

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

before the

**SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY
U.S. HOUSE OF REPRESENTATIVES**

on

COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY

July 25, 2006

Chairman Ney, Ranking Member Waters, and members of the Committee, I am Maureen Ohlhausen, Director of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning. I am pleased to present the Commission's testimony on protecting the interests of consumers and competition in the real estate brokerage industry.¹ New technologies have given rise to alternative brokerage models that offer a real promise of greater competition (and greater savings) for consumers, and we are committed to using our enforcement, advocacy, and research capabilities to protect the interests of consumers in this important market.

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² The FTC has consistently used four primary tools to carry out our Congressional mandate of ensuring that markets remain competitive. First, the Commission enforces the antitrust laws against those who engage in anticompetitive conduct. Second, the Agency uses its expertise in competition law and economics to provide state and federal policy makers with analysis of the likely

¹ This written statement represents the views of the Federal Trade Commission. My oral presentation and responses are my own and do not necessarily reflect the views of the Commission or of any Commissioner.

² Federal Trade Commission Act, 15 U.S.C. § 45.

effects on consumers of proposed laws and regulations. Third, the FTC conducts research to increase our knowledge of issues affecting competition and consumers. Finally, drawing on experience from enforcement, advocacy, and research, through reports and speeches, the Agency seeks to educate the public about important issues that affect competition and consumer welfare.

The FTC has a long history of bringing these tools to bear on issues relating to competition in the real estate industry. Since the 1980s, the Commission has actively investigated and challenged anticompetitive practices in the industry, including efforts by private associations of brokers to disadvantage brokers who use non-traditional listing agreements.³ The competition advocacy program has addressed issues related to real estate transactions, such as laws that restrict non-attorneys from performing certain aspects of real estate closings⁴ and minimum-service brokerage laws, which generally

³ See *In the Matter of Austin Board of Realtors*, File No. 0510219 (July 13, 2006), at <http://www.ftc.gov/os/caselist/0510219/0510219.htm>; *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, Docket No. C-3461, 116 F.T.C. 972 (1993), at <http://www.ftc.gov/bc/realestate/cases/UnitedRealEstateBrokersofRocklandLtd116FTC972.pdf>; *In the Matter of American Industrial Real Estate Association*, Docket No. C-3449, 116 F.T.C. 704 (1993), at <http://www.ftc.gov/bc/realestate/cases/AmericanIndustrialRealEstateAssociationetal116FTC704.pdf>; *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (F.T.C., Aug. 2, 1990), at <http://www.ftc.gov/bc/realestate/cases/PugetSoundMultipleListingAssociation113FTC733.pdf>; *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C., Aug. 2, 1990), at <http://www.ftc.gov/bc/realestate/cases/Bellingham-WhatcomCountyMultipleListingBureau113FTC724.pdf>; *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 115 F.T.C. 305 (1990), at <http://www.ftc.gov/bc/realestate/cases/MetroMLS113FTC305.pdf>; *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, Docket No. C-3163, 106 F.T.C. 95 (1985), at <http://www.ftc.gov/bc/realestate/cases/MultipleListingServiceoftheGreaterMichiganCityAreaInc106FTC95.pdf>; *In the Matter of Orange County Board of Realtors, Inc.*, Docket No. C-3162, 106 F.T.C. 88 (1985), at <http://www.ftc.gov/bc/realestate/cases/OrangeCountyBoardofRealtorsIncetal106FTC88.pdf>.

⁴ See Letter from FTC and the Justice Department to Massachusetts State Representative Paul Kujawski (Oct. 6, 2004); Letter from FTC and the Justice Department to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); Letters from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); Letter from the FTC and the Justice Department to President of the North Carolina State Bar (July 11, 2002); Letter from the FTC and the Justice Department to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); Letter from the FTC and the Justice Department to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Letter from the FTC and the Justice Department to the Supreme Court of Virginia (Jan. 3, 1997); Letter from the FTC and the

require all real estate agents, regardless of their fee structure, to provide most of the services supplied by “traditional” full-service agents. In 1983 the FTC released a comprehensive report on the real estate brokerage industry reflecting years of enforcement activity and industry research.⁵ In the next few months, the FTC and the Department of Justice plan to release a report based on information gathered in connection with a real estate workshop we hosted last October with the Department of Justice. The Commission also has launched a consumer information Web page that allows the public to find all of the FTC’s work concerning the real estate industry in one place.⁶

This testimony will focus on the FTC’s recent experiences with the real estate brokerage industry, including our recent investigations and enforcement actions, our competition advocacy efforts, and what we have learned from the joint workshop last fall and from our other endeavors. This testimony also outlines our plans for our future work in the sector.

