I N D E X

COMPETITION POLICY AND THE REAL ESTATE INDUSTRY

OCTOBER 25, 2005

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COMPETITION POLICY

AND THE REAL ESTATE INDUSTRY

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Reported by: Susanne Bergling, RMR-CLR

P R O C E E D I N G S

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MS. OHLHAUSEN: Thank you very much for coming on such a wet, windy day. I'm pleased to welcome you to the FTC and DOJ's Conference on Competition Policy in the Real Estate Industry. I'm Maureen Ohlhausen. I'm the Director of the Office of Policy Planning at the Federal Trade Commission. Before we get started this morning, I wanted to go over a few details.

First, the matter of security. You're required at all times by the Federal Protective Service to wear your visitors' badges or these name tags. If for any reason you leave the building, my script says to catch a breath of fresh air because you're the really hearty type to want to be out in the rain today to do that, but in case you want to or when you leave for lunch, you will need to go back through security when you come in. And I'll give you more specifics about the process before we leave for lunch.

In case of an emergency, there are two exits that you should know about. One is the front door where you came in, and there's another one behind you, there's a corridor there next to where the coffee table is. If for any reason there's an emergency and we need to stay inside, the security personnel will advise us on what to do.

If you need to use the restrooms, they're very close by. They are on the other side of the lobby. Simply go through the lobby and follow the signs. And you can always ask any of the staff members or security for assistance.

As for cell phones, our audio/visual staff asked me to remind you that our microphones are very sensitive, so please turn them off, and if you are out in the hallway, actually sometimes the conversations can be picked up as well. So, for your own privacy, if you are going to make a cell phone call, you may want to go out to the main lobby out there.

During the panels, there will be time for questions from the audience. What we are going to do is have people write them on cards. They should be in your packet. If you need additional question cards or pens, our kind staff of paralegals will be walking around with additional cards and pens, and if you have a question to hand in, you know, hold it up, and they will bring it up to the moderator. That way, time is tight, and we're able to get through a lot more questions that way.

Also, if there are any additional comments you need to make, the record for the workshop will be open another month, until November 25th, and we definitely welcome comments from anyone and everyone. You should file your comments with the Federal Trade Commission and with the Department of Justice on our web sites. The FTC web site is www.ftc.gov, and the DOJ web site is www.usdoj.gov/apr/index.html.

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So, if everyone has turned off their cell phones and pagers, to begin our proceedings today, I'm honored to present the Chairman of the Federal Trade Commission, Deborah Platt Majoras.

(Applause.)

CHAIRMAN MAJORAS: Thank you so much, Maureen. Good morning, everyone, and welcome to our workshop.

The real estate industry is critical to our citizens. For many, the purchase of a home represents tangible fulfillment of the American Dream, the reward for hard work and dedication, sometimes spanning decades. It may also be the most significant personal investment that some make in their lifetimes. Competition in the real estate industry, therefore, is not merely of interest to those involved in the real estate industry or to enforcers, but rather to anyone who has ever bought or sold or is thinking about buying or selling a house.

As housing prices across the country have continued to rise at significant rates, the stakes have been raised for home sellers and buyers, as well as for those professionals working for sellers and buyers in this market environment.

The vast majority of residential real estate sales involve real estate brokers who may assist at different times both home buyers and home sellers. Traditionally, real estate brokers and their affiliated agents have performed virtually all services relating to the sale of a home, including listing the home in the Multiple Listing Service or MLS, marketing the home, negotiating with the potential buyers, and helping to coordinate the closing of the transaction.

Several related developments are presenting challenges to the traditional brokerage model. First, in response to perceived consumer demand, some real estate professionals are offering to provide services more on an a la carte basis rather than as an entire package of services. In a so-called fee-for-service or limited service brokerage model, a home seller might choose, for example, to pay a broker only for the service of listing the home in the local MLS and placing advertisements and then choose to handle negotiations or paperwork for him or herself.

Second, real estate professionals are increasingly incorporating the internet into their business models in a variety of ways, as many other industries are as well. In general, these models use the internet to allow someone else to perform a task perhaps traditionally performed by the broker or agent. Some brokers, for example, offer potential buyers the option of viewing full, detailed listing information online, allowing them perhaps to delay contacting a real estate professional until they are ready to buy. Other firms use web sites to gather lead information on customers who seek real estate services and sell those leads to real estate professionals, usually for a fee, based on the commission that the professional earns in the transaction. Still other business models exist that use the internet to match home buyers and sellers.

Actions by individual firms of real estate professionals, by groups of professionals acting through

MLSs, by industry trade associations and by state regulatory or legislative bodies have all spawned recent controversies or even lawsuits. Some of the issues concern how existing industry members and institutions have responded to real estate professionals that offer these new business models. Several states have considered or passed laws or regulations that would effectively curtail fee-for-service brokerage. Further, some states have either passed new laws or regulations or interpreted existing laws or regulations to prevent brokers from passing a portion of their commissions along to consumers.

As you may know, the FTC has a strong and growing advocacy program. We not only bring cases to challenge anti-competitive conduct or unfair competition, we also advocate for competition in the marketplace. The FTC, often in conjunction with our colleagues at the Department of Justice Antitrust Division, provides comments to legislators and other policy makers on proposed legislation or actions that may impact competition either adversely or sometimes even favorably. It is important that competition have a voice apart from individual interests, because government-imposed barriers to or restrictions on competition may have at least as adverse an effect on consumers as private restrictions, if not an even greater effect.

Proponents of government-imposed restrictions often tout the consumer benefits of their restrictions, perhaps without focus on the potential harms that such restrictions may impose on consumers. At the FTC, we need to look at both. In our advocacy comments, we try to identify the potential harms and suggest ways in which decision-makers might accomplish their goals while still minimizing restrictions on competition.

Recently, as you know, the FTC and the DOJ together have advocated in a number of states against the passage of laws and regulations that would impose minimum service requirements on real estate brokers. In general terms, under the proposed legislation, real estate professionals who agree to list homeowners' property for sale would be required to provide a state-mandated minimum service package, effectively impeding consumers' ability to purchase a more limited and perhaps less expensive set of real estate services. We have argued that the proposed legislation would likely harm competition in two ways.

First, consumers who want to hire a broker to list their property in the MLS will have to purchase additional services that they may not want or need, which may cost them more. And second, without competition from fee-for-service brokers, the prices for traditional full-service options will likely be higher. What we want for consumers is choice.

Admittedly, our efforts thus far in state legislatures have not been terribly successful, as several have imposed statutory minimum service requirements on brokers that likely will limit the range of services available to consumers. Nonetheless, we have continued to advocate against such measures and, in fact, have submitted an advocacy letter urging the Michigan Legislature not to impose a minimum service requirement on brokers in that state.

Critical to being a champion for competition is careful study and analysis of the marketplace, as well as then educating the public on its workings. The Commission regularly holds public workshops on issues of importance to consumers in an effort to further educate ourselves and others. Given the substantial changes occurring in the real estate brokerage marketplace, given consumers' strong interest in a competitive real estate brokerage industry, and given that industry participants have told us that they think that our advocacy in this industry thus far has been misplaced, the FTC and DOJ are hosting today's workshop, to provide a public forum to discuss current issues affecting the competitiveness of real estate brokerage.

This workshop will afford us the opportunity to hear from all sides on the many issues facing the industry, hopefully to increase everyone's understanding and identify ways to preserve competition while protecting consumers.

In our first panel this morning, we will lay the groundwork for discussion of these issues by providing an overview of the real estate transaction from both the buyer's and seller's sides, defining key terms and identifying the various relationships and business models that currently exist in this industry. One of the areas of focus will be how industry participants are using the internet as an efficiency-enhancing tool.

The second morning panel will address issues affecting competition among sellers' brokers, including minimum service requirements, state licensing and other requirements affecting for-sale-by-owner web sites, local MLS rules, and other private actions that may impact brokers with non-traditional models.

In the first afternoon panel following the lunch break, we will turn to issues affecting competition among buyers' brokers, including state anti-rebate legislation, policies that limit the online display of real estate listings, and the effect of minimum service requirements on buyers' brokers. With each of the issues to be discussed today, we will explore how the restrictions or actions impact consumers, either by producing benefits or imposing higher costs on them.

In the final panel, we will address empirical evidence on competition in this industry. The panelists will examine the data available to test the various hypotheses and look at recommended areas for future empirical analysis. They will discuss what the data show about competition in this industry, for example, whether commission rates have been perennially fixed at 6 percent or have fluctuated over time in response to market conditions.

In conclusion, I would like to thank our many distinguished panelists for coming from all over the country to share their insights and experiences. We are very pleased to have a wide variety of viewpoints represented at this workshop. Based on pre-registration information, we have in attendance today representatives from several real estate trade associations, including the National Association of Realtors. In addition, our attendees represent several different types of brokerages, including traditional, discount and fee-for-service. I am encouraged by the large number who are willing to participate in this workshop, which I think demonstrates the importance of these issues.

I would also like to thank the staffs of the Antitrust Division and the Federal Trade Commission for their work in putting this program together. With that, I am now pleased to turn the panel over to my good friend and colleague, the Acting Assistant Attorney General in charge of the Antitrust Division, Tom Barnett.

Thank you.

(Applause.)

MR. BARNETT: Thank you, Debbie, and good morning. I, too, want to welcome you to our workshop. I'm delighted to be here.

These workshops I think are an excellent example of the good and healthy working relationship that the Federal Trade Commission and the Antitrust Division have these days, and in particular these workshops I think are extraordinarily helpful to us in educating ourselves about the industries that we are monitoring and policing and educating the public about many of the issues.

Indeed, as I was driving here this morning sitting in traffic, much delayed by the rain, I was thinking about what I was going to say today, and the concept that came to mind, shockingly, was sunshine.

I'd like to have more sunshine today, and I'm glad that you all are here to help us today to shed some light on issues of great importance.

These workshops, while very valuable, do require a lot of work, and I want to thank up front the staffs of the Antitrust Division and the Federal Trade Commission for all of the work that they have put into organizing the workshop today and to thank you all in advance for your help in carrying it forward. Because they require a lot of work, we can't do them for every industry for every issue, but I think the real estate industry is clearly an industry that warrants much scrutiny.

As Debbie indicated, owning a home is the American Dream. In recent years, I think selling your home has become the American Dream given the rapid increase in prices, and in connection with that, it's reported that in 2004, American consumers paid over $60 billion in commissions for basically real estate brokerage services. That's an increase of $20 billion or almost 50 percent from the commissions paid the year before.

One question we might ask is, why are brokers making so much money? Inquiring minds want to know. And certainly the FTC and the Antitrust Division want to know. There could be a number of reasons for that. There is great change in the industry going on. As Debbie pointed out, the introduction or expansion of the internet, our ability to collect and disseminate information, have caused new business models to begin to emerge.

I guess what I thought I would like to do is just briefly talk about a couple of the areas which one could possibly think about or factors that one could point to as explaining that increase in the amount of money that American consumers paid for real estate brokerage services.

One is that the number of transactions could well have gone up. I have no doubt that that's at least part of the explanation. It could be that the value of homes have gone up substantially and that brokers are paid on a percentage basis, but that raises to my mind a question, have the costs of providing these services gone up that much as well?

In general, in a competitive market, it's not the value of the services that leads to the price. The economists tell us it's the cost of those services, and many of the technological innovations that we see suggest that the costs, if anything, are going down. Our ability to collect and disseminate information at a low cost is far superior to what it was even five or ten years ago, and as a result, that leads to a suggestion of whether or not there are other factors that may be at work here.

I emphasize I am raising these as questions. I have -- and based on some of the public statements that we have made and actions that we have taken, we obviously have some views -- on some specific issues, but our purpose here today is to raise questions and to listen.

One area in particular that Debbie has already alluded to is, when there is change, you would expect many in the industry to react to that change. They can react by bringing out new products, services, trying to compete harder, or they may react by going to their state real estate commission, their state legislature, trying to obtain measures that will protect them from the forces of those changes. It's not a new phenomenon. I strongly suspect that the manufacturers of horses and buggies were not big fans of Henry Clay Ford, and similarly, it's probably true that the makers of the IBM Selectric were not big fans of the Wang word processing system, but from the consumer perspective, these types of changes can be good.

Now, again, I want to emphasize here that I'm not suggesting that every time somebody goes to a real estate commission or legislature that that's not good. There are many laws, many regulations that are passed that can be helpful to consumers. We certainly suspect that there are some efforts that have been undertaken recently that are not so helpful for consumers, and Debbie alluded to a couple of those.

One of those -- and it's been going on for a number of years -- has to do with the definition of the practice of law. There are a number of states that allow laypersons, non-lawyers, to provide certain closing services relating to these transactions, and in the states where that's allowed, people have done studies, and they've found out that there doesn't appear to be any greater incidence of consumer complaints of consumer harm. The cost of those services provided by laypersons is lower, and indeed, the cost of those same services provided by attorneys is lower because they face competition from the non-lawyers. That's an example of when we believe something is good and successful regulation or, shall we say, limited regulation that advances the interests of consumer welfare.

There have been a number of states who have looked at expanding the definition of "practice of law" to prevent laypersons from providing those real estate closing services. We have been asked in a number of instances to provide our perspective, and we have done so, and we have had a number of what we view as successes in terms of encouraging people to keep the definition relatively narrow.

More recently, Debbie again alluded to the what I call minimum service legislation or regulations. On the one hand, these can be presented as a consumer protection measure designed to ensure that when I retain a real estate broker, I am going to get the services that I expect. There's another perspective out there that suggests that it's no different than passing a regulation that says, "When I walk into McDonald's and order a hamburger, I'm told that I also have to buy some french fries, because the state has decided that it might be deceptive or misleading or bad if I only got the hamburger, paid for it and didn't realize I wasn't going to get the french fries." I may not want french fries, and from that perspective, being able to choose from amongst a menu of services to buy only the things that you want to buy we generally view as a good and positive thing.

What do we do about these situations? Our role is threefold. First is to educate ourselves, and that's what we're here to do today. Second is to use the benefit of our experience and the information that we collect to educate others who have to make a decision, and when, for example, a state legislature is considering a proposed minimum service law, we have been asked to and we try to respond to those requests to give the benefit of our knowledge and information, and I'm slightly more optimistic than Debbie on this one. I think we have had some successes.

In a fairly public example, the State of Oklahoma amended the legislation after looking at what we and others had to say about it, to narrow the restrictions, to provide and preserve more consumer choice. There have been several other states where they have reached out, asked us for input, and in response to some of that input, they made changes. That, from our perspective, is positive.

Our message to these lawmakers is before you restrict consumer choice, before you require a purchase of certain services, make sure there's a need to do so, and if you decide that there's a need to do so, we recommend doing it as narrowly and on limited a basis as possible. Ultimately, with respect to the legislatures, we understand and respect that it is their choice. Our role is to help them make the most informed choices possible.

There are times, however, where we run across a state-related restriction that we think allows us to have a more active role. An example of that would be the case that the Antitrust Division brought against the Kentucky Real Estate Commission earlier this year. It related to a rebate prohibition that prohibited brokers from giving a rebate on their commission to their clients. From what we could tell, there was no pro-competitive justification for this rule. There was certainly an obvious restriction on competition. When we looked into it, we looked at some of the statements from the brokers themselves who said -- in their words, not mine -- that "this regulation was preventing the outbreak of a bidding war. It was preventing consumers from demanding things that would reduce broker profits," and from our perspective, that made the regulation a bad thing, anti-consumer, and we challenged it. I'm pleased to say that we have a proposed settlement pending with the Court right now and that brokers in the State of Kentucky are already beginning to offer rebates and other inducements, which we view as a positive thing.

Stepping back a little bit, I note that, again, coming back to what I said, what we are trying to do is shed light on the facts, the issues or what is going on, so legislatures can make informed choices, real estate commissions can make informed choices, and if necessary, judges can make informed choices.

Finally, I will mention just briefly that one other possible source of the rise in real estate commissions and potentially profits is, of course, private agreements beyond the scope of what I've just been talking about, and I'll have no further comment on that for now.

So, again, thank you very much for participating. We do think that this is an extraordinarily important issue, appreciate the effort that the staff have put into this. We look forward to hearing from you, to evaluating the results and seeing what we can all do to improve the welfare of consumers in this important industry.

Thank you.

(Applause.)

MS. OHLHAUSEN: Thank you very much, Tom and Debbie, for your remarks.

At this point, we are going to start the first panel. So, if you will just give us a moment's indulgence, I ask Cathy Whatley and Robert Hahn to come up, and we will get started.

(Pause in the proceedings.)

MS. OHLHAUSEN: Well, this is the overview panel, and the purpose of this panel is to, as Chairman Majoras mentioned, give an overview of the transaction and go through some of the relationships between buyers and sellers and brokers and the MLS and different things like that and also identify some of the areas that may be raising competitive issues and competitive concerns.

To help educate us all and inform us, we have Cathy Whatley, the 2003 President of the National Association of Realtors. Cathy is a realtor from Jacksonville, Florida, and I should mention that the NAR is the largest professional association with over a million members. She's been a realtor since 1969 and is the broker/owner of Buck & Buck, a family firm established by her grandfather in 1907.

Cathy has also been very active at the state level, and she was the President of the Florida Association of Realtors in 1996 and received the Realtor of the Year Award in 1998. She currently serves as one of the nine commissioners on the Florida Commission on Ethics and also is a member of the State's Impact Fee Task Force. She lives in Jacksonville with her husband, and she has five children and seven grandchildren.

On my left, your right, is Robert Hahn.

It's all right if we call you Bob? Okay.

He is the Co-Founder and Executive Director of the American Enterprise Institute-Brookings Joint Center, which focuses on regulation and antitrust. Previously, Bob worked for the Council of Economic Advisers. He has also served on the faculties of Harvard University and Carnegie Mellon University, and he frequently contributes to leading scholarly journals and general-interest periodicals, including the American Economic Review, Yale Law Journal, Science, and the New York Times.

He is the author of "Reviving Regulatory Reform: A Global Perspective," which is put out by AEI-Brookings, and several other books. He is also Co-Founder of the Community Prep School, an inner-city middle school in Providence, Rhode Island that provides opportunities for disadvantaged youth to achieve their full potential.

I would like to just thank you both for coming today.

This is just going to be basically -- we are not going to do formal presentations. It's just a discussion, so I'll be playing the Oprah character this morning, I guess, posing some questions and just going through some of these topics and getting the viewpoints of these both very well-informed and experienced people.

First of all, I guess, the first question is, who are the relevant players in the real estate brokerage industry and what roles do they play?

Maybe, Cathy, you can -- feel free to both jump in, but maybe we will start with Cathy on that one.

MS. WHATLEY: Sure.

There are a number of relevant players in the real estate transaction. You certainly start with the buyer, the seller. You have the real estate professional, and then you have a lot of additional relevant players, such as the mortgage lender, the insurance agent, the home inspector, the termite or WDO, as we call it, wood-destroying organism inspector, the surveyor, the appraiser, the closing attorney, the title company, the escrow agent. There are a number of relevant parts to the transaction that are essential to get from the buyer and seller actually having a discussion about the purchase and sale of that home to actually getting the keys to the home when they get to closing.

I think just to start the discussion, I'd like to maybe paint a picture, and I think of it as somewhat analogous to a play. You might be at a theater. If you're in the audience, everything seems to go very smoothly because everyone has a role. They know their part. They know their part in the script. In the event that something were not to go well and someone either enters at the wrong time, forgets their lines, it becomes very disruptive to the process. The ultimate end goal for both the buyer and the seller is to have a successful closing. So, all parts of the transaction are extremely relevant to make sure that it is a very seamless and successful transaction for the buyer and seller.

MS. OHLHAUSEN: Cathy, maybe you could follow up on that and just say, what role does the real estate agent play in -- like a number of the things you mentioned involved the legal requirements for transferring the property in a particular state and certain financial requirements.

MS. WHATLEY: Well, in my role as a real estate professional, depending upon whether I'm assisting the buyer or the seller, I have different roles in that transaction, but ultimately a real estate professional, and if there are more than one in the transaction, will work together to make sure that all parts of that transaction are facilitated appropriately, not only in terms of actually showing the property, marketing the property, working through the transaction itself, meeting the home inspector, helping the seller and/or the buyer understand what the results of that inspection were, overseeing repairs, making sure that things that are necessarily time-sensitive get responded to in a time-sensitive manner.

I think that the transaction itself, if you talk about what has technology done to the transaction, it's not just the internet that has driven things. Technology has shortened the entire process time for the buyer and seller to be able to transact this sale, and so when you talk about the internet, the internet is just one part of technology that has driven a shortened time frame, which really makes it more critical than ever to have someone who understands the script, to be able to make every stage of that process work, to come to a successful closing.

DR. HAHN: Can I just comment?

MS. OHLHAUSEN: Yes, sure, Bob.

DR. HAHN: I agree with most of what Cathy says, but what strikes me -- my mom was a real estate agent and my dad was a real estate broker but dealing with commercial, and my mom dealt with residential.

UNIDENTIFIED SPEAKER: We can't hear you.

DR. HAHN: I can swallow the mic if you like.

I was saying that my mom was a real estate agent in the residential market, and my dad dealt with commercial and real estate management, but what's striking, even though Cathy is talking about changes in technology, is when I look at the kind of transaction that my mom engaged in, if I'm allowed to say it, 30 years ago or 40 years ago since she's not here, it's virtually the same as the transaction that most of you engage in today when you buy or sell a house.

I don't see a whole lot of new technology entering into this transaction or the kinds of gains that we've seen in other industries and the internet resulting, at least in the residential market, in benefits for consumers. So, in that sense, while I think we're beginning to see some new models emerge, I think public policy -- and I think Mr. Barnett alluded to this in his remarks -- public policy could have an impact on the pace at which they emerge and the likely benefits that could accrue to consumers.

MS. OHLHAUSEN: So, Bob, just to make sure that I understand what you're saying, you're saying there is technology out there, and there is a role for it, but it's not being adopted as quickly into the process as one might expect?

DR. HAHN: Certainly based on other industries. If you were to look at airlines, for example, you would probably go and bring up your favorite web site -- I am not going to give an advertisement for one of them -- and go get an airline ticket. You don't have that kind of menu of choices, at least the way I and my colleagues, Bob Litan and Jesse Gurman, who wrote a paper on this recently for the real estate industry.

MS. OHLHAUSEN: Actually, that brings me to my next question, which is the menu of services, because I also wanted to talk a little bit about the MLS and the part of the transaction, the service that the real estate agent provides in listing a seller's property in the MLS or showing MLS data to a buyer.

Maybe, Cathy, you could expand on that a little bit.

MS. WHATLEY: Sure. The Multiple Listing Service -- let me start with the understanding that the MLS is a broker-to-broker information exchange that provides the opportunity for cooperation and compensation. It establishes rules by which we all understand are discussion points. It tells me if I put the property in as a listing agent, I'm then allowing those who are cooperating in the marketplace, in my marketplace, to have access to that information, and it tells them at what fee that I am willing to cooperate with them. So, that's all disclosed up front, and that's a very important part, because if you talk about what brings an efficient marketplace, the ability to have aggregated information for me, as a practitioner, to be able to go and have information that other brokers in my marketplace are willing to share with me, to allow me to have the information that I can assist my customer and client with.

It also spells out what the cooperation is that that listing agent is willing to pay me if I'm going to show the property, and that is highly competitive. I can tell you that that is extremely competitive in the marketplace. A lot of things are driven by supply and demand, and we have been through a period of increasing demand for real estate and limited supply. So, if there is anything that really can motivate competition, it is limited supply and strong demand and vice versa. So, you know, it is important.

The MLS is strategically one of the most valuable things to me, and that's done because the brokers in my marketplace are all willing to cooperate and provide that information in a competitive environment but still working in the best interests of their customers or clients.

MS. OHLHAUSEN: Let me just follow up, Cathy --

DR. HAHN: Can I --

MS. OHLHAUSEN: Okay, Bob, and then --

DR. HAHN: This is absolutely crucial and an area where weary economists like myself might differ from the average person on the street, but I want to talk about the MLS for a minute and try to quote what Cathy just said.

The MLS provides for cooperation among competitors, I think that's what she said, and I think I would also agree -- before I explain where I might disagree with Cathy -- that sometimes cooperation among competitors can be a really good thing, but by the same token, what we as economists know is when we allow competitors to cooperate, we want to look very closely at the rules that they might have about who can cooperate with each other and the conditions under which they can cooperate with each other.

The MLS is essentially a club, and its members decide who gets to be in this club, who gets to share the listings, and the conditions under which they get to share the listings. From an economist's perspective, the more different types of folks who might get to share those listings, the more likely it is that the consumers are likely to be presented with a wide array of choices. So, I think this is a point that will come up later today, but it's important to note that when Cathy talks about competition, yes, it's absolutely true that my mom would compete vigorously for listings, just as people do today, but that's very different from competition about who gets in the club, because the club decides the rules on who gets to be a member.

So, for example, in the extreme, if a club decided only two people could be members and 17 people had a legitimate reason or a legitimate business model, albeit slightly different from those in the club, you might not think that that's an arrangement that the Department of Justice or the FTC would necessarily think was a good thing or was necessarily a good thing for consumers. So, I think that in a way we might be talking past each other, but economists see the problem a little bit differently.

MS. OHLHAUSEN: Actually, that feeds into what my question was going to be for you, Cathy, is who runs the MLSs and the kinds of rules that they promulgate? What do you see as sort of the most important rules that an MLS may promulgate for its members?

MS. WHATLEY: Well, most of the MLSs do have boards. They are made up of realtor members. That varies from MLS to MLS, because the MLS is unique to each individual market. The National Association of Realtors does not have, you know, guidelines that everyone must establish, they are unique to the marketplace, but they are highly competitive as well.

I want to state, too, that understand that the Multiple Listing Service has been validated by the courts. So, don't miss the point that it is an allowable opportunity to have this information provided to us as a benefit of our membership in the realtor organization, and the fact is that it is broker-to-broker cooperation. It's not trying to limit the club. It's trying to make sure that there are cooperation and compensation guidelines which everyone knows, because that's in the best interests of the consumer.

Actually, again, the fact that you've got a distinguishable database of aggregated information helps the consumer because it allows us and now the consumer in those marketplaces where it's highly visible, such as REALTOR.com, to be able to see information and to have that efficient marketplace roll smoothly.

DR. HAHN: I want to respond to that, if I might.

Cathy said the MLS has been validated by the club, but it's also --

MS. WHATLEY: By the courts.

DR. HAHN: Or by the courts, excuse me, but it's also true that at one point commissions were totally non-negotiable, which economists would call price fixing of a sort, and the courts struck that down. So, it's not as if this club has engaged only in activity that I would view as pro-consumer or pro-competitive. I would say that there have been major benefits from the setting up of a platform however many years ago that was called the MLS, but I also think it's time to take a serious look at what the institution can and cannot do and whether that's good for consumers, which is what I care about.

MS. OHLHAUSEN: Actually, sticking with the MLS, I understand that not all listings go in in the same form, and I was hoping, Cathy, you could explain to us the differences between an exclusive right to sell, an exclusive agency, and something that's sometimes called an open listing contract.

MS. WHATLEY: Sure. An exclusive right to sell agreement is one where the seller lists their property with a real estate firm, and there is a fee, either a percentage or a flat fee, that is agreed to, and that fee is paid regardless of who finds the purchaser for the property. So, even if the seller has someone to approach him in the store and they say, you know, "I've got my house up for sale." The seller then says, "Contact my real estate professional." The lead may have come from the seller, and that comes to me, but there is still an agreed-upon commission structure. Most oftentimes, it is cooperation between real estate companies, an exclusive right to sell.

An exclusive agency agreement, if that same seller lists with me, if any other real estate professional brings the buyer to the transaction, there is still a fee paid; however, if the seller has someone that they may have a pre-arrangement with, that they've said, you know, four people have contacted me and said I'm really interested, if you ever sell your house, please let me know, and they were exclusions and/or the seller retained the right to sell to someone that they found individually, that would be an exclusive agency relationship.

The third is an open listing, and an open listing is where the seller could tell each one of us as licensees, "If you bring me a customer, I will pay you a fee," but there is nothing exclusive about it. It is independent, each one operating in that own environment.

And I just can't leave the last comment without saying to Bob, I think we all serve consumers. The real estate professional's major responsibility is to work for their customer and client. We are in the business to serve the consumer. So, in that regard, we are both on the same level.

DR. HAHN: I don't dispute that. The airline industry, when essentially fares had to be filed with the Civil Aeronautics Board, also could make a strong argument that they served consumers in the sense that when people purchased a ticket, we knew that it was at least worth the value of that ticket to take the ride from San Francisco to New York.

The question from an economic perspective is is this industrial structure that we call the residential real estate market the best way to serve consumers? I'm not suggesting that any individual agent would not work to promote the interests of necessarily the buyer or the seller, because that's what they're supposed to do.

MS. WHATLEY: But a real estate transaction is unique in that there are multiple consumers who have to be served. When you're talking about the airlines, when you're talking about other industries such as that, you have one consumer who is able to interact with the business environment. It's different in the real estate transaction where you have two consumers who both need to be served, and the public interest, you know, that is a very strong component, which I think makes it distinct and different from some of the other areas that may be discussed.

MS. OHLHAUSEN: Actually, Cathy --

DR. HAHN: There are a number of markets in which you have buyers and sellers and platforms, including your cousin, commercial real estate. So, I don't see that there's anything particularly unique about it. But you're right that you need to cater to buyers and sellers to get people to yes.

MS. OHLHAUSEN: Actually, this might be a good point, Cathy, to go into the issue of the relationship between the agent who brings the buyer in and the duties that that agent may owe to the buyer and to the seller and the interaction between the listing agent and the agent who brings in the buyer.

