannot deprive consumers of the benefits that would flow from these new ways of competing. According to the complaint, brokers who participated in the NAR work group that formulated the VOW policy recognized that the opt-out right would be "abused beyond belief." As quoted in the complaint, the chairman of the working group admitted that the opt out right was likely to be exercised by brokers despite the fact that "it may not be in the sellers' best interest to opt out." NAR's policy denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, suppresses innovation, discourages competition on price and quality, and prevents new, efficient competitors from entering into the marketplace - all to the detriment of consumers.

63. In December 2005, NAR filed a motion to dismiss the lawsuit. NAR argued that its VOW policies do not violate the Sherman Act because they merely empower individual brokers to opt out and therefore "restrain" nothing. The Court denied NAR's motion, holding that collective action that "purports to regulate how [competitors] will compete in the marketplace" can indeed, if proven, constitute a restraint of trade.¹²⁸ Discovery is continuing, although no trial date has been set.

5. Restrictions on Use of Non-Attorneys to Close Transactions

64. As we noted in our 2005 submission, the United States, each of the fifty-states regulates the legal profession.¹²⁹ Pursuant to unauthorized practice of law ("UPL") statutes, states determine the tasks that only an attorney legally can perform. In the majority of states, non-lawyers compete with lawyers to provide real estate closing services, such as performing title searches and completing mortgages and deeds. Some states, however, have restricted anyone other than licensed attorneys from performing many of the tasks associated with closing a residential real estate transaction.

¹²⁷ On the morning the lawsuit was filed, NAR announced a revised policy that contained a blanket opt-out under which the listings of brokers who withheld their listings from a VOW could appear on no brokers' website, except for NAR's website, Realtor.com. The DOJ subsequently filed an amended complaint to take the revisions into account. *See* Amended Complaint, *U.S. v. Nat'l Ass'n of Realtors*, (October 4, 2005) at <http://www.usdoj.gov/atr/cases/f211700/211751.htm>.

¹²⁸ *See U.S. v. Nat'l Ass'n of Realtors*, Memorandum Opinion and Order Denying Defendant's Motion to Dismiss the Complaint of the United States, No. 05 C 5140 (N.D. Ill. Nov. 27, 2006) at <http://www.usdoj.gov/atr/cases/f219800/219889.htm>.

¹²⁹ *See* United States Submission, Global Competition Forum, Roundtable on Bringing Competition into the Regulated Sectors, DAF/COMP/GF/WD(2005)35 (Feb. 10, 2005) ("*US UPL Submission*"), at <http://www.ftc.gov/bc/international/docs/compcomm/2005Roundtable%20on%20Bringing%20Competition.pdf>.

65. Through competition advocacy, the Agencies have encouraged state legislatures, bar associations, and courts to eliminate or narrow restrictions on competition between attorneys and non-attorneys in performing tasks related to the real estate closing.¹³⁰ Separately, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition by non-attorneys in violation of the antitrust laws.¹³¹ The Agencies have argued that that these UPL restrictions are likely to reduce consumer welfare.¹³² First, they reduce consumer choice and increase the price of closing services for consumers who otherwise would hire a non-attorney. Second, to the extent that non-attorneys provide competitive constraint on attorney pricing, these restrictions also are likely to raise the price that consumers who prefer to hire an attorney pay for closing services. At the same time, the Agencies are not aware of any evidence of widespread consumer harm due to non-attorneys performing tasks related to the real estate closing. Thus, the harm from restricting competition in the provision of closing services is not offset with any benefits that consumers value.

¹³⁰ See letter from the Justice Department and the FTC to New York Assemblywoman Helen Weinstein (Jun. 21, 2006); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (Jun. 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Ass'n (Jun. 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at <http://www.usdoj.gov/atr/cases/f203700/203790.htm><http://www.ftc.gov/be/V040017.pdf>; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at <http://www.ftc.gov/os/2003/07/georgiabrief.pdf><http://www.usdoj.gov/atr/cases/f201100/201197.htm>; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>. Advocacy letters are available at <http://www.usdoj.gov/atr/public/comments/comments.htm> and <http://www.ftc.gov/be/advofileother.htm>.

¹³¹ In *United States v. Allen County Bar Ass'n*, the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. N.Y. County Lawyers Ass'n*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). See also *United States v. County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980). In addition, the Justice Department has obtained injunctions against other anticompetitive restrictions in professional associations' ethical codes and against other anticompetitive activities by associations of lawyers. See, e.g., *United States v. Am. Bar Ass'n*, 934 Supp. 435; *Prof'l Eng'rs*, 435 U.S. 679; *United States v. Am. Inst. of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors' Reps.*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

¹³² For a more detailed exposition of our framework of analysis, see *US UPL Submission* at 4-5.

