

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

before the

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY

effects on consumers of proposed laws a

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 Unitedi0Ron

customers who seek real estate

make it more difficult for these alternative business models to compete against traditional

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

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.

described what he calls the “tragedy of th

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

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

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

C. New Business Models Are Being Undermined By Traditional Brokers

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

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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 se

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

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.