MS. WHATLEY: Understand that the state -- and it was mentioned earlier -- that the licensing is regulated at the state level. So, you have 50 states who have 50 state legislatures who enact laws and 50 state real estate commissions who implement those laws. It varies in terms of what the real estate professional's duties and responsibilities are based upon what the state may have determined are those duties and responsibilities.

By and large, most states work in an agency environment, meaning that there's common law areas, common law of agency, which talks about fiduciary duties of obedience, loyalty, confidentiality, disclosure. There are some states who have established a little bit different type of fiduciary responsibilities and the real estate professional may be working in a transaction or a facilitator capacity, and so there are different defined fiduciary duties in those circumstances.

There are times when a real estate professional may be working with a buyer who is actually their customer as opposed to their client. So, there are various levels at which the responsibility of the real estate professional may be in terms of fiduciary duties to their buyer, customer or client.

MS. OHLHAUSEN: And in that also, could you explain how the splitting of the commission works between the listing and the cooperating brokers? Typically. I understand it varies.

MS. WHATLEY: Sure. When I go out and I list a property, at the time that I list that and put it into the Multiple Listing Service, I make a definitive determination of what my real estate company will pay to a cooperating real estate firm and that broker. That is disclosed in the Multiple Listing Service where anyone who is going to show that property knows what I'm willing to pay.

If they have any question about that payment, they have to address that with me and either renegotiate it up front if they're unhappy with it, because once they've shown the property, then I have presumed that they have understood that is my compensation and that's what they will receive if they bring a customer and a buyer and we ultimately negotiate the contract.

Everyone is considered a cooperating broker. You may have a cooperating broker who is a buyer's agent, who is working exclusively for the buyer, has exclusive fiduciary duties to that buyer. You may have a cooperating broker who is a subagent, actually is working on behalf of the seller. You may have a cooperating broker who is a transaction broker who has limited fiduciary duties, but their role is to make sure that the transaction works smoothly.

But the compensation part is actually established, and that's why it's so important that it is known up front, because it would be extremely disruptive in the marketplace if I didn't know that, if I couldn't go into the MLS and it tell me what it was that the other broker was willing to pay me in the event I had a customer who was willing to buy that.

DR. HAHN: Let's explore that for a minute. First of all, I just want to make a comment about these split arrangements. Sometimes they have been required by the MLS bylaws, these traditional split arrangements, and from an economics point of view, that isn't necessarily a good thing.

But when you tune in to -- if you're thinking about taking a flight, say, from Washington, D.C. to Providence or Boston, you don't necessarily have your fees or your splits set up front. You go look at the computer screen, and you say, "Today it's going to cost me $100 on Airline X and 50 bucks on Airline Y," and you decide whether the time's convenient or not and you choose.

So, it's not necessarily clear to me that having the consumer know everything with certainty up front as a particular fixed price is a good thing. I mean, we may want to see more competition over price and certainly the menu of services that's offered. So, I think that's an open question, and that's why economists like the idea of different business models out there so we can see which ones actually will win in the marketplace.

MS. WHATLEY: As a practitioner, though, if I did not have that information and I am working in an exclusive buyer agency relationship and I don't know that and my customer has a commitment to a certain level of compensation to me, in the event that that is not achieved and I can't tell my customer that up front, I haven't served my consumer customer. So, it's very important that the entire process is known.

For instance -- and it is highly competitive -- in my marketplace, I can look on my MLS, and it will vary from listing to listing as to whatever the cooperating compensation is to me. Some it might be X percent, some it might be $1, because it can be a flat fee, and it can be as low as $1.

Now, if it is a $1 cooperating compensation and I have a buyer broker agreement and the buyer is committed that I am going to receive at least a minimum compensation of X and I can't tell my buyer that before we even start in to go look at this property, I don't think I'm serving my buyer well. So, I think that the fact that the information is disclosed is very competitive, and the marketplace itself has driven very competitive pricing in terms of, you know, what the cooperating commission is.

DR. HAHN: I'd like to take a poll here, see a show of hands of those people who own houses and have actually sold them, how many people sold them and had to pay a commission of 5 and a half to 6 percent?

That doesn't suggest that there's necessarily collusion, but it does raise a flag that you want to be thinking about, that this price-setting arrangement may not necessarily be the best way of serving consumers generally.

MS. OHLHAUSEN: Actually, that also brings up another question I think that Tom Barnett had brought up in the Kentucky case, on the buyer side, the rebates that occasionally are paid to the buyers, and I just wanted to get your impression, Cathy, of whether that's common. Does that raise issues that you think can affect the effectiveness of the MLS, or do you see any issues or concerns with that?

MS. WHATLEY: Well, I'm not sure how it would play in your question as to the MLS. You know, are there opportunities for people to be able to work with their buyers and sellers? Yes, there are. In Florida, am I allowed to compensate the buyer or seller back for my commission? Yes, I am, and that may come in some type of negotiated arrangement. In.

The event that we get into discussions with the seller, if I'm working with the buyer, if we get into discussions with the seller and I find that what it's going to take to actually put this transaction together is eliminating a part of my fee or something, I mean, there are ways that compensation is rebated. Sometimes it's direct. I'm limited to directing it only to the buyer, to the parties in the transaction, in my state, but state by state makes those determinations.

That's why you have state legislatures, and that's why you have regulatory bodies who implement the state legislation. They adopt what they believe is best for the consumers who have elected them.

DR. HAHN: I don't get involved too much in state legislation, but from what I read in the papers and the academic literature, it's not unusual for the National Association of Realtors to come out on the side that price competition, which is essentially allowing rebates, is not a good thing and also supporting what Mr. Barnett alluded to, minimum quality standards related to real estate transactions, which is a flag also for economists, keeping certain competitors out who may only want to offer one part of the menu and not the total menu.

So, I'm delighted to hear that Cathy is suggesting that this price competition is out there among realtors, and I would just urge the NAR and other groups at the state level to vote against legislation that puts restrictions on price competition.

MS. WHATLEY: Well, I don't think minimum standards actually place restrictions on competition. In fact, I think minimum standards -- and I'm not speaking for the National Association of Realtors, because NAR is very neutral on this position -- but as a practitioner, what I believe is important is that both parties are able to actually get to the closing, and you cannot make unilateral decisions oftentimes as one party that don't ultimately have an impact on the other party in the transaction.

If the consumer is making the selective decision that they're going to try to work through this process on their own, there's no issue to that as long as they understand all of the things that are responsible in that entire transaction, where they understand the level of service that is necessary, that they are having to bring to the transaction. There are financial consequences to buyers and sellers when the transaction does not close.

Buyers have paid for appraisals. They've paid for credit reports. Often their lenders have charged them up-front processing or application fees. They are time-restricted to be able to close the transaction. They have lock-ins on their loans, and if they do not close within 30 days, their interest rate is at risk, and those costs are at risk for them. In addition, the buyer is out there. They've actually given notice to their apartment or wherever it is they're living. So, there are real time constraints in which the process has to work.

And you're talking from one side of the seller's capability to be able to do all of it on his or her own, and that's fine as long as they understand. Oftentimes, though, the negotiation part requires somebody to help them understand exactly what it is that they're obligating themselves to, and in some contracts, the seller is obligated for those financial consequences if they are not able to bring the closing to the transaction.

So, you know, if the seller is not told, "If you don't get to closing by 30 days, then you can't do this," then you have got all these buyer costs, and although the buyer said they were going to pay them in the contract, they are yours to pay now, Mr. Seller.

It's just the understanding of the entire process, and the minimum level is either just making the seller aware that there are things that they need to know or minimal steps to be able to assure that both parties in that transaction can actually get to the point where the seller is handing the buyer the keys to the house.

DR. HAHN: I agree with that. I also think that's one area where the different kinds of internet models can play an incredibly important role simply because all you have to do is have one web site, and you know, if you're trying to build a new business model, and you can decide whether you want to target sellers and educate them and maybe get some fee for that or do the opposite for buyers. So, I agree with you that the transaction is complicated, but I also think there are other ways of skinning the cat and other models that should be allowed to emerge.

MS. OHLHAUSEN: Cathy, actually, I wanted to follow up. In our competition advocacy filings, we've certainly brought out the issue that consumers, to the extent they're not understanding an issue, what they're giving up, you know, the unbundled services that maybe a disclaimer or waiver or something might work, but also, the other issue that we've heard is concerns from agents that they might be put in an undisclosed dual agency situation, and maybe if you could expand a little bit on that, what that entails.

MS. WHATLEY: I would say if either party in the transaction has questions, what tends to happen is that they will ask whoever is there in front of them. So, if I'm representing the buyer and the obligation for me, based upon the relationship that the listing agent has with the seller, is that I'm to fax the contract to the seller, I'm to present the contract to the seller, and that's not customary in my marketplace. In my marketplace, the listing agent presents all offers. That's not necessarily the case across the country, but that's what it is in my marketplace.

I have a fiduciary duty to my buyer, but the seller who is sitting there is going to very naturally ask me questions about the contract. I mean, that's just typical. As they ask me those questions, I'm put in the position of either trying to say to the seller, "You know, I really can't answer that for you," which tends to not put my buyer in the best position, because the seller's automatically thinking I'm not trying to help them out. So, there are situations where it's a darned if you do and darned if you don't.

If you try to answer those questions, you may be putting yourself in a position that you are not allowed to do based upon your fiduciary buyer duties with your client, and you are darned if you don't because the seller takes offense and they don't want to sell to your buyer.

DR. HAHN: I think it's a difficult area. As Cathy points out, there can be conflicts of interest, and even if you sell your house and you have an agent, there are issues about how much effort that agent will put into selling your house. Steve Levitt, the author -- I guess the now famous author of Freakonomics, did this amazing little study where he looked at sellers selling their own houses versus sellers selling other people's houses and the prices that were fetched for comparable houses, and needless to say, when the agent sold her own house, the price fetched was considerably higher. They put a little bit more effort in, because at the margin, it was worth it to them, they were getting the pull pay-off, versus if they got an extra $20,000 for a seller, they are going to get, say, 1 and a half percent of that. So, there are incentive issues all over the place in the real estate market.

It's a complicated market. I'm not saying there's anything wrong with putting more effort into selling your own house if you're an agent than if you're selling somebody else's house, but we need to look at those, and that's all the more reason -- I realize I'm becoming a broken record on this -- but that's all the more reason to have different competitive models out there and different kinds of services being offered to the consumer.

MS. OHLHAUSEN: Cathy, I wanted to give you the opportunity if you wanted to say anything on that.

MS. WHATLEY: Sure. You know, sellers make decisions for a lot of different reasons. They may elect to take a negotiated price because, in fact, if they figured that they had to pay another mortgage payment or two, it would be the same dollars to them. Maybe based upon the time sensitivity of the market, when you're in a hot seller's market -- in fact, our market is still an extremely strong seller's market. There isn't any seller who is going to take a property contingent upon the sale of their home.

So, the time sensitivity of being able to get a contract, know that they can then go out into the marketplace and buy a home and not be at the price point of what it is today versus what it might be six months from now, it's all relative. Those are all things that the buyers and sellers take into consideration as they're considering offers.

I won't speak to whether or not, you know, an agent may or may not make additional money. There may be an investment property versus something where the home seller is needing to get out. So, there are different stages of things, but I think it's very important to know that when I'm meeting with sellers every day, they make their selling decisions based upon a number of factors that influence what their housing decisions are going to be.

Homestead Exemption, you know, are they going to be able to get in and be able to qualify for Homestead Exemption for that next year? In Florida, we have a 3 percent cap on properties. So, it's very important that once you can get to that stage, then the property taxes are not going to increase by more than 3 percent. So, establishing that value as early on as possible is very important for people in my marketplace.

So, there are a lot of things that weigh into the fact of why sellers make decisions based upon what they think is a reasonable price at which they're willing to sell.

DR. HAHN: I agree.

MS. OHLHAUSEN: Bob, you had mentioned how many people had sold homes and paid the 6 or 7 percent commission. Based on some of the research that you've reviewed, does it suggest that there is some sort of optional rate out there, commission rate?

DR. HAHN: There may be, but I have no idea what it is, and I don't think anybody else does either. I think the more interesting question that came up a little earlier is are these rates going down and what do we know about them? That's why I kind of did this little poll. The sad truth is that we know very little about them.

When I issued or we issued an initial draft of our paper, we had hoped that we were going to get detailed microdata, not Mrs. Smith's, you know, we don't get to know who that is, but we wanted to see whether most folks were still paying 5, 6, whatever it is, and how that had changed over time.

Steve Murray, who very graciously agreed to share with us some of his aggregate data along with the Wall Street Journal and everyone else, I mean, he has this generalized data, but I don't think it tells us very much about the structure of this market. So, one of the things that I would hope the FTC or Justice Department or Congress would do would be to figure out a way to get better data, but that's what economists like anyway, so we can publish papers.

MS. OHLHAUSEN: That's what I've heard from our economists all the time, better data.

Well, turning away from price competition, the recent GAO study suggested that brokers are competing more on non-price variables such as quality and reputation and level of service, and Cathy, I was wondering, do you think this is happening and sort of how does that play out in the market?

MS. WHATLEY: Well, I can say I would disagree with the GAO in that there is price competition. I'm dealing with it every day in the marketplace. So, to presume that it is not there I think is a false presumption. And Bob, I would also presume that you feel that is a very positive thing. I think that's good for consumers. I think consumers need to be able to weigh the level of service, the quality of the company, the quality of the activity that's going to be brought to them, what they need to do versus what someone else is going to handle for them, and they weigh that in relationship to whatever their fee structure is.

I think people are concerned about the transaction, because as was mentioned right at the beginning, it's the single largest transaction most people ever make in their lifetimes. They want it to go smoothly. When they're sitting in the theater, they want the play to end with a happy ending. They don't want someone to have messed it up along the way and not be able to get to the closing.

So, I do think people do weigh -- you know, they ask their friends, you know, "Who have you used? Did you have a successful transaction with them? Would you recommend them again?" A lot of people, word of mouth, networking, ask those type of questions, because that's what's important to them. That is truly what is important to the consumer, is that they are able to get to the closing.

They have told their family they're moving, they have made all of these arrangements, and so determining who is best capable of bringing that to them, and whether that's in a bundled service, a fee-for-service, a flat fee, I do part of it myself and somebody else does part of it, or a full-service relationship, I think all is in the discussion points with the consumer today.

MS. OHLHAUSEN: So, you are sort of making the point, which certainly I would agree with, that there is no one consumer, there is a variety of consumers, and they have different experience levels, abilities, risk tolerance, so certainly it sounds like -- I think, Bob, in your paper you said 77 percent of home buyers use a real estate agent or broker. So, there is certainly a large majority of consumers who seem to want the traditional model, but for those consumers who maybe have more experience or just would like to try a different model, I wanted to spend a little bit of time now, we have got 10 minutes left on the panel, turning to some of the new real estate models and how they operate.

Bob, I may have you speak on that first.

DR. HAHN: I'm not sure I consider myself an expert on this, so I'll do something I was taught in my

TV training, which I never do very well, which is I'll try to answer another question and then come back to the question, and hopefully Cathy can bail me out on this one, because I don't consider myself an expert on the business models.

But one of the findings in the GAO report which Cathy disagreed with may or may not be right, but I think it's a logical consequence if what they're saying is true of not having a lot of price competition. They're noting that they're competing over other variables other than price. Well, that's exactly what we observed in the airline industry before Fred Kahn, Steve Breyer, Ted Kennedy deregulated airlines, got rid of the Civil Aeronautics Board.

For those of you who are old enough to remember, we had things like the sandwich wars on some airlines to get people to come on. We had things like -- dare I say it in mixed company -- the mini-skirt wars to get some people to come on planes. So, it's not surprising to me that we observe non-price competition if, in fact, there isn't a lot of price competition.

As for different models, I think Cathy alluded to most of them in her remarks. There are also full-service internet brokers. You can have flat fees for getting on the Multiple Listing Service, although I have to tell you I have one anecdote where my office mate or the guy next door tried to sell his house as sort of a for-sale-by-owner and get on the Multiple Listing Service only to learn that he did not get the same level of privileges as your typical agent did when he or she has access to the Multiple Listing Service, so he couldn't put his phone number there or whatever, and it was just hard for people to get in touch with him.

But there are a whole lot of models out there. I don't think that's the issue. I think for me, there are really two issues. One is the fact that competition is being restricted at the state level, which may or may not be a federal issue, and we talked about price competition in these minimum service standards, which I don't necessarily think are a good thing.

The second thing is the MLS, and I think that's kind of the 800-ton gorilla in the room, and the fact that the folks who are in that club get to make the rules needs to be scrutinized very carefully.

MS. OHLHAUSEN: So, Bob, you kind of answered the previous question and at the tail end jumped into a little bit of what I was asking about, but, for example, you mentioned the MLS. So, if somebody has a, you know, a flat fee listing, they put their house in the MLS, and then they may offer compensation to a buyer's broker or they may --

DR. HAHN: Right.

MS. OHLHAUSEN: -- give a flat fee.

Now, there was another business model I don't think we've touched on, which is customer referral firms, where, for example, we have a representative from Lending Tree on a panel later in the day, and so they have information they're providing to interested buyers who are certainly coming on the site to find out about what size mortgage they can qualify for, and then if those customers are interested in using a real estate agent, then they refer them to a realtor in a network and I guess for a referral fee.

I just wanted to get your views on that, Cathy, is that a growing area of the market? Has that always existed? Is it something new? Is it causing, you know, new issues to arise?

MS. WHATLEY: Well, there's always been referral business, broker-to-broker referral business. You want to refer your important customer, because they ultimately would drive business to you, you want to refer them to someone that you believe is trusted and capable of handling their transaction for them. So, referral activity is not new.

Keep in mind, there are two distinct databases.

The first one is the Multiple Listing Service, which I want to reiterate is broker to broker. That talks about cooperation and compensation. If a seller wants to get their property put into the Multiple Listing Service, they do that through a real estate professional. They don't enter it directly, because the consumer is not a member of the realtor organization. So, they contact a real estate professional.

If the real estate professional, they reach an agreed-upon fee or for free or whatever their arrangement is, that goes into the MLS, but then there is, again, the part of the MLS is not only cooperation, but compensation, and the broker who is adding that information in is the one who is agreeing to the compensation. So, they are agreeing that they will pay my firm $1 or X percent or whatever it is if I bring them a buyer ready, willing and able. They have a separate relationship with the seller, and the seller has said this is the fee that I'm willing to pay, but what's in the MLS is cooperation offered broker to broker.

There's a separate informational resource that the consumer has the capability to see, but that's advertising. That's basically, when you go out on my web site and you see my information and other people's information, that's advertising, and a broker ought to be able to have the ability to say who has the right to advertise his or her properties for the public to see. They have had to work hard to get that listing, and in fact, some real estate commissions actually -- most are required to have permission of that listing broker to be able to advertise their property.

So, have there been referrals? Yes, there are ongoing referrals every day. I send referrals to qualified real estate professionals that I know in other marketplaces. If they're successful in closing the transaction, I may receive a fee for that, but that is done broker to broker within the MLS. The separate thing of what is allowed on the internet and viewable and the access to that by the consumers should have some opportunity for the broker who has spent time, money and vested a lot of information in that to be able to determine that it's being advertised in places that they are comfortable.

MS. OHLHAUSEN: Okay.

DR. HAHN: I want to respond to that at a couple levels.

Cathy, Joseph Heller once wrote a book called Catch-22, some of you may have seen the movie or read the book, but the catch-22 here is that the MLS --

remember we talked about that earlier? -- the MLS decides on who gets to be in the club and decides on what's a broker. So, you or I may think that a full-service internet provider of real estate services might be a broker, but the MLS can decide whether that person or whether that entity is a broker.

I may think that the firm HomeGame is a broker, but the MLS in Dade County, Florida or wherever it is might decide it's not a broker. It also decides that my colleague Scott cannot post his phone number when he wants for-sale-by-owner and access to the Multiple Listing Service, which makes it a heck of a lot harder for him to sell his house directly if he wants to do that, even if he purchases that privilege from an agent or broker to get onto the MLS.

So, my only point is the MLS has quite a bit of power to set the rules and therefore affect the kinds of services that consumers get offered, and some of the rules that they endorse may neither be pro-competitive nor pro-consumer, and that's where there is a role for people, analysts and public servants like yourself, to take a serious look.

MS. OHLHAUSEN: I wanted to emphasize that this is an overview panel. So, a lot of these issues that we've raised, we're sort of giving you the appetizers, and you'll get a little more into the entrees in the specific panels that will deal with buyers' issues and sellers' issues and some of the empirical evidence.

In our last three minutes here, I wanted to give both of our panelists just a chance to say -- we have covered a lot of topics here, but what other issues and challenges do you see coming down the road for real estate brokerage?

MS. WHATLEY: As a real estate practitioner, I am challenged every day to ensure that affordable housing is available for the consumers that I try to serve. I think there are a number of things that play in the marketplace. You've got changing insurance availability and affordability. That's an issue for the real estate community as a whole to have to deal with, and certainly with all the hurricanes and things that are happening, that's an issue that we have to deal with.

I think potential tax law changes could be an extremely big issue that we have to deal with, and I think the availability of mortgage money, if limited, could be a huge thing that we have to deal with in the brokerage community, because right now, consumers are very, very well served by being able to go out and know that there is available money, assuming that they have the qualifications, that there is available money there for them to be able to borrow. They know what benefits are there based upon their home ownership purchase, and you know, if they find the right house and they can't get insurance, they're not going to buy the house, because the lender isn't going to make the loan.

So, those are all things that I think are greatly influencing and impacting the real estate brokerage community today, and I see that in the future.

MS. OHLHAUSEN: Thanks.

Bob?

DR. HAHN: I think the real challenge for all of us is how we're going to or how this industry is going to evolve from the 20th Century into the 21st Century, and again, I'm just a narrow card-carrying economist, and the way I think about it is what policies can we promote to get us from here to there, and at the state level, it's a no-brainer. Forgive me. I mean, the literature on regulation has shown time and time again that price and entry regulation, i.e., minimum service standards and other things like that, are bad for consumers.

I think the MLS is a more complicated issue. I think Cathy makes a good case that there have been definite benefits for consumers over time with respect to having a platform where buyers and sellers can meet and share listings. The question is, what should be the rules for that and what should be the rules for access and so forth?

And even though I was told not to talk about it, I'm going to spend five seconds by mentioning that I also think it's not a bad idea to allow banks into the real estate business under certain conditions, because it would promote competition, and that's what this seminar is supposed to be about.

MS. OHLHAUSEN: Just to clarify, what I told Bob was it was beyond the scope of the workshop. It's all in the interpretation certainly.

DR. HAHN: I'm just pulling your leg.

MS. OHLHAUSEN: Well, I would like you to join me in thanking our panel, Cathy and Bob.

(Applause.)

MS. OHLHAUSEN: We will reconvene at 10:45, where we will look at sellers' issues. Thank you.

(A brief recess was taken.)

DR. COOPER: Thanks. Thanks for coming and welcome to today's second panel.

We are going to focus today on issues affecting competition among the sellers' brokers. I'm James Cooper, the Assistant Director of the Office of Policy

Planning here at the Federal Trade Commission.

Before we get started, I want to remind you all that we will have questions from the audience during this session. They will be on written cards. For those of you who picked up packets, there should be a card in your packet. There will be ushers walking around to pick up those cards, and in case you didn't get a card or you don't have a question card, those ushers will also have a card and a pen. So, please feel free to fill out your card and give it back to the usher, they will work their way through some magic and end up with me, so we'll go from there.

A recent NAR survey reports that 82 percent of home sellers hire a real estate agent to help them sell their home, and the vast majority of these people appear to be contracting with real estate agents to provide them with a full range of services associated with selling that home; for instance, providing pricing advice, listing the house in the MLS, conducting open houses, otherwise marketing the home, showing the home to prospective buyers, negotiating with the buyer, and then accompanying them to the closing.

Although the data seem to indicate that this is the predominant model, the one that most consumers currently purchase, there are new business models that are arising that offer consumers the option of purchasing some of the services as opposed to the full bundle. For example, a popular option offered by so-called fee-for-service brokers is the MLS listing. Under that sort of service contract, the listing agent will place the home in the MLS, but the rest of the transaction is pretty much left up to the home seller.

Taking it one step further, there's a whole class of home sellers that do it on their own, and these so-called FSBOs or for-sale-by-owners, they don't pay a broker's fee, but at the same time, they take on all the effort themselves. An entire industry now exists to help these home sellers perform the tasks involved in selling their home.

In this panel, we hope to explore these different business models and discuss how they compete to gain home sellers' business. We are also going to examine state-imposed restrictions on some of these models; for instance, minimum service laws which several states recently have considered or adopted and which, I might add, that the FTC and DOJ is opposed to, most recently in Michigan. We sent a letter to the Michigan Legislature last week which some of you may or may not be aware of, and if you're not, it's in your packet.

We'll also discuss reported discrimination against for-sale-by-owners and other fee-for-service business models by private parties.

We are lucky to have a distinguished panel to discuss these diverse issues. First, over here on my far right, we have Aaron Farmer. He's the owner Texas Discount Realty and recently named one of real estate's most influential people for his vociferous struggle against minimum service regulation in Texas.

Next we have Thomas Kunz, President and CEO of Century 21 Real Estate. He's been involved in virtually all aspects of the real estate transaction for over 30 years or around 30 years, I'm not sure which.

We also have over here to my immediate left Colby Sambrotto. He's the Chief Operating Officer of ForSaleByOwner.com. This is a web site that offers FSBO listings and also offers consumers who are trying to sell their house on their own a wide array of products and services to help them sell their house on their own.

And finally, we're pleased to have Wayne Thorburn down at the far end of the table. Dr. Thorburn has a Ph.D. in political science from the University of Maryland. He's been a professor. He's worked with HUD, the Department of Housing and Urban Development. He's the Immediate Past President of the Association of Real Estate License Law Officials and currently is

Administrator of the Texas Real Estate Commission.

Sam Licklider, who was supposed to be with us today, unfortunately will not able to join us.

Each panelist is going to give a brief presentation, and then we will have what I hope is a very lively discussion about these issues.

So, without further adieu, let me turn it over to Aaron Farmer.

MR. FARMER: Hello, my name is Aaron Farmer. I am the broker/owner of Texas Discount Realty out of Austin, and I would first like to thank the FTC and the Department of Justice, specifically James Cooper and Maureen Ohlhausen, for inviting me to be on this panel. I'm very honored. I appreciate it.

I'd first like to start with showing the organizations that I'm a member of. I'm a member of the National Association of Realtors, of course, the Texas Association of Realtors, Austin Board of Realtors, Houston, San Antonio, Arlington Board of Realtors and MLS, Brian/College Station, Waco Board of Realtors, New Braunfels Board of Realtors, Alice Board of Realtors, and finally, the Tyler Board of Realtors. Last year I paid over $4,000 in dues and fees to various realtor organizations. So, I consider myself a realtor.

I'd first like to get into my business, a little bit about my business model. I founded Texas Discount Realty as a one-man operation in Austin, Texas in the summer of 2000. We work, as today, primarily with sellers. We offer three different listing packages, a menu of services, if you will.

The first one and the most controversial one is our limited service package. We charge $595 now. When I first started, we charged $395 and have since raised our prices to $495 and then up to $595, and this is the most controversial package that we offer and the one all of the fights have been about.

The next service we offer, I call it our flat fee plus. We charge $495 at the time of listing and then a flat rate of $1,500 at closing for full-service assistance to the seller once a buyer is found. We don't do any additional marketing of the house other than putting it onto MLS, and it goes onto REALTOR.com, AustinHomeSearch.com, IDX sites, various places like that. Of course, out of all of our packages, we do offer 3 percent to the buyer's agent.

Finally, I have a full-service plan. Granted, I don't sell a lot of these, but we do charge 4 to 6 percent paid at closing, and yes, we have charged 6 percent to some certain sellers with very low-priced properties. Finally, we do offer rebates to buyers who do a lot of their own legwork.

How I got involved with all this was through the minimum service laws. Texas was the first state in the U.S. to pass a minimum service law in September of 2002, and I'd like to read a little bit to you of the first shot I guess that was fired through the minimum service laws, and this is directly out of the Texas Register.

It says, "This amendment adds new Section 535.2 to define minimum level of service that a consumer may expect to receive from a broker who represents the consumer. This clarification is proposed based on concerns raised by various industry organizations regarding limited service listings. A limited service listing agreement is an agreement by which a broker provides fewer services than those provided for in a traditional real estate listing agreement. A limited service agreement may provide for a menu of services or reduced fees for certain specified services rather than a full commission for the complete range of brokerage services generally found in a traditional real estate agency relationship."

Now, this is the State of Texas that is putting this out. This is not the National Association of Realtors. This is not TAR. This is the State of Texas who's telling me that I should charge a full commission instead of a menu of services, and of course, this outraged me, and this is what provoked me to go and do what I've done.

So, I filed suit. I did what any warm-blooded American does these days, I filed a lawsuit against the State of Texas and the Texas Real Estate Commission specifically. In fact, I believe Dr. Thorburn was the one who was served with the papers, I believe.

We were immediately granted a temporary restraining order. The next day, after this restraining order was granted, the State Attorney General's Office called my attorney and said, "How do we make this thing go away? How do we make this lawsuit go away?" We said, "Simply repeal the rule. Just repeal the rule, that's all we want." And immediately the rule was repealed.

