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COMPETITION POLICY
AND THE REAL ESTATE INDUSTRY

A PUBLIC WORKSHOP HOSTED BY THE
FEDERAL TRADE COMMISSION
AND THE
DEPARTMENT OF JUSTICE

TUESDAY, OCTOBER 25, 2005
9:00 A.M.

FEDERAL TRADE COMMISSION
601 NEW JERSEY AVENUE, N.W.
WASHINGTON, D.C.

Reported by: Susanne Bergling, RMR-CLR

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1 P R O C E E D I N G S

2 - - - - -

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

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

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

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1 do.

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

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

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

23 Also, if there are any additional comments you
24 need to make, the record for the workshop will be open
25 another month, until November 25th, and we definitely

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1 welcome comments from anyone and everyone. You should
2 file your comments with the Federal Trade Commission and
3 with the Department of Justice on our web sites. The
4 FTC web site is www.ftc.gov, and the DOJ web site is
5 www.usdoj.gov/apr/index.html.

6 Finally, I would like to emphasize that the
7 views expressed in this conference are the views of the
8 participants alone and are not necessarily the views of
9 the Department of Justice or the Federal Trade
10 Commission or any Commissioner. Likewise, the selection
11 of any panelist or moderator does not necessarily
12 reflect the views of the Justice Department, the Federal
13 Trade Commission or any Commissioner regarding the views
14 or qualifications of any moderator or panelist.

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

19 (Applause.)

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

22 The real estate industry is critical to our
23 citizens. For many, the purchase of a home represents
24 tangible fulfillment of the American Dream, the reward
25 for hard work and dedication, sometimes spanning

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1 decades. It may also be the most significant personal
2 investment that some make in their lifetimes.
3 Competition in the real estate industry, therefore, is
4 not merely of interest to those involved in the real
5 estate industry or to enforcers, but rather to anyone
6 who has ever bought or sold or is thinking about buying
7 or selling a house.

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

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

22 Several related developments are presenting
23 challenges to the traditional brokerage model. First,
24 in response to perceived consumer demand, some real
25 estate professionals are offering to provide services

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1 more on an a la carte basis rather than as an entire
2 package of services. In a so-called fee-for-service or
3 limited service brokerage model, a home seller might
4 choose, for example, to pay a broker only for the
5 service of listing the home in the local MLS and placing
6 advertisements and then choose to handle negotiations or
7 paperwork for him or herself.

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

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

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

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

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1 consumers as private restrictions, if not an even
2 greater effect.

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

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

23 First, consumers who want to hire a broker to
24 list their property in the MLS will have to purchase
25 additional services that they may not want or need,

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1 which may cost them more. And second, without
2 competition from fee-for-service brokers, the prices for
3 traditional full-service options will likely be higher.
4 What we want for consumers is choice.

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

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

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1 a public forum to discuss current issues affecting the
2 competitiveness of real estate brokerage.

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

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

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

22 In the first afternoon panel following the lunch
23 break, we will turn to issues affecting competition
24 among buyers' brokers, including state anti-rebate
25 legislation, policies that limit the online display of

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1 real estate listings, and the effect of minimum service
2 requirements on buyers' brokers. With each of the
3 issues to be discussed today, we will explore how the
4 restrictions or actions impact consumers, either by
5 producing benefits or imposing higher costs on them.

6 In the final panel, we will address empirical
7 evidence on competition in this industry. The panelists
8 will examine the data available to test the various
9 hypotheses and look at recommended areas for future
10 empirical analysis. They will discuss what the data
11 show about competition in this industry, for example,
12 whether commission rates have been perennially fixed at
13 6 percent or have fluctuated over time in response to
14 market conditions.

15 In conclusion, I would like to thank our many
16 distinguished panelists for coming from all over the
17 country to share their insights and experiences. We are
18 very pleased to have a wide variety of viewpoints
19 represented at this workshop. Based on pre-registration
20 information, we have in attendance today representatives
21 from several real estate trade associations, including
22 the National Association of Realtors. In addition, our
23 attendees represent several different types of
24 brokerages, including traditional, discount and
25 fee-for-service. I am encouraged by the large number

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1 who are willing to participate in this workshop, which I
2 think demonstrates the importance of these issues.

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

10 Thank you.

11 (Applause.)

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

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

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

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

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

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

23 One question we might ask is, why are brokers
24 making so much money? Inquiring minds want to know.
25 And certainly the FTC and the Antitrust Division want to

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1 know. There could be a number of reasons for that.
2 There is great change in the industry going on. As
3 Debbie pointed out, the introduction or expansion of the
4 internet, our ability to collect and disseminate
5 information, have caused new business models to begin to
6 emerge.

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

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

20 In general, in a competitive market, it's not
21 the value of the services that leads to the price. The
22 economists tell us it's the cost of those services, and
23 many of the technological innovations that we see
24 suggest that the costs, if anything, are going down.
25 Our ability to collect and disseminate information at a

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1 low cost is far superior to what it was even five or ten
2 years ago, and as a result, that leads to a suggestion
3 of whether or not there are other factors that may be at
4 work here.

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

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

25 Now, again, I want to emphasize here that I'm

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1 not suggesting that every time somebody goes to a real
2 estate commission or legislature that that's not good.
3 There are many laws, many regulations that are passed
4 that can be helpful to consumers. We certainly suspect
5 that there are some efforts that have been undertaken
6 recently that are not so helpful for consumers, and
7 Debbie alluded to a couple of those.

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

24 There have been a number of states who have
25 looked at expanding the definition of "practice of law"

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1 to prevent laypersons from providing those real estate
2 closing services. We have been asked in a number of
3 instances to provide our perspective, and we have done
4 so, and we have had a number of what we view as
5 successes in terms of encouraging people to keep the
6 definition relatively narrow.

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

24 What do we do about these situations? Our role
25 is threefold. First is to educate ourselves, and that's

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1 what we're here to do today. Second is to use the
2 benefit of our experience and the information that we
3 collect to educate others who have to make a decision,
4 and when, for example, a state legislature is
5 considering a proposed minimum service law, we have been
6 asked to and we try to respond to those requests to give
7 the benefit of our knowledge and information, and I'm
8 slightly more optimistic than Debbie on this one. I
9 think we have had some successes.

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

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

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1 possible.

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

23 Stepping back a little bit, I note that, again,
24 coming back to what I said, what we are trying to do is
25 shed light on the facts, the issues or what is going on,

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1 so legislatures can make informed choices, real estate
2 commissions can make informed choices, and if necessary,
3 judges can make informed choices.