I. Changes in the Real Estate Industry

The real estate industry has undergone a number of substantial changes in recent years. Real estate professionals are increasingly incorporating the Internet into their business models in a variety of ways, such as offering potential buyers the option to view full, detailed listing information online or using Web sites to gather “lead” information on

Justice Department to the Virginia State Bar (Sept. 20, 1996). These letters can be found at <http://www.ftc.gov/be/advofile.htm>. See also Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission in *Lorrie McMahon v. Advanced Title Services Company of West Virginia*, 607 S.E.2d 519 (W. Va. 2004) (filed May 25, 2004), at <http://www.ftc.gov/be/V040017.pdf>; Brief *Amicus Curiae* of the Federal Trade Commission and the United States of America in *On Review of ULP Advisory Opinion 2003-2* (filed July 28, 2003), at <http://www.ftc.gov/os/2003/07/georgiabrief.pdf>.

⁵ See THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY, FTC STAFF REPORT (1983), at <http://www.ftc.gov/bc/realestate/workshop/index.htm>.

⁶ See Competition in the Real Estate Market Place, at <http://www.ftc.gov/bc/realestate/index.htm>.

customers who seek real estate services and then selling those leads to real estate professionals. Still other business models use the Internet to match home buyers and sellers.

For example, we are still watching the emergence of alternative ways that brokers are offering real estate sales services to consumers, such as virtual office Web sites (“VOWs”), which offer potential buyers the option of viewing full, detailed multiple listing service (“MLS”) information online. VOWs allow consumers to delay contacting a real estate professional until they are ready to buy, and in exchange for performing less work, many of these brokers agree to rebate a portion of their commission to the customer when the transaction closes.

On the selling side, Web sites have emerged that allow sellers to value their homes more easily, and there are numerous online platforms that allow home sellers to market their homes to potential buyers. The increased ease with which home sellers can perform tasks that once were the exclusive domain of brokers likely has been an important factor in the increased demand for innovative, non-traditional brokerage services. In a typical limited-service brokerage package, a home seller might choose to pay a broker only for the service of listing the home in the local MLS and placing advertisements, and choose to handle negotiations and paperwork himself or herself. This model gives the consumer the choice to save potentially thousands of dollars in commissions in exchange for taking on more work.

As alternative brokerage models have grown in prominence, however, the Agency also has become aware of actions by groups of professionals acting through MLSs, industry trade associations, and state regulatory and legislative bodies that are likely to

make it more difficult for these alternative business models to compete against traditional brokers. For example, on July 13, the Commission charged the Austin Board of Realtors (“ABOR”), an association of real estate brokers in the Austin, Texas, metropolitan area, with violating Section 5 of the FTC Act.⁷ The FTC’s complaint alleged that ABOR’s adoption of rules that effectively prevented consumers with non-traditional real estate listing agreements from marketing their listings on important public Web sites discouraged Austin MLS members from entering into such agency listings with their clients, thus impeding one way of providing unbundled brokerage services to consumers and making it more difficult for home sellers to market their homes. The Commission’s consent order with ABOR, which settled the charges, prohibits ABOR from adopting or enforcing any policy to deny, restrict, or interfere with the ability of its members to enter into non-traditional listing arrangements. It is important to emphasize that the ABOR enforcement action does not reflect any attempt by the Commission to favor one form of brokerage business model over another. Rather, the Commission’s enforcement action, and all of its work in the sector, is intended to protect competition in the market (not competitors) so that consumers can select the services that best meet their needs.

The Commission also engages in substantial competition advocacy work in the industry. Over the past two years, several state legislatures and real estate commissions – at the urging of state Realtor[®] associations – have considered or adopted minimum-service requirements, which would have the effect of forcing consumers to purchase a state-mandated bundle of real estate brokerage services. Because these measures are likely to harm consumers, the FTC and DOJ have been active in advocating against them.

⁷ See Austin Board of Realtors, File No. 0510219 (July 13, 2006), at <http://www.ftc.gov/os/caselist/0510219/0510219.htm>.