There is a process, you know, later in 2003, it was repealed, but immediately, the wheels began in motion again to pass a new rule, so to speak, I guess that TAR and the TREC thought maybe could make it through the courts, I guess, and so we attempted to negotiate and were invited on several occasions to try to make a more consumer friendly rule or law.

Then, in February of 2005, a law that was deemed to be not consumer friendly by myself and by others was proposed through the Real Estate Commission again, and then this is when the Department of Justice and the Federal Trade Commission stepped in and wrote their letter saying that this new rule would harm consumers, of which I agreed with most of the letter.

At that point, seeing that we were probably in for another fight in the court system, Texas Association of Realtors goes through the Legislature and has a law attached to a general housekeeping bill 11 days before the end of session, and of course, Governor Perry signs the law into effect on September 1st of 2005.

So, now we get to the present day, and I want to talk a little bit about kind of who was behind these laws. 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. Something I find more egregious is in 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. But of course, NAR is neutral on the minimum service clauses.

But you kind of see a pattern here. This is not

Ralph Nader or John Stossel or any other consumer organization coming out for these laws. These are industry insiders who are pushing these laws through, and in fact, just the opposite is happening with the consumer rights groups, they are coming out against these rules and laws.

So, what are some of the arguments nowadays? You know, the first argument was, well, you know, we think agents should charge a full commission, whatever that may be, instead of a menu of services. Well, now the arguments for this new law have changed a little bit, and now they say, but we owe a fiduciary duty to our clients, which I absolutely agree with. I agree that we owe a fiduciary duty to our clients. But when I was going through school, I learned fiduciary duty meant you do what's in the best interests of your client ahead of your best interests.

If my client comes to me and says, "You know what, Aaron, I know more than you. I can negotiate my contract better than you. I can sell my house better than you. I just need you to help me with this, this or this," am I not doing my fiduciary duty by doing what my client is telling me is in his best interests?

So, another thing that I find that these laws, these minimum service laws do is we're essentially saying someone who just took 120 hours of real estate classes maybe online, who's maybe never bought or sold a house, who passed a real estate exam yesterday, is more qualified to sell a house than someone who maybe has been a real estate attorney for the last 30 years and is not a member of an MLS. That's what these laws are essentially saying.

Last year in Texas there was around 3500 complaints against traditional brokers in the State of Texas. How many against limited service brokers? None. Against limited service transactions? Zero. Never. There's never been a consumer complaint in the State of Texas on a limited service transaction. I think if the realtor establishment would really like to help the consumer, let's look at some of these 3500 complaints. Let's look at the root causes of some of those. Let's go after some of those instead of going after something that there's no consumer outcry for.

And what about competition? NAR says that there's competition in the real estate industry, and I agree. I agree there's a lot of competition in the real estate industry, but the competition is among traditional brokers. There's not the competition between traditional agents and alternative brokers. This is the kind of competition that I see practiced on me in my markets.

I've personally had brokers, agents, tell potential sellers that no one would show my listing. If they listed their house with me, no one would show the house. I have had brokers tell people that, hey, he's gone out of business. I heard he's going out of business soon. You know, I have had signs stolen. I've received hateful emails. I even had one agent who was ridiculed in public for being a discount broker at a public realtor event, and other agents around the country have had frivolous complaints filed against them, have had their listings removed from MLS for no reason, have been asked for every copy of every listing.

I don't really call this competition. I call this harassment and discrimination. Not only is it discrimination against us as brokers, it's discrimination against the consumer, the seller, who might be drawn to us, who doesn't feel like that they need a traditional agent. The discrimination doesn't even stop there. You know, it goes up to, you know, the State of Texas, who's saying that I shouldn't have a menu of services. I should charge a full commission.

Now, something that we're seeing go through some of the local MLSs now are exclusive agency laws that are being passed that says that if a seller chooses to have an exclusive agency listing, well, you can list your home on MLS, but it's not going to be listed on the REALTOR.com or any of the IDX web sites, and this is something that's happening through some of the local MLSs, including my home MLS of Austin, Texas.

So, what does the future of the industry bring? I believe that we must stop the lies and discrimination as an industry against people who are different, against brokers who are different, against consumers who want to do things different. We have got to remember that not every consumer is the same, not everyone fits in the same little box, not everyone has the same experiences as other people. There may be people who have bought and sold 20 houses over the last five years, which I have several of those clients, real estate investors, and we can't treat them the same as traditional agents have in the past.

Also, most alternative brokers are also realtors. I personally agree with the National Association of Realtors and the realtor establishment most of the time. Seventy-five to 80 percent of the time, I believe that they do great things for the communities. You know, in Texas, they have raised a lot of money for hurricane victims, and they do great things, and they provide great resources for me as a broker and me and my agents. They provide great resources and tools for us.

I think they have lots of value, and you know, I wouldn't be paying $4,000 a year if I didn't agree that I was getting value out of that, but I just don't agree with their definition of competition and how they practice it.

Thanks.

(Applause.)

MR. KUNZ: Ladies and gentlemen, it's a privilege for me to be here with you today. My name is Tom Kunz, and I am President and CEO of Century 21 Realty, LLC. I hope to show the unique perspective of someone who currently sells franchises to real estate brokers and provides services to affiliated brokers and sales professionals.

Previously, I have been president of an independently owned and operated real estate brokerage company in Southern California and also head of a software company earlier in my career. I am here to represent the over 137,000 small, independent businessmen and women who are members of the Century 21 Franchise System either as brokers or sales associates. We have more than 7500 offices worldwide, but half of our offices have 17 or fewer sales associates, and the median number of closed transactions by offices last year were 141 closed transactions. We're a big system but one that is proud to have so many small to medium-sized businesses in our ranks along with our larger brokers.

I also can speak from a real estate consumer's perspective, because in the past year, I sold my primary residence in California, moved across the country, purchased a new home in New Jersey, and I might add that precisely because of my 31 years of experience in the industry, I made an educated decision to work with a full-service real estate professional on both transactions, using both a seller's agent and a buyer's agent. I got what I paid for, too. Excellent marketing, local knowledge and advice and counsel throughout the process.

Since this is a seller's panel, I'd like to open by talking about the listing. The issue of who owns the listing is fundamental to this conversation. I will tell you in rather no uncertain terms that a listing is a broker's work product. It is interesting to hear some people espouse that the theory that selling a home is a simple process and that one must only list it with an MLS in order to make a sale, anyone who has ever sold a home fully appreciates that the listing is merely the first of many steps in the process.

A listing is the agreement between a broker and a homeowner that describes the manner in which a home will be marketed and sold. It often defines the manner in which the home will be presented, marketed to the body of prospective buyers. The terms of this agreement are, and we believe should remain, a matter for private negotiation between the listing homeowner and the broker of his or her choice rather than the subject of government regulation at the federal, state or local level.

If anything, the increased use of the internet by potential sellers and buyers of residential real estate have significantly increased the negotiation power of the listing homeowner in setting the terms of such transactions, which are already significant as a result of his or her control of the key asset, that being the home itself. It is our firm belief that the Federal Government should not get involved in dictating to state-licensed real estate professionals and homeowners on how these individual marketing plans should or should not be implemented.

Let me ask you, in what other industry do individual service providers negotiate a competitive price for their services and then aggressively market their products to the competition, sharing upwards of 50 percent or more of their fees to attract buyers? And in what other industry do individual competitors voluntarily make their inventory available to other industry participants, empowering the competition to avoid the cost of infrastructure necessary to produce their own inventory?

I'll tell you, the residential real estate industry is one of the last great industries where entrepreneurs can open up shop next door to the largest brokerage firm in town, join a cooperative group called an MLS, and share in their competitors' inventory, investing relatively little in startup costs and actually making a living.

This industry is dominated by small to medium-sized family-owned-and-operated firms, many handed down from generation to generation. There are more than one million sales associates and brokers operating in nearly 100,000 offices around the country. They are fiercely independent, yet with the voluntary efforts unique to the industry, they are cooperative with the competition in ways unheard of in any other industry that I know of. And why? Because cooperation best meets the needs of the consumer.

This is facilitated through a cooperative known as the Multiple Listing Service or MLS. Depending on who you ask, there are anywhere between 800 and 2000 MLSs operated in the country today. Long ago, the industry recognized that through cooperative efforts, brokers and agents can sell a consumer's home faster and more efficiently. If you look at the past several years in particular, where many transactional investments and those who manage them have failed, real estate professionals have done their job quite well. Simply put, the process works and works rather well.

In a performance-driven economy, I would say the real estate industry has outperformed. The simple fact of the matter is that the U.S. housing marketplace tends to be very efficient for consumers. When a real estate professional represents himself to a prospective home seller and makes a listing presentation, she does so with a full understanding of the very real pricing pressures and competitive issues. She presents her skills, resources, technology, marketing plan for the home. She also presents and explains her fees.

Generally, the typical homeowner will invite listing presentations from more than one agent. Through the cooperative effort in the industry, the internet empowers home sellers to be well educated on the market, attributes of various firms and specific sales associates, pricing, and the list just goes on and on and on.

Ultimately, the home seller selects the real estate professional, he or she, and her brokerage firm. Each real estate professional competes against the other ultimately in a very efficient process driven by the homeowner determining which fee and which services best meets the homeowner's needs. As you are aware, sales associates are almost always independent contractors, and our experience shows that all commission fees are negotiable. This very efficient price/value proposition process takes place thousands of times each day throughout this country.

Some sales associates are simply better than others, and they are able to demand and earn higher fees. Some choose to discount their fees, which may or may not reflect their service levels. At the end of the day, it is the homeowner who decides if the price/value proposition meets his or her needs.

The home seller ultimately controls the listing decision, which gives him a great deal of influence over the price of the services. As my father used to say to me, "People vote with their cash." Thus, the marketplace determines what is acceptable.

The fact is that the national average broker commission rate over the past dozen or so years has trended down from the 6 to 7 percent range down to 5.1 percent according to REALTrends, a leading industry consultant and analyst firm. That said, it is almost impossible to determine what the competitive price level is in any industry, especially one as dynamic as the real estate business, where there are highly individual services and rapid technological changes taking place every day.

If you are the listing broker, a number of states have determined that you must actually have a physical presence to properly represent sellers and provide the services necessary to manage the sales process. More than a dozen states have determined that one cannot properly represent a seller's interest while operating out of a call center located two states away. Thus, we have seen a recent uptake in minimum service requirement laws passed at the state level.

First and foremost, this is a states rights issue. I cannot, nor can you, dissuade the states from doing what they think is best for their respective citizens. They are acting to protect their customers or their consumers, not to shield the real estate industry in some way.

For the record, while we have no reason to believe that the states' motives are anything but well-intentioned, neither Century 21 nor our parent company, Cendant, believes that minimum standards legislation is truly necessary. We believe in consumers' rights to choose their real estate representation, or not, and we also believe that the full-service real estate model employed by the majority of our brokers presents a compelling value proposition that is recognized on its own merits by today's increasingly savvy consumers.

That being said, it is important to note that in the past five years, there have been a variety of alternative real estate models launched, which is strong evidence that competition and the ability to innovate are alive and well and thriving in our industry. And who benefits most from this competition? The consumer. They have more choices than ever before.

At the end of the day, the consumer should determine what is in his or her best interests, and in fact, when I look across residential real estate in America, I see a very dynamic and competitive industry that should be left free of Federal Government regulatory intervention to sort itself out.

Thank you very much.

(Applause.)

(Technical difficulty.)

MR. SAMBROTTO: Once again, my name is Colby Sambrotto. I'm the Chief Operating Officer of ForSaleByOwner.com, and I'd like to thank the FTC for, A, convening the workshop today, but B, for allowing us to take part in it. It is a privilege. Thank you very much.

I'm here to talk about ForSaleByOwner.com but also to talk about changes that are taking place in the real estate services industry, changes that we think we're playing a part in driving. ForSaleByOwner.com is dedicated, of course, to no-commission real estate, to not using agents at all, but we do have a section of our services that is predicated upon us closely interacting with realtors. So, while it does get adversarial at times when we talk about our model relative to realtors, we do work closely with them oftentimes.

Over the course of the last six years, we've built this business on the internet, primarily on the internet, although we do have bricks and mortar offices across the country. Over the course of those six years, there are a number of trends that we've noticed taking place, becoming evident in the industry, trends being driven by consumers and the changing aspect of consumer demands.

One thing is that consumers want unbundled real estate services. That's a certainty. The second and probably the biggest driving force in the growth of ForSaleByOwner.com is the fact they want to reduce transaction costs associated with buying and selling real estate. So, those are the two big factors that have driven the growth in our business. I think those are the two biggest factors driving growth in the real estate services industry today.

To a certain degree, the traditional real estate service industry, that end of the industry that's, you know, populated by agents, has resisted change I think to a certain degree. What most concerns us is that over the course of the last year and a half to two years, they seem to be actively moving to prevent us from offering services that consumers have a great deal of demand for. So, that's why we're here today.

One of the things I wanted to talk about -- and if I had my Power Point presentation, I would have a snappy page here to show you -- the internet is driving the change in real estate. Real estate, it seems to ForSaleByOwner.com, has changed more over the course of the last five years than it did probably in the previous 90 combined, and the reason that that change has taken place -- well, the change is being driven by consumer demand, but it's being facilitated by the internet, and the fact is that the internet brings enormous efficiencies to the process of buying and selling real estate, and those are the efficiencies that we use and deliver to the consumer, and the consumer seems to be reacting positively.

It is having an effect on commissions. We have heard that talked about already today, but you know, traditionally while we've seen commissions up above 6 percent, they are still between 5 and 5 and a half percent, and it's our feeling that if you're selling your largest asset, which is the case for most Americans, you should be able to hold onto that equity that you have worked so hard to build up over the course of the lifetime of being in the home.

The internet is an ideal platform for marketing real estate. You can post color photos. You can post virtual tours. In the case of ForSaleByOwner.com, you can put up a 3000-word description of your property. And you can have that information easily searched and frequently searched by buyers from their own homes on the internet. So, to a certain degree, we consider ForSaleByOwner.com and models like us to be a consumer version of the MLS. The MLS is kind of a closed corporate intranet. We're available to the whole public, to the entire public, via the internet.

I do have my Power Point now, so I am going to try to skip ahead.

Again, the change isn't being driven by new models. The new models are there in response to demand on the part of consumers.

A thumbnail sketch on ForSaleByOwner.com, it was founded in 1999. It is primarily a web-centric business. It started really with the URL and grew from there to the point now where we have 70,000 or roughly 70,000 listings across all 50 states. We're one of the largest real estate web sites in the world based on traffic, probably fifth or sixth if you rate them across all different categories.

While our core competency is no-commission real estate, a significant part of our business is centered around offering consumers reduced-commission access to the local MLSs in their area. So, in that sense, we do have a vested interest in talking about minimum service requirements, and I'll get into that a little bit later on.

We do have a portion of the business that also refers out real estate to agents through an affiliated brokerage. So, on a number of different levels, we interact with traditional real estate, but obviously we're focused really on no commission.

I think one of the biggest factors in our success, beyond the fact that there's enormous demand for our services, is that while we're affordable, we're also effective, and one of the things that we pay close attention to is the success rate of the sellers on our web site. So, we do poll them on a regular basis. When they take a listing off the site, we ask them did the home sell, and 65 percent of those respondents say that the home did sell, and it was due to the fact that we drove buyer interest to the ad.

The size of the market that we serve, although we consider all real estate consumers to be a target for our services, the size of the ForSaleByOwner market is often debated. The NAR typically pegs the size of that market at about 14 percent of all sellers, but there are competing studies that indicate that it could be significantly higher, as high as one in five sellers consummating real estate transactions without an agent. So, I mean, just from an anecdotal standpoint, it seems to us that that rate is growing, and it's growing significantly over the course of the last three years, three to four years.

The demand for our services has allowed us to grow at the rate we have. We grow on an average rate of about 100 percent year over year. So, we have grown very rapidly. We have been profitable from year one. We think those figures go a long way towards validating the efficacy of our model.

The fact of the matter is, if you're going to sell a $200,000 house and you're going to use an agent, you are going to spend, on average, close to $12,000 to sell that house. If you use ForSaleByOwner.com or a service like ForSaleByOwner.com, you're going to spend, on average, about $300. So, the extreme differences in price makes it very compelling for the average seller.

It's very easy for us to get our foot in the door when we can say, "Look, what do you have to lose? Give it a shot. Give it a shot for a couple months. Spend a couple hundred dollars. We're very effective, we're very affordable. You can always move on to the full commission approach down the line if you so choose."

As I alluded to earlier, there seems to be an effort to throw up roadblocks to change to allow competition to flourish in the industry. These are the three big ones, four big ones actually, and I think the first one, not to belabor it, is probably the easiest for us to knock down. There seems to be no rational way to defend minimum service requirements, so I'm not even going to bother, but that's something that we struggle with on a state-by-state basis. Certainly Texas is the biggest example of that.

Efforts to prevent our customers from getting full distribution of their EA listing, exclusive agency listings. When one of our customers opts for an MLS package, they go into the MLS as an exclusive agency. That means that they're obligated to pay an agent, if the agent brings a buyer, 3 percent, but we seem to be running into some resistance to how those listings are distributed after they get placed into the MLS. Most importantly, do the listings get uploaded to REALTOR.com, and there seems to be a degree of resistance to uploading them to REALTOR.com if they're an EA listing.

Second, something that we have had trouble with in the past is an overly broad interpretation of licensing laws at the state level. We have had states send us cease and desist letters, saying the services that you offer rise to the level of an agent. You should be licensed as such, and until you are, stop doing business. So, we did fight a legal battle in the State of California on that issue.

Finally, I think one of the things that drives some of the resistance to change is the fact that departments of real estate around the country are for the most part controlled by agents and realtors, and they're able to kind of rubber-stamp that legislation when it comes down the pike. I would point out the State of Texas as being an example of that with minimum service requirements. Six of nine of their board members, I believe, are agents or realtors, and four should be removed. I'm sorry, that shouldn't be there.

The forms that we think would help us to continue offering services that are competitive and there's a great demand for on the part of the consumer, repealing on a state-by-state basis minimum service agreements; ensuring that EA listings receive full distribution; eliminating onerous licensing requirements on a state-by-state basis that prevent for-sale-by-owner type models from existing and flourishing; ensuring that there's more of a balance in the departments of real estate in regard to who sits on those boards, so that there's maybe a more diverse set of professionals on the board helping implement real estate law around the country; and then again, number four is making sure that the EA listings get full distribution.

That's really it. Thank you very much.

(Applause.)

DR. THORBURN: Well, this is one time in my life where I'm glad that I'm technologically challenged, because I don't know the first thing about using that, and it won't break down on me.

I'm Wayne Thorburn, and I am here today as the Immediate Past President of the Association of Real Estate License Law Officials and also as Administrator of the Texas Real Estate Commission, and correspondent with Aaron on various matters, as you can imagine.

Now, however, my comments today are solely mine and should not be construed as an official position of either ARELLO or the Texas Real Estate Commission, and while the issue of competition in real estate is a most important one for regulators and for ARELLO, the organization has not taken any official position on modes of competition or the requirement of providing specific services in an agency agreement.

I would start by saying that about 50 years ago, a gentleman by the name of Richard Weaver wrote a very important book, and its title says everything. The title of the book was Ideas have Consequences, and it's an important reminder that just as ideas have consequences for future action, so, too, despite what the Mad Hatter said, words do have specific meanings, and I would urge everyone to concentrate on what is actually the meaning of the word "agency" and what is meant by the concept of representation, because I think those are two of the things that sometimes, in some of the perspectives that you have heard today -- and you will hear from others, including some federal officials -- there seems to be a sliding over of what is the concept of agency and what are the fiduciary responsibilities of one who holds one's self out to be an agent of another.

I would just as a quick analogy say that I think Professor Hahn was making a very poor analogy when he made the comparison to airline tickets. I think when you consider, I came up yesterday, certainly I went on the internet and I purchased an airline ticket. I had a service that was delivered to me yesterday, and that was the end of that transaction. It was a one-time event on one day, quickly delivered. What we're talking about here, I think, as Mrs. Whatley pointed out and others have pointed out, is not a one-time occurrence, but rather, a transaction, over time, that involves a number of players working together, all of whom are directed -- again to use her analogy -- it is the director of the play who is responsible for all of the activity that takes place in that event. It is the real estate broker or salesperson who enters into an agency agreement with a client who is responsible for making sure that all those elements come together.

Let me begin by saying that it has been accepted for some time that a real estate broker, while acting as an agent for another, is a fiduciary. As a fiduciary, a real estate broker is held to owe specific duties to his or her principal, including, as was cited earlier, loyalty, disclosure, confidentiality, reasonable care and diligence, and as an agent, the broker has agreed to provide representation to his or her client throughout the entire real estate transaction, not solely on the day that the agency agreement is signed.

In its last regular session, as Aaron has pointed out, the Texas Legislature enacted a provision whereby a broker who obtains an exclusive right to sell or an exclusive agency agreement to represent a party in a real estate transaction is that party's agent. Such a person may not instruct another broker to negotiate directly with the first broker's client. Those of you in the audience who are attorneys are very familiar with this concept. If someone is represented by an attorney in any kind of a legal matter, it is not appropriate, without the consent of the other attorney, for that individual, that attorney, to talk directly to your client, and that is the similar situation in our state law and has been there for some time.

Also, the individual must inform his client if he receives material information related to a transaction and must answer the client's questions and present any offers to or from the client. Answer questions relating to the transaction, presents any offers to or from the client, and provide any material information that comes into that person's possession relative to the transaction.

Now, these seem to me to be rather basic characteristics and requirements of representation, the kinds of services that virtually all consumers would expect when they do what? They hire someone to represent them as their agent in an undertaking.

Now, under our system of federalism, the responsibility for licensing and regulating real estate professionals has been placed in the hands of the various states, and as regulators, we are required to apply state statutes and set forth the requirements for obtaining and retaining a real estate license.

However, somehow it appears that certain individuals here in Washington do not believe that these basic elements should be requirements for representation, that an individual can claim to be an agent without performing any of these duties for the person they are claiming to represent in a real estate transaction.

Perhaps it would be more helpful if their emphasis were placed on what I would say is preventing false claims by those who sign an agency agreement with a client, promise to provide representation, place the property on the internet, and then walk away from any further involvement in the real estate transaction. Frankly, I have no problem with this alternative business model as it has been called, except that it is neither agency nor representation. Simply stated, it's a marketing or advertising agreement that an individual has with a client.

I think that brings us to a related issue which lies beneath the surface of much of the involvement of the federal agencies and their efforts to support alternative business models for consumers. Somehow, there has developed a belief in Washington that there is only one way of effectively marketing residential real estate, and that is through the private entity called the Multiple Listing Service.

Now, as state licensing agencies, we do not regulate the MLS. It is a private, voluntary organization which establishes its own membership criteria, as you've heard earlier today. Now, since the FTC and the DOJ apparently are unable to coerce this private entity into changing its criteria for membership to meet their demands, they are approaching the issue indirectly by attempting to influence state legislatures and regulatory bodies.

Let's just look for a moment at competition in the marketing of residential real estate. Not only is there this entity called the MLS, but every daily newspaper in the country -- this is one from the Austin paper -- runs classified and display ads that can be placed by owners, by agents, by others, and I think if you talk to the newspaper industry, they would tell you that this is an effective means of selling residential real estate.

In addition, I went to my neighborhood supermarket, and I picked up something called Homes of Greater Austin, For Sale By Owner, Homes & Land of Greater Austin. Individuals pay good money to place advertisements in these publications. Why? Because they believe that they are effective methods of marketing and advertising their residential real estate.

There's been a lot of discussion today of the internet. Well, let's look at the internet for a minute. Here's just a few, you know, there are pages and pages. This is called American Home Guides, this is the Austin Home Network, this is House.Info, this is

ForSaleByOwnerandBuilder on HomesByOwner.com, and now what's been happening is just like in the timeshare industry, the major entities are getting involved in this. So, very respected trade names are now entering into the process.

Here's Yahoo Real Estate, here's Lycos Home Sales, and of course, the inevitable eBay Real Estate that is also available. The next thing you know, it's going to be amazon.com real estate. Is there competition? Certainly there is, and it's not just REALTOR.com or the MLS system. There are any number of other entities that are available for the marketing and advertising of real estate.

To pretend that the MLS system is the only way to market real estate belies the reality of the competition present throughout the United States. To purport that an agent who claims to represent another has no fiduciary duty to provide minimum service runs counter to both public expectations and negates the ability of states to effectively license and regulate real estate professionals.

I think it's safe to say that most state regulators have no problem at all with individuals entering into marketing or advertising agreements with clients to promote the sale of real estate. In fact, in most states, one does not even need a real estate license to do so, but I do object, and so do many other regulators, to individuals claiming to be an agent and then refusing to perform the most basic duties of representation.

I think, in conclusion, that is a matter which should be of interest to the Federal Trade Commission in ensuring that the public is truly receiving the service for which they have entered into an agreement, an agreement for representation.

Thank you.

(Applause.)

DR. COOPER: I want to thank all the panelists for very enlightening presentations.

Let me just start off our discussion here with -- this panel's about competition among sellers' brokers, so I just want to talk, go back to first principles, how do sellers' brokers compete? How do they compete for listings?

What I have in mind is how price-sensitive are consumers? Do they often negotiate for commission? How many listing brokers will they typically look at if they're trying to sell their house? Are they typically under time pressure? We heard earlier that often they're under a time pressure to sell their house and move on to the next one because of some sort of exogenous factors going on. So, I will just turn it over to each of you to discuss -- we have different business models here, or maybe we don't -- and find out how this competition really works.

MR. FARMER: Well, I would first like to touch on some of Wayne's comments about the advertising. If you look at his -- some of his examples, virtually every house in those examples are in MLS, and I've done some informal polling in my marketplace with some different title companies, and I know Colby said, you know, that 15 to 20 percent of all homes are for-sale-by-owners.

In my marketplace, I'm finding that it's less than 5 percent. Very rarely, if you look through Wayne's example from the Austin newspaper, virtually every one of those properties will be in MLS. There are probably no more than 10, 15 for-sale-by-owners out of that whole book. So, the MLS is the marketplace in most areas.

As far as competition goes, you know, we get a lot of our leads through the internet, but also referrals from past clients because we do a good job. You know, we try to personally go out there and touch every consumer that we go to. We don't just sit behind a computer like some limited service brokers do.

Now, my company may be different than some companies. I mean, one of my agents goes to every one of our listings, and so we do offer value.

I'll turn it over to Tom.

MR. KUNZ: Well, I guess I probably sit in a little bit different position, but I would dare say that if you look at our franchise organization and the realtors that we have in our organization, you would probably find pretty much most of the models that have been talked about here today, with the exception, we haven't quite figured out how to franchise the for-sale-by-owner person, but maybe we should look at that. I don't know.

In terms of the number of agents that a consumer would have sitting in front of them, I don't know that there's any number that has been put there. I can tell you, as a consumer, I sat and listened to seven agents do their listing presentation for me before I made a decision as to who I was going to have represent me in the property that I had, and I can also tell you that as a consumer, that there are a number of things that I look at, especially because, as you heard, in my transaction, I was moving across the country, and I was taking on a job that was very demanding in terms of time, and I wouldn't have sold my home had that not been the case, and I think that's the situation that a lot of us tend to forget, is that most transactions happen because of events happening in people's lives. Most people don't get up in the morning and decide to just move.

I did choose a full-service person and I was willing to pay those fees because of what I was asking that person to do, and that was not something that they came in and said that this was just the fee that you have to pay. It was something that we sat down and talked about and negotiated, because I told them exactly what I wanted, and I wanted services over and above what would be typical in a normal transaction, and that was that I needed somebody who could be at that home when I needed somebody there to help me move across the country. And I don't think I'm too unlike a lot of the services that are out there.

In terms of marketing and advertising, I mean, come on, anybody that has any type of ability to put -- if I'm going to go out and represent somebody in the marketplace in terms of marketing their home, that's what they're hiring me for, and so if I can expose that, I want to expose that to as many possible buyers as I possibly can, and that's one of the things at Century 21 that we look at, is that we, because of our name recognition in the marketplace over the last 30-plus years, you know, we have a large draw to our web site, and in some cases, it might even be a situation where, you know, we have as many consumers come to us as some of our major competitors or even, you know, the industry web sites.

So, I think that a real estate agent really is sitting down and looking at all of the areas that they possibly can list that property to put out there, because at the end of the day, what we're looking for is somebody who's taking a listing, is to see how many buyers we can bring to that table and how we can negotiate the best possible price in the quickest possible time period for the consumer based on what they're looking to get out of it.

DR. COOPER: Colby?

MR. SAMBROTTO: We acquire our sellers off the internet primarily. We spend a significant amount of money on paper click advertising, but in addition to that, we get a significant number of customers who are referred to us after talking to a friend who has used our service and who has seen our yard sign in a neighbor's yard or in their neighborhood.

Our sellers are conscious of price, and I think they do shop around, to answer your question, but I don't think that price is the biggest motivating factor. Certainly there are services like ours that are cheaper. I think the primary motivating factor is, A, not having to pay 5-6 percent to an agent, but B, making sure that the company that they are paying to market their property has the reach to actually sell that property.

So, people are cognizant of, yeah, price, but also how many people are on the site. So, they are very interested in the number of visitors we get to the site and how many buyers we can drive to their listing, and those are the two big motivating factors for ForSaleByOwner.com.

DR. THORBURN: I have no comment.

DR. COOPER: Yeah, we will leave you out of this one.

Aaron, this goes to you and perhaps Colby, but how often when you are competing to get a listing, say, is the consumer's next best option going to be going with more of a traditional broker? They are trying to weigh it. Should I go traditional, should I go MLS only, should I go FSBO? What is the marginal consumer like, I guess to use an economic term here?