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

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

17 Thank you.

18 (Applause.)

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

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

25 (Pause in the proceedings.)

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

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

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

24 On my left, your right, is Robert Hahn.

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

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

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

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

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

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

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

6 MS. WHATLEY: Sure.

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

21 I think just to start the discussion, I'd like
22 to maybe paint a picture, and I think of it as somewhat
23 analogous to a play. You might be at a theater. If
24 you're in the audience, everything seems to go very
25 smoothly because everyone has a role. They know their

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1 part. They know their part in the script. In the event
2 that something were not to go well and someone either
3 enters at the wrong time, forgets their lines, it
4 becomes very disruptive to the process. The ultimate
5 end goal for both the buyer and the seller is to have a
6 successful closing. So, all parts of the transaction
7 are extremely relevant to make sure that it is a very
8 seamless and successful transaction for the buyer and
9 seller.

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

16 MS. WHATLEY: Well, in my role as a real estate
17 professional, depending upon whether I'm assisting the
18 buyer or the seller, I have different roles in that
19 transaction, but ultimately a real estate professional,
20 and if there are more than one in the transaction, will
21 work together to make sure that all parts of that
22 transaction are facilitated appropriately, not only in
23 terms of actually showing the property, marketing the
24 property, working through the transaction itself,
25 meeting the home inspector, helping the seller and/or

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1 the buyer understand what the results of that inspection
2 were, overseeing repairs, making sure that things that
3 are necessarily time-sensitive get responded to in a
4 time-sensitive manner.

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

16 DR. HAHN: Can I just comment?

17 MS. OHLHAUSEN: Yes, sure, Bob.

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

22 UNIDENTIFIED SPEAKER: We can't hear you.

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

24 I was saying that my mom was a real estate agent
25 in the residential market, and my dad dealt with

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1 commercial and real estate management, but what's
2 striking, even though Cathy is talking about changes in
3 technology, is when I look at the kind of transaction
4 that my mom engaged in, if I'm allowed to say it, 30
5 years ago or 40 years ago since she's not here, it's
6 virtually the same as the transaction that most of you
7 engage in today when you buy or sell a house.

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

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

23 DR. HAHN: Certainly based on other industries.
24 If you were to look at airlines, for example, you would
25 probably go and bring up your favorite web site -- I am

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1 not going to give an advertisement for one of them --
2 and go get an airline ticket. You don't have that kind
3 of menu of choices, at least the way I and my
4 colleagues, Bob Litan and Jesse Gurman, who wrote a
5 paper on this recently for the real estate industry.

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

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

14 MS. WHATLEY: Sure. The Multiple Listing
15 Service -- let me start with the understanding that the
16 MLS is a broker-to-broker information exchange that
17 provides the opportunity for cooperation and
18 compensation. It establishes rules by which we all
19 understand are discussion points. It tells me if I put
20 the property in as a listing agent, I'm then allowing
21 those who are cooperating in the marketplace, in my
22 marketplace, to have access to that information, and it
23 tells them at what fee that I am willing to cooperate
24 with them. So, that's all disclosed up front, and
25 that's a very important part, because if you talk about

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1 what brings an efficient marketplace, the ability to
2 have aggregated information for me, as a practitioner,
3 to be able to go and have information that other brokers
4 in my marketplace are willing to share with me, to allow
5 me to have the information that I can assist my customer
6 and client with.

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

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

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

24 DR. HAHN: Can I --

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

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

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

16 The MLS is essentially a club, and its members
17 decide who gets to be in this club, who gets to share
18 the listings, and the conditions under which they get to
19 share the listings. From an economist's perspective,
20 the more different types of folks who might get to share
21 those listings, the more likely it is that the consumers
22 are likely to be presented with a wide array of choices.
23 So, I think this is a point that will come up later
24 today, but it's important to note that when Cathy talks
25 about competition, yes, it's absolutely true that my mom

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1 would compete vigorously for listings, just as people do
2 today, but that's very different from competition about
3 who gets in the club, because the club decides the rules
4 on who gets to be a member.

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

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

20 MS. WHATLEY: Well, most of the MLSs do have
21 boards. They are made up of realtor members. That
22 varies from MLS to MLS, because the MLS is unique to
23 each individual market. The National Association of
24 Realtors does not have, you know, guidelines that
25 everyone must establish, they are unique to the

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1 marketplace, but they are highly competitive as well.

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

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

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

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

23 MS. WHATLEY: By the courts.

24 DR. HAHN: Or by the courts, excuse me, but it's
25 also true that at one point commissions were totally

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1 non-negotiable, which economists would call price fixing
2 of a sort, and the courts struck that down. So, it's
3 not as if this club has engaged only in activity that I
4 would view as pro-consumer or pro-competitive. I would
5 say that there have been major benefits from the setting
6 up of a platform however many years ago that was called
7 the MLS, but I also think it's time to take a serious
8 look at what the institution can and cannot do and
9 whether that's good for consumers, which is what I care
10 about.

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

17 MS. WHATLEY: Sure. An exclusive right to sell
18 agreement is one where the seller lists their property
19 with a real estate firm, and there is a fee, either a
20 percentage or a flat fee, that is agreed to, and that
21 fee is paid regardless of who finds the purchaser for
22 the property. So, even if the seller has someone to
23 approach him in the store and they say, you know, "I've
24 got my house up for sale." The seller then says,
25 "Contact my real estate professional." The lead may

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1 have come from the seller, and that comes to me, but
2 there is still an agreed-upon commission structure.
3 Most oftentimes, it is cooperation between real estate
4 companies, an exclusive right to sell.

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

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

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

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1 on the same level.

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

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

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

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1 MS. OHLHAUSEN: Actually, Cathy --

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

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

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

23 By and large, most states work in an agency
24 environment, meaning that there's common law areas,
25 common law of agency, which talks about fiduciary duties

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1 of obedience, loyalty, confidentiality, disclosure.
2 There are some states who have established a little bit
3 different type of fiduciary responsibilities and the
4 real estate professional may be working in a transaction
5 or a facilitator capacity, and so there are different
6 defined fiduciary duties in those circumstances.

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

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

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

25 If they have any question about that payment,

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

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

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

23 DR. HAHN: Let's explore that for a minute.
24 First of all, I just want to make a comment about these
25 split arrangements. Sometimes they have been required

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1 by the MLS bylaws, these traditional split arrangements,
2 and from an economics point of view, that isn't
3 necessarily a good thing.