In 2005, the Agencies sent letters to the Texas Real Estate Commission,⁸ the Alabama Senate,⁹ Missouri Governor Blunt,¹⁰ and to Michigan state Senator Alan Sanborn¹¹ providing analysis of the likely competitive effects of proposed minimum-service laws. We concluded that by effectively eliminating many of the most popular packages offered by limited-service brokers, these minimum-service laws would reduce consumer choice and competition among traditional brokerage models and limited-service models. Further, we noted the dearth of evidence that such laws are necessary to protect consumers; throughout our advocacy efforts staff was never presented with evidence of actual consumer harm from the limited-service brokerage model. In the end, Texas, Alabama, and Missouri adopted minimum-service laws, while the Michigan proposal currently appears to have stalled.

II. FTC/DOJ Real Estate Workshop

Critical to the FTC's work in protecting competition and consumer choice is careful analysis of the marketplace, as well as educating the public on its workings. In an effort to further educate ourselves and the public about the substantial changes occurring in the real estate brokerage marketplace, and given consumers' strong interests in competitive real estate brokerage service markets, the FTC and DOJ held a workshop addressing competition policy and the real estate industry on October 26, 2005. This

⁸ Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), at http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm.

⁹ Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), at <http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf>.

¹⁰ Letter from the FTC and the Justice Department to Governor Matt Blunt (May 23, 2005), at <http://www.ftc.gov/opa/2005/05/mrealestate.htm>.

¹¹ Letter from FTC and Justice Department to Michigan State Sen. Alan Sanborn (Oct. 18, 2005), at <http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf>.

workshop provided a forum to discuss current issues in real estate competition and to assess how they impact consumers.

We learned a great deal from the workshop. Thirteen panelists, including practitioners, economists, and state administrators, provided their various views on competition in the real estate brokerage industry. In addition, the agencies received almost 400 submissions in response to their request for public comment in connection with the workshop. The information received generally falls into one of the four following categories: (1) economic evidence on competition; (2) insufficiently informed consumers; (3) disparagement of innovative business models by traditional brokers; and (4) lack of support for minimum-service laws. We will now discuss each of these categories separately.

A. Economic Evidence on Competition

There appears to be substantial agreement among workshop panelists and commentators, as well as many others who have analyzed the real estate brokerage industry, that the industry's structure exhibits several characteristics that one would expect to find in a competitive market. First, the industry has a large number of brokers and agents offering various types and levels of brokerage services. The U.S. brokerage industry is comprised of approximately 2.53 million real estate licensees. Approximately 98,000 brokerage firms operate over 200,000 local offices across the country. Second, the industry was described as highly fragmented, with low market concentrations and a predominance of relatively small brokerage firms. Third, there is readily available information for consumers regarding houses for sale, as well as the home-buying and

selling process. Finally, there appear to be low barriers to entry, expansion, and exit in the real estate brokerage industry.

Despite these structural features, there is a perception – supported primarily by anecdotal evidence – that commission rates remain at supra-competitive levels. This perceived lack of price competition is based on the observation that commission rates do not appear to vary across factors that would be expected to affect rates, such as geography, the price of the house for sale, the experience level of the real estate broker, and the quality of the service provided by the broker.¹² There is little current empirical evidence, however, that systematically measures the degree to which real estate brokers and agents compete on price (via commission rates). As a result, more study is needed to determine the level of “competitive” commission rates.

There is relatively recent survey data indicating that average commission rates are declining, as well as anecdotal evidence that discount and limited-service brokers are forcing full-service brokers to compete on price. However, the significant increases in property values over the past few years appear to have more than offset such nominal decreases in commission rates. For example, in markets where home prices have nearly doubled in recent years, even a 20 percent reduction in the average commission rate still represents a substantial increase in the actual dollar value of average brokerage fees.

In contrast to the state of price competition, there appears to be a fairly broad consensus that there is vigorous non-price competition in the brokerage industry. Specifically, there is strong competition among brokers and agents for property listings. In commenting on this competition for listings, a workshop panelist and economist

¹² See, e.g., GAO, REAL ESTATE BROKERAGE: FACTORS THAT MAY AFFECT PRICE COMPETITION 10-11 (Aug. 2005).

described what he calls the “tragedy of the commission.” In the absence of price competition, the panelist explained that brokers and agents spend the vast majority of their time and efforts competing for property listings. The panelist referred to this type of competition as “prospecting,” which includes activities such as door-to-door canvassing, mailings, and calling on home-owners who are attempting to sell their homes without any broker assistance. As housing values increase, relatively fixed commission rates mean increased profit opportunities for agents. Those profits, however, are diluted as an increasing number of agents enter the industry to chase such profit opportunities. The end result, according to the panelist-economist, is industry overcapacity, low agent productivity (that is, a small number of sales per agent), and flat or falling wages for agents, while consumers pay more for brokerage services as the commissions increase proportionately with property values.