MR. FARMER: Sure. Well, you know, I'm not knocking traditional agents at all. I think there's a lot of great traditional agents out there that earn their 6 percent, earn their 5 percent or whatever, it is what they charge, but there are also a lot of agents that charge those same rates that have the 3P marketing plan, which is put up a sign, put it in MLS and pray. You know, there's a lot of agents out there that offer little or no value to the transaction, and unfortunately, for the traditional industry, that's the majority of the agents that we're competing against, and they see that, hey, you know, Texas Discount Realty will do the same thing, but they won't charge as much.

MR. SAMBROTTO: Well, our customers I think, given the fact that they're on our site, they have gotten to our site, are predisposed to not paying a traditional broker or agent the typical 5-6 percent. The vast majority of our customers want to pay no commission whatsoever. Those who do understand that they might benefit from the marketing power of the MLS are interested only if they can pay a reduced commission, and in our case, that's a 2-3 percent commission to the buyer's agent as opposed to the traditional 5-6 percent. So, they are definitely interested in saving on the commission if they have to pay commission at all.

DR. COOPER: Related to that, I just want to follow up. Your site obviously offers both the FSBO, the pure sort of I'm going to do everything on my own, but you also offer the MLS listing only.

MR. SAMBROTTO: Right.

DR. COOPER: I guess one question is, what percentage of your clients, say, start out as an FSBO, then go to MLS, and I guess related to that, what would be the marginal impact of being on the MLS versus just being a FSBO as far as if you have data or have anything anecdotal.

MR. SAMBROTTO: Sure. Well, less than 10 percent of our sellers utilize the MLS package, but still, you know, to date we've done something like 5000 MLS listings nationwide, reduced-commission MLS listings, and the way that works is we have a network, proprietary network of listing agents that we farm that work out to. They put it into the MLS for a flat fee, a portion of the fee that the consumer pays us, and then, of course, the buyer's agent is still incentivised to the same degree that he or she might otherwise always be incentivised. They still get that 2-3 percent commission if they bring a buyer that the seller accepts.

At the same time, they're listed on ForSaleByOwner.com. We don't allow people to just do MLS listings. We bundle them together, an EA listing on the MLS in conjunction with a listing on ForSaleByOwner.com.

DR. COOPER: Okay. Do you have any idea what the marginal impact of that is? Say if I'm on the MLS, I have a higher probability of selling my house versus just being on the web site as a FSBO?

MR. SAMBROTTO: Right. We haven't to date tracked how including the MLS in addition to the ForSaleByOwner.com listing improves your success rate. That's something we've just started tracking. Today we've only tracked, has it sold via ForSaleByOwner.com? Do you as a seller believe it sold via ForSaleByOwner.com?

DR. COOPER: Okay, Aaron, I have a -- sorry to keep picking on Colby and Aaron here, but I want to ask a little more about that, the fee for service that you offer.

The people who come to you and say I just want the MLS only package, how often do they come back later on? They get the MLS only package, they think they're ahead of the game that, you know, I can take care of this, I can sell my house, but later on they realize, maybe I do need a little help here. Does that happen often?

MR. FARMER: I would say it's less than --

probably about 30 percent of the time that the consumer who does a limited service listing with us will come back and ask for more services, but it does happen. You know, I would guess, you know, somewhere in the 30 percent range.

But you know, the demographic of our typical limited service consumer is someone who is generally more educated. Our average list price in Austin last year was $295,000, where the average list price overall was about $160,000. You know, they've generally -- very rarely do we get first-time home sellers or first-time home buyers that are attracted to us. It's people who have been through several transactions and who know how the game's played, so to speak.

DR. COOPER: Yeah, go ahead.

MR. KUNZ: Sitting here listening to this, it's very interesting, and I referred to this in my remarks, too, and I think this is the perception of a lot of the consumers in the marketplace, is that all I need to do is get my home on the MLS, and everything is taken care of and it's done, when in fact, the majority of what probably a real estate agent really does happens at the time when there's an offer put on the table. From that point until closing, there's a tremendous amount of effort that's put in, a tremendous amount of money that's expended to go out and make sure that the transaction gets closed, and yet we still keep focusing on just the aspect of, okay, let's put it on MLS and put it on some kind of service that gets it out there.

Now, I think if we're going to look at what a real estate agent does and how the transaction takes place and the fees that get paid for that, then I think we need to look at the whole transaction, from the time that a consumer starts to decide to put a home up for sale or a consumer decides to buy a home until they actually move into that property and maybe even until the next time that they put the home back up for sale, and that's the transaction process I think we need to look at if we're really going to get to the facts of what really happens in a real estate sale transaction.

MR. FARMER: I couldn't agree more, but I just think that we can't put every consumer -- not every consumer is the same. I mean, in general, I think that, you know, no more than probably 10-15 percent of the consumers out there are even qualified to do a limited service listing and should do a limited service listing.

DR. THORBURN: James, if I could just throw out a few numbers and calculations here.

DR. COOPER: Sure.

DR. THORBURN: If we accept what Professor Hahn indicated earlier was about 23 percent of residential sales occur without the use of a broker, and then we keep in mind, also, the terms "broker" and "realtor" are distinct terms, and a realtor is a member of the association that Mrs. Whatley represents or did represent as president, and there are other people out there with licenses who are engaging in real estate brokerage who are not members of that organization.

Also, in most communities, although not all, to get into the Multiple Listing Service, a broker has to be a realtor. I don't think it's universal, but it's almost everywhere. So, if we have at least 23 percent of all sales that are occurring without a broker, there's also a percentage that's unknown above that that are occurring without a realtor. So, to focus solely on the MLS and the realtor I think is missing the entire picture.

I'll give you another perspective. The latest numbers I heard is that there are 2.3 million individuals in the United States who have a real estate license, broker, salesperson, whatever. Correct me if I'm wrong, but I think maybe the National Association of Realtors is at like 1.1-1.2 million? What is that, about 50 percent? In my own state, we have 135,000 people who today have a license as a salesperson or a broker. There's slightly over 70,000 members of the Texas Association of Realtors.

So, while I will certainly concede that the Multiple Listing Service is an important ingredient in this whole equation of how there's competition in real estate, and while I will agree that the National Association of Realtors is the premier trade association for real estate professionals, let's not lose perspective on the fact that there are real estate transactions occurring outside of the MLS, outside of use of a member of the National Association of Realtors, and I think all this emphasis on the MLS as the only vehicle to market and sell homes has put a smoke screen in front of a lot of Washington bureaucrats who focus on that and realize that they can't perhaps do anything to affect that private organization, so they're going roundabout to state regulators and legislatures to impose their position on them.

DR. COOPER: I guess I'll jump ahead, since you kind of jumped ahead a bit here, and ask this question to you, Wayne.

You talked in your presentation and you just talked here that there is certainly a distinction between what state regulators do in their laws and their duty to protect consumers versus what the MLS is. The issue you posited that we bureaucrats -- I don't include myself in that -- we're trying to get to the MLS. I have a question.

When you issue regulations and you're worried about the consumer, there's a marketplace out there, and there are marketplace realities. Is it necessary to take those into account when you are trying to think about how my regulation is likely to affect consumers? Yes, there's an MLS, yes, state law has no effect on it, but it's there, and those rules are there. So, if I issue a rule, given the MLS, it's likely to have this effect on consumers. Doesn't that need to be taken into account?

DR. THORBURN: Well, yes, I think it does, and I think also what has to be taken into account is what the individual is representing themselves as doing, and that's where I get back to this definition of "agency," the definition of what it means to be a fiduciary, what it means to be representation.

In our state, newspapers don't have to have a real estate license. The magazines I showed you don't have to have a real estate license. If I went to an individual and said, I'll give you a sign, I'll put you on my web site, I'll draw up an advertisement and put it in the Austin American Statesman, I don't need a license for that, because I'm not claiming to be their agent. I'm not saying that I am providing them with representation through a transaction. All I'm doing is giving them marketing and advertising advice.

Frankly, I think if, you know, the model that is being presented here was presenting itself as an advertising, promotional, marketing model and agreement, we wouldn't have any problem with it. Frankly, I don't even think you'd need a real estate license for that, because you are not holding yourself out as a fiduciary, as an agent providing representation.

DR. COOPER: Okay, well -- I'm sorry, Colby.

MR. SAMBROTTO: Well, I would like to respond, because in regard to minimum service requirements, there's an enormous demand on the part of the consumers to be able to use the MLS. They respect it. There's a prestigio marketing power associated with that in the mind of the average consumer, so they want to get their listing in there.

If they're unwilling to pay a listing agent 3 percent, they don't think it's worth 3 percent of the equity they have worked so hard to build up in their house, we came up with a plan where the listing agent gets a flat fee. The listing agent is providing a great service. They oftentimes are providing them with advice in regard to how to market that home, how to field offers from buyers' agents. The buyers' agents are still getting the 3 percent.

But we don't understand why if you're worried so much about the consumer, just make a disclosure law. If you're worried about the consumer is signing up for something and not getting the services that they thought they were getting, it could easily be solved by just asking them to sign a piece of paper saying I understand what I'm paying for, I understand I'm not getting these additional services, but I am getting a price break.

So, it seems to me that you would have to take that into account at some level if you're concerned about the consumers of Texas who are trying to sell property and keep as much equity as possible in their pocket.

DR. COOPER: Well, let me move into the minimum service issue here. I've talked about this at a couple of forums, and I have been to forums and I've listened, and I have heard minimum service requirements alternatively referred to -- the analogy of merely requiring the pilot to check the weather and inspect the airplane before he takes off, and alternatively I've heard kind of along the lines of what Tom Barnett said earlier today, is going into a restaurant and being forced to have an appetizer, a salad and a desert when all you want is a main course. So, which is it? I open it up to all of you.

MR. FARMER: Well, I think Wayne made an important analogy earlier when he talked about lawyers, you can't talk with another lawyer's client, but he did put the caveat in there, "without consent," and I think that that is the simple cure to all these minimum service laws, like Colby had said, is let's have some consent. Let's have a disclosure form. Instead of throwing the baby out with the bath water, there's easier ways to do it.

MR. KUNZ: Well, I think having been around this industry for a long time that the consumer has really spoken as to what they feel about service, and they will go out and talk to their friends, they will talk to their neighbors, and they'll talk about if you had a real estate transaction, who met your needs and who serviced your needs? I don't think we need to have legislation that says that, you know, that you have to do 15 different things in order to serve a real estate transaction.

I think there are fundamental service ideas that are in the marketplace right now, and a consumer understands what they're -- hopefully they understand what they're really trying to get at, and that is to sell my home, market my property, because I have some other thing going on that I have to take care of. In my case, it was moving. I had to get out -- I had a job change. So, I don't think we need legislation to sit down and say what good service is or what a minimum service level should be. I think that those are things that each company, each agent and the consumer are going to make that determination by themselves.

DR. COOPER: Colby?

MR. SAMBROTTO: From our standpoint, there seems to be no demand on the part of the consumer for those types of laws. I don't discern any demand for those types of laws coming from our listing agents in our network. Certainly the buyers aren't involved in that, so they don't care, but I mean for me it's a bundling of services. It doesn't make any sense. There's no demand for it, and it seems to only kind of pop up this antiquated commission structure that no one -- well, no one outside of traditional real estate and no one who's a consumer really wants.

DR. COOPER: Wayne?

DR. THORBURN: Well, I think it goes back to terminology and I think what individuals are purporting to be providing to their clients or their customers, and that's where I'm really focused, again, on what is the meaning of being an agent, what is representation throughout a transaction, and does the state, the various 50 states and territories -- I know we're in the District of Columbia, and I don't want to in any way overlook them also -- do they have the ability to define what it means to be an agent, what are the obligations, the minimum obligations, and what we're talking about here really I think has to stress the word "minimum."

Answering questions, presenting offers, providing any information that comes in to their purview to their own client. Those are what I would regard as simple essentials of what it means to be representing someone else. Once again, we don't have any problem with a new business model that offers only these limited services as long as they're not claiming to be an agent of another, claiming to provide representation.

MR. FARMER: I believe that the consumer should have the right to waive these and not have the state force these fiduciary duties on them, and if a consenting adult, so to speak, you know, says -- an informed consenting adult says, "I don't want this stuff, I know I have other options, but I don't want them," I think that should be legal.

DR. COOPER: Colby

MR. SAMBROTTO: The only thing I would add is it's kind of a footnote to our model. We are devoted to no agents, no commissions, and we are going to make an end run around the entire system, which is our goal in the long term, so we are not really concerned with that end of the industry, because ultimately it won't move to strengthen ForSaleByOwner in our minds.

DR. COOPER: I have a question from the audience, and I swear I didn't make this up, but Wayne, doesn't the law of agency in Texas permit the principal to define the scope of his agency in the sense that you can -- if I'm the principal, I'm the homeowner, I want to -- I can define how much my agent is going to do for me from the git-go, and if I just want him to do a couple things, that shouldn't violate the principal/agent duties or the fiduciary duties that go along with agency.

DR. THORBURN: Well, within certain limitations, that's true, but there is also a provision in state law that says that an individual who is represented by another broker, you cannot engage in negotiations directly with the principal. So, that I think is one of the points that overrides that ability of the principal to give directions to his or her agent in a situation.

MR. FARMER: I know in Texas law, when I've been through this with Wayne at the several commission meetings over the last three years, and actually, Texas statute defines negotiations, this is Section 535.15, I can quote the law by heart, but is simply bringing a buyer and seller together is negotiations in Texas. That's how it's defined under that section anyway.

DR. COOPER: I guess keeping on this theme, is there a distinction that's being blurred here in these minimum service rules between qualifications, core fiduciary duties, such as honesty, fair accounting, loyalty, that sort of stuff, and then service provision?

For instance, I'm an attorney, and I know that if I engage a client, I have certain duties to them, but then that client comes to me and says I just want kind of a discrete -- some advice on estate planning. Well, I can give him that discrete advice and send him a bill, but it also doesn't mean I have to write their will for them and set up trusts for their children. And maybe that's an extreme analogy, but as long as I do those tasks honestly and keep my confidences, I haven't violated any of my duties.

What's the difference between the core fiduciary duties that an agent has, but as long as he performs those tasks, doing those core -- keeping with those core fiduciary duties in mind, where has the agency relationship gone wrong?

DR. THORBURN: Well, I just think that what the state legislatures in a number of jurisdictions have decided is that there needs to be further definition of what those fiduciary duties are and to clarify, and in the clarification, they are not going beyond what I believe is the common perceived public perception of what is representation in a transaction, and again, stressing what it is is answering questions related to the transaction, assisting in the developing of offers or counter-offers, maybe phrased differently from one jurisdiction to another, but normally it also may be this presenting all information that's relevant to the transaction. All it is is spelling out what are those core fiduciary responsibilities.

MR. KUNZ: You know, in the company I had in San Diego, I didn't need a government agency to sit down and tell me how my agents need to service the customer, but I spent money going out and talking to consumers that we had done business with, other companies in our marketplace had done business with, and talked about the transaction and asked them what they wanted out of that transaction, and we had a list of about 22 or 23 things that every one of my listing agreements had in them that said these are the functions that we are going to provide to you and these are the services that we sat down and talked to consumers about and said, if we do not provide these kind of services to you, you have the right to take back your listing and put it with anybody else that you would like to.

I didn't need a regulatory body to sit down and tell me that that's how good business runs. I was an entrepreneur. I sat down and decided that if I was going to put a business in place in that marketplace and within this industry that there were certain things that I had to provide the people that I was going to service, and so we sat down and did that ourselves, and I don't think that I was, you know, the extraordinary office that did this. I think every one of the competitors that I had in the marketplace in San Diego basically had the same kind of things that they went out and talked to their prospective sellers with.

So, I don't think that we need to really have regulatory issues that come up and say, "You must do this, you must do this or you must do this," or "Here is a minimum." Where is the minimum? Where do you draw the line? So, I still say that I think that the consumer will speak, and they will speak with the dollars they have, or in the seller's case, with the homes that they're going to put on as inventory for us to go out and work with, and I think that entrepreneurs are getting in the business, business people, and independent contractors, called agents, know they have to provide a certain level of service in order to gain the trust that a person's going to have to give them the biggest asset that they have and ask them to go sell that product for them because they have to go do something else with their life.

MR. FARMER: Again, I agree with Tom, but I also want to point out that not providing a service for reduced fees for people is a service. By not providing a service, I'm providing a service to consumers who are coming after me and seeking me out.

DR. COOPER: Recently, in the last week or so, I think, a task force set up in Ohio, set up to look at these minimum service requirements or the proposed minimum service requirements, a task force that was -- the Ohio Association of Realtors, I believe, came up with a recommendation of sort of a disclosure and waiver model. You have these core minimum service duties that the real estate agent is supposed to provide, but as long as there's disclosure and informed consent, a consumer can waive those.

Is there anything wrong with that, or would that work? And I think I know the answer of these three, but

I'd ask Dr. Thorburn down there about this kind of a disclosure and consent. If we're worried about consumers not getting what they think they're paying for, which is something that was in your opening remarks, would that be something that could solve this?

DR. THORBURN: It's possible. Certainly given our state law, it's not applicable in our particular situation in Texas. It's the decision of the Legislature has been to spell out what is representation involved with an agency agreement, but I have not had an opportunity to read the Ohio report, although I did receive it. I think probably in a number of jurisdictions that may be a way that they may wish to approach this question. So, I can't really comment in any great detail, although I think it is a viable option for consideration in a number of jurisdictions.

MR. FARMER: I just wish I could have some of the money back from my attorney and the hours that I spent sitting in TREC board rooms trying to make this particular compromise that, hey, let's just have some informed consent here, and you can pass your minimum service with informed consent. That's all we were arguing, and that was a simple compromise that we wanted.

DR. COOPER: I want to switch gears a little bit here away from the minimum service area. We're rapidly running out of time. I want to talk a little about sort of private conduct that we hear reports about. Aaron talked about it in his introductory comments, and I think Colby touched on it a little bit, discrimination against exclusive agency listings.

Now, back in the 1980s, the FTC gained a series of consent decrees against various local MLS or real estate boards and their MLS policies that would exclude exclusive agency listings, and here we are 20-some odd years later, and we read the reports that exclusive agency listings, while they're being accepted now, they're not being sent into REALTOR.com or put on the web site.

A recent NAR report shows that 80 percent of home buyers check the internet as part of their home-buying decision, and the most popular web site is REALTOR.com, and then after that is the local MLS web site. So, exclusive agency listings are at least arguably being excluded from these important marketing tools with important exposure.

You know, I guess I'll ask this question to anyone who wants to answer, but number one, how prevalent is this? Is this something that's going on? Is it widespread? And are there any justifications for this? I mean, I am aware that apparently exclusive agency listings, you know, they're different from exclusive right to sell, and in some MLS rules, it's marked differently in the MLS just because it presents a special risk to cooperating brokers, perhaps. So, I'll just throw that out there.

MR. FARMER: The only risk that or the only reason that I have been told is that it possibly could create confusion among home buyers. That's been the only rational explanation that I've been given in Austin, and I know there's several other MLSs. I know Cleveland, Raleigh-Durham, some other MLSs have enacted this as well, but as far as reasoning, it makes no sense to me.

DR. COOPER: Tom, with respect to the exclusive agency listing, is there any reason that the exclusive agency listing is inherently more risky or more suspect for the cooperating broker than the exclusive right to sell?

MR. KUNZ: I don't know. You know, I think that when a real estate agent sits down with a prospective consumer and talks about how they're going to take a listing and what does that really mean, and as I said, spells out the services that they're going to provide for that, for whatever compensation that the seller is willing to give or pay for the services that they're going to get, then I think that that almost becomes a mutual negotiating point in terms of letting the consumer know what does that mean to them and what's it going to mean to their property if they put it out there. So, I don't know.

I don't know that there's enough information that I've seen that I could sit down and say that it's going to be detrimental one way or the other.

MR. FARMER: I also want to note that this is not something that just -- this exclusive agency discrimination, if you want to call it that -- is not something that just affects the alternative broker model. In Austin, one of the top agents in Austin advertises, "If you sell your house yourself, you pay nothing." He's actually a RE/MAX agent, and this is how he competes to get listings, and he's a traditional agent with a traditional company, and you know, it affects him as well, because he's technically doing an exclusive agency listing. While he may not list it that way in MLS, that's what it is.

DR. COOPER: Do you want to weigh in on that?

MR. SAMBROTTO: Obviously there's demand for it. Consumers want those types of listings because they retain the right to sell by owner, and that's central to the model that we have. It's central to the package that we include on our web site, which bundles an MLS listing with for-sale-by-owner. A sale through MLS, you pay 2-3 percent; otherwise, you pay no commission.

I understand the agent's concern is the possibility that you could put a significant amount of time marketing that property and then not be paid for that, but I think that's the nature of the beast, and I think ultimately it's about competition and choice, and ultimately the winner in that type of a fight is the consumer even though real estate professionals may be forced to sometimes work a little harder for less. That's just the nature of what the consumer's demanding.

DR. COOPER: Okay, I'll finish off this last question here I got from the audience, and this is directly to Tom, and I think I would be remiss if I didn't ask it.

It has to do with who owns the listing. It says, if I list with Century 21, why do you consider the listing to be your inventory? If I were to go to The Washington Post and put a home in their classified ads, that home listing doesn't become The Washington Post's inventory. So, why do you consider my listing your property and not the homeowner's property?

MR. KUNZ: Well, first of all, I don't consider it mine as Century 21. I consider it the broker's who signed the agreement. The reason I consider that is because the consumer has sat down with that individual and they have worked out an agreement. It's a contract, it's signed, and it states the facts that are pertinent to that particular contract, and therefore, they've contracted with us. If that doesn't in any way, shape or form say that that product now is mine to go out and market because the consumer who owns that product has decided that based on their exposure to me and other competitors in the marketplace, they feel I might do a better job of making that happen. So, therefore, I would look at it as my product.

DR. COOPER: Okay.

Well, we're about five minutes over, but I think that leaves everyone plenty of time to get lunch and get back here for the afternoon panel. I want to thank everyone for their hard work.

(Applause.)

MS. OHLHAUSEN: I just wanted to remind everyone, the packet has a list of local eateries. If you need more information, it's outside. We'll reconvene at 1:30, and you will need to go through security again. Thanks.

(Whereupon, at 12:17 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(1:30 p.m.)

MS. OHLHAUSEN: Well, thank you very much to everyone for returning so promptly. I just want to remind you, please turn off your cell phones. Lee mentioned it, and I am just going to reiterate. Some of the feedback we are getting on the microphones is from the cell phones. So, if everyone would please turn them off, I think it would be kind of an easier listening experience for everyone this afternoon.

To start our afternoon session, I'm pleased to introduce Commissioner Jonathan Leibowitz of the Federal Trade Commission, without further adieu.

(Applause.)

COMMISSIONER LEIBOWITZ: And thank you, Maureen, and if any of you didn't get a chance, there's a terrific little handy two-pager here called "Where to Eat in the Vicinity of the FTC Building," and it rates restaurants according to price.

MS. OHLHAUSEN: We're all about the consumer.

COMMISSIONER LEIBOWITZ: And I like the Capitol City Brewing Company and Corner Bakery.

Anyway, good afternoon. I am Jon Leibowitz, a member of the Federal Trade Commission -- thank you, Maureen -- and I would like to begin with the usual disclaimer, that the views expressed here today are my own and they don't reflect the views of the Commission or any other Commissioner.

T. S. Elliott once wrote, "Home is where one starts from," no doubt realizing the complexities of buying a home in the United States and wanting to spend his time penning poetry rather than signing disclosure forms, he immediately moved to England, where things are apparently simpler. As Elliott would no doubt agree, owning a home makes people feel connected to and invested in their communities at a very fundamental level, and the purchase or sale of a home, as Tom Barnett said this morning, Debbie Majoras said this morning, is really one of the most important decisions a family can make. But buying a home is a complicated task, and the purchasing process can be somewhat, well, opaque.

Take, for example, the recent house-hunting experiences of four of my staffers. Their names have been changed to protect the innocent. Dorothy, who is the buyer in her transaction, retained a broker and blithely proceeded with her purchase without inquiry as to what the total commission cost might be, because she knew in this instance that the fees, although embedded in the purchase price, would not come directly out of her pocket.

Lion retained a -- you see where this is going, don't you? -- who retained an agent to assist in both the sale of his old house and the purchase of his new one, negotiated such a favorable commission rate from his broker that he had to sign a confidentiality agreement. This is absolutely true. He is prohibited from talking about the terms of the deal, but we can imagine that they were pretty good for him.

Tinman, who is the purchaser in his transaction, ended up agreeing to compensate his realtor and we'll call her an "uber-realtor," for an extra one-half percent in the event that her share of the seller's commission didn't exceed two and a half percent.

And Scarecrow and her buyer both dispensed with agents altogether when she sold her house, and they bypassed commissions entirely.

Now, what does this tell us about the residential real estate industry today, or alternatively, what does it tell you about my staffers? That was a joke, although it is revealing. Is this indicative of a market where consumers can get better deals or superior representation based upon informed evaluation of their options, or is it reflective of a market where consumers lack even the most medieval evil level of information upon which to make a decision? And, no matter how you ultimately answer this question, the stakes are enormous.

The median price of a single-family home in America is now approximately $180,000, and of course, it soars much higher in sought-after areas like Los Angeles, New York and D.C. Indeed, the median purchase price of residential real estate in San Diego, which is I think the seventh largest city in the country, is nearly a half million dollars, and that doesn't include Tom Leary's lavish condominium in Coronado. Tom Leary is one of the Commissioners here at the FTC.

An estimated $60 billion, roughly one-half of 1 percent of the GEP for 2004, changed hands last year in real estate commissions, much of it coming from the traditional full-service brokerage fee. However, the real estate industry, as you know, and its traditional model is beginning to undergo a sea change. Increasingly savvy customers, empowered by the internet and the information age, are demanding more at lower cost.

Consequently, a new category of service provider is surfacing that seems attuned to consumers' clamoring for more autonomy and a greater range of service and price options. These providers, who range from mortgage lenders with brokerage licenses to flat-fee limited service brokers to full-service discounters, have deployed internet technology to drive sales. In the process, they are re-allocating home sale commissions that have traditionally gone to the full-service realtors.

The agents, understandably, are feeling as though they're unfairly under siege. They cite to vigorous intra-industry competition, including among the 1.2 million agents who are members of the National Association of Realtors, and they're quick to claim that average commissions have fallen from about 6 percent to 5.1 percent over the past decade. Realtors also worry about internet loan companies who provide limited reality services in addition to mortgage financing. The full-service realtors protest that these competitors are, in effect, wearing two hats and free riding on listings.

Additionally, realtors are concerned about the integrity of their respective MLSs, many of which are owned and operated with realtor boards affiliated with the national association. The realtors assert that the security and accuracy of the system will be compromised unless local and national NAR affiliates continue to screen participants and control distribution. To that end, local boards have set parameters in certain jurisdictions governing who may enter or view the MLS and how entries will be treated. Some boards have downgraded the prominence of certain listings entered by discount limited service brokers. Often they involve the houses that we would commonly call for-sale-by-owner. Others have removed these listings entirely.

Now, the NAR and its allies argue that their ultimate concern in these instances is for the consumer, more specifically, eliminating potential confusion among agents, sellers and buyers regarding whether a seller is represented by an agent, and protecting the unweary consumer by being compromised by service that falls below expectations. The realtors cite failed transactions and recall having to clean up messes left by limited service brokers. No doubt in certain circumstances this is probably true.

Critics of the traditional full-service brokerage model make several arguments in response. Those seeking to offer fee-for-service options argue that a la carte pricing can potentially save individual consumers thousands of dollars per transaction. Online lending services such as LendingTree assert that they, in fact, bring in more business for brokers -- who do, by the way, participate willingly with them -- while at the same time offering customer friendly discounts generated by technological efficiencies and economies of scale.

Discount brokers argue that efforts to block their access to the MLS on the same terms as full-service realtors is unfair, geared solely towards protecting the traditional full-service, high-commission model. The Progressive Policy Institute, a Washington think tank, has estimated that these newer internet-based business models could save consumers close to half of that $60 billion currently spent on real estate commissions. If that's true, or if it's even partially true, that would represent a huge savings obviously to consumers.

Further complicating matters are various state legislative proposals, heavily backed by full-service providers, which require that real estate agents provide a minimum level of service to clients purchasing or selling property. Despite discouragement from the federal antitrust agencies, these proposals have recently become law in several states.

Now, restrictions of this sort erect entry barriers for new business models that provide consumers with the ability to purchase only those services that they want or need, and they lock in a business model that bundles together high-end services. The Commission generally has argued that these minimum service requirements can harm consumers by eliminating choices and causing higher prices, and certainly from my perspective the threatened proliferation of similar laws is troubling, because once these laws are enacted, there is no going back, and there is little anyone can do to address potential anti-competitive effects absent repealing the laws.

Having said that, I am very interested to see what empirical evidence reveals about the economic impact of these laws and the impact they may have on consumers, and hopefully some of that evidence has been unveiled today and will be unveiled this afternoon. Here's why this is so important.

The reported price increases to date from at least one recently enacted state law -- and I note that they are anecdotal -- have not been exorbitant from a monetary standpoint. For example, a discount broker in Texas reported to the New York Times that his increases have increased from $600 to only $700 per home.

To be sure, the type of debate that's pervading the real estate industry where high-technology competition challenges a traditional business model is nothing novel. Indeed, we've witnessed resistance to internet-based competition with respect to wine, contact lenses and toy sales, to name just a few, and we have seen, I think to the great benefit of consumers, a quasi-revolution in the travel industry, another business in which agencies are compensated largely through commissions.