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

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

21 MS. WHATLEY: As a practitioner, though, if I
22 did not have that information and I am working in an
23 exclusive buyer agency relationship and I don't know
24 that and my customer has a commitment to a certain level
25 of compensation to me, in the event that that is not

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1 achieved and I can't tell my customer that up front, I
2 haven't served my consumer customer. So, it's very
3 important that the entire process is known.

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

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

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

24 That doesn't suggest that there's necessarily
25 collusion, but it does raise a flag that you want to be

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1 thinking about, that this price-setting arrangement may
2 not necessarily be the best way of serving consumers
3 generally.

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

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

19 The event that we get into discussions with the
20 seller, if I'm working with the buyer, if we get into
21 discussions with the seller and I find that what it's
22 going to take to actually put this transaction together
23 is eliminating a part of my fee or something, I mean,
24 there are ways that compensation is rebated. Sometimes
25 it's direct. I'm limited to directing it only to the

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1 buyer, to the parties in the transaction, in my state,
2 but state by state makes those determinations.

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

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

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

23 MS. WHATLEY: Well, I don't think minimum
24 standards actually place restrictions on competition.
25 In fact, I think minimum standards -- and I'm not

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1 speaking for the National Association of Realtors,
2 because NAR is very neutral on this position -- but as a
3 practitioner, what I believe is important is that both
4 parties are able to actually get to the closing, and you
5 cannot make unilateral decisions oftentimes as one party
6 that don't ultimately have an impact on the other party
7 in the transaction.

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

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

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1 there are real time constraints in which the process has
2 to work.

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

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

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

24 DR. HAHN: I agree with that. I also think
25 that's one area where the different kinds of internet

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1 models can play an incredibly important role simply
2 because all you have to do is have one web site, and you
3 know, if you're trying to build a new business model,
4 and you can decide whether you want to target sellers
5 and educate them and maybe get some fee for that or do
6 the opposite for buyers. So, I agree with you that the
7 transaction is complicated, but I also think there are
8 other ways of skinning the cat and other models that
9 should be allowed to emerge.

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

20 MS. WHATLEY: I would say if either party in the
21 transaction has questions, what tends to happen is that
22 they will ask whoever is there in front of them. So, if
23 I'm representing the buyer and the obligation for me,
24 based upon the relationship that the listing agent has
25 with the seller, is that I'm to fax the contract to the

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1 seller, I'm to present the contract to the seller, and
2 that's not customary in my marketplace. In my
3 marketplace, the listing agent presents all offers.
4 That's not necessarily the case across the country, but
5 that's what it is in my marketplace.

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

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

22 DR. HAHN: I think it's a difficult area. As
23 Cathy points out, there can be conflicts of interest,
24 and even if you sell your house and you have an agent,
25 there are issues about how much effort that agent will

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1 put into selling your house. Steve Levitt, the
2 author -- I guess the now famous author of Freakonomics,
3 did this amazing little study where he looked at sellers
4 selling their own houses versus sellers selling other
5 people's houses and the prices that were fetched for
6 comparable houses, and needless to say, when the agent
7 sold her own house, the price fetched was considerably
8 higher. They put a little bit more effort in, because
9 at the margin, it was worth it to them, they were
10 getting the pull pay-off, versus if they got an extra
11 \$20,000 for a seller, they are going to get, say, 1 and
12 a half percent of that. So, there are incentive issues
13 all over the place in the real estate market.

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

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

25 MS. WHATLEY: Sure. You know, sellers make

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

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

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

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

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

13 DR. HAHN: I agree.

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

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

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

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

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

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

24 MS. WHATLEY: Well, I can say I would disagree
25 with the GAO in that there is price competition. I'm

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1 dealing with it every day in the marketplace. So, to
2 presume that it is not there I think is a false
3 presumption. And Bob, I would also presume that you
4 feel that is a very positive thing. I think that's good
5 for consumers. I think consumers need to be able to
6 weigh the level of service, the quality of the company,
7 the quality of the activity that's going to be brought
8 to them, what they need to do versus what someone else
9 is going to handle for them, and they weigh that in
10 relationship to whatever their fee structure is.

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

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

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1 to the closing.

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

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

23 Bob, I may have you speak on that first.

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

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

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

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

22 As for different models, I think Cathy alluded
23 to most of them in her remarks. There are also
24 full-service internet brokers. You can have flat fees
25 for getting on the Multiple Listing Service, although I

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1 have to tell you I have one anecdote where my office
2 mate or the guy next door tried to sell his house as
3 sort of a for-sale-by-owner and get on the Multiple
4 Listing Service only to learn that he did not get the
5 same level of privileges as your typical agent did when
6 he or she has access to the Multiple Listing Service, so
7 he couldn't put his phone number there or whatever, and
8 it was just hard for people to get in touch with him.

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

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

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

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1 they may --

2 DR. HAHN: Right.

3 MS. OHLHAUSEN: -- give a flat fee.

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

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

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

25 Keep in mind, there are two distinct databases.

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

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

22 There's a separate informational resource that
23 the consumer has the capability to see, but that's
24 advertising. That's basically, when you go out on my
25 web site and you see my information and other people's

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1 information, that's advertising, and a broker ought to
2 be able to have the ability to say who has the right to
3 advertise his or her properties for the public to see.
4 They have had to work hard to get that listing, and in
5 fact, some real estate commissions actually -- most are
6 required to have permission of that listing broker to be
7 able to advertise their property.

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

20 MS. OHLHAUSEN: Okay.

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

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

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

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

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

23 MS. OHLHAUSEN: I wanted to emphasize that this
24 is an overview panel. So, a lot of these issues that
25 we've raised, we're sort of giving you the appetizers,

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1 and you'll get a little more into the entrees in the
2 specific panels that will deal with buyers' issues and
3 sellers' issues and some of the empirical evidence.

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

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

19 I think potential tax law changes could be an
20 extremely big issue that we have to deal with, and I
21 think the availability of mortgage money, if limited,
22 could be a huge thing that we have to deal with in the
23 brokerage community, because right now, consumers are
24 very, very well served by being able to go out and know
25 that there is available money, assuming that they have

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1 the qualifications, that there is available money there
2 for them to be able to borrow. They know what benefits
3 are there based upon their home ownership purchase, and
4 you know, if they find the right house and they can't
5 get insurance, they're not going to buy the house,
6 because the lender isn't going to make the loan.