B. Consumers Are Insufficiently Informed

The workshop confirmed that the Internet had a significant impact on the real estate brokerage industry. It has expanded the amount of information available to consumers, as well as the number and types of business models that provide brokerage (and related) services. For sellers, it has replaced the yard sign as the most-used marketing tool. For buyers, it has become an indispensable source of information on properties, neighborhoods, and the home-buying process itself.

Even with the significant amount of information available on the Internet, however, the workshop and the public comments filed with the FTC and DOJ indicate a gap in consumer knowledge in several areas. First, there is evidence that consumers of brokerage services are not necessarily aware that commission rates are negotiable.

Although it appears that consumer awareness of this negotiability is increasing, perhaps due to the increasing numbers of discount brokers that have entered the industry over the past few years, many consumers fail to negotiate commission rates.

Second, consumers often are not fully informed as to what, if any, duties they are owed by their broker or agent. This can occur because the broker or agent fails to disclose such information to the client, as legally required.¹³ Lack of full and timely disclosure can result in a customer revealing sensitive information, such as the maximum amount that the buyer is willing to pay for a house or the minimum amount for which the seller is willing to sell a house, to a broker or agent who is actually representing the party on the other side of the transaction.

Third, consumers often are unaware of the possibility that their brokers or agents may be steering them away from property listings that offer lower commissions to the agent but that otherwise match the criteria identified by the consumers. Brokers and agents have a greater incentive to show prospective buyers property listings that offer the prevailing commission rate than listings that offer a lower rate. There is evidence that such steering is one tactic used against brokers and firms whose business models depart from charging customary commission rates.¹⁴

C. New Business Models Are Being Undermined By Traditional Brokers

In discussing potential factors that may be inhibiting price competition in the real estate brokerage industry, workshop panelists and commentators identified the

¹³ States typically require agents to disclose to their clients the duties they owe to their clients under state law. *See, e.g.*, VA. CODE § 54.1-2131(E).

¹⁴ *See* Real Estate Workshop Public Comment No. 19 at 57 (Barry) (reporting that, because the public sources of property listings never show the commission offered by the listing brokers, buyers are unaware that their agents have screened out listings with lower commission offerings), *at* <http://www.ftc.gov/os/comments/realestatecompetition/518795-00368.pdf>.

disparagement and harassment of non-traditional brokers as one such factor.¹⁵ As mentioned above, traditional brokers may discourage price competition by resisting cooperation with brokers utilizing innovative business models. Steering prospective buyers away from listings offered by non-traditional brokers is a subtle way to discourage price competition. A more blatant method reportedly used is to disparage or harass non-traditional brokers.

Several workshop panelists and commentators – including the owner of a discount brokerage firm and the owner of an exclusive buyer brokerage firm – described the treatment that they have received from their competitors. Such treatment has included, among other things: (1) explicit refusals by competitors to show the non-traditional brokers’ listings; (2) disparaging comments by competitors to clients or potential clients the effect that the non-traditional brokers are going or have gone out of business; and (3) the filing of baseless complaints with local real estate commissions against the non-traditional brokers.¹⁶

D. Lack of Justification for Minimum-Service Legislation

Finally, the workshop and public comments filed with the agencies demonstrate a lack of a sound basis for minimum-service legislation, enacted recently in a few states. No workshop panelist provided any evidence of consumer harm from allowing brokerages to provide limited brokerage services. Panelists representing both traditional brokerages – including Coldwell Banker and Century 21 – and new business models all

¹⁵ See Real Estate Workshop Transcript at 74 (Farmer); 192 (Early).

¹⁶ See Real Estate Workshop Public Comment No. 304 (limited-service broker from Kentucky reporting to be the target of harassing complaints from the Kentucky Real Estate Commission), *at* <http://www.ftc.gov/os/comments/realestatecompetition/518795-00331.htm>.

stated that they did not see a need for minimum-service laws.¹⁷ As noted earlier, the FTC and DOJ have explained in several advocacy letters sent to states that such laws are detrimental to competition among brokerage service providers and, thus, consumers of such services.¹⁸

First, minimum-service laws limit consumer choice and harm consumers who would otherwise choose a limited-service option by preventing them from purchasing their most-preferred combination of price and service. Required to provide more services than they otherwise would (in the face of a minimum-service law), a limited-service broker must raise his or her price accordingly.¹⁹ The result is that some consumers will be forced to purchase more real estate brokerage service than they otherwise would prefer – at a higher price than they otherwise would pay.