Travel agents, by the way, have largely adapted to the challenges of high-tech rivalry by concentrating efforts in a few sectors, like business travel, cruises and tours, where consumers tend to prefer full-service assistance, and the results have been telling. Although internet sites like Orbitz, Travelocity and Expedia are among the top competitors in sales, traditional agencies like American Express Travel still claim the top spots. Indeed, the vast majority of travel agents have opted to stay in the business, and they just raised the level of their game to meet internet competition.

So, where does this leave us? For now, I think we are squarely at the crossroads between investment in and comfort with the traditional real estate model and the promise of new, innovative alternatives. My own sense is that there's a way to create more competition for the consumer clearly and without confusion, because like my staffer Tinman, there will always be consumers who prefer a full-service broker and are willing to pay the price, and these people surely should be able to do so. Conversely, though, consumers may prefer to choose among a disaggregated selection of services and receive adjusted pricing, sort of closer to my staffer Lion, and should likewise have that option, too.

Now, I am very empathetic to concerns regarding free riding and certainly to protecting consumers from confusion. I mean, this is, after all, at the heart of the second hat that the FTC wears -- and our consumer protection staff would, of course, argue that that's the first hat that the FTC wears -- but I have yet to see any real indication that either of these phenomena is likely to compromise the efficient operation of the MLS database.

Put differently, a relaxation of the realtor rules of engagement rather than a tightening of the MLS screw might be in consumers' best interests, and it might not result in the sky falling down on top of a full-service brokerage model either.

However, we are still learning about this rapidly changing industry, and everybody here today is listening. Workshops like these are a good start towards understanding the marketplace and I think also towards understanding each other.

In that regard, we are most fortunate to have two distinguished panels here this afternoon, which include an array of knowledgeable and competent people, ranging from federal enforcement officials to professors of economics to industry experts, and I am particularly appreciative of the realtor presence here today, and not just the realtor presence from across the street, but also the realtor presence from around the country.

No matter what our differences are, some of which we hope to bridge this afternoon, I am sure that we all agree with Dorothy's statement, which is "there's no place like home." Thank you very much.

I'm happy to take a couple questions, then we have a Commission meeting, and then I will turn it over to the panels, if anyone has a question. If anyone doesn't have a question, I will immediately leave. Any questions?

(No response).

COMMISSIONER LEIBOWITZ: No questions. I will adjourn to the panel. Thank you so much.

MS. QUINN: Thank you so much, Commissioner Leibowitz.

(Applause.)

MS. QUINN: My name is Lee Quinn, and I'm an attorney with the Antitrust Division, Department of

Justice, in one of the litigation sections.

This afternoon, we will turn our attention to buyer side issues, things that will affect, in particular, buyers when they go into the market. Certainly one of the major issues that I know one of our panelists will discuss will be anti-rebate legislation.

Additionally, while some of the issues that were discussed this morning you may feel have been covered, they actually take a different cast when they're looked at from the buyer's side. For example, take the MLS issue that we talked about this morning. One recent commentator said over 70 percent of all buyers use the internet to search for homes, and so maybe that might cast a different light on how we might look at the MLS or any of the internet services in terms of their usefulness to the buyer consumer.

To start our discussion, we have assembled a knowledgeable and diverse panel to help us explore the issues. Let me introduce those panelists, as I know you want to hear from them, not from me.

On my right is Alex Perriello. Mr. Perriello is President and Chief Executive Officer of Cendant Real Estate Franchise Group of Cendant Corporation. With the recent announcement -- I wrote this yesterday and it's already out of date -- but Cendant is the largest franchisor of residential/commercial real estate brokerage offices in the world, and in this capacity, Mr. Perriello oversees Century 21, Coldwell Banker, Coldwell Banker Commercial, ERA and Sotheby's International Realty. These brands have more than 14,400 franchise and company-owned offices and 303,000 brokers and agents worldwide.

In addition, Mr. Perriello is responsible for the franchise group's shared support services, which include franchise sales, operation, technology, learning and the preferred client group.

Our next speaker will be Philip Henderson. Mr. Henderson is Vice President of LendingTree, LLC. He joined LendingTree in 1999 as legal counsel where he helped to build the company's mortgage services business. As LendingTree expanded to include real estate services, Mr. Henderson has held positions in both the legal and business strategy groups. LendingTree operates RealEstate.com, which is a one-stop shop to simplify the often complex real estate transaction and help consumers save time and money. Mr. Henderson was an associate with Kirkpatrick & Lockhart here in Washington on mortgage banking matters and received his law degree from the University of Virginia.

The next speaker will be Cathy Whatley. You were introduced to Cathy this morning. I think her resume is very impressive. She was the 2003 President of the National Association of Realtors and is a member of the family firm that was founded in 1907. So, we welcome Cathy back to our panel and thank her for doing double duty for us today. Cathy resides in Jacksonville, and she is also on the Florida Commission on Ethics and a member of the state's Impact Fee Task Force.

Next, and to my left, is Tom Early, President of the National Association of Exclusive Buyer Agents. Tom has been in the real estate business for 24 years starting as a salesperson and then becoming a broker in 1987. He opened one of the first exclusive buyer representation real estate brokerages in 1989, making him a pioneer in the field of buyer representation. He helped found the National Association of Exclusive Buyer Agents in 1995 and served as President of that organization in '97 and '98. Tom is considered to be an expert in the area of common law of agency as it relates to the real estate industry and speaks on the subject to many organizations, including the REVAC, at the NAR convention on several occasions. Tom served in Vietnam, with honor, as a member of the Special Forces, Green

Berets. He notes that some say this is the reason he is so hard-headed; some say it is the reason he is so dedicated to the causes he supports. Either way, I think he will be a force to be dealt with today.

Our second to the last speaker will be Geoff Lewis. Geoff has a very varied business background, and he now is a member of the RE/MAX Network, serving as Senior Vice President and Chief Legal Officer of RE/MAX International. He previously served as vice president, corporate development, and general counsel for Hyster/Yale Materials Handling in Portland, and before that as Vice President and General Counsel for American Health Properties in Greenwood Village, Colorado from '91 to '95. He also practiced law with the firm of Jones Day in Los Angeles, received his Bachelor of Arts from Brigham Young and a JD from the University of Virginia and an MBA from the University of Colorado.

Our last speaker will be Steve DelBianco. Steve is an experienced business leader and policy expert in internet and information technology. He ran an IT consulting firm before helping to start two tech policy groups, the Association for Competitive Technology and NetChoice, a coalition of Ecommerce, business and consumers, and at the present time, he is the Executive Director, NetChoice Coalition, Washington, D.C. In addition, Steve was an investor and board member of eRealty.com, a startup brokerage that empowered realtors with internet technology to better serve home buyers who want the convenience of online search and communications.

I think you'll agree with me that we have an excellent panel to help lead our discussions today.

So, shall we begin, Alex?

MR. PERRIELLO: Thank you, Lee, and good afternoon.

I'm here, as Lee said, representing the more than 300,000 sales professionals, managers and brokers of the four real estate brands, Century 21, Coldwell Banker, ERA and Sotheby's International Realty.

First, I would like to thank our hosts today, the Federal Trade Commission and the Department of Justice. I'm pleased to be able to present my comments in this forum, and I am doing so with the intention of helping foster a greater understanding of the topic of competition in the residential real estate industry.

First, let me begin by saying and addressing the heart of the matter, which is competition. The residential real estate business is a very, very competitive business. As we have heard earlier, there's 1.1 million licensed realtor members of the National

Association of Realtors in the U.S. This figure is at an all-time high and speaks volumes to the competition levels that are in the business.

Moreover, there are no significant barriers to entry or expansion in the residential real estate industry. As a result, there has been a dramatic number of new agents and new entrants into the industry in recent years. Even in areas where a new entrant faces one or more long-established competitors, there is a proven ability of such dedicated, hard-working professionals that they can attract listings on both the buy side and the sell side, and that ensures to the extent that if there is local demand for alternative pricing or service models, that this demand will be filled either by the incumbent firm that is willing to adapt their business model or the new firms will fill that void.

Just last week, I was talking to one of our brokers, Brad Holter of Coldwell Banker Caine Halter in Greenville, South Carolina. During our conversation, I mentioned to Brad that I was going to be down here speaking on a panel about competition in the real estate industry, and I'd like to share with you what he said to me. This was his exact quote. "Alex, are you kidding? Have they come to Greenville if they want to see competition? My family has been in this business for over 75 years, and during three generations we have never seen or experienced more competition than we're seeing today, not only from traditional real estate companies, but also from a host of discounters and limited service providers." He said, "It seems as though there is one opening up every month in our market."

Accordingly, based on Mr. Halter's remarks and similar stories that are conveyed to me by brokers all across the country, I must admit to being puzzled as to statements that the residential real estate industry lacks competition, shuns technology or operates in some sort of anti-competitive manner. The U.S. real estate market thrives today because buyers and sellers have choices, and choices mean more competition.

Let's take a look just for a second at the many options a home buyer has when purchasing a home. There's a number of ways that they can begin their home search process, continue and complete their home search process. They can buy directly from the homeowner or for-sale-by-owner. They can enter into an exclusive buyer agency agreement and deal with that particular agent to find a home. They can deal with any number of listing agents and buy directly from them. They can work with a number of agents and say this is what I'm looking for, go find it, and when you do, I'll do business with you. They can shop the internet and look for agents online and review resumes and send emails and interview people electronically, or they can go through an intermediary who will refer them to a sales professional perhaps so that that buyer may receive some sort of a rebate on the commission. As you can see, there's a myriad of choices for buyers to choose representation or not as they seek to purchase a home.

From personal experience, what I can tell you, though, is home buyers usually end up selecting someone that they like, that they respect, and someone who is willing to do what it takes to bring the transaction to a successful close. Real estate, by its very nature, is a local business. Sales associates are predominantly independent contractors, and they only make a commission when the transaction closes, and they only make a living in the business by having satisfied customers time and time again. This requires them to be very competitive and use all the tools at their disposal, including the willingness to negotiate price and other terms on which their services will be offered.

I'd now like to address the impact of technology, and more specifically the internet, on the home-buying process. Today, the true value of the internet to the residential real estate industry and consumers alike is that it's a very highly effective marketing tool as well as a tremendous information resource and communication tool. Unlike some industries, the residential real estate industry was among the first industries to really embrace technology and the internet to help their consumers. Real estate companies began posting listings on web sites back in the 1990s, and today, those web sites are amazing. Property photos, virtual tours, rich text, mapping functionality, neighborhood information, and on and on and on.

In doing so, real estate brokers and agents have incurred a variety of new costs associated with technology in an already low-margin business. For example, online advertising and marketing costs, those are significant, and this is in addition to the more traditional print media and advertising that their buyers and sellers expect. Hardware, PCs, laptops, servers, software, digital cameras, virtual tour equipment, professional services, personal and office technology products, on and on and on.

Now, these costs have been absorbed virtually in their entirety by the industry itself. Consumers have not realized increased transaction costs due to the adoption of new technology in marketing real estate. In fact, online searchs are a definite time-saver in the way they empower the customer to select a buyer or seller's agent and narrow their home search process from the comfort of their own home. What the internet does very well is to act as a marketing tool to promote transactions. It's a search tool for customers and an advertising and communication tool for sales associates.

Now, looking to the future, there are numerous potential benefits to the increased use of technology in real estate transactions, primarily revolving around the speed of the transaction process, and we believe that those efficiencies and cost savings will come as transaction management platforms become more sophisticated and more widely used, but with that said, real estate is not a commodity. Unlike an airline ticket from Orbitz or a book that you buy on Amazon, a house is a unique item that requires in-person investigation and evaluation.

The ultimate cost of a wrong decision on a real estate purchase is significant. The role of technology in our business, accordingly, is pretty difficult to predict. Undoubtedly, because of the competitive nature of the business, there will be winners and losers just like there have been over the past many decades. Respectfully, I would suggest that there is really no need for the Federal Government to intervene to fix what really isn't broken.

Let me now turn to the issue of rebates and inducement, my final point, just for a moment. In today's marketplace, consumers expect discounts, rewards and other benefits when shopping for everything from a car to a hotel room to a meal in a restaurant. Still, some states prohibit all forms of inducement by real estate licensees. This deprives those consumers of potential advantages and benefits available to consumers in other states and may limit the competitiveness of real estate offices in the state where those prohibitions exist.

Our parent company, Cendant, has been working with many of the real estate commissions to repeal rules that would prohibit the use of incentives, discounts, sweepstakes and other consumer benefits in a real estate transaction. Simply put, we feel that those prohibitions on inducements are not necessary. The remaining anti-inducement states should remove those antiquated laws, as just occurred in West Virginia, and stop denying businesses the opportunity to offer rebates or inducements.

With that said, though, I feel it's incumbent on me to raise one concern as it relates to rebates and inducements. Choosing someone to represent you in a real estate transaction is a very important decision. Making that decision based solely on who will give you a rebate at the closing is akin to buying a car that you don't like just to get the manufacturer's rebate. My advice to home buyers and sellers is to do their homework, interview several agents from competing firms, ask tough questions, and then decide who you feel is the most qualified person to represent you in the transaction.

In closing, choice is important. We believe that consumers, home buyers and sellers, should be able to choose their service models as well as the provider of those services, whether they be limited service or full service. We encourage free and open competition in the marketplace. Discount brokerages, referral businesses, lead generation companies have a role to play in the real estate industry. Discounters have been in our business for decades. Some of our brand affiliate brokers participate in referral networks or purchase leads from third-party marketing companies.

However, with all that said, we believe that property listings are the work product of the brokers.

The MLS is a B2B relationship that was never intended to be a consumer-direct resource. If an independently owned and operated broker wants to make a business decision to share their work product, that's their decision, and they have that right, and we respect that right for them to do that.

But last and certainly not least, let me conclude by saying that competition is alive and well in the real estate industry. I hear it every day from our brokers, and as Mr. Halter said to me, just come to Greenville if you would like to see it in action. There is simply no need for government involvement at this point in time to interfere with the competitive ebb and flow of the free market for residential real estate services.

Thank you.

MS. QUINN: Thank you, Alex.

(Applause.)

MS. QUINN: Philip?

MR. HENDERSON: Thank you, Lee.

Good afternoon. My name is Philip Henderson, and I'm with LendingTree, and as has been mentioned several times, we operate RealEstate.com, and I'm going to tell you a little bit more about that business.

I first want to thank the Federal Trade

Commission and the Department of Justice, the leadership of it and the staff, for putting on this excellent event. As Commissioner Leibowitz said, the industry and the structure of the policy are often opaque, and events like this and others will help bring some light to it I think that will benefit both the industry and consumers and the market.

Several commentators recently, the Government Accountability Office's report, the American Enterprise Institute-Brookings, the Department of Justice, the Federal Trade Commission, have identified significant barriers to competition in the industry. I'd like to touch upon one of them and ask you to think more about one of the barriers to competition, and it's one that Alex just mentioned, the states that prohibit brokers from giving consumers a rebate.

Before I do that, I want to tell you a little bit about RealEstate.com so you can understand why we use that practice and what our business is about. RealEstate.com has built a network of local brokers and agents. These are brokers and agents who have joined our network because we deliver value to them. We can do for them things that they could do for themselves, but they opt to have us cooperate with them in a partnership relationship. Many of the things that Alex mentioned that are costly and difficult to do for an individual broker, those individuals can become more efficient by partnering with other entities. It's not true for every brokerage, but some use it and find value in it.

We deliver consumers to those brokers after having cultivated that consumer with online tools and information so that those brokers do realize value. They become more efficient. Those brokers pay us a cooperative brokerage fee, and in many cases, where we're permitted, we deliver some of that value back to the consumer in the form of a rebate.

So, why do we use rebates? Why do many brokers use them? They have been around for a long time. Well, the first concept is the mechanics of the transaction work against a broker who's working with a buyer from reducing the cost of its services. If a broker wishes to use price competition, a common practice in most industries, to gain market share, to obtain new consumers, it's very difficult for the buyer side to do that, because the custom in the industry, which a number of people have touched upon, is for the seller's broker to split its commission with the buyer's broker. So, the buyer's in a difficult negotiation position, but a rebate helps to facilitate that price competition and deliver value back to the consumer.

One of the things we've seen is that although rebates have been around for many years, the internet and the increased role of the internet has really turbo-charged the need for them, the demand for them, and brokers' desire to use them. Why is that? Well, one of the great powers of the internet is the ability to build a network like we've done, have a network that local agents and brokers, rather than having to build branchs around the country or franchise, the internet enables this sort of networking. So, a number of groups that are built on membership rules, such as Costco's a membership entity, USAA, a group that serves the military community, will team up with a company like us that's built a network to deliver value back to its members, to say use this network and you receive a rebate. So, the demand for these rebates has increased.

It's often cast as a consumer issue, right? The consumer should have the ability to get value back. But what I'd like to stress today is it's a brokerage. It's good for brokers to have the ability to compete, to use tools to increase its market share and to gain consumers, and I think that's a theme throughout many of the subjects that we've talked about today, is that it's about unleashing brokers to have the ability to use new methods and tools to expand, to succeed, and to succeed in this market that is competitive in many ways. There are many brokers and agents out there. Giving them new tools to compete will help the industry.

So, what's the argument against rebates? Why do states, many of them, have statutes and regulations, rules, that say brokers cannot give rebates? Well, the truth is, it's hard to find a good articulated defense of them. In many cases the statutes are quite old and there is no sort of regular debate about the issue, but the things we hear periodically fall into three groups, arguments for laws that prohibit rebates.

The first is what I call the truth is stranger than fiction concept, because the logic used is quite unusual. In some cases, the real estate commissions say, well, we have a licensing statute that requires persons who are acting as an agent or broker to be licensed. So, if the consumer's receiving money back out of the commission, that means they're acting as an agent, and they're not licensed. So, it's okay for consumers to get a rebate as long as they go become licensed as an agent. It's Alice in Wonderland logic, but that's what's used.

The other is different, and I think it had a more legitimate genesis, and it's the anti-inducement statutes, laws that said -- I think they were originally designed and aimed at third parties from receiving fees to induce a transaction, but they've been interpreted and used to say brokers can't give a rebate because it's an inducement to do a deal. I think it falls into the category that Alex touched on about whether consumers should be persuaded by the rebate to hire a specific broker.

In the third category of states that limit -- don't prohibit -- limit here the ability of a brokerage to give rebates, they require the broker to do it at the closing table. You can't do it after the commissions have been received and netted out in delivering rebates back to the consumer, and that's very difficult as a practical matter. It requires the seller receiving a lower price for their home and a lower fee going to seller's broker and the seller's broker passing that discount back to the buyer's broker. It's confusing to the seller, it's difficult to do, and it's a practical significant limitation on using rebates.

So, to sum up, what we see, I think, on a number of fronts, and in particular with rebates, is brokers and agents in the industry seeking to use new methods and models and practices to compete and to succeed, and I think our message to the leadership of the industry and to policy makers is that these barriers deserve significant scrutiny, and we have to ask, is there a real pro-consumer, pro-industry argument for them? I think in many cases, barriers don't stand up to that scrutiny.

So, again, thank you for being here today. Thank you to the Federal Trade Commission and the Department of Justice for hosting this, and I look forward to good questions from this group.

MS. QUINN: Thank you, Philip.

(Applause.)

MS. QUINN: Before Cathy speaks, in order to get her to do double duty today, we have to respect the fact that she has to leave exactly at 3:30. So, if you want to ask Cathy some questions on your little index cards, get them up first.

MS. WHATLEY: Thank you very much, Lee, and I, too, want to echo the appreciation of being able to participate, and although I have had the privilege of serving as President of the National Association of Realtors, I think I come today as a practitioner, and I think that's what I bring to the discussion, because when I'm in my marketplace, I am every day working with buyers and sellers, seven days a week, 12 to 14 hours a day.

People used to talk about our real estate campaign, and one little boy said, "Oh, I understand you're in real estate. You have no life." And sometimes that -- you know, it is a very highly intensive activity that you do when you are representing your customers and clients.

So, I want to talk about -- because this morning I started by saying it's like a play, that there were actors in the play and there was a director who kind of orchestrated things, and if it didn't go well, the end result wasn't the experience that the audience expected, and I want to state unequivocally in my mind that the buyer's single most important objective is to get to closing. They want to make sure that they are sitting at a closing table with an attorney or a title company or an escrow agent getting the keys to the home. So, if that's the end of the story, if that's the end of the play, what takes place to get there and what's happened over the course of time that actually has amplified, streamlined, moved things forward?

Certainly the first thing that the buyer needs to have information about are properties that are available, and over the last ten years, we have seen so much expansion in the capability of the consumer to have information online that they may do research, not only about what properties are available, but about the process of buying and selling real estate. In the Multiple Listing Service, which has been touched on today, that is a very valuable tool for me as a real estate professional. What it brings to me is information about listings that have been provided by all brokerages. Anyone who is a member of the realtor organization, whether they are a discount broker, a limited service broker or a full-service broker, have their listings in the Multiple Listing Service, and in that broker-to-broker cooperative compensation environment, that is real time information for me to be able to deliver to my customer or client, the buyer, and real time is important, especially if you happen to be in a seller's market, because the advertising vehicles that are out there on the internet are not real time, and by the time even that a consumer might be able to see something online, it could be gone.

So, being able to have a real estate professional who can tell them the minute something is listed, "Let me tell you, there was a new listing that just popped up, it's matched your criteria, I think we ought to go out and look at it," that is extremely valuable, and that's part of the strength that I bring to the transaction.

Actually, writing the offer, the offer itself has been streamlined. It used to be 45 to 60 days from the time you wrote the contract until the time you closed, because it took a longer time for the mortgage process to take place. It took more time for all the steps to be ready to close. Now, most closings that I do are within 30 days. So, if you think about that shortened time frame, that's been caused by technology, because most of that is in the lender community. They now have automated underwriting, they have capabilities that they were unable to achieve before. Technology has driven that.

So, what does that mean to my buyer? To my buyer it means we better be able to enact every part of that process. We better be able, not only from the time we sign the contract, to be able to make the mortgage loan application, to be able to get the appraiser out there, to be able to do our home inspections and to be able to respond with those concerns or issues back to the seller, be able to have the termite inspection done, to be able to have the survey done, and in some markets, the buyer is not in control of each and every one of those steps. So, you'll have some markets where the seller is responsible for securing the title insurance and the survey, and in others, the buyer does it, but all of this is in an abbreviated time frame.

Again, if the ultimate goal of my buyer is to get to closing, it is really essential that there is the capability to have all of those players understand that they have a timely role to play. In the event we don't have the right ending, what are the potential downsides to my buyer? Number one, their binder deposit can be at risk. You're talking about competition and savings. There are really some potential challenges that the buyer faces if they don't close in a timely fashion. They could have their loan approved, but if everything else isn't done, because most contracts are just subject to loan approval, so their loan's approved, but they can't close for another reason, their binder's at risk.

Secondly, their interest rate lock-in is generally for 30 days now. If you don't close within that time frame, your interest rate could be at risk and/or the costs that they would have.

Third, the actual capability of where are they going to live, because most of them have given notice that their apartment or they have sold their home, and everything is dictated upon this wonderful closing that's going to happen, when they're going to get the keys to their house.

So, in the world of competition, there are multiple players in this story, and the buyer's ultimate objective is to make sure that he or she is sitting at the closing table, signing the mortgage documents, seeing everything necessary to be able to close, and the rest of it is just the beginning and the middle, but the most critically important factor to them is actually closing.

(Applause.)

MS. QUINN: Thank you very much.

Tom?

MR. EARLY: In the short time I have, I'm going to try to touch on four subjects, minimum service requirements, non-disclosure, designated agency and realtor procuring cause if I have the time.

I want to thank the DOJ, I want to thank the FTC for holding these meetings. I've picked up an awful lot of information, and I've met some great people here today and last night.

Minimum service requirements, it seems everything I've read or hear from realtors today about the level of service being recommended by NAR for its state associations -- and ladies and gentlemen, NAR is not neutral in these matters where the state legislation is being passed. Please, don't swallow that one.

Everything I hear about these minimum services says it's a good thing for the consumer. The problem is the only person they're talking about when they're talking about the consumer, they're talking about the sellers. When 90 to 95 percent of the complaints that are filed by consumers are filed by buyers, why are we looking at these minimum level services for sellers? We're looking at them because the real estate industry, the organized real estate industry, is losing listings. They're losing sellers. They're not losing buyers. They're trying to find a way to stop the bleeding. They're trying to find a way to stop the loss of the listings to the traditional setting of brokerage.

For roughly 80 years, NAR embraced a minimum standard in real estate transactions. That minimum standard was called the common sense common law of agency; agency, which mandated the firm and its licensees to put the interests of the client ahead of all others, including their own. This level of service obligated the brokerage to loyalty, confidentiality, obedience, reasonable care, accounting and disclosure. This was the industry's only way of delivering service to the one client we had at the time, the seller.

The introduction and the growing awareness of buyer agency turned everything upside down within the industry. We in the industry now found ourselves with the potential of having two clients as buyers began to expect full representation, too. How can one firm, which has a major incentive to bring a transaction together, fully represent adversaries? Attorney firms don't represent adversaries because they recognize the inherent conflicts of interest. Who would agree that a buyer and seller aren't in an adversarial situation?

One wants the highest possible price on the best possible terms; the other one wants the lowest possible price on the best possible terms. Adversarial, by the way, does not mean hostile. How, then, can one real estate brokerage faithfully represent these opposing parties?

In its search for the resolution, some of us have fully embraced the common law of agency and decided to open up companies that represented one party to the transaction and one party only. In my case, it was the buyer. Agents who do such are called EBAs or exclusive buyer agents. Many of these brokers came together to form an association called NAEBA, the National Association of Exclusive Buyer Agents, the organization I am proud to represent.

The majority of the industry made other choices. These choices ranged from facilitation, commonly known as transaction brokerage, which provided no higher level duties -- and by the way, no fiduciary duties -- to designated agency. Designated agency allows licensees from the same firm to purport to offer full representation as a fiduciary to opposing parties in the same transaction from the same brokerage with no conflicts of the -- just no disclosure of the conflicts of interest that are inherent in dual agency.

Designated agency is dual agency. Designated agency is a product of legislation being passed on a state-by-state basis, with NAR guidance, advised by state associations of realtors. It is dual agency. The definition of dual agency under full disclosure and informed consent, two parties at the same brokerage representing opposing parties in a real estate transaction. The definition of designated agency, two parties from the same brokerage representing opposing parties in the same transaction. One, dual agency under the common law, required informed consent. Designated agency does not require informed consent.

The common law of agency has now been replaced in roughly 26 states by designated agency legislation, making legal that which was previously unethical and illegal under the common law. Now, agents from the same brokerage can represent opposing sides without the cumbersome informed consent disclosure required under dual agency. In every instance, it has been the state realtor associations which have called for, written and paid for with PAC dollars, passed this legislation, just as we are seeing done today with minimum level services.

NAR is not neutral. The latest example of designated agency legislation being passed was passed in Massachusetts after failing to pass on a committee on two separate occasions. It was passed by attaching it to a midnight piece of legislation, the State Budget Bill. In Connecticut, it was attached to another midnight piece of legislation, in this case Megan's Law. The consumer should have no problems with firms serving them as customers, clients or as dual agents, as long as there has been full advanced disclosure of what each relationship entails and informed consent has been given by the consumer.

In other words, tell the consumer of her options and get their permission to proceed under one of those options. Consumers should, though, have a real problem with designated agency, as it encourages dual agency without full advanced disclosure of the conflicts, nor does it seek informed consent.

The mandatory minimum level services being passed state by state do nothing more than bring back what was thrown out with the bath water, aspects of the agency representation and fiduciary duties. The

Massachusetts Office of Consumer Affairs and Business Regulation conducted a sting operation, visiting 45 offices to find out how many were in compliance with their two-year-old law requiring agency disclosure at first meeting with a contact. The results were both dismal and predictable. Zero compliance.

Many states, including my home state, Ohio, has moved disclosure from first meaningful contact to as soon as practical but no later than the writing of an offer. Practicable for whom? How good is it for a buyer to be getting to a table, getting ready to write an offer on a home, to find out that the agents who are sitting in front of them represent the seller, or if they want to write that offer and continue with the process of putting an offer in on that home, they are dealing with a dual agency? How practical is it to do disclosure of your agency relationship at the table when you're writing an offer?

This brings us to the last issue that I mentioned I would be addressing, and that's realtor procuring cause. I'm going to be real short on this, because it's considered by the industry to be an insider thing, and it really doesn't involve the consumers and so on and so forth. Nothing could be further from the truth. Do buyers know that working with a realtor, in most cases the listing agent, that they jeopardize their ability to be fully represented? This is never discussed, it is never disclosed, it is never mentioned, and if that buyer decides they don't want to work with the seller's agent and they don't want to accept the conflicts of interest that come with working with the buyer's agent from the same firm that is represented by the seller, what good does that do?

This buyer could choose not to use the dual agent or their brokerage and hire a true buyer's agent. The buyer's agent is the only person involved with the buyer who has a contract for representation. This brokerage provides all of the services required to purchase the property, and yet his income is in jeopardy by an agent who may have introduced them to the property and maintained contact even though the buyer decided he didn't want to use that agent anymore. The buyer moved on and found other representation.

I'm going to close it right there. I've got some other things to say on that subject, but I won't. We have a white paper that we've put out, and I'd be more than happy to answer any of your questions later.

(Applause.)