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

10 MS. OHLHAUSEN: Thanks.

11 Bob?

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

23 I think the MLS is a more complicated issue. I
24 think Cathy makes a good case that there have been
25 definite benefits for consumers over time with respect

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1 to having a platform where buyers and sellers can meet
2 and share listings. The question is, what should be the
3 rules for that and what should be the rules for access
4 and so forth?

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

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

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

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

17 (Applause.)

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

20 (A brief recess was taken.)

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

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

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1 Planning here at the Federal Trade Commission.

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

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

23 Although the data seem to indicate that this is
24 the predominant model, the one that most consumers
25 currently purchase, there are new business models that

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1 are arising that offer consumers the option of
2 purchasing some of the services as opposed to the full
3 bundle. For example, a popular option offered by
4 so-called fee-for-service brokers is the MLS listing.
5 Under that sort of service contract, the listing agent
6 will place the home in the MLS, but the rest of the
7 transaction is pretty much left up to the home seller.

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

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

25 We'll also discuss reported discrimination

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1 against for-sale-by-owners and other fee-for-service
2 business models by private parties.

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

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

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

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

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1 Administrator of the Texas Real Estate Commission.

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

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

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

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

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

25 I'd first like to get into my business, a little

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1 bit about my business model. I founded Texas Discount
2 Realty as a one-man operation in Austin, Texas in the
3 summer of 2000. We work, as today, primarily with
4 sellers. We offer three different listing packages, a
5 menu of services, if you will.

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

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

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

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1 do a lot of their own legwork.

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

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

22 Now, this is the State of Texas that is putting
23 this out. This is not the National Association of
24 Realtors. This is not TAR. This is the State of Texas
25 who's telling me that I should charge a full commission

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1 instead of a menu of services, and of course, this
2 outraged me, and this is what provoked me to go and do
3 what I've done.

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

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

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

24 Then, in February of 2005, a law that was deemed
25 to be not consumer friendly by myself and by others was

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1 proposed through the Real Estate Commission again, and
2 then this is when the Department of Justice and the
3 Federal Trade Commission stepped in and wrote their
4 letter saying that this new rule would harm consumers,
5 of which I agreed with most of the letter.

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

12 So, now we get to the present day, and I want to
13 talk a little bit about kind of who was behind these
14 laws. In Texas, the law was filed or the amendment was
15 tacked onto the housekeeping law by a state
16 representative who also happens to be a real estate
17 broker out of El Paso and also happens to be a ranking
18 member in the Texas Association of Realtors. Something
19 I find more egregious is in Utah, a minimum service law
20 recently passed, and it was pushed through by a state
21 senator out of Utah who also happens to be the President
22 this year of the National Association of Realtors. But
23 of course, NAR is neutral on the minimum service
24 clauses.

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

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

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

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

24 So, another thing that I find that these laws,
25 these minimum service laws do is we're essentially

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1 saying someone who just took 120 hours of real estate
2 classes maybe online, who's maybe never bought or sold a
3 house, who passed a real estate exam yesterday, is more
4 qualified to sell a house than someone who maybe has
5 been a real estate attorney for the last 30 years and is
6 not a member of an MLS. That's what these laws are
7 essentially saying.

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

19 And what about competition? NAR says that
20 there's competition in the real estate industry, and I
21 agree. I agree there's a lot of competition in the real
22 estate industry, but the competition is among
23 traditional brokers. There's not the competition
24 between traditional agents and alternative brokers.
25 This is the kind of competition that I see practiced on

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1 me in my markets.

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

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

23 Now, something that we're seeing go through some
24 of the local MLSs now are exclusive agency laws that are
25 being passed that says that if a seller chooses to have

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1 an exclusive agency listing, well, you can list your
2 home on MLS, but it's not going to be listed on the
3 REALTOR.com or any of the IDX web sites, and this is
4 something that's happening through some of the local
5 MLSS, including my home MLS of Austin, Texas.

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

18 Also, most alternative brokers are also
19 realtors. I personally agree with the National
20 Association of Realtors and the realtor establishment
21 most of the time. Seventy-five to 80 percent of the
22 time, I believe that they do great things for the
23 communities. You know, in Texas, they have raised a lot
24 of money for hurricane victims, and they do great
25 things, and they provide great resources for me as a

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1 broker and me and my agents. They provide great
2 resources and tools for us.

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

8 Thanks.

9 (Applause.)

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

17 Previously, I have been president of an
18 independently owned and operated real estate brokerage
19 company in Southern California and also head of a
20 software company earlier in my career. I am here to
21 represent the over 137,000 small, independent
22 businessmen and women who are members of the Century 21
23 Franchise System either as brokers or sales associates.
24 We have more than 7500 offices worldwide, but half of
25 our offices have 17 or fewer sales associates, and the

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1 median number of closed transactions by offices last
2 year were 141 closed transactions. We're a big system
3 but one that is proud to have so many small to
4 medium-sized businesses in our ranks along with our
5 larger brokers.

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

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

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1 first of many steps in the process.

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

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

23 Let me ask you, in what other industry do
24 individual service providers negotiate a competitive
25 price for their services and then aggressively market

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1 their products to the competition, sharing upwards of 50
2 percent or more of their fees to attract buyers? And in
3 what other industry do individual competitors
4 voluntarily make their inventory available to other
5 industry participants, empowering the competition to
6 avoid the cost of infrastructure necessary to produce
7 their own inventory?

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

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

25 This is facilitated through a cooperative known

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

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

21 Generally, the typical homeowner will invite
22 listing presentations from more than one agent. Through
23 the cooperative effort in the industry, the internet
24 empowers home sellers to be well educated on the market,
25 attributes of various firms and specific sales

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1 associates, pricing, and the list just goes on and on
2 and on.

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

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

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

25 The fact is that the national average broker

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

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

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

25 For the record, while we have no reason to

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1 believe that the states' motives are anything but
2 well-intentioned, neither Century 21 nor our parent
3 company, Cendant, believes that minimum standards
4 legislation is truly necessary. We believe in
5 consumers' rights to choose their real estate
6 representation, or not, and we also believe that the
7 full-service real estate model employed by the majority
8 of our brokers presents a compelling value proposition
9 that is recognized on its own merits by today's
10 increasingly savvy consumers.

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

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

24 Thank you very much.

25 (Applause.)

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1 (Technical difficulty.)

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

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

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

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

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

18 One of the things I wanted to talk about -- and
19 if I had my Power Point presentation, I would have a
20 snappy page here to show you -- the internet is driving
21 the change in real estate. Real estate, it seems to
22 ForSaleByOwner.com, has changed more over the course of
23 the last five years than it did probably in the previous
24 90 combined, and the reason that that change has taken
25 place -- well, the change is being driven by consumer

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1 demand, but it's being facilitated by the internet, and
2 the fact is that the internet brings enormous
3 efficiencies to the process of buying and selling real
4 estate, and those are the efficiencies that we use and
5 deliver to the consumer, and the consumer seems to be
6 reacting positively.