6. Consumer Knowledge

66. The availability of consumer information may alter the competitive environment. For example, there is evidence that some consumers of brokerage services are not necessarily aware that commission rates are negotiable.¹³³ Although it appears that consumer awareness of this negotiability is increasing,¹³⁴ perhaps due to the increasing numbers of discount brokers that have entered the industry over the past few years, some consumers fail to negotiate commission rates. Further, some consumers are not fully informed as to what, if any, duties they are owed by their broker. This can occur because the broker fails to disclose such information to the client, as legally required.¹³⁵ Without full and timely disclosure a customer may reveal sensitive information, such as the buyer's maximum offer or the seller's minimum price, to a broker who is actually representing the party on the other side of the transaction.¹³⁶

67. Some consumers may be unaware of the possibility that their brokers may be steering them away from property listings that offer lower commissions to the broker but that otherwise match the criteria identified by the consumers.¹³⁷ All else equal, brokers have a greater incentive to show prospective buyers property listings that offer the prevailing commission rate rather than listings that offer a lower rate. Homebuyers' increasing use of the Internet, however, may limit brokers' ability to steer buyers away from discounters' listings without their knowledge. As noted earlier, 80 percent of consumers use the Internet to search for homes and 24 percent of homebuyers' survey reported first finding the house they ultimately purchased online.¹³⁸ To the extent that consumers have a greater knowledge of the stock of housing for sale than they used to, brokers will be less able to exclude a particular listing from a homebuyers' search without their knowledge. If a homebuyer finds a discounter's listing on their own that appears to be a good match, a broker either will have to show the homebuyer the discounter's listing or explain to his client why he will not.

¹³³ See, e.g., Paul Anglin & Richard Arnott, *Are Brokers' Commission Rates on Home Sales Too High? A Conceptual Analysis*, 27 REAL ESTATE ECONOMICS 719, 721 (1999) ("Another factor in sustaining a collusive commission rate is that many sellers do not realize that the commission rate is negotiable."); 1983 FTC STAFF REPORT at 66, 68-69 (reporting that as many as three-fifths of recent sellers and three-fifths of recent buyers may have been unaware of the negotiability of commission rates).

¹³⁴ See, e.g., Lord, Public Comment 254 at 1 ("The competition is fierce the majority of time that an agent has a listing appointment . . . they are confronted with the question how much can you reduce your commission? It is a standard question now."); Paulsen, Public Comment 364 at 1 ("If the public felt there was a set fee I would not be asked what my rate is to sell a house. And trust me, everyone asks.").

¹³⁵ States typically require agents to disclose to their clients the duties that they owe to their clients under state law. See, e.g., VA. CODE § 54.1-2131(E).

¹³⁶ In an effort to educate consumers about the real estate brokerage marketplace, the FTC recently issued a guide for consumers who are selling their homes. See *Selling Your Home? Tips for Selecting a Real Estate Professional*, at <http://www.ftc.gov/bc/edu/pubs/consumer/homes/zrea01.pdf>.

¹³⁷ See Barry, Public Comment No. 19 at 57 (reporting that, because the public sources of property listings never show the commission offered by the listing brokers, buyers are unaware that their agents have screened out listings with lower commission offerings); CFA REPORT at 5 ("home buyers will not have access to this information about the splits, so they cannot check to see whether their broker is steering them away from houses carrying lower splits"); White, *supra* note 160, at 5 ("in a milieu where there is a great deal of uncertainty as to which house will best fit the demands of a buyer and which buyers are true prospects for a seller, it may be difficult for the client to determine that her agent is steering in a disadvantageous way"); 1983 FTC STAFF REPORT at 75 ("Because many buyers think they are seeing all the properties a broker or salesperson knows to be on the market, the practice of steering coupled to the general practice of denying consumers direct access to information from a MLS may mislead buyers.").

¹³⁸ See note 120, *supra*.

7. Conclusion

68. The Internet has led to a dramatic change in the real estate brokerage industry in the U.S. Although traditional, full-service brokerage currently is used by the majority of U.S. consumers, business models have proliferated that allow home buyers and sellers to take on more of the real estate transaction themselves. A variety of factors, including actions taken by state and private actors, are likely to hinder the ability of these non-traditional brokers to compete. In appropriate cases, the FTC and DOJ have engaged in competition advocacy and enforcement of the antitrust laws to preserve competition for consumers in this important industry.