MR. LEWIS: I'd like to begin by thanking the FTC and the Department of Justice for including RE/MAX in this workshop, but more importantly, I'd like to thank the DOJ for not including us in your lawsuit.

UNIDENTIFIED SPEAKER: There's still time.

MR. LEWIS: And I was going to add that I hope you don't change your mind after you hear my remarks.

Those who decry the lack of competition in the real estate industry would be prudent to follow the common sense advice applicable to every weather man. Before you broadcast current weather conditions, stick your head out the window to make sure you know what's really going on.

In today's real estate market, consumers are bombarded with choices via the internet and in the physical world, discount commissions, flat fees, low commissions, rebates, credit cards, home warranties and the like. RE/MAX International knows about competition in the industry. The day when Gail Liniger started RE/MAX 33 years ago, they had a revolutionary new business model: Let the agent keep all of his or her commissions and give them the freedom to run their business as they see fit. This came at a time when the traditional industry kept up to 50 percent of the agent's commissions and exercised tight control over how they operated.

To Mr. Farmer who spoke this morning, RE/MAX knows about competition. We know about breaking into an industry. We know about lies and misrepresentations. But today, more real estate is sold under the RE/MAX brand than any other brand. How did RE/MAX overcome our competition and reach the pinnacle of our industry? Well, one thing is for sure. We did it without the intervention of the Federal Government. We did it because we had a better model, and we made it successful the old-fashioned way, through hard work and customer service. The marketplace recognized the value of the RE/MAX business model and rewarded it.

Today, as always, RE/MAX welcomes competition from any legitimate business that can stand on its own merits and its own resources. RE/MAX believes there's no need for Federal Government legal or regulatory intervention in the residential real estate brokerage industry. There are no barriers to entry in our industry, and there is no evidence that free market forces are being impeded in any way.

Let me speak about commission rates. Commission rates have been trending down over the past two decades. They've gone from 7 percent to the current average rate of 5.1 percent. That is a 40 percent decrease. How many other industries have experienced that level of decrease in pricing over the same period of time?

RE/MAX believes that the RE/MAX system has been a significant factor in the decrease in commission rates. Because a RE/MAX agent does not split his commission with his broker, he's empowered to negotiate the commission directly with the customer.

Many have questioned how, with the rapid rise in housing prices recently, the commission rates have not come down further than they have. Well, notwithstanding the rapid rise in housing prices, agent income has not increased correspondingly. The median gross income for real estate professionals in 2004, as reported by NAR, was -- prior to business expenses, which are not insignificant -- was $49,000. That's without healthcare, that's without retirement, that's all paid for by the agent. On a net basis, average income is lower than average school teachers' salaries, and over the past two years, income is down 6 percent.

How do you explain the lack of increase in agent income given the rising housing prices? Well, I think the explanation is due to the large increase in the number of agents entering the industry. NAR's reported a 26 percent increase in membership over the past two years and a 40 percent increase over the past five years. These agents are being drawn in by the increase in housing prices. I think also a lot of these agents are coming from the downsizing that has occurred in corporate America.

As a result of the increase in number of agents searching for transactions, the average number of transactions per agent is decreasing, and that is putting a little bit of a limit on the ability of commissions to continue to come down further, although the trend is increasing, and as you stick your head out the window, any agent will tell you that there is tremendous pressure and tremendous pricing pressure in our industry.

Let me speak for a minute about internet companies and new business models. There's little difference between traditional companies and online companies because traditional companies all embraced internet years ago and have a significant online presence. Virtually every broker and most agents have a web site that allows consumers to search all MLS listings in their market. It's easy to say the internet has brought down costs in other industries, so it should do the same for real estate, but not all industries are the same.

The internet has not affected prices for doctors or attorney services, newspaper advertising or subscription rates, landscaping or a myriad of other industries, including, I might add, government services. Not every industry is going to be impacted by the internet the same as airline ticket vendors, stockbrokers or book sellers. After all, these industries are selling commodities. Real estate agents are selling unique properties and providing individualized services. An experienced real estate professional provides a value-added service that assists sellers to obtain the best price for their homes and for buyers to find the best home at the lowest price.

I'd like to take a few minutes and venture into the area of internet listing display. Since we're not a part of the litigation, I'm going to exercise my First Amendment rights to speak about this.

Despite misrepresentations to the contrary, the new internet listing display policy adopted by NAR does not allow a broker to withhold his listings from the MLS. Every broker in the MLS has the right to receive the listings of all other brokers. The Multiple Listing Service, as has been explained today, was designed as a B2B vehicle, not a business-to-consumer vehicle. It was designed as a mutual sharing of information by industry peers to facilitate the sale of and search for properties by customers. The idea was that brokers and agents would work to earn their own customers using their own assets. The concept is simple. You earn a customer, you get to use the MLS with the customer. The concept is not you get free access to the MLS, and then you use it to advertise the properties on it in order to attract a customer.

The starting point of the internet listing display policy is that each broker will provide all listings to all other brokers for display on the internet. Although the policy does contain a blanket opt-out provision, the ILD policy imposes severe consequences on a broker who opts out such that it is extremely unlikely that any broker will do so. RE/MAX encourages all of its brokers to share their listings and is not aware of any broker who has opted out. Brokers and other third parties do not have an absolute right to display the listings of other brokers in order to advertise them in an effort to attract customers. The MLS is not a public utility.

If I can make an analogy to the sale of an automobile, you have a number of options when you sell an automobile. One is to simply take it and trade it in when you buy a new car. Another is to sell it yourself, using the papers, other vehicles that you have to advertise it. Many of you have probably seen, and I have used this tactic myself, take a vehicle and park it in a high-traffic area with a for sale sign in the window. I don't think any of us would presume that we would have the right to drive our vehicle onto the lot of one of the largest brokers on auto row and park it right next to the street and put a for sale sign in the window. That lot is proprietary to the broker, just as the MLS is a system that brokers have agreed to use with each other. It is not a system that's a public utility that's open to third parties who are not engaged in the real estate brokerage business.

As such, the provision in the internet listing display policy that prevents non-brokers from internet display of listings is lawful and is consistent with state laws and the purpose of the Multiple Listing Service. To open up the MLS for internet display listings by parties who do not actually engage in brokerage would risk causing genuine brokers to withdraw from the MLS. This could jeopardize the viability of the system that has and continues to serve consumers well.

On the subject of state law restrictions on limited service providers, if I were looking for someone in support of these, after hearing all of our panelists today, I think I'd feel a little bit like I believe it was Diogenes in Greek mythology, searched with a lantern looking for an honest man. There doesn't seem to be anybody today willing to stand up and support these laws. RE/MAX believes this is a determination left to the individual state legislatures.

All 50 states require real estate professionals to be licensed. In order to obtain a license, would-be professionals must become knowledgeable about the intricacies of real estate transactions, including agency, fiduciary obligations, sales contracts, escrow, title, appraisal, survey, property disclosure, environmental hazards, Megan's Law, mortgages, deeds of trust and a number of other factors.

Given that for most people the purchase or sale of a home is a transaction involving their most valuable asset, a state legislature may legitimately determine that the fiduciary duty and agency responsibility of a broker or agent requires full representation of a client; however, if a state legislature determines to allow limited service providers, RE/MAX believes that the state should require that such providers make a thorough disclosure to their client of all the steps involved in a real estate transaction and identify the aspects of the transaction where the client will be left on their own. Mr. Farmer alluded to this this morning, to full disclosure being an acceptable compromise. We agree with that.

While some consumers may be sophisticated enough to represent themselves in some or all of the steps of a transaction, most are not. Interestingly, Mr. Farmer defined his market this morning as only about 10 to 15 percent of consumers selling homes that he felt should use his services. A consumer who does not receive full disclosure may believe he will receive more representation than he has contracted for from a limited service provider. He may not be aware of the risks. Full disclosure is the answer.

If a state legislature determines to allow limited service providers, RE/MAX believes that the state should not allow such providers to disclaim their agency relationship and fiduciary duties. To do so, as Mr. Thorburn pointed out this morning, has simply reduced them to a marketing relationship. If that's the role they play, that's fine, but then they should remember that the Multiple Listing Service is a business-to-business vehicle for brokers, not for marketing agencies.

Another area state legislators should address, if it determines to allow limited service providers, is proper protection of and compensation to a full-service agent involved in one side of the transaction. RE/MAX is increasingly hearing complaints from its agents who encounter parties in a transaction who expect the RE/MAX agent to pick up the responsibility of the other side who has contracted for limited service. In addition to this being economically unfair for the full-service agent, it also puts them in a difficult position with respect to their fiduciary responsibilities and their agency relationship with their own client.

On the subject of state law restrictions on rebates, RE/MAX believes that brokers and agents should be allowed the ability to freely negotiate transaction servicing pricing with their clients in any way they see appropriate. The RE/MAX business model empowers the agent to do this.

I would like to conclude by noting that I have a much more expanded white paper that addresses my comments that's available on RE/MAX.com, on the residential homepage, and I would refer you there, and I'd be happy to answer any questions later.

Thank you very much.

(Applause.)

MS. QUINN: Before Steve speaks, I want it noted that I said while we had a topic, panelists could say anything they wanted, so...

MR. DelBIANCO: Thank you, Lee.

Batting last in this distinguished line-up during World Series season has a couple of implications. In a National League city like Houston tonight, the bottom of the order, last batter's up -- well, it's a weak batter, the pitcher is likely to lay down a bunt. But in an American League city it is going to be something altogether different. I'd like to be thought more of as the designated hitter.

NetChoice members includes some Ecommerce giants like America Online, eBay and Oracle, but also our founding members included some Ecommerce pioneers, 1-800-CONTACTS, Orbitz and eRealty. Do you know who the pioneers are? They are the ones with all the arrows sticking in them.

Starting with Orbitz, which was the online travel, search and booking service that was vehemently opposed by travel agents who had their own powerful national trade association. Orbitz fought through those barriers and became immensely popular with consumers and even profitable before being acquired by Cendant -- no.

Now, eRealty.com is a startup company that I became involved with in 1998 as an angel investor -- don't try that at home -- and as a director of the company for six years. ERealty was a licensed brokerage. They were part of the club, Bob Hahn called it, right, a licensed brokerage that's in the club, playing by the rules. They had licensed agents, also club members, and they used innovative technology. Their mission was to better serve internet-savvy home buyers with the convenience of online search, something we called incubation, which was to monitor and then quickly report the instant any listing came up that fit a profile that you pre-established with eRealty, and then communicate instantly through email or any device you needed and assist you through the scheduling of appointments and the whole scheduling of the transaction all the way through to close, as Ms. Whatley has talked about.

So, while the MLS, as I've learned today, was really designed for cooperation and compensation, as a business-to-business exchange, a member of the club, a duly admitted member of the club, like eRealty, used it for even more, took it a step beyond that and used the power of the information in there to better serve consumers. Now, eRealty also took listings before and after, and eRealty was giving a 1 percent rebate back to the buyer, trying to realize the efficiencies that they could on technology and to attract customers to the model.

Now, eRealty built their systems from the ground up according to a proven MLS market exchange. They were very careful to grant data access to only bona fide buyers who got into the site via password, and in the heady "dot com" days of 1998, I'll tell you, eRealty looked like a slam dunk success, but the doors started slamming shut on eRealty because established brokerages and NAR used their local associations to block, exclude and to punish eRealty. They kicked them out of the club, as it were.

Now, everyone has heard enough today on laws prohibiting rebates, and that immediately slammed the door on certain states for eRealty, but in 2000, the Austin, Texas Board of Realtors try to cut off eRealty's access to MLS data, and they sued eRealty for what they called copyright infringement, which was based on a local rule passed there in Austin less than 30 days prior to the lawsuit, the eRealty rule. eRealty countersued for antitrust violations, as I think Geoff just mentioned, tells the government to stay away. If you're a real player, you will pony up, hire your own lawyers and go to court, and at eRealty, we did that.

Now, Judge Nowlin, thankfully, he concluded right away that the way that eRealty happened to deliver listings to its bona fide buyers could not be treated any differently than the way other brokers delivered their listings, whether by fax, hand, hard copy paper or by email, and that made it very expedient that the Austin Board of Realtors would settle that case, because the Judge painted clearly that they could not discriminate just based on the way that eRealty was delivering information.

Now, Winston Churchill once said, "There's nothing quite so exhilarating as to be shot at without effect," and initially, we felt pretty exhilarated at eRealty, but now five years later, five years after the Austin case, MLSers are still discriminating against brokers who serve their customers through innovative or browser-based technologies. Geoff and Alex both said that they are perplexed about the anti-competitive concerns that have been talked about today. I would counsel you to read the lawsuit.

The lawsuit itself is very clear, shows the circular arguments that are being employed today. The circular argument says that there's so much competition and alternative business models that we don't need a lawsuit, but at the same time, the lawsuit seeks to stop brand new NAR rules which would stop some of those new business models from even coming into existence. You see, the circular argument there just doesn't make any sense, but all this is probably getting too much into the weeds. Let's see if I can step it up a level.

There's plenty of real estate experts and legal experts in the room today, but even regular people know something about buying and selling homes. By definition, and as Tom Early described, you have your first experience in real estate as a buyer, not a seller, and you don't even understand at that point as a buyer where this commission money flow is going, and when you sold your first home, did you really compare listings from multiple listing agents? Not likely.

You were anxious to get rid of that starter home or condominium and move up, and the dollars involved in a starter home, first-time seller, are unlikely to justify a broker beauty contest or haggling over a commission rate. But I will say to you that there are some important and unstoppable changes that have occurred since you bought and then sold that first home, changes in two ways, the demographics and the dollars involved.

The demographics, pretty obvious, a generation of Americans are now comfortably and constantly connected to the internet and to Ecommerce. They instinctively start with the internet before they search to buy anything. They do extensive research online. It makes them easier to serve even if they did the search and went into a traditional real estate agent.

Now, they expect systems, servers, to do the grunt work of searching for homes, gathering data on schools and neighborhoods, monitoring new listings, and then reporting whenever a listing fits their profile; scheduling appointments, as I said earlier, to help them see the home.

Now, let me turn to the dollars involved. As sellers and buyers move up the price ladder, we become acutely aware of what commissions are costing. Around here in Washington, a townhouse, a $500,000 townhouse, is $30,000 worth of commission. That's real money, especially when you are trying to use whatever you can to move up to the next home.

Now, consumers around here especially know that home prices have doubled in the last five years, and we're all pretty sure that the level of effort needed to sell that home has not doubled. So, sellers will expect greater competition among listing agents, including discounting a commission at times and new business models.

Now, this rising generation of buyers and sellers, they're going to expect internet technology to both improve service and to drive efficiencies that eventually, we're told by the economists, driving efficiencies eventually leads to lower prices, but the court will have to be the one to determine whether NAR is guilty of antitrust violations, but the court of consumer expectations with this rising generation is starting to pay attention, and here's what they see.

When consumers see Geoff's white paper, and I encourage them to do so, they will be absolutely insulted by the argument that prices have come down. It's the same thing we hear with property taxes. The property tax rate has declined, but every year you're paying more. I don't think we're so gullible that we believe that that is a price cut of any kind.

I think consumers will think that it's inexcusable that their own listing agent won't show their home to buyers who go to real estate web sites. I think the rising generation of home buyers would be perplexed to learn that they can't receive commission rebates from buyer brokers who have figured out how to serve them more efficiently, and again, because realtors have tremendous power in the state legislatures.

Now, brokers running these virtual broker web sites, brokers like eRealty, had their club keys taken away and their data feeds downgraded, which made it impossible to maintain portfolios of homes in order to serve their buyers better. And then web-savvy home shoppers on the buy side will be suspicious that big franchise brokers want to restrict the co-branding relationships with favorite internet destinations, like a Yahoo, an MSN, an eBay or a LendingTree.

Now, I think that will consumers really buy, will they really buy what the realtors are saying as justification for all of these barriers, justification of consumer protection? Are consumers harmed by limited service and discount brokers? There's no more credibility to that than when stockbrokers told us all that investors shouldn't be allowed to use discount stock trades.

Will consumers really believe realtors when they give us rhetoric about personal security fears, when home listings can be viewed online by people everywhere, that that's really a serious security risk, to have your home on the market and to have others know about it? You better take down those yard signs and cancel those ads.

The court of public opinion, regardless of what this court does, but the court of public opinion is smart enough to know when consumer protection is really being used to justify competition prevention, and it's true that some big brokers are actually gearing up to serve information-driven consumers with better tools for search, monitoring and scheduling, but we've heard today that the biggest franchisors will allow the use of the MLS only on their own terms, that B2B club of theirs, that says it's really only about -- what, everyone? -- cooperation and compensation if and when they're ready.

After all, they have paid a lot, a lot of these franchisors, they have paid a lot to acquire brokerages around the country, traditional brokerages with gold plated Rolodexes of relationships with traditional customers, and they want to preserve the profitability of that traditional business model against pressures that might come from new competitors, but the tactics that the large franchisors are employing to restrict competition are truly doomed to fail.

The Department of Justice, the FTC, competition advocates and new business model businesses and consumers are all sending a very clear signal to the realtors. When it comes to information technology, we expect more services, a broader range of information and choices, and we expect to pay less, not more.

So, nobody expected Cendant and NAR to be so bold, actually, in their response to the Justice Department's two-year investigation. I don't think they were all paying attention ten years ago in this town to what happened in the antitrust trial against Microsoft, because one of the tactics you would not want to do is you wouldn't want to moon the giant like that by releasing new rules despite a two-year investigation cautioning you against the new rules.

So, I probably would just close with a quote from W. C. Fields that I think seems targeted at NAR and the big franchises with respect to both looking at a lawsuit and looking at what's coming in the marketplace with the new generation. W. C. Fields said that, "There comes a time in the affairs of man when he must take that bull by the tail and see what's coming."

Thank you.

(Applause.)

MS. QUINN: Well, I think our speakers have certainly laid the groundwork for some good questions, but before we begin, Cathy, I know you're not representing NAR here today, but many of the comments were directed toward NAR and Cendant, and I wanted to know if either one of you wanted to lead off with any comments or responses.

MR. PERRIELLO: Cathy, do you want to --

MS. WHATLEY: Well, certainly from the extent that the National Association of Realtors is very much into cooperation, and we are in the representation of consumer business, I would say that I think that a number of the comments that were stated by Steve were unfounded in my mind. I'll allow, you know, more of that to come as conversations come out, but I think he is totally off base in a number of his comments.

MR. PERRIELLO: I would have to agree, Lee. I appreciate a lot of what Steve said, but our beliefs and my remarks were all about choice. We welcome the competition in the market. We encourage the competition in the market. And I believe that at the end of the day, the results will speak for themselves. This is all about the broker, the agent who gets results, who provides good service, offers it at a fair and reasonable price. Those are the people that will stay in business.

I don't see where limiting consumer choice, that's never been our position. Our position has been the opposite, to give consumers as much choice as possible and let the chips fall where they may.

MS. QUINN: Anyone else want to join the debate? Tom?

MR. EARLY: Opening my brokerage in 1989 as an exclusive buyer broker, being one of the first people in the country, I have to take exception with those who say that NAR is looking for choice and is open to choice and is open to competition. I got my brains beat out for the first three years as an exclusive buyer's agent. We were introducing a brand new concept to the industry, the representation of a buyer into an industry that had represented sellers 100 percent of the time at all times. We were not welcomed.

We were -- I can't put it any better way -- we were beat up. We were beat up by the local associations, we were beat up by our state associations, we were beat up by NAR, and it took a fight, and I mean a fight, to survive within my industry that I'd been a member of for 24 years.

I am a realtor. I deserve the same respect for my business model, the same disclosure of my business model, as every other business model that is now acceptable within the real estate industry. Today, we have in the State of Ohio, the first state after 11 years of hard work, have been recognized as an agency option as an exclusive buyer broker in the State of Ohio. Two months after we were recognized as an agency option, Ohio came out with its new agency disclosure form, and we're not listed on it as an agency option.

I'm sorry, but you know, it's nice to say we're all playing nice, but the facts are we're not all playing nice.

MS. QUINN: Anyone else? Steve?

MR. DelBIANCO: With respect to choice, it's true, you can have your data any way you want unless NAR says you can't have it that way, and the choice about business models, I read Geoff's white paper, it's excellent. The choice about business models is that RE/MAX chose a different business model. They really did. No more splits with the agents. They were going to charge a fixed fee. And Geoff's own paper talks about the fact that he was discriminated against, and the other realtors punished him for that.

And what did he do? They sued. They sued the other realtors and were able to stop the anti-competitive practices so that RE/MAX is a phenomenally successful brokerage to this day. So, choices, perhaps they're there, but to exercise the choice that one has to endure the arrows of any pioneer and perhaps endure what it takes to bring lawsuits against anti-competitive tactics.

MS. QUINN: Well, I've gotten several questions that we can move on from here just a little bit, which is we recognize some of the problems with the system, and the questioners are concerned about what should come next, and does it still make sense for the buyer and seller's agents to be paid through the seller rather than separately arranged or negotiated by the buyer and the seller? In other words, the buyer hires his agent and pays it, the seller hires her agent and pays it.

MR. HENDERSON: Sure, I can speak to that, and perhaps Tom, I think, would have some ideas on that.

MS. QUINN: Okay.

MR. HENDERSON: That might make sense. Some consumers might wish to do that, and we should free them up and free brokers to serve that demand without restrictions through state law, state regulation or MLS rules that might say, no, in order to join the MLS, you have to do business this way, which is what we see in other areas of business. So, I mean, I think the concept is let the market work. Let consumers demand that and allow brokers to provide it.

MS. QUINN: Anyone else?

MR. PERRIELLO: Lee, if I could add to that, I think we also need to take a look at, in the circumstance we just described, is there's competition out there between brokers, but there's also competition that no one ever talks about, which is competition between sellers, and if I have my house on the market, I may be willing to pay a good portion of my equity to a buyer's broker to come in to attract more traffic to my property, where someone else won't. So, in many cases, it's really the owner of the property that's really making the decisions in many cases, not just the broker.

When I listed my house a year ago to move, I talked to my listing agent about the strategy of what she would retain and what we would offer to a buyer's broker in the market. She didn't say, "Here's what I'm going to give." We talked about that as a strategy. Now, I may have said -- the market was very active at that point. I may have said, if there were a lot of properties on the market, "Heck, I'll offer 4 percent or 5 percent to the buyer's broker to make my property stand out," and that's how I think this business works. We need to have that flexibility in there. It's not just the brokers who are competing or the agents. It's many times the seller having to make decisions about what will make my house more attractive.

MR. EARLY: Well, you have the opposite that takes place, that hurts people more than the scenario you just gave of offering more of a carrot to the buyer's agent. You have the opposite taking place in hot seller markets where there is no offer of compensation being made, there's a reduced offer of compensation being made, and basically we have a listing agent telling us what we're worth.

Keep your co-op. We don't want it. Set your fee with your client for the services you provide to your client. Leave my fee alone. I will work that out with my client. I can't stress that strongly enough. I don't need your co-op. I don't need you telling me I'm worth 2 and a half percent. I don't need you to telling me I'm worth 3 percent. I don't need you telling me what I'm worth at all. That's between me and my client.

If NAR were to put the power of NAR behind that it has and go to the banking industry and ask for a separation of the fees on the closing statement, on the HUD-1, it would happen tomorrow, not a doubt in my mind about that. It would happen tomorrow.

MS. QUINN: Cathy, do you want to respond?

MS. WHATLEY: Yes, I would. In all honesty, in my day-to-day activities, Tom, you can have that discussion with your buyer, and you do, and if the compensation that's offered in the MLS is not to your liking, you structure something differently with your customer and your client. I have the capability to do that every day in my marketplace, but there are a lot of buyers who do not have excess cash. The customers that you're working with have limited down payment, they have limited cash with which to then turn around and also compensate in a cash format their real estate professional who's assisting them. So, any way that you want to structure it, it's there today.

What the MLS does is at least tells me from the business activity side of what compensation is available to me, and if that's acceptable to me before I ever go out and show the property, then fine, that's what I presume to accept. If that is not acceptable to me, if it's too high, I can give some of it back to the buyer. If it's too low and I've already set some arrangement with the buyer, the buyer knows what the expectations are in their environment. So, you know, I have that ability today, and I'm really challenged to find out what you believe is not necessarily available to everyone to negotiate in that world.

MR. EARLY: That's a direct question to me and I'll answer it. You said the buyer has to come up with the cash to pay the difference. If I'm only being offered 2 percent in a normal 3 percent co-op market, I'm 1 percent short if I'm charging my client in my contract 3. My buyer has to come up with cash. If NAR were to put, as I said, if NAR were to put the power of NAR behind the banking industry and work with the industry and separate the fees, we wouldn't have that problem. My buyer would be able to finance 100 percent of his fees due to my brokerage in his contract, just as he's always done.

MS. WHATLEY: Well, and he can do that today as long as it will meet the appraisal issue.

MR. EARLY: He cannot do it today -- well, he can do it today, but you've got a problem in putting it on the buyer's side of the transaction when it's a buyer brokerage fee.

MS. QUINN: Another issue came up that I thought was very interesting, Alex, it was something that you brought up. I've bought and sold about four houses during my lifetime, and I can never remember either my agent telling me what the other agent was getting or the other agent telling me, you know, as the buyer what the seller's agent was getting, and the last one was five years ago, but now it seems to be an important issue.

What is the benefit to the buyer, for instance, to know what the seller's getting or the seller to know what the buyer's agent's getting?

MR. PERRIELLO: Now, what I was saying was at the time of the listing, to have the discussion with the owner of the property, with the seller, as to the fees that you're going to charge for your services and what percentage of the total fee will be given to a buyer's agent that brings a buyer to the transaction.

Earlier today, it sounded as though that was an automatic decision made solely by the broker with no client input, and from what I hear from agents, I know when I was an agent back in the seventies and eighties, I always had that conversation with my client, just to say here's what I charge, here's what I think we should charge or what you should allot for a buyer's agent coming to the property.

In many markets, when I was in a market that was very, very slow, it was not uncommon to actually have a disproportionate share go to the buyer, because you may have 50 or 60 listings in a portfolio and no one to buy them. So, at that point, if it was say a 6 percent commission, I might take 2 percent and offer 4 percent to the buyer's agent to make that house more attractive.

Well, that's all marketing. That's all strategizing with the seller who you're being hired by to market your house effectively, and that conversation should take place.

MS. QUINN: Anyone else?

Steve?

MR. DelBIANCO: Yes, Lee, you did ask the question just before that, what should come next, right?

MS. QUINN: Yes.

MR. DelBIANCO: If you don't mind, I'd like to try to address that. I really believe that NAR should simply rescind the new rules that were proposed, the rules that are the subject of the case, just tear them up, settle the case, and it will all be over, and we can all get back to work, back to work on innovation, efficiency and competition within the MLS.

Let's keep it a club for licensed members. I think it's a great innovation. It's a superb tool for broker-to-broker cooperation, compensation, and it can be an incredible tool for consumers. So, we need to allow new equipment and new wardrobes to be worn on the club's golf course, and I think the consumers, they will choose professional realtors who are empowered with new technology, and if we let innovation increase, I believe we'll see commissions come down.

MS. WHATLEY: Lee, if I could also add something that hasn't been at all addressed today which is an area of additional competition options for the buyer. If you're in a seller's market, you probably don't have much leverage, but in a buyer's market, oftentimes you'll have the seller paying some buyer closing costs or you will have the seller who is doing some type of compensation toward allowances of things that need to be done on the home. Those are all, again, types of opportunities where the buyer is being engaged and is receiving a benefit of the competition that's driven by supply and demand.

You're focusing a lot on the brokerage world, but there are a lot of things within the transaction itself that bring capabilities for the buyer to have a strength in a buyer's market, but in a seller's market, when you have no inventory and you have one house available and 40 customers who are wanting it, I mean, your capabilities of negotiating are extremely limited, and so it's a function of supply and demand.

A lot of what's being raised here now are honestly, in my mind, based upon the fact that we have had an extremely limited supply of inventory, and that's going to be sustained. I don't see that changing over a period of time. While the market may have somewhat leveled out in some areas, in other areas, it is still a very strong seller's market, and in those types of dynamics, there are huge opportunities for competition to play out in the marketplace.

Whether that's through the exclusive buyer agency relationships where you are bringing that strength to the buyer, to say, you know, your best opportunity to be able to secure that one home when you're one of 40 is to have my representation, because I know exactly what it is I'm doing, or whether that's through an online environment where they have the capability to capture that, it's still there. It's still a work in progress, and you know, I'm just not being tasked by my customer buyers or my customer sellers to say this is a huge issue to them. They know that they've got options out there, and they are looking at them, and then they're making the decision that they think is in the right interests for their personal situation.

MS. QUINN: Tom?

MR. EARLY: When you're in a hot seller's market like New England, and I'll just take northern New Jersey, and you've got the three major brokers in that market taking what they're calling exclusive listings, they're advising their sellers not to put the home into the MLS, it's not necessary to put your home into the MLS, we have 40 buyers lined up at our back door of our brokerage, and we don't need the cooperation of other brokers in order to get your home sold.

What happened to the sharing of the MLS information from broker to broker? It's not convenient today. We've got our own buyers today. Now, next month, when things cool off a little bit and the buyer market comes back in and the inventory's up and everybody's happy, then we'll start putting our listings back into the MLS again. We'll start letting you, fellow brokers of ours, our brothers in arms, start showing our properties again and start selling our properties again.

These are the kinds of things that we write letters to NAR, and we get back responses that say, "They're operating within the rules of the MLS. There's nothing we can do about it." That's not good enough, folks. I mean, that's just not good enough. No one can say that a seller is not better off with full exposure of their property. You just can't make that statement and make it stick. The more buyers that know the home's for sale, the better off the seller is going to be when it comes to the offer he finally gets.