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

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

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1 public, to the entire public, via the internet.

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

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

7 A thumbnail sketch on ForSaleByOwner.com, it was
8 founded in 1999. It is primarily a web-centric
9 business. It started really with the URL and grew from
10 there to the point now where we have 70,000 or roughly
11 70,000 listings across all 50 states. We're one of the
12 largest real estate web sites in the world based on
13 traffic, probably fifth or sixth if you rate them across
14 all different categories.

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

22 We do have a portion of the business that also
23 refers out real estate to agents through an affiliated
24 brokerage. So, on a number of different levels, we
25 interact with traditional real estate, but obviously

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1 we're focused really on no commission.

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

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

24 The demand for our services has allowed us to
25 grow at the rate we have. We grow on an average rate of

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1 about 100 percent year over year. So, we have grown
2 very rapidly. We have been profitable from year one.
3 We think those figures go a long way towards validating
4 the efficacy of our model.

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

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

19 As I alluded to earlier, there seems to be an
20 effort to throw up roadblocks to change to allow
21 competition to flourish in the industry. These are the
22 three big ones, four big ones actually, and I think the
23 first one, not to belabor it, is probably the easiest
24 for us to knock down. There seems to be no rational way
25 to defend minimum service requirements, so I'm not even

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1 going to bother, but that's something that we struggle
2 with on a state-by-state basis. Certainly Texas is the
3 biggest example of that.

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

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

24 Finally, I think one of the things that drives
25 some of the resistance to change is the fact that

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1 departments of real estate around the country are for
2 the most part controlled by agents and realtors, and
3 they're able to kind of rubber-stamp that legislation
4 when it comes down the pike. I would point out the
5 State of Texas as being an example of that with minimum
6 service requirements. Six of nine of their board
7 members, I believe, are agents or realtors, and four
8 should be removed. I'm sorry, that shouldn't be there.

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

23 That's really it. Thank you very much.

24 (Applause.)

25 DR. THORBURN: Well, this is one time in my life

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1 where I'm glad that I'm technologically challenged,
2 because I don't know the first thing about using that,
3 and it won't break down on me.

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

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

17 I would start by saying that about 50 years ago,
18 a gentleman by the name of Richard Weaver wrote a very
19 important book, and its title says everything. The
20 title of the book was Ideas have Consequences, and it's
21 an important reminder that just as ideas have
22 consequences for future action, so, too, despite what
23 the Mad Hatter said, words do have specific meanings,
24 and I would urge everyone to concentrate on what is
25 actually the meaning of the word "agency" and what is

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1 meant by the concept of representation, because I think
2 those are two of the things that sometimes, in some of
3 the perspectives that you have heard today -- and you
4 will hear from others, including some federal
5 officials -- there seems to be a sliding over of what is
6 the concept of agency and what are the fiduciary
7 responsibilities of one who holds one's self out to be
8 an agent of another.

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

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1 those elements come together.

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

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

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

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

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

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

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1 transaction.

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

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

21 Now, as state licensing agencies, we do not
22 regulate the MLS. It is a private, voluntary
23 organization which establishes its own membership
24 criteria, as you've heard earlier today. Now, since the
25 FTC and the DOJ apparently are unable to coerce this

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1 private entity into changing its criteria for membership
2 to meet their demands, they are approaching the issue
3 indirectly by attempting to influence state legislatures
4 and regulatory bodies.

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

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

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

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

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

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

22 I think it's safe to say that most state
23 regulators have no problem at all with individuals
24 entering into marketing or advertising agreements with
25 clients to promote the sale of real estate. In fact, in

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1 most states, one does not even need a real estate
2 license to do so, but I do object, and so do many other
3 regulators, to individuals claiming to be an agent and
4 then refusing to perform the most basic duties of
5 representation.

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

11 Thank you.

12 (Applause.)

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

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

20 What I have in mind is how price-sensitive are
21 consumers? Do they often negotiate for commission? How
22 many listing brokers will they typically look at if
23 they're trying to sell their house? Are they typically
24 under time pressure? We heard earlier that often
25 they're under a time pressure to sell their house and

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1 move on to the next one because of some sort of
2 exogenous factors going on. So, I will just turn it
3 over to each of you to discuss -- we have different
4 business models here, or maybe we don't -- and find out
5 how this competition really works.

6 MR. FARMER: Well, I would first like to touch
7 on some of Wayne's comments about the advertising. If
8 you look at his -- some of his examples, virtually every
9 house in those examples are in MLS, and I've done some
10 informal polling in my marketplace with some different
11 title companies, and I know Colby said, you know, that
12 15 to 20 percent of all homes are for-sale-by-owners.

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

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

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

4 I'll turn it over to Tom.

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

14 In terms of the number of agents that a consumer
15 would have sitting in front of them, I don't know that
16 there's any number that has been put there. I can tell
17 you, as a consumer, I sat and listened to seven agents
18 do their listing presentation for me before I made a
19 decision as to who I was going to have represent me in
20 the property that I had, and I can also tell you that as
21 a consumer, that there are a number of things that I
22 look at, especially because, as you heard, in my
23 transaction, I was moving across the country, and I was
24 taking on a job that was very demanding in terms of
25 time, and I wouldn't have sold my home had that not been

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1 the case, and I think that's the situation that a lot of
2 us tend to forget, is that most transactions happen
3 because of events happening in people's lives. Most
4 people don't get up in the morning and decide to just
5 move.

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

18 In terms of marketing and advertising, I mean,
19 come on, anybody that has any type of ability to put --
20 if I'm going to go out and represent somebody in the
21 marketplace in terms of marketing their home, that's
22 what they're hiring me for, and so if I can expose that,
23 I want to expose that to as many possible buyers as I
24 possibly can, and that's one of the things at Century 21
25 that we look at, is that we, because of our name

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1 recognition in the marketplace over the last 30-plus
2 years, you know, we have a large draw to our web site,
3 and in some cases, it might even be a situation where,
4 you know, we have as many consumers come to us as some
5 of our major competitors or even, you know, the industry
6 web sites.