A second form of consumer harm from minimum-service laws arises because limited-service brokers are likely to provide a competitive constraint on full-service brokers' pricing. A full-service broker who wants the business of a consumer who might otherwise consider limited-service brokerage will need to offer lower commissions and/or higher-quality service to induce such a consumer to pay for the additional services offered by a full-service broker. If limited-service brokers are eliminated as a choice for

¹⁷ See *Real Estate Workshop Transcript* at 71-72 (Farmer); 82-83 (Kunz); 152 (Perriello), available at <http://www.ftc.gov/opp/workshops/comprealestate/051209transcript.pdf>.

¹⁸ See notes 8-11, *supra*.

¹⁹ See Glenn Roberts Jr., *Flat-fee brokers adapt to new real estate law Texas' new minimum-service law enacted Sept. 1*, INMAN NEWS (Oct. 12, 2005), available at <http://www.inman.com/inmannews.aspx?ID=48325>; see also <http://www.texasdiscountrealty.com/laws.htm> (website of Texas Discount Realty explaining that “because of the added responsibilities forced on to you, the seller and us the broker, by [the Texas minimum service law], we are forced, as most brokers to adjust our prices); Tracy Donhardt, *New Law Provides Realtors and Edge*, INDIANAPOLIS BUSINESS JOURNAL (Jul. 10, 2006), available at <http://indybiznow.com/Default.aspx?TabId=391&issueyear=2006&issuemonth=07&issueday=10&page=1&article=Ar00101> (noting that Indiana’s minimum service law has caused at least one limited-service broker to exit the market).

consumers, and as a check on rates charged by full-service brokers, some consumers who prefer full-service brokers, therefore, are likely to pay higher prices for real estate brokerage services.

The arguments that have been made in favor of minimum-service legislation do not appear to be consistent with consumers' interests. Some justify such legislation on the basis that consumers expect real estate brokers and agents to perform certain tasks, such as assisting in the marketing of the property, presenting offers and counteroffers, and answering questions regarding the transaction. Requiring full disclosure by limited-service brokers to consumers of the tasks that such brokers will and will not provide, however, is a better way to address consumer expectations than an outright ban on the use of such brokers. Notably, a number of states that have considered the issue have adopted such disclosure requirements instead of prohibiting provision of limited service brokerage entirely.²⁰

Additionally, some argue that minimum-service laws are necessary because sellers using limited-service brokers shift additional work and responsibilities onto cooperating brokers, who are put into the awkward position of serving a party to whom they do not owe a fiduciary duty in order to insure that the transaction is completed at all. Again, requiring full disclosure to sellers using limited-service brokers that they may not expect any assistance from buyers' brokers is far superior to banning altogether the use of limited-service brokers.

²⁰ For example, Tennessee, Virginia, and Wisconsin have adopted laws that allow consumers to purchase limited-service packages as long as there is disclosure and consent.

III. Applying What We Learned at the Workshop

The FTC and DOJ plan to issue a joint report this fall setting forth our findings with regard to the state of competition in the real estate brokerage industry. The report will be based on the agencies' review of the testimony provided at the workshop, the numerous public comments filed with the agencies, and other information and industry analyses. In addition, the FTC plans to apply what we learned from the workshop to help ensure competition in this industry.

First, the FTC will continue investigate and bring enforcement actions against, anticompetitive conduct in the real estate industry. Staff currently is investigating MLS practices from around the country that may impair competition between new and traditional brokerage models.

Second, the FTC plans to continue our competition advocacy work. When the Commission is invited to comment on legislation that impacts the industry, we will offer our views as to whether the proposed law appears to benefit or harm consumers.

Third, given the relative lack of current empirical evidence on the state of competition in the real estate brokerage industry discussed above, staff intends to evaluate whether it is feasible to conduct additional empirical analyses to determine more accurately the state of price competition in the brokerage industry. The feasibility of such a study, of course, depends on the availability of current, reliable data on commission rates and other relevant indicia of competition.

Finally, as discussed above, the Commission plans to ameliorate perceived gaps in consumer knowledge regarding the negotiability of commission rates, the timely and appropriate disclosure of agency relationships, and potential steering of buyers away

from listings offered by price-cutting brokers. The Commission intends to develop and issue education materials to help consumers become more knowledgeable about the various ways in which they can save money and protect their interests as they buy or sell a house.

IV. Conclusion

The FTC has a long history of vigilantly monitoring the real estate brokerage industry and taking law enforcement and other actions to insure its competitiveness. We remain committed to ensuring that consumers can enjoy the benefits of competition in this very important industry.