MR. PERRIELLO: Lee, can I respond?

MS. QUINN: Alex.

MR. PERRIELLO: You mentioned northern New Jersey, which is near and dear to my heart since I live there, but I did do some research on The Garden State MLS, and I found some very interesting things. You know, all of the conversation is about what an agent gets paid and not how an agent gets paid, and I think that part of the conversation needs to come forward.

You know, when a person lists their house, the agent, the listing agent, the listing broker, then assumes all of the costs, all of the responsibility to market that house with the expectation that at some point in the future, that house is going to sell, and what you hear about all the time is the house that sells in one day for an exorbitant price and the agent didn't work real hard.

So, what I did, I just looked at some Garden State MLS statistics for the last four years, and I think it's very interesting. 2004 was a record year for home sales in New Jersey. They had a record amount of listings put in the MLS, over 52,000. What's really interesting is that the market time was 82 days. During the hottest real estate market in New Jersey, it was 82 days, and that's just from the time the property was listed until the time there was a contract on it, and as Cathy said, you need to add another 30, maybe 45 days to that. So, we're talking about a third of the year.

What's interesting is although 2004 was a record year, only 66 percent of the listings that went into that MLS actually sold. So, I think that just demonstrates that the agent and the broker take all the risks with the hope of a payday down the road. It's almost a third of a year process, and there's a one-third likelihood that you are never going to see a payday, the house won't sell, it will either expire or the person will take it off the market. So, I think there's that risk/reward factor that people have to take into consideration as to how this business is conducted.

MR. LEWIS: Yeah, Lee, I would like to agree with Cathy's point that I think we need an historical perspective, and we are an incredibly buoyant seller's market with particularly hot spots around the country, be it, you know, Florida, Southern California, Phoenix, Las Vegas, and some of the issues that we're talking about are really a result of it being a seller's market and buyers not having a lot of power.

Five years from now, we can be sitting here looking at the opposite situation, and a lot of the business models that I think are arising, it remains to be seen whether those are going to survive long-term. If you think back to the "dot com" boom, it seems like there were internet stockbrokers popping up left and right, and everybody was on the internet day trading, and you don't see that today. I mean, that came to a crash in 2000, and now there's more equilibrium.

Some of the stronger, better new business models have survived; many have not. In looking at solutions and in looking at choices, I think we need to be looking at it from more of a market equilibrium perspective and not be too much influenced by what's happening in some parts of the country today.

MS. QUINN: Thank you.

Steve?

MR. DelBIANCO: From what Cathy and Alex were saying, I had to check the name of this conference, and I had to check the panel title again. This isn't about competition between home buyers to buy a home. It's about competition amongst real estate agents representing buyers and sellers and what they charge and what they do to provide the services. Thankfully, Geoff brought us back home again.

Let's focus harder on the market. The market in definition here is not the market of home buyers and sellers. It's the market of realtors and real estate professionals providing services to home sellers and buyers, and you know, it's almost as if, like she said, it's a chicken and egg problem between do we allow the innovation and will that generate competition or do we need to have competition first that will generate the "dot com" style innovation?

I'm an IT guy, I'm a huge believer in what IT can do, and so it's really not a chicken and egg problem. It's more like don't be chicken, give us the eggs, and we will bring home the bacon. Let us innovate, and within the club, within the MLS, we will make it more productive, more competitive, and five years from today, you'll be glad that you went that way.

MR. HENDERSON: Is there another question?

MS. QUINN: Yes, actually, I am getting a lot of questions about the MLS, and basically I am going to paraphrase a little bit.

Why does it matter if the listing agent owns the listing once the agent chooses to contribute the listing to the MLS? Doesn't that listing fall under the rules for what a joint venture of competitors can control about members' business?

And the other one is pretty much on the same theme, after saying that there's an NAR rule that brokers should not discourage exclusive agency listings, yet many MLSs do not send EA listings to REALTOR.com, thereby pressuring sellers indirectly to list only in an exclusive right to sell capacity.

So, what are some of the approaches that we should take toward the MLS?

MR. HENDERSON: I'd like to take a stab at that.

MS. QUINN: Not "we" as a government; just "we" as consumers.

MR. HENDERSON: You know, one of the interesting things, you know, earlier in the day, we heard a lot about fiduciary duty, particularly with regard to minimum service brokerages and the need to emphasize that the agent is, in fact, an agent and is working on behalf of the consumer. One question is, with regard to both opting out, you know, letting brokers prevent listings from being displayed on internet sites as opposed to being printed out, and with regard to preventing new kinds of brokers from joining the MLS, I would ask the brokerages who are fighting for those policies, how does that help your seller?

I mean, if the purpose of putting the listing into the MLS is to recruit other brokers who represent buyers so the home sells, whose interests are being served by opting out and whose interests are being served by erecting barriers so that new kinds of brokers can't play?

MS. QUINN: I have one on the other side, too.

MR. HENDERSON: I guess you would call that a rhetorical question if no one answers. I thought there might be an answer by somebody fighting for those rules, and clearly there is not.

MR. EARLY: Well, Phil, I'll say something to that. It has to do with the in-house transaction; it has to do with doubling your income on the sale of a property. I mean, we've skirted around this all day long. We've never talked about the double-dip or the dual agency or the double income. I haven't heard it mentioned once in the entire day. Take the in-house transaction, double-dip transaction off of the table as a problem in our industry, and we have no problems. We have no problems.

We start providing fiduciary level services to both buyers and sellers if we take that in-house double-dip transaction off the table as a problem. We're not going to do that.

MS. WHATLEY: I would like to at least try to respond to the question. Again, the Multiple Listing Service is open to every realtor member. You have access to that information today. The minute you join, you have access to that information. It is yours to use, it is yours to then communicate to your buyer or your seller in the best avenue that you find helpful to you.

It is different when you have other avenues that you are providing that information in terms of advertising or marketing, and there are some limitations on those uses that are different, but today, you could sit right here, if we had our laptop computer and we opened it up and we had a wireless, we could go right into the MLS. You could have access to every bit.

If you and I were competing brokers in the same marketplace where we both belonged to the same MLS, we'd open up the same thing and we'd see the same thing. We would see exactly the same information, and you could on the internet communicate that then to your customer, and I could either do that online, I could fax it to my customer, or I could pick up the phone and call them. We have the same information available to us.

MR. HENDERSON: Maybe I don't understand how opt-out works then. I thought if I'm using the internet that not all listings would be available if some brokers had opted out.

MS. WHATLEY: Well, in the IDX world, the internet data exchange world, which has been operating now for four or five years and has been hugely successful, the rules of engagement of IDX have been that it was a blanket opt-out and a reciprocal response to you. So, in the event that I didn't want my listings being able to be shown by other brokers, they couldn't be shown by any other brokers, but vice versa, then I couldn't show any of theirs. So, there was a huge penalty to me if I felt like that was where I had to go, and it has been highly successful.

Most real estate companies, most real estate agents, have access to IDX sites right on their own web sites, and so, you know, to say that that's somehow limiting your ability to share information with the consumer, what you see in the MLS is more detailed information, but again, you have access to that, and you can provide that to the consumer just like I can in whatever avenue or vein you might elect to do that.

MR. PERRIELLO: Yeah, I would agree, Cathy. We opened up our national web sites to our brokers where IDX was available, and we would link to their local web sites so the consumer could see all of the listings in the market from one of the brand web sites. The brokers were standing in line to sign up for that, because they had all of the brokers' listings in their market, it was on their local site, and now they had the option to put it on their national site.

I think the issue of the opt-out is we believe the listing is the work product of the broker, and there should be some protection. We believe that if a listing shows up someplace that you really find objectionable, that you would have the right to say, "You know, I think I'll just keep my listings to myself." Would you ever do it? Probably not, because your competitors would eat you alive if you made that decision, because they would use that against you. They'd say, "Well, you don't want to list with them because they don't share their listings with anyone."

So, the competitive pressure will keep everyone sharing listings, but it's giving that broker that failsafe, if you will, if they wanted to use it, and I think that with the new policy, the ILD policy, adding that feature where the customer makes the final choice I think is an excellent feature, because then it takes it out of the broker's hands into the customer's, and to say to the seller, "Do you agree with this? If you do, fine. If not, you can opt in." I think that's a good feature and a good resolution to it.

MS. QUINN: Go ahead, Steve.

MR. DelBIANCO: Just hit reverse on the tape to about 45 minutes ago when Cathy told us that the advertising data that she just finished bragging about is really stale. Real time data is much better, and you can only get that from your broker. Only your broker can get it to you. The advertising data isn't really the right data. That's the same thing.

Now, hit the reverse button again, go back six weeks. Six weeks ago, NAR was putting forth a policy of selective opt-out under pressure from the largest franchises to do selective opt-out, which was deliberately aimed to be able to punish a broker who has somehow gone outside the rules by not only using it for cooperation and compensation, but maybe even showing those listings as a way to attract customers.

So, selective opt-out is something that's -- is it really off the table? It's certainly not out of the minds of NAR, but it's off the table now because -- because of what? Not because of competitive pressure that Alex just described. It's off the table now because the Justice Department for two years has been saying it's against the law. So, we need the kind of antitrust enforcement that we have in this case to keep the MLS system from running afoul of antitrust laws.

MR. EARLY: Well, not to say that it's not forgotten, but part of the new ILD rules stipulate that you must make an offer of compensation and accept offers of compensation. EBAs, exclusive buyer agents, do not list properties. We do not put homes in MLSs. We do not make offers of compensation. Who's that rule aimed at? I wonder.

I mean, that's a very serious question. I do wonder, did somebody just happen to write those words down, or did somebody think about them before they were written down? My organization, the National Association of Exclusive Buyer Agents, does not make offers of compensation, but according to the new ILD rules, you have to make offers of compensation in order to be a member of your MLS, to participate.

MS. QUINN: Anything else?

Well, we have a question from the audience that says what, if anything, precludes proponents of new business models from cooperating to form their own accumulation of listings? Isn't that competition? How would you respond to that audience member?

MR. HENDERSON: I can take a quick stab at it. The marketplace, which is, you know, in the securities world, it's NASDAQ, the New York Stock Exchange, in the real estate world, it's the MLSs, is useful for brokers who represent buyers because it is a cooperative entity. It can see what's for sale. It's useful for sellers because they know buyers are using it. And there's a critical mass concept that's very important to allowing marketplaces to work.

If a new entrant, you know, if I go start Henderson Brokerage here in Washington, D.C., I could join the MLS and, you know, touching on Alex's comment, ownership of listings, no broker objects to me printing out their listings all day long, and they don't invoke ownership rights to say I can't give a piece of paper with a listing to a potential buyer, nor do they invoke advertising rights, say, "No, you can't give that piece of paper to a potential buyer."

The objection is that it's on the internet. And so our position is that competition is good, just like with the rebates, you want to allow brokers to use different tools, to use available technology, to serve buyers, to serve sellers. The same concept applies in other areas of the industry. Let's allow brokers to use technology and available tools to compete.

MS. QUINN: Steve?

MR. DelBIANCO: I think the question was does anything preclude competition other than, you know, outside of the MLS, and I think we just heard a good answer from Philip that it's hard because of network effects, but there's also a catch in that if alternative business model like FSBO, FSBO.com, well, they were hauled into court in California because that alternative model was treated as what? It was treated as advertising if you believe the California Board of Realtors, and they wanted them shut down because they weren't acting like a realtor.

So, the alternative business models often find themselves getting trapped and captured by the laws designed to govern the conduct of realtors, and another alternative, say eBay for instance, if eBay is listing homes for sale as an alternative, then they shouldn't be forced to become licensed brokers in certain states, and yet you see complaints all the time from realtors telling the state licensing board, "You guys have homes for sale online. They need to be licensed."

So, again, it's all about don't preclude competition, but by golly, the first time it shows up, regulate it.

MS. QUINN: Anyone else?

(No response.)

MS. QUINN: Well, I think we're almost out of time. I would like to thank the panel for being so good to come and spend their time with us today and for all the work and effort that they've put into their talks and their responses. So, let's give them a hand.

(Applause.)

(A brief recess was taken.)

DR. SALINGER: Well, good afternoon. My name is Michael Salinger. I'm Director of the Bureau of Economics here at the FTC.

Although it may not be a sound economic proposition, I am a strong believer in saving the best until last, and from my perspective, which I realize may not be shared by everyone in the room, our session this afternoon, because it focuses on economic analysis, is the one that I've been looking forward to most. Now, whether or not you share my enjoyment of economic analysis, sound public policy must ultimately rest on it. Particularly in an industry where most people have some experience but only a few episodes of it, we cannot let anecdotes win the day. Policy must be based on a systematic review of the evidence based on a coherent analytical framework.

We're fortunate today to have two outstanding economists as panelists to help us in that effort. Dr. Lawrence Yun is the Managing Director of Quantitative Research at the National Association of Realtors, where he manages the Statistics and Forecasting Groups of the Research Division. He writes regular columns on real estate market trends, creates NAR's forecasts, and participates in many economic forecasting panels, including Blue Chip and the Harvard University Industrial Economist Council.

Dr. Yun has been quoted on the real estate market and the economy in the media, including The Wall Street Journal, The New York Times, and The Washington Post. He has also appeared on CNBC and Bloomberg TV. Dr. Yun received his undergraduate degree from Purdue University and his Ph.D. from the University of Maryland at College Park.

Chang-Tai Hsieh is Associate Professor of Economics at the University of California, Berkeley. Previously he was Assistant Professor in the Department of Economics at the Woodrow Wilson School at Princeton. Professor Hsieh has published many papers in major economic journals, including, "Can Free Entry Be

Inefficient? Fixed Commissions and Social Waste in the Real Estate Industry," in the October 2003 Journal of Political Economy.

He is currently a Faculty Research Fellow for the National Bureau of Economic Research, Co-chair for The World Bank Research Department Advisory Committee, and a Visiting Scholar at the Federal Reserve Bank of San Francisco. Professor Hsieh graduated from the University of California, Berkeley, with a Ph.D. in Economics in 1998.

As Dr. Yun works for the National Association of Realtors and Dr. Hsieh's article refers to social waste in the real estate industry, I have no doubt that we are in for a lively session.

I will ask Dr. Yun to start us off.

DR. YUN: Thank you very much.

As the introduction made it clear, my day-to-day activity usually centers around sort of forecasts of the economy in the housing market, Friday's release of the PD will show some growth rate of close to 4 percent, but today's discussion is not about that but about a topic that I studied intensively while in graduate school.

My graduate school specialty was in industrial organization, which is the study of the competitiveness of the industry, and I am very happy to have taken on this topic to sort of refresh some of the things that I learned at graduate school and sort of apply it.

The traditional graduate school study examining the industry will look at the structure of the industry, that is to say, is it a monopoly, oligopoly, perfectly competitive industry? Based upon the structure, then we will look for some conduct activity. Is there a lot of collusion involved, or is it fairly -- are prices determined through competitive pressures? And then finally, we will look at the performance. What is the bottom line? Is it good for society? Is it good for consumers? Is it good for workers? So, all these aspects I will be covering.

Some of the data, because we're the last panel, has been earlier discussed, and I will quickly go over it, but I will try to frame it from more of an economist's perspective.

From the consumer's point of view, they have a wide choice. Not only can they think about for-sale-by-owner, which one million home sellers do each year, but they can choose a discount brokerage, or some people call them more of a minimum service brokerage, a traditional brokerage. There's a wide availability of information available. So, from the consumer side, it appears fairly competitive, a wide range of choices.

From the supplier point of view, let's look at the figures. Currently, 1.25 million realtor members; 2.53 million service providers who have licenses; 98,000 active firms in over 200,000 local offices; and again, choice available for consumer is for-sale-by-owner, which is over one million per year.

There's very low entry barrier. Last year, we had an increase in membership, but the increase was not due to just straight increase. There were many people who dropped out. In fact, 253,000 entered the market, became realtor members, and 127,000 dropped out, indicating that the market is fairly dynamic, that there's free entry, free exit. Just as the perfectly competitive model would predict in Economics 101, through this process, one would get a sort of economically efficient outcome that maximizes consumer surcharge. And also again, on the information side, information is everywhere.

Let's look at the past housing cycles. There was a recession back in the early 1980s. Paul Volcker, Chairman of the Federal Reserve, his goal, cut back on inflation. The way to do that, drastically increase interest rates. Average interest rates, mortgage rates, at 18 percent at one point. During that time, home sales declined by 50 percent. So, if you were a realtor in the business, you lost half of your business.

Similarly, in the recession of the 1990s, less severe, but nonetheless, a housing cycle. Now, this time around, thanks to the generation of low mortgage rates, we have record home sales, record home price growth, and not surprisingly, record increase in membership. The realtor membership is following the market trends.

This is the sales activity, again, one can see back in the early 1980s, a drastic decline in sales, some decline in 1990s. The real price growth, so this would be the home price growth after subtracting away the Consumer Price Inflation, a few years were negative. Those years that are negative one can correlate with the next chart that shows that when the real home price growth was negative, that membership generally declined. There was no enthusiasm for people to want to become a realtor. But given the current record home price growth, not surprisingly, we are having a record increase in membership.

In studying the industry structure, economists here at FTC, as well as in DOJ, they would generally look towards the concentration ratio to see whether the industry is concentrated and can exert some market power, if they can collude. This is the concentration ratio among the firms in the real estate industry, real estate brokerage firms.

This is the hard data, but I would caution that this data may not be as meaningful for the real estate brokerage compared to other industries. The key reason is that agents are independent contractors. An agent working at Century 21 would be competing with another agent working at Century 21. Cendant, they have different branches, Coldwell Banker, Century 21. It's my understanding that these two brands will be competing within the Cendant branch. So, even though by overall company this is the market share, I would say from the market outcome point of view, consumer choice point of view, the real concentration is the 2.5 million real estate licensees.

So, in other words, one can think of how many businesses are out there? There are 2.5 million independent real estate agents having their own business model, how much effort to put into advertising, how much effort to place a phone call, and so many, many different business model that each real estate agent would be conducting.

This is the market structural size, so this is the number of sales force, one to five or six to ten.

So, back in 1983, 51 percent of the offices had one to five agents. By 1999, one to five agents, small companies, 60 percent were of small companies. So, very large, 50-plus agent office is a very rare situation in the real estate brokerage industry. In 2004, we don't have the exact comparable data, but nonetheless, we slice it differently, we find that 96 percent of the offices have ten or fewer agents.

Now, the question is raised, how can a small size firm survive over time? Well, there's a study by Zumpano, a professor at University of Alabama, he did some cost measurements, and from this cost measurement, he found that the industry is of constant economies of scale. That, in plain language, is there's no benefit of being big. Big or small, you are on equal footing from the cost point of view.

One can also turn to Stigler's Survival Test. Stigler is named after George Stigler, a Nobel Prize winner in economics, which he said basically the firms are able to survive best by systemic demonstration that the market is efficient based upon how the results are shown. So, the results are showing that small firms can survive, which means that there is really no economies of scale.

Now we have seen that small firms are able to survive. How is that? Well, the Multiple Listing Service, the great Multiple Listing Service, is putting everyone on equal footing. If you want to start a business and assume that you don't have any access to Multiple Listing Service, it's very difficult to obtain clients, but Multiple Listing Service allows, whether large or small firms, on equal footing, equal information, and small firms can survive over time.

Furthermore, agents, as mentioned, are independent contractors, and they are providing person-to-person, case-by-case service that requires highest level of trust. Just think of legal advice. Is a legal advice a commodity or a service? Estate planning advice, tax advice. And what are the fees associated with that? Has the internet impacted their fees? And are the real estate brokers, real estate agents, when they are providing service, is it a one-second transaction, or is it a three-month home-buying process or home-selling process?

I would contend that it is a professional service that requires a lengthy amount of time, and not only that, requires many, many paperwork. I was a first-time home buyer several years back, and I have a Ph.D. in economics. I didn't realize how daunting the home-buying process could be. But we believe that, you know, real estate service is not a commodity, and hence, we really don't see why the internet would necessarily bring a drastic decline in prices as one would purchase an airline ticket or purchasing an item in stock.

Are we producing a perfectly competitive outcome? In Econ 101, perfectly competitive market structure would say that there is no excessive economic profit. Any abnormal profit will induce new entry, and the profit will be eaten away. The realtor income, $52,000 in 2002, that's the median, and again, as someone alluded to earlier, that is before business costs, before health insurance costs and other fees.

The real median income has fallen. That's not surprising. The number of new agents entering the market in the past couple of years has outpaced the home sales growth and even the home price growth. So, given the fact that the realtor membership has increased far more than actual home sales, it's not surprising that the median income has fallen.

Also, the commission rates, often mentioned source REALTrends, 5.5 percent to 5.1 percent decline. I would question the reliability of the data. Now, I'm not really questioning the reliability, but at the same time, because NAR has been -- well, when I first came to NAR, they said, "One thing you should never do is study commissions," and I think the reason for that is in honor of the latest Nobel Prize winner in economics, Thomas Schelling, which say basically in large organizations, coming out with some kind of figure represent a focal point for others to collude. So, whatever figure NAR come out with, maybe other people will sort of use that as a collusion point.

So, we cannot study commissions, but I'm not sure how the commission studies are conducted. Does it include the costs that realtors provide in terms of free moving trucks, closing cost assistance, commission rebates? We are hearing, particularly in hot markets, California, South Florida and elsewhere, that realtors are going to extra lengths, extra financial inducement to provide service to their clients, whether buyer or seller.

Let's look at some other desirable performance measures. Now, I have developed these performance measures in light of the fact that we have been hearing, by some well-renowned economist which I respect personally, have even suggested that possibly banks entering into the real estate brokerage industry will better provide the performance measures.

One, economic mobility. While home sales is very dynamic, one of the most dynamic in the world in the U.S., I think that's a good proxy to represent that there is a lot of economic mobility in the United States, and I think that's a good thing. In Japan, there's very, very little mobility. In fact, most of the home sales are new home sales, not existing home sales.

Historical experience of seeking a government bailout. In the real estate business, none. Bad times, as the chart earlier illustrated, were self-correcting through realtors exiting the market.

Taxpayer risk, none. Let me just quote you one recent study by the FDIC concerning the concentration of the banks. Again, this relates to some people noting that perhaps banks entering into the real estate business would be good.

"FDIC research economists stated that because of mega-mergers that had been occurring in the financial services industry, a failure of a single mega-bank could overwhelm the insurance system at the expense of taxpayers and expose taxpayers to huge potential liability." The top five bank financial service companies own more than 50 percent of the market control, and I'm not sure we want to move a real estate industry which currently is highly, fiercely competitive, into a very concentrated industry.

What about other measures? Social promotion of self-reliance and entrepreneurship, I think most Americans would agree that self-reliance and entrepreneurship is a good thing. Every single agent pretty much are independent contractors.

Fifty-five percent of the realtor members are women. Some people -- I mean, people may disagree, but some people consider some more participation among sort of more diverse populations as a good thing.

Flexible hours. Work stoppage through labor strikes, none. They're all independent contractors.

Data mining, what is data mining? Well, Oracle, SEBOL (phonetic) systems and other very sophisticated artificial intelligence designs, things of that nature, they sell their software to banking companies and credit card companies. What is the purpose of that? They data mine, which is to say they want to see the consumer buying habits. Based upon that, they can price discriminate. They know that certain people are willing to pay slightly higher price for the same service and so on. So, providing home transaction over to the banking industry would expose even more potential for data mining and price discrimination and extraction of consumer surplus.

And also, currently, real estate is all local,

local, local, local. If we move it into the banking industry, there's a potential that certainly there could be some international regulatory jurisdiction. Then we would have I guess an even stronger regulatory power than FTC or DOJ.

Now, just the issue of Multiple Listing Service, again, economist's point of view, what is the purpose? Why was it designed? It helps with home sales transactions, facilitates home sales transactions, easy information availability. It was designed through a cooperative arrangement by the brokers to, again, facilitate transactions.

It's available to all realtor members and many non-realtor members. I forgot to insert that other word, "non-realtor members," many non-realtor members. It depends upon the ownership structure of the MLS. Every MLS is slightly different in terms of ownership structure, but it is pretty much available to many, many real estate licensees, whether realtors or non-realtors.

Over half a million dollars have been invested, at least only strictly on REALTY.com. Who paid for that? Actually, I don't know. Maybe realtors, they are paying fee to advertise their space, but irrespective of who paid the half million dollars, the industry is proactive in bringing consumer friendly results.

Government did not dictate, "Hey, realtor organization, you should have some kind of computer web site that's consumer friendly." No one dictated that to us. It was the market response. It was a proactive response to bring consumer friendly results.

MLS was never set up to solicit clients. So, if the brokers who are using Multiple Listing Service to facilitate home transactions, but they see another entity entering the system, in a sense, not directly sell the homes but in a sense to solicit clients, and if that is permitted, you can just anticipate just normal human business reaction, "I don't want to participate in that system."

Well, is it a public utility? Well, let's consider it, as one person alluded to earlier about the used car and putting it in front of a used car sales parking lot. Getting a beer at a stadium, $5, you know, just down the street one can get it for $1 or $2. Why don't we make it consumer friendly for stadium participants? Let's open the stadium as a public utility and allow all the street vendors to come in to the stadium and sell their beer for $1. That's consumer friendly.

Shopping malls, heck, got a lot of flea market vendors out there who can sell it for lower price. Open up the shopping mall, hopefully all these flea market vendors will enter and let the consumers benefit. I hear that the pharmaceutical drugs from Canada and Mexico are a little cheaper. What would CVS, Walgreen's react to that if they allow that to be a public utility so that consumers would benefit?

Sure, consumers can benefit over the short term, but we know the long-term consequences of allowing as a public utility. The providers of the system, whether Multiple Listing Service, stadium, shopping malls, they would have no incentive to provide that.

I would say just economic principles, we have heard very good arguments back and forth among many panelists, but when in doubt, I would say we would trust market outcomes based upon massive free entry and exit.

Market not subjected to profit in the long run, and I just inserted that because Dennis Mueller was my dissertation advisor, and that's the topic that I studied, which basically states that large companies, like the banks, they can be inefficient but yet survive because they have market power, despite the economies of scale, they are able to survive by setting up barriers to entry. And certainly the real estate profession is not subjected to that.

Private ownership. Private ownership always seems to work. Any time there is a little interference in the private ownership, unintended consequences sometimes occur. As one Swedish economist mentioned, "There's two ways to destroy a city: One is through a bombing; one is to just set a rent control and just wait 30 years." The same thing.

MLS participants, they are private organizations. They are making business decisions on private matters. We open up to the public, perhaps in the short run, it benefits the consumers, but perhaps over the long run, there may be some unintended consequences.

And also, regarding minimum level service and commission rebates, economists can debate all the pros and cons related to it, but we would just, as the NAR, just defer to the democratic process. We enjoy the discussion, and I think sort of through the discussion, persuasion of consumers, perhaps through that process, that democratic process works in terms of whether it is consumer friendly or puts the consumer more at risk.

That's the end of my presentation. Thank you.

(Applause.)

DR. HSIEH: Well, as you can all see, I don't believe in using new technologies, and in my field, we take pride in using slides.

So, let me talk about what we think or what I see as being the consequences or the nature of competition in the real estate industry, and what you are going to see at the end of my talk is that the argument that I am going to make is basically the same argument that Mr. Lewis of RE/MAX in the previous panel made, but I'm going to give it a very different spin.

So, what do we mean by the "Tragedy of the Commission," and for those of you who have taken an Econ 101 class, I'm basically making an allusion to the tragedy of economics. So, what is it that is puzzling? What was it that got us started in this, because if you note, I am not a person who specializes in real estate, but what got me really interested in this is that the real puzzle in the real estate business is why does there seem to be this relatively fixed commission structure?

Now, we don't have a very good story for why this commission structure looks like it's relatively fixed, or at least it doesn't seem to vary that much. I mean, it could be the case that, you know, it could be the stories that were told in the previous panels about actions by the local real estate boards against firms like eRealty.com or in the place where I live, in the San Francisco Bay area, the major internet broker is

ZipRealty, but what's puzzling about this is what this means is that as long as this commission rate is relatively fixed, or it doesn't vary that much, what this means is that the amount that a consumer pays rises one to one, it rises proportionately, with the value of the house.

I mean, it may go down a little bit because of higher rebates if you're selling a more expensive house or you may get a free moving truck, but you know, all of that is minor compared to, you know, how much additional money you are going to pay. In the neighborhood where I live, the median price of a home is $1.2 million, and as far as I can tell, the commission rate is still at 6 percent. Some brokers might offer you 5, but 5 or 6 percent of 1.2 mill is a chunk of change. It's a lot of money.

The point is that, and this is something that a lot of people have alluded to already, it's highly unlikely that the amount of time, that the amount of effort that a broker has to put into selling a house or in trying to incentivise a buyer to buy a house is going to rise linearly with the amount of the cost of these services.

Now, you know, this might seem like a great deal for brokers. It might seem the case that brokers who operate in my area are going to earn extraordinary profits, because in one given transaction, they can walk away with $35,000, right? But that's actually not the right way to think about it, and this is something, again, that a lot of other people have alluded to, because there's relatively free entry into the profession and into the real estate brokerage business, and basically what that does is that it basically dilutes the profits for everybody, and at the end of the day, realtors don't make any more money in the San Francisco Bay area than in a city like Pittsburgh, but people like me, we're paying much, much more for these services than somebody that lives in the City of Pittsburgh.

So, let me illustrate the story that I'm telling by just telling you a tale of two cities. So, let me tell you, and I guess I'll say a little bit more about this, but the data that we use is basically the data from the Centennial Housing and Population Census. We did this work in 1998 and '99, so we had access to the data from the 1980 and 1990 population censuses.