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

16 DR. COOPER: Colby?

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

24 Our sellers are conscious of price, and I think
25 they do shop around, to answer your question, but I

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1 don't think that price is the biggest motivating factor.
2 Certainly there are services like ours that are cheaper.
3 I think the primary motivating factor is, A, not having
4 to pay 5-6 percent to an agent, but B, making sure that
5 the company that they are paying to market their
6 property has the reach to actually sell that property.

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

13 DR. THORBURN: I have no comment.

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

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

23 MR. FARMER: Sure. Well, you know, I'm not
24 knocking traditional agents at all. I think there's a
25 lot of great traditional agents out there that earn

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1 their 6 percent, earn their 5 percent or whatever, it is
2 what they charge, but there are also a lot of agents
3 that charge those same rates that have the 3P marketing
4 plan, which is put up a sign, put it in MLS and pray.
5 You know, there's a lot of agents out there that offer
6 little or no value to the transaction, and
7 unfortunately, for the traditional industry, that's the
8 majority of the agents that we're competing against, and
9 they see that, hey, you know, Texas Discount Realty will
10 do the same thing, but they won't charge as much.

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

24 DR. COOPER: Related to that, I just want to
25 follow up. Your site obviously offers both the FSBO,

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1 the pure sort of I'm going to do everything on my own,
2 but you also offer the MLS listing only.

3 MR. SAMBROTTO: Right.

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

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

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

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1 the MLS in conjunction with a listing on
2 ForSaleByOwner.com.

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

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

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

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

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

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

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

15 DR. COOPER: Yeah, go ahead.

16 MR. KUNZ: Sitting here listening to this, it's
17 very interesting, and I referred to this in my remarks,
18 too, and I think this is the perception of a lot of the
19 consumers in the marketplace, is that all I need to do
20 is get my home on the MLS, and everything is taken care
21 of and it's done, when in fact, the majority of what
22 probably a real estate agent really does happens at the
23 time when there's an offer put on the table. From that
24 point until closing, there's a tremendous amount of
25 effort that's put in, a tremendous amount of money

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1 that's expended to go out and make sure that the
2 transaction gets closed, and yet we still keep focusing
3 on just the aspect of, okay, let's put it on MLS and put
4 it on some kind of service that gets it out there.

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

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

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

24 DR. COOPER: Sure.

25 DR. THORBURN: If we accept what Professor Hahn

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1 indicated earlier was about 23 percent of residential
2 sales occur without the use of a broker, and then we
3 keep in mind, also, the terms "broker" and "realtor" are
4 distinct terms, and a realtor is a member of the
5 association that Mrs. Whatley represents or did
6 represent as president, and there are other people out
7 there with licenses who are engaging in real estate
8 brokerage who are not members of that organization.

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

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

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1 broker. There's slightly over 70,000 members of the
2 Texas Association of Realtors.

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

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

22 You talked in your presentation and you just
23 talked here that there is certainly a distinction
24 between what state regulators do in their laws and their
25 duty to protect consumers versus what the MLS is. The

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1 issue you posited that we bureaucrats -- I don't include
2 myself in that -- we're trying to get to the MLS. I
3 have a question.

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

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

20 In our state, newspapers don't have to have a
21 real estate license. The magazines I showed you don't
22 have to have a real estate license. If I went to an
23 individual and said, I'll give you a sign, I'll put you
24 on my web site, I'll draw up an advertisement and put it
25 in the Austin American Statesman, I don't need a license

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1 for that, because I'm not claiming to be their agent.
2 I'm not saying that I am providing them with
3 representation through a transaction. All I'm doing is
4 giving them marketing and advertising advice.

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

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

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

20 If they're unwilling to pay a listing agent 3
21 percent, they don't think it's worth 3 percent of the
22 equity they have worked so hard to build up in their
23 house, we came up with a plan where the listing agent
24 gets a flat fee. The listing agent is providing a great
25 service. They oftentimes are providing them with advice

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1 in regard to how to market that home, how to field
2 offers from buyers' agents. The buyers' agents are
3 still getting the 3 percent.

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

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

17 DR. COOPER: Well, let me move into the minimum
18 service issue here. I've talked about this at a couple
19 of forums, and I have been to forums and I've listened,
20 and I have heard minimum service requirements
21 alternatively referred to -- the analogy of merely
22 requiring the pilot to check the weather and inspect the
23 airplane before he takes off, and alternatively I've
24 heard kind of along the lines of what Tom Barnett said
25 earlier today, is going into a restaurant and being

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1 forced to have an appetizer, a salad and a desert when
2 all you want is a main course. So, which is it? I open
3 it up to all of you.

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

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

23 I think there are fundamental service ideas that
24 are in the marketplace right now, and a consumer
25 understands what they're -- hopefully they understand

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1 what they're really trying to get at, and that is to
2 sell my home, market my property, because I have some
3 other thing going on that I have to take care of. In my
4 case, it was moving. I had to get out -- I had a job
5 change. So, I don't think we need legislation to sit
6 down and say what good service is or what a minimum
7 service level should be. I think that those are things
8 that each company, each agent and the consumer are going
9 to make that determination by themselves.

10 DR. COOPER: Colby?

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

22 DR. COOPER: Wayne?

23 DR. THORBURN: Well, I think it goes back to
24 terminology and I think what individuals are purporting
25 to be providing to their clients or their customers, and

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1 that's where I'm really focused, again, on what is the
2 meaning of being an agent, what is representation
3 throughout a transaction, and does the state, the
4 various 50 states and territories -- I know we're in the
5 District of Columbia, and I don't want to in any way
6 overlook them also -- do they have the ability to define
7 what it means to be an agent, what are the obligations,
8 the minimum obligations, and what we're talking about
9 here really I think has to stress the word "minimum."

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

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

25 DR. COOPER: Colby

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

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

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

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

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

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

22 What's the difference between the core fiduciary
23 duties that an agent has, but as long as he performs
24 those tasks, doing those core -- keeping with those core
25 fiduciary duties in mind, where has the agency

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1 relationship gone wrong?

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

16 MR. KUNZ: You know, in the company I had in San
17 Diego, I didn't need a government agency to sit down and
18 tell me how my agents need to service the customer, but
19 I spent money going out and talking to consumers that we
20 had done business with, other companies in our
21 marketplace had done business with, and talked about the
22 transaction and asked them what they wanted out of that
23 transaction, and we had a list of about 22 or 23 things
24 that every one of my listing agreements had in them that
25 said these are the functions that we are going to

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1 provide to you and these are the services that we sat
2 down and talked to consumers about and said, if we do
3 not provide these kind of services to you, you have the
4 right to take back your listing and put it with anybody
5 else that you would like to.

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

18 So, I don't think that we need to really have
19 regulatory issues that come up and say, "You must do
20 this, you must do this or you must do this," or "Here is
21 a minimum." Where is the minimum? Where do you draw
22 the line? So, I still say that I think that the
23 consumer will speak, and they will speak with the
24 dollars they have, or in the seller's case, with the
25 homes that they're going to put on as inventory for us

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1 to go out and work with, and I think that entrepreneurs
2 are getting in the business, business people, and
3 independent contractors, called agents, know they have
4 to provide a certain level of service in order to gain
5 the trust that a person's going to have to give them the
6 biggest asset that they have and ask them to go sell
7 that product for them because they have to go do
8 something else with their life.

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

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

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

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

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

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

25 DR. COOPER: I want to switch gears a little bit

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

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

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

22 You know, I guess I'll ask this question to
23 anyone who wants to answer, but number one, how
24 prevalent is this? Is this something that's going on?
25 Is it widespread? And are there any justifications for

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1 this? I mean, I am aware that apparently exclusive
2 agency listings, you know, they're different from
3 exclusive right to sell, and in some MLS rules, it's
4 marked differently in the MLS just because it presents a
5 special risk to cooperating brokers, perhaps. So, I'll
6 just throw that out there.

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

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

20 MR. KUNZ: I don't know. You know, I think that
21 when a real estate agent sits down with a prospective
22 consumer and talks about how they're going to take a
23 listing and what does that really mean, and as I said,
24 spells out the services that they're going to provide
25 for that, for whatever compensation that the seller is

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1 willing to give or pay for the services that they're
2 going to get, then I think that that almost becomes a
3 mutual negotiating point in terms of letting the
4 consumer know what does that mean to them and what's it
5 going to mean to their property if they put it out
6 there. So, I don't know.

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

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

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

23 MR. SAMBROTTO: Obviously there's demand for it.
24 Consumers want those types of listings because they
25 retain the right to sell by owner, and that's central

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1 to the model that we have. It's central to the
2 package that we include on our web site, which
3 bundles an MLS listing with for-sale-by-owner.
4 A sale through MLS, you pay 2-3 percent; otherwise,
5 you pay no commission.

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

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

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

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1 my listing your property and not the homeowner's
2 property?

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

17 DR. COOPER: Okay.

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

22 (Applause.)

23 MS. OHLHAUSEN: I just wanted to remind
24 everyone, the packet has a list of local eateries. If
25 you need more information, it's outside. We'll

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1 reconvene at 1:30, and you will need to go through
2 security again. Thanks.

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

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1 AFTERNOON SESSION

2 (1:30 p.m.)

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

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

14 (Applause.)

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

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

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

23 Anyway, good afternoon. I am Jon Leibowitz, a
24 member of the Federal Trade Commission -- thank you,
25 Maureen -- and I would like to begin with the usual

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1 disclaimer, that the views expressed here today are my
2 own and they don't reflect the views of the Commission
3 or any other Commissioner.

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

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

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1 her pocket.

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

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

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

18 Now, what does this tell us about the
19 residential real estate industry today, or
20 alternatively, what does it tell you about my staffers?
21 That was a joke, although it is revealing. Is this
22 indicative of a market where consumers can get better
23 deals or superior representation based upon informed
24 evaluation of their options, or is it reflective of a
25 market where consumers lack even the most medieval evil

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1 level of information upon which to make a decision?
2 And, no matter how you ultimately answer this question,
3 the stakes are enormous.

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

13 An estimated \$60 billion, roughly one-half of
14 1 percent of the GEP for 2004, changed hands last year
15 in real estate commissions, much of it coming from the
16 traditional full-service brokerage fee. However, the
17 real estate industry, as you know, and its traditional
18 model is beginning to undergo a sea change.
19 Increasingly savvy customers, empowered by the internet
20 and the information age, are demanding more at lower
21 cost.

22 Consequently, a new category of service provider
23 is surfacing that seems attuned to consumers' clamoring
24 for more autonomy and a greater range of service and
25 price options. These providers, who range from mortgage

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1 lenders with brokerage licenses to flat-fee limited
2 service brokers to full-service discounters, have
3 deployed internet technology to drive sales. In the
4 process, they are re-allocating home sale commissions
5 that have traditionally gone to the full-service
6 realtors.

7 The agents, understandably, are feeling as
8 though they're unfairly under siege. They cite to
9 vigorous intra-industry competition, including among the
10 1.2 million agents who are members of the National
11 Association of Realtors, and they're quick to claim that
12 average commissions have fallen from about 6 percent to
13 5.1 percent over the past decade. Realtors also worry
14 about internet loan companies who provide limited
15 reality services in addition to mortgage financing. The
16 full-service realtors protest that these competitors
17 are, in effect, wearing two hats and free riding on
18 listings.

19 Additionally, realtors are concerned about the
20 integrity of their respective MLSs, many of which are
21 owned and operated with realtor boards affiliated with
22 the national association. The realtors assert that the
23 security and accuracy of the system will be compromised
24 unless local and national NAR affiliates continue to
25 screen participants and control distribution. To that

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1 end, local boards have set parameters in certain
2 jurisdictions governing who may enter or view the MLS
3 and how entries will be treated. Some boards have
4 downgraded the prominence of certain listings entered by
5 discount limited service brokers. Often they involve
6 the houses that we would commonly call
7 for-sale-by-owner. Others have removed these listings
8 entirely.

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

19 Critics of the traditional full-service
20 brokerage model make several arguments in response.
21 Those seeking to offer fee-for-service options argue
22 that a la carte pricing can potentially save individual
23 consumers thousands of dollars per transaction. Online
24 lending services such as LendingTree assert that they,
25 in fact, bring in more business for brokers -- who do,

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1 by the way, participate willingly with them -- while at
2 the same time offering customer friendly discounts
3 generated by technological efficiencies and economies of
4 scale.

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

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

23 Now, restrictions of this sort erect entry
24 barriers for new business models that provide consumers
25 with the ability to purchase only those services that

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1 they want or need, and they lock in a business model
2 that bundles together high-end services. The Commission
3 generally has argued that these minimum service
4 requirements can harm consumers by eliminating choices
5 and causing higher prices, and certainly from my
6 perspective the threatened proliferation of similar laws
7 is troubling, because once these laws are enacted, there
8 is no going back, and there is little anyone can do to
9 address potential anti-competitive effects absent
10 repealing the laws.

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

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

23 To be sure, the type of debate that's pervading
24 the real estate industry where high-technology
25 competition challenges a traditional business model is

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1 nothing novel. Indeed, we've witnessed resistance to
2 internet-based competition with respect to wine, contact
3 lenses and toy sales, to name just a few, and we have
4 seen, I think to the great benefit of consumers, a
5 quasi-revolution in the travel industry, another
6 business in which agencies are compensated largely
7 through commissions.

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

19 So, where does this leave us? For now, I think
20 we are squarely at the crossroads between investment in
21 and comfort with the traditional real estate model and
22 the promise of new, innovative alternatives. My own
23 sense is that there's a way to create more competition
24 for the consumer clearly and without confusion, because
25 like my staffer Tinman, there will always be consumers

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1 who prefer a full-service broker and are willing to pay
2 the price, and these people surely should be able to do
3 so. Conversely, though, consumers may prefer to choose
4 among a disaggregated selection of services and receive
5 adjusted pricing, sort of closer to my staffer Lion, and
6 should likewise have that option, too.

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

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

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

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

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

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

18 (No response).

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

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

23 (Applause.)

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

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1 Justice, in one of the litigation sections.

2 This afternoon, we will turn our attention to
3 buyer side issues, things that will affect, in
4 particular, buyers when they go into the market.

5 Certainly one of the major issues that I know one of our
6 panelists will discuss will be anti-rebate legislation.

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

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

21 On my right is Alex Perriello. Mr. Perriello is
22 President and Chief Executive Officer of Cendant Real
23 Estate Franchise Group of Cendant Corporation. With the
24 recent announcement -- I wrote this yesterday and it's
25 already out of date -- but Cendant is the largest

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1 franchisor of residential/commercial real estate
2 brokerage offices in the world, and in this capacity,
3 Mr. Perriello oversees Century 21, Coldwell Banker,
4 Coldwell Banker Commercial, ERA and Sotheby's
5 International Realty. These brands have more than
6 14,400 franchise and company-owned offices and 303,000
7 brokers and agents worldwide.

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

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

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

11 Next, and to my left, is Tom Early, President of
12 the National Association of Exclusive Buyer Agents. Tom
13 has been in the real estate business for 24 years
14 starting as a salesperson and then becoming a broker in
15 1987. He opened one of the first exclusive buyer
16 representation real estate brokerages in 1989, making
17 him a pioneer in the field of buyer representation. He
18 helped found the National Association of Exclusive Buyer
19 Agents in 1995 and served as President of that
20 organization in '97 and '98. Tom is considered to be an
21 expert in the area of common law of agency as it relates
22 to the real estate industry and speaks on the subject to
23 many organizations, including the REVAC, at the NAR
24 convention on several occasions. Tom served in Vietnam,
25 with honor, as a member of the Special Forces, Green

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

5 Our second to the last speaker will be Geoff
6 Lewis. Geoff has a very varied business background, and
7 he now is a member of the RE/MAX Network, serving as
8 Senior Vice President and Chief Legal Officer of RE/MAX
9 International. He previously served as vice president,
10 corporate development, and general counsel for
11 Hyster/Yale Materials Handling in Portland, and before
12 that as Vice President and General Counsel for American
13 Health Properties in Greenwood Village, Colorado from
14 '91 to '95. He also practiced law with the firm of
15 Jones Day in Los Angeles, received his Bachelor of Arts
16 from Brigham Young and a JD from the University of
17 Virginia and an MBA from the University of Colorado.

18 Our last speaker will be Steve DelBianco. Steve
19 is an experienced business leader and policy expert in
20 internet and information technology. He ran an IT
21 consulting firm before helping to start two tech policy
22 groups, the Association for Competitive Technology and
23 NetChoice, a coalition of Ecommerce, business and
24 consumers, and at the present time, he is the Executive
25 Director, NetChoice Coalition, Washington, D.C. In

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1 addition, Steve was an investor and board member of
2 eRealty.com, a startup brokerage that empowered realtors
3 with internet technology to better serve home buyers who
4 want the convenience of online search and
5 communications.

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

8 So, shall we begin, Alex?

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

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

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

21 First, let me begin by saying and addressing the
22 heart of the matter, which is competition. The
23 residential real estate business is a very, very
24 competitive business. As we have heard earlier, there's
25 1.1 million licensed realtor members of the National

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

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

18 Just last week, I was talking to one of our
19 brokers, Brad Holter of Coldwell Banker Caine Halter in
20 Greenville, South Carolina. During our conversation, I
21 mentioned to Brad that I was going to be down here
22 speaking on a panel about competition in the real estate
23 industry, and I'd like to share with you what he said to
24 me. This was his exact quote. "Alex, are you kidding?
25 Have they come to Greenville if they want to see

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1 competition? My family has been in this business for
2 over 75 years, and during three generations we have
3 never seen or experienced more competition than we're
4 seeing today, not only from traditional real estate
5 companies, but also from a host of discounters and
6 limited service providers." He said, "It seems as
7 though there is one opening up every month in our
8 market."

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

17 Let's take a look just for a second at the many
18 options a home buyer has when purchasing a home.
19 There's a number of ways that they can begin their home
20 search process, continue and complete their home search
21 process. They can buy directly from the homeowner or
22 for-sale-by-owner. They can enter into an exclusive
23 buyer agency agreement and deal with that particular
24 agent to find a home. They can deal with any number of
25 listing agents and buy directly from them. They can

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1 work with a number of agents and say this is what I'm
2 looking for, go find it, and when you do, I'll do
3 business with you. They can shop the internet and look
4 for agents online and review resumes and send emails and
5 interview people electronically, or they can go through
6 an intermediary who will refer them to a sales
7 professional perhaps so that that buyer may receive some
8 sort of a rebate on the commission. As you can see,
9 there's a myriad of choices for buyers to choose
10 representation or not as they seek to purchase a home.

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

24 I'd now like to address the impact of
25 technology, and more specifically the internet, on the

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1 home-buying process. Today, the true value of the
2 internet to the residential real estate industry and
3 consumers alike is that it's a very highly effective
4 marketing tool as well as a tremendous information
5 resource and communication tool. Unlike some
6 industries, the residential real estate industry was
7 among the first industries to really embrace technology
8 and the internet to help their consumers. Real estate
9 companies began posting listings on web sites back in
10 the 1990s, and today, those web sites are amazing.
11 Property photos, virtual tours, rich text, mapping
12 functionality, neighborhood information, and on and on
13 and on.

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

24 Now, these costs have been absorbed virtually in
25 their entirety by the industry itself