But let's think about two cities, and we picked these two cities, Boston and Minneapolis, because they look quite similar among a bunch of dimensions. They are cities of roughly similar size, cities have similar demographics, cities have similar racial composition, they -- but the thing that strikes out, that really jumps out at you when you want to think about Boston versus Minneapolis, and this is data for 1990, is that housing in Boston is a lot more expensive than what it is in Minneapolis. It costs twice as much, and obviously if you look an analysis, my guess is that it's going to be much, much higher, because there's been a real housing boom in the Boston area.

Now, this would seem to imply that as long as the commission structure is relatively fixed, what this would seem to imply is that a realtor in Boston is going to make much more, is going to make twice as much as a realtor in Minneapolis, because if you sell a house in Boston, you get twice as much than a realtor that sells a similar house in Minneapolis, but you know, again, but that's not the end of the story.

I mean, if that were the end of the story, then it would be like a story that you see in a lot of other industries. Some people pay more for a service, and other people gain from the service. So, you know, so then the commission structure would just be a transfer from consumers to the realtors, some people are worse off, some people are better off, but at least some people are happier as a result of the higher commission, but the tragedy of this business is that that's actually not the right story, because what happens, and again, for those of you who are in this field, there are many, many more realtors in Boston than there are in Minneapolis.

So, at the end of the day, what happens, an average realtor in Boston just sells less. An average realtor in Boston sells 3.3 houses per year, which is about one-half of what an average realtor in Minneapolis sells. Again, all of this data comes from the U.S. Housing and Population Census.

Now, one can argue that, well, this is not really the right comparison, because Boston is different. Houses are different in Boston. It just takes a lot more work to match buyers and sellers in Boston than it does in Minneapolis. It could be the case that, you know, people whose predecessors came from Ireland are just more difficult to deal with than those who came from Sweden, that could be the story, but you know, this has not always been the case, because if you just look back ten years, if you look at Boston versus Minneapolis in 1980, the productivity, houses sold per agent, in Boston was almost exactly the same as that in Minneapolis. They were almost exactly the same, and clearly we know what happened, you know, what happened.

There was a housing boom in Boston, but there was not a housing boom in Minneapolis. So, what happened over the ten-year period from 1980 to 1990 is that you saw massive entry of realtors into the real estate brokerage business, which made it much more difficult for everybody else to find a business, and what that did is that it just drove down profits for everybody, so that at the end of the day, the average income of a broker in Boston in 1990 is exactly the same as what it was in 1980, and it's exactly the same as what an average broker earns in the City of Minneapolis, despite the fact that a homeowner in Boston pays twice as much, and this is what we call the tragedy of the commission, that basically this is a case in which somebody is paying more, us consumers, yet nobody is better off. The money is just waste. The amount of additional profits, the amount of the higher cost, is not benefiting anyone, and I'll try to document that more precisely in the few minutes that I have left.

So, basically what we've documented is that this is exactly the pattern, when you look across all of the cities in the U.S., that if you look across the approximately 300 metropolitan areas of the U.S. and if you look at changes from 1980 to 1990 and you look at cities where housing prices have gone up relative to the cities where housing prices have gone up by less, what you're going to see is that in places where housing prices have gone up by more, what you see are three things.

What you see are more real estate agents, and let me just show you what the data looks like. So, this is just a scatter plot. It's a scatter plot, and what's on the Y axis is basically the change from 1980 to 1990 in the number of realtors relative to the number of workers in the city, and what's on the X axis is the change in the average price of housing, and we normalize the price of housing by the average wage in the city, so to try to account for differences in the costs of doing business, and basically the slope looks very -- the scales are somewhat different, but the slope is very close to one.

What does that mean? It means that every one percentage point increase in the housing prices increases the number of realtors by about almost one percentage point. Now, if you think that the demand for these services, the amount of buying and selling that homeowners want to do in a city, is not going to rise that much with an increase in the price of housing in the city, it's clear what this is going to mean, right? It's clear what this is going to mean.

It's going to mean that the number of transactions, the number of sales by a typical agent, is going to fall. It is going to fall. So, the second thing that you're going to see is that as housing prices go up, number of sales per agent falls. In other words, think about it as over-capacity, over-capacity of industry. So, let me show you the evidence of lower productivity.

So, what's on the Y axis this time is a number of -- is a change -- again, all this is is the 1980 and 1990 -- anyway, it's the number of houses sold in a city relative to the number of hours worked by a realtor. You could also do it relative to the number of realtors, but it's not going to make that much difference. We did hours worked to try to account for the fact that there may be changes in the amount of hours worked by realtors.

And again, the slope looks like this. It's very close to one. So, a 1 percent increase in price would translate into a fall in sales per hour's work or sales by almost one percentage point. So, the bottom line is that in places where housing prices have gone up, nothing happens to wages. So, basically what's here, what's on the Y axis, is the wage of the realtor or the income of the realtor as reported in the Census, relative to what we constructed as the alternative wage of the broker, where basically we look at the demographic characteristics of brokers, and we make an estimate of how much they could earn if they did something else with their time, and it looks incredibly flat. And again, this is something that a lot of the people here have already alluded to. Wages are no higher in places where housing prices have gone up. So, realtors are no better off despite the fact that consumers are paying a lot more for those services.

Now, what could be some of the problems with this analysis? Well, the natural problem with this analysis is that, well, it could be the case that, you know, a broker in Boston just has to work a lot more to try to match buyers and sellers. It just takes a lot more time to, you know, to show the houses, or after an offer has been made, to get to closing, as a former panelist talked of, but you know, there are a couple of things to remember.

One is that remember that what we're doing is that we're comparing the same city, that is, we are not comparing Boston with Pittsburgh. What we are doing is we're comparing changes in Pittsburgh with changes in Boston. So, we're talking about the same city, the same houses, the same houses.

Another way in which you could try to get at this is you could try to get direct measures of the amount of time that realtors actually have to put in to actually try to sell houses. So, we tried to put together a little bit of that data, so we looked at three measures, and so what's in this top panel is basically time on the market, time on the market against the price of housing, and this is something that I guess we all know, that in places where housing prices have gone up, time on the market falls. So, it's not the case that the listings stay on the market for a longer period of time.

Again, the unit of observation here is a city. So, each circle represents a city, and then the size of -- I guess I should have said the size of the circle relates to the size of city. If you look at data on the point of view of buyers, so this is data from the buyer's side, this is the average number of houses that buyers look at in different cities, and the line looks roughly flat, so that's this panel here. Now, it doesn't seem to be the case that in higher cost cities that buyers look at more houses in the process of searching for a house.

Lastly, this last part -- I think the last thing is actually data from the National Association of

Realtors, but this is the number of months that home buyers search for a house in different cities, and again, the line looks flat, the line does. So, it's not the case that in higher cost cities that home buyers are actually spending more time trying to find a house.

So, the question then is, what is it that realtors are doing? You know, what is it that realtors are doing differently in Boston than in Minneapolis or what is it that realtors in Boston in 1990 were doing differently than they were doing back in 1980? And here I guess our story is that, well, you know, why don't we think about two things that realtors do.

The first thing that they do, and it's an incredibly valuable service, is that they match buyers and sellers. That's an incredible value. But the other thing, which I'm sure that all of you know, is that they spend a lot of their time doing prospecting. They spend a lot of their time prospecting. You know, they go from door to door, they leave notepads with their pictures on them. In the neighborhood where I live, I have a lot of realtors living free pumpkins on my door step. You know, they call on FSBOs. They service their farm. I'm sure you all know what I mean.

I guess our claim is that the second type of activities, prospecting, is really of little value to us consumers. What we value is the services that a realtor usually provides in getting the right price for the house and in negotiating the offer and in getting to closing, all of the things that the previous panelists talked about. That's of real value to us.

But these things, the prospecting, is of little value, are things of little value to us, and our claim is that the amount of time and the amount of money that a realtor spends on the second type of activity increases when housing prices go up. So, the answer to the question I asked a minute ago, what are realtors doing with their time? They are doing most of the time, doing this, the prospecting part, and less of the time doing this, the actual matching of buyers and sellers.

So, to end the story, what is the bottom line? What is the bottom line of the story? Well, let me ask you, how much is the waste? How much is the social waste? Well, here it's hard to give a precise answer, because it depends on what you take as your benchmark; that is, you know, how much time should it take for a realtor to do things that are of value to us, to us as consumers?

So, if you take your benchmark city as Athens, Georgia, that is, you know, what do I mean by a benchmark city? If you make the assumption that all the all of the time that realtors in Athens, Georgia are putting in is actually of real use to us, that it's of real social value to us, and brokers in all of the other cities in the U.S. aren't as productive as brokers in Athens, Georgia, if you were to take that, the waste, the amount of time and effort that is put into prospecting, that amounts to $8.2 billion in 1990, which are half of the revenues of the real estate brokerage business in that year.

Our data from the Census suggests that earnings of brokers in 1990 are about $16 billion, and this figure, I think if you sort of look at it more recently for 2000, which we have not done, my guess is that it probably would be higher then. So, you know, $8 billion is, you know, is a lot of money.

So, in a sense, again, this is what we call the tragedy of the commission. It's basically efforts to protect the price, you know, efforts to try to deal with discount brokers such as eRealty.com, efforts to deal with, you know, again, in my area, with ZipRealty. All of those efforts are ultimately self-defeating, because they don't benefit from it. I mean, that is the tragedy of the business.

If I want to take the analogy that Mr. Yun gave about the baseball vendors in the stadium, Mr. Yun just gave one part of the story, and it's the first step in the analysis, but the right way to try to think about what's going on in the real estate brokerage business is that basically there is free entry into becoming a vendor in a baseball stadium. So, therefore, price is still -- essentially, if you want to think of it an analogy, what's going on in the real estate business is that prices of hotdogs in the stadium are still fixed at, you know, 10 bucks, beer is still fixed at 20 bucks, but instead what you have is for every person who's watching a game in the stadium, there are two vendors, and that's, of course, an exaggeration, but that's one way to look at it, because there basically is free entry, and basically the people who are watching the game and buying hotdogs and beer, they are paying more, and it's not clear what they are getting out of it.

So, I think that what we should be trying to do is to think about ways where we could try to create structures or laws that would try to channel competition in the real estate brokerage business, because it's clear there's an enormous amount of competition in the real estate brokerage business, but what we should try to do is think of ways in which competition translates into lower prices, higher quality of service, not into this kind of waste.

Thank you.

(Applause.)

DR. SALINGER: We originally had three speakers scheduled for today, and one of them had to drop out. I was originally on tap just as the moderator, for which the two requirements are that you have a suit and a watch, but since the one speaker dropped out, I'm going to take a somewhat more active role and discuss a little bit what we just heard.

I'm going to try to stir up the pot a bit, as if these gentlemen haven't done enough already to stir up the pot, but given that I'm going to try to do that, I should issue our standard disclaimer, which is that anything I say today reflects my views and doesn't reflect the views of the Federal Trade Commission or any of the Commissioners.

When I was a staff economist at the FTC 20 years ago, literally my first assignment was to analyze the persistence of 6 percent commission rates on residential real estate transactions in the wake of what at the time seemed like dramatically increased prices of real estate. Unlike Rip Van Winkle, I am finding the world peculiarly unchanged after 20 years. But of course, the world has changed quite a bit.

Technology has developed so that it should be easier and less expensive to make information about properties for sale available to would-be buyers. Many types of transactions are done differently and at less expense than used to be the case, and prices of real estate, particularly in some urban areas, have continued to increase. So, as Dr. Hsieh and I'm sure many people today have pointed out, the puzzle is why the percentage commission has been so stubbornly persistent.

We've seen this pattern in industries before. This is not a unique case. I thought I'd talk a little bit about where else we've seen this pattern. One of them is airlines.

Prior to airline deregulation, the Civil Aeronautics Board regulated the price of airline service, and it regulated entry. Even though it regulated entry, it didn't regulate the quantity of service. So, if you had the authority to fly a particular route, then you could put as many planes on that route as you wanted. So, what happened?

Well, one thing that happened was that prices were really high, and they were particularly high on long distance routes. Just to take one example, in 1977, which is at the end of the regulatory period, the average discounted round-trip fare from Los Angeles to Washington was $333 in 1977 dollars; that would be $779 in today's dollars. Last week on Travelocity, you could buy a ticket for $183. Now, that's not quite a fair comparison, because that was the best price we could find, so it's not the average, but still, the average price on that route has surely come down dramatically.

Now, even though prices were high and particularly high on these long routes, it didn't help the airlines any. A striking feature of that experience was that even though we were regulating minimum prices, the airlines weren't making any money. Why was that?

Well, the airlines learned that when passengers called up an airline to make a reservation, they would call up the airline that had the most frequent flights. That created an incentive to fly as many planes as you could on that route, and what we saw was that load factors were lower than they had to be.

I have fond memories of flying in that era when you would get on a plane, and you would find that you could stretch out across three empty seats. That hasn't happened to me in a while, and I suspect it hasn't happened to you.

Now, airlines aren't the only example of this phenomena. Another is stock brokerage. We used to regulate the minimum price per share that would be charged for stock brokerage, and the consequence of that was that there was a lot of service competition to try to get those rents that were built into the regulated prices.

The results that Professor Hsieh has reported to us today fit those patterns quite closely. Prices apparently above competitive levels and free entry combine to cause excessive entry and excess capacity. Remarkably, in the real estate industry, productivity seems to have declined.

There was an article in The Times on Saturday about the steel industry. It made the point that it used to take nine hours of time to produce a ton of steel, and now that's down to two or three hours, and if you just look across the economy, we've seen dramatic improvements in productivity, but apparently not in the real estate industry.

Now, the most striking, I think, features of Professor Hsieh's results are the comparison across urban areas and the comparison of the productivity of real estate agents in areas depending on whether there are high real estate prices or low real estate prices and whether or not the prices have gone up.

Another feature of Professor Hsieh's results that are reminiscent of the airline industry are that the productivity is particularly low in those areas where the prices seem to be high. In the airlines, we would see lower load factors on the long distance routes, where with the real estate industry, we're seeing less productivity in the high price areas.

Dr. Yun has been very kind to be on our panel today, and I don't want to appear to be an ungracious host, but it would be naive for an NAR economist to come to this conference and not expect to get some tough questions, and indeed, I would expect that he or I would welcome the opportunity to answer the questions. So, I'll put it to you directly.

In the airlines, we deregulated the prices and eliminated restrictions on entry, and prices came down dramatically. Now, true, some aspects of quality have dropped. Airline food is not as good as it used to be, but even accounting for that, the economists who have looked at this have concluded that we are by far better off with the lower prices than we were with the higher service levels designed to attract people to pay the higher prices.

If we were to figure out a way to bring more price competition to the current commission structure -- and I should hasten to add that I'm having my un-Rip Van Winkle type feelings, because it has not proven so simple to do so -- why wouldn't we expect to see a similar phenomenon with real estate brokerage? Why wouldn't we expect prices in general to come down? Why wouldn't we expect them particularly to come down in areas with high real estate prices? And why wouldn't those developments, on balance, be beneficial?

DR. YUN: Thank you for the question.

First, I think the question is premised on the fact or the belief that somehow the prices, commission, is regulated. As everyone was saying, it is perfectly negotiable.

Also, I would recommend to Professor Hsieh, he talked about 5 or 6 percent in California. Put up a sign saying "I am only willing to pay 4 percent" and see how many realtors you get. Prices are negotiable currently.

Also, I would say that industry has fundamentally shifted. In prior years where the Multiple Service Listing information was held more by brokers and less on the consumer side, where the brokers had more leverage -- we are talking about 1990 data on Census -- currently, the Multiple Listing Service data is available to all consumers. It was brought out through the system that we currently have. It is a private market system. There was an incentive by some entrepreneurs to create certain internet friendly system, so the information is widely available.

I would say that the real estate section of the advertisements in The Washington Post, living here, ten years ago, I would not have seen any prominent ad of 4 and a half percent commission. We see that currently widespread. Others say they are not a discounter, but nonetheless, they offer a much higher level of service.

So, commission ranges all over the place, and also, again, questioning the 5.1 percent, again, all the realtors, number one complaint that I hear from realtors, is there's too much competition -- sort of following Professor Hsieh's story -- too much competition, but at the same time, you know, one can say there's too much excessive waste of resources.

In tournament games, people want to be sports stars, but only few people can become sports stars, yet millions of youngsters spend a lot of time and resources in the process. So, one can say that's a wasted energy, so that all those youngsters should stop playing sports. You know, we don't do that.

In the little document written by Thomas Jefferson which says that every person has the right to life, liberty and the pursuit of happiness, he did not say happiness, he said pursuit of happiness. Sure, some realtors go into the market, face bad business decisions and exit, but that's their right, that's their decision to enter and exit.

Again, I would say the market has changed fundamentally, and I think there's more room for negotiation today than before, and certainly information is widely available. It's certainly not regulated.

DR. SALINGER: Okay, well, we have gotten a number of questions from the audience, and one of them relates to your point when you say that this isn't a regulated price, it's a market price, and that's certainly the case. So, this is a question for Dr. Hsieh.

Do you have any theory for if the commission rate that we're observing is not a competitive rate, given how structurally competitive the market appears to be, do you have an explanation for why the rate persists?

DR. HSIEH: That's a great question, and I really don't have the answer. I don't have the answer for that question. I mean, as Dr. Yun said, it could very well be the case that if you look at the data now, commission rates have fallen a little bit, but still, I think it's a little bit disingenuous to say that commissions have fallen in a place like Bethesda, where housing prices have tripled in the last 15 years. So, commission rates falling from 6 to 5.1, you know, you are still paying more than twice as much for selling exactly the same house, and again, it's not clear what you are getting for the service.

Now, the direct answer to your question, I mean, I really don't have an answer to the question. I mean, it's something that has puzzled me a lot, and I'm sure that it's puzzled Michael as well, because I recommend that all of you go read the two volumes of the FTC Report on the Real Estate Industry that was published in 1982, because a lot of the same issues are there, are there in that 1982 staff report.

I guess if you were to push me to try to give some guesses on why it's the case, I mean, I think it's basically a story of about principals, the homeowners, who are weak, who are weak and that, you know, that basically it's the most important financial transaction of their life. They don't have any experience or most people don't have a whole lot of experience in doing this.

So, it's a case that's just ripe for the typical principal/agent problems, and if you want to think about other features of the real estate business, it seems that a lot of other things seem to be consistent with this story. For example, something that I haven't talked about, forget about the debate about whether commissions should be 6 percent or 2 percent, which is what it is in the U.K., but one interesting thing to think about is why is the commission rate a fixed percent of the total value of the house.

The reason I ask this question is suppose that you have a house that will sell for approximately half a million dollars, give or take $30,000 either way. You could list the house for $400,000, and you could give the house away. If the house was worth about $500,000, if you list the house, you would be willing to sell it for $400,000, you know, you have got buyers flocking to you. You don't need an agent for that.

But then the question is, so, basically, what is the marginal value of the agent? The marginal value of the agent is basically gets you prices that are higher than $500,000. So, in other words, the point of this is that the optimal commission structure, if the interest of the seller is really the interest that you have in mind, should be one in which you get nothing if you sell the house for under $450,000, but for every dollar that you sell above that amount, you get 50 cents on that, so that this would more closely align the incentives of the broker with that of the seller, yet this is not the case.

But this is the case if you want to look at other things, because this is roughly the way in which car salesmen are compensated, that, you know, that if you sell a car at a very low price, you get nothing from the owner of the car dealership, and it seems that the difference is that the agent that the car salesman is dealing with sells hundreds of cars every month. So, he has an interest or she has an interest to set the optimal structure, the optimal compensation structure for the agent, but that's not the case with the homeowner, because they are doing this for the first time or they are doing this two or three times. It's just not worth their time to try to negotiate the optimal commission. I think it's really a story about agents which are weak.

DR. SALINGER: Well, I was about to ask a question that was appropriate for both panelists, but it turns out you have just posed the question, so I'm going to turn it to Dr. Yun, but I'll elaborate on it a little bit.

Why do we see the commission structure that we see? Professor Hsieh has suggested that maybe we should expect to see contracts with higher powered incentives. The question here is what if we had salaried agents, and in your comments, you said, well, the real estate transaction is different from, say, selling stocks or airline tickets because it's not a homogeneous transaction, but the typical real estate transaction has a lawyer doing some work on it, and that piece of it is not necessarily as homogeneous as stock brokerage or the sorts of things that you see done on the internet, and those are typically compensated by the hour. So, how do you explain the percentage rate?

DR. YUN: I think the percentage rate occur due to sort of the historical patterns. I mean, in the prior years, when brokers had a lot of power and more information, in fact, they actually told agents, our companies charge this percent, or perhaps sort of the wiggle room of the commission negotiation is only this, but now, I am hearing from so-called full-time brokerage services, Long & Foster, Weichert, I asked the agent, "Is the commission negotiable or how much does the broker influence your commission?" And they said, "It's pretty much my decision, and if I want to set it for $2,000, $20,000, it's, again, mostly my decision."

Of course, they have to get the approval from the brokers, but it's not necessarily the percent now. I think in today's market, people can actually talk about the actual fixed dollars, and one thing that has not been really discussed is that people are unhappy with 5 percent, 6 percent? Who are these people? According to our survey, it's the people who want to do for-sale-by-owner. That market is available, it has always been available, yet people continue to seek the professional service of the realtor agents.

DR. SALINGER: Well, when you talk about there are negotiations going on, and maybe the 6 percent isn't like the gravitational constant. It would be really helpful to know exactly what the distribution of the commissions are, and I know you mentioned in your talk that NAR is reluctant to do this because, I mean, the explanation was you can sometimes get into antitrust problems if you do that, and yet there are standards by which trade associations collect data on the market, and given that it seems like perhaps there are some antitrust problems already that are being driven by this presumption that the percentage rate is sticky, why haven't you done and why haven't you made public the results of a sufficiently systematic survey that would tell us what the distribution is?

DR. YUN: If there is a research within our department on the commission, I would like to know. I don't know. We have not conducted internal surveys. Some brokers have actually asked us, well, why don't you conduct possibly -- not even the actual percent distribution, but just the question, has the commission increased, commission declined? And the people that I report to say, "No, don't touch commissions. We could get into trouble with antitrust." So, I really don't know the answer to it.

And just from the market experience, you know, one can see the advertisements in the newspapers, there's an opportunity for for-sale-by-owner, commission, talk to your realtors, ask them, "Is it negotiable? Are you willing to do it for 5 and a half percent instead of 6 percent?" See what his answer is.

DR. SALINGER: I think we have time for one more question, because I want to give you equal time.

You mentioned that commissions were 2 percent in England. What do you know about any differences in how the market works there, how is it that somehow the industry works with such a much lower commission structure?

DR. HSIEH: The only thing that I know about the U.K. case, I haven't spent much time looking at this, but the only thing that seems to be different from the U.K. and the U.S. is that the legal work seems to be separate in the U.K., whereas some of the legal work might be done by realtors in the U.S., although when I bought a house, I had to hire a lawyer to do a lot of the legal work, or in some places, you can use a title company to do a lot of the legal work.

But I guess let me just try to not answer your question, but I think that it seems clear, I mean, it seems clear, and especially from thinking about what we're discussing today, and if you go back to the FTC report from more than 20 years ago, things really have not changed that much. So, it just seems to me that we have to stop thinking about other things, other things.

I'm reminded of the case of discount brokerage where the mergers in the internet might do it, might do it eventually, but you might get a case where you start to think about things like, you know, why not think about separating the MLS part of the business from the brokerage part of the business, because it seems that a lot of this is really just the access to data, the access to information, and there's no reason why they have to be part of the same thing.

Now, I'm sure that some people are going to kick and scream, but that seems like, you know, if we could think about radical solutions for IBM back in the 1970s, then it seems that we could start to think outside the box to try to think about ways to bring more value to consumers.

DR. SALINGER: All right. Well, thank you to everyone who has stuck it out for this long and also thank you to our panelists for a very lively discussion.

(Applause.)

MS. OHLHAUSEN: Before I introduce our closing speakers, I just wanted to reiterate what I mentioned this morning, which is that the record for the workshop will be open another month, until November 25th, so as you can see, there are a lot of issues that were raised today, and if people want to follow up on them or if you feel there were issues that were not raised that you want to bring to our attention, I definitely urge you to file comments on the FTC web site and the USDOJ web site.

Now, it's my pleasure to introduce our two closing speakers. First, we are going to hear from Susan Creighton, who's the Director of the Bureau of Competition at the Federal Trade Commission, and she will be followed by J. Robert Kramer, Junior, Director of Operations from the Antitrust Division at the Department of Justice.

Susan?

MS. CREIGHTON: Good afternoon. On behalf of the FTC, I wanted to thank you for joining us today. As you heard from Professor Hsieh, the FTC has been very active in this area for a number of years now, and this workshop is one manifestation of our long-term interest. I want to thank you for contributing to the panels today, as well as for all of your comments, both those that have already been submitted and those that may be submitted in the future. I am sure they will contribute considerably to our understanding going forward of the many important issues in this policy debate.

Coming from an enforcer's perspective, I believe that the single overarching story line of our program for many years probably has been this: From time to time conventional, full-price brokers have taken collective action to disadvantage innovative, reduced-service, lower-priced brokers. The particular actions that they have taken have changed over time, but the same intent resurfaces. And we've engaged in an ongoing process of identifying and preventing those actions.

Dating back to the late 1980s and early 1990s, we brought cases involving local MLSs that were refusing to list houses that were being sold under "exclusive agency" contracts, or were treating such listings on disadvantageous terms. The underlying MLS rules were a form of private agreement, and we thought the agreements were anti-competitive on that particular point. We obtained a number of consents against that discriminatory treatment.

Since that time, the FTC has continued to be active in enforcement in the real estate area, in the area of enforcement. In the last ten years, between 1995 and 2005, we have conducted a total of 22 real estate related matters. These include a mix of investigations, cases, advisory opinions and advocacies, but most were investigations. Not all investigations led to filed cases, of course, but some did.

In 1995, for example, we obtained a consent order from the Port Washington Real Estate Board. That order prohibited restrictions on the use of exclusive agency listings, restrictions on holding open houses or using "for sale" signs, restrictions on advertising free services such as free appraisals, and similar matters. So, we've maintained a continuous monitoring presence in the industry.

More recently, efforts to burden reduced-service brokers have broadened from MLS rules to state governmental action. There's nothing improper about an industry advocating restrictive policies to the government, of course. However, such policies aren't always in the public interest either. When asked for their views, the antitrust agencies have sometimes pointed out what we see as the public cost of these constraints.

Earlier this year, for example, the FTC and the DOJ jointly sent advocacy letters to the governors or real estate commissions of three states, Texas, Missouri and Alabama. The letters urged those jurisdictions not to adopt proposed "minimum service" rules. State authorities haven't been as responsive to our advocacy letters as we might wish, but that's another story. Just last week, we sent a fourth letter to Michigan, and perhaps now our fortunes will turn.

Our current law enforcement investigations, unlike our advocacy letters, are, of course, not public; however, I think it's safe to say that we are continuing to look for possible anti-competitive agreements. In particular, we're looking for agreements that are intended to exclude new entry by brokerage firms that use new, more responsive, lower-cost business models.

Problematic agreements could take any of several forms, but two clear areas of focus include MLS rules that put cut-rate brokers at some unwarranted disadvantage in their listings, and conduct aimed at improperly punishing or deterring advertisements that inform the public of the availability of reduced-cost services.

Now, let me end these short remarks by

emphasizing that we recognize that most real estate brokers are not engaged in illegal agreements, and we applaud the essential and highly valuable services that they provide. We offer our own services in helping them devise new means of selling houses that respond to consumer demands and also avoid antitrust entanglements. That seems to be one of the benefits of exercises such as this workshop, and we will continue to look forward towards working with you on this.

Let me invite my colleague, Bob Kramer, who's the Director of Operations at the Antitrust Division of the Department of Justice, to the podium.

MR. KRAMER: Thank you, Susan.

I can be brief, in part because Susan really fully and adequately covered the collective advocacy that our agencies do in the real estate industry, and I would like to emphasize that it is a collective activity that we cooperate with each other on, and I'll shy away from discussion of cases, because we are in litigation right now, and that wouldn't really be appropriate.

So, on the Department's behalf, I would like to thank the industry participants, the scholars, the consumer representatives and the regulators who took the time to be here today on the panels and to share their perspectives with us. Their ideas about and analyses of competition in the real estate industry sparked vigorous discussions that we've heard today. I had a great time sitting here today and listening to the panels. I found it highly instructive.

I'd also like to thank you in the audience for your active participation. I'd like to thank the FTC for helping in sponsoring this event and for the use of this conference facility. As the Acting Assistant Attorney General stated this morning, although the Department of Justice and the FTC have taken positions on some of the issues discussed today, the purpose of this workshop is to involve others in the debate by providing a forum in which interested parties can discuss these issues with differing points of view. As the large turnout and the lively audience participation have demonstrated, I think we have succeeded in promoting dialogue about competition in an industry so very important to American consumers.

Thank you for coming. Have a safe trip back.

(Applause.)

(Whereupon, at 5:09 p.m., the workshop was concluded.)

C E R T I F I C A T I O N   O F   R E P O R T E R

DOCKET/FILE NUMBER: V050015

CASE TITLE: COMPETITION POLICY AND THE REAL ESTATE INDUSTRY

DATE: OCTOBER 25, 2005

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 11/8/05

SUSANNE BERGLING, RMR

C E R T I F I C A T I O N   O F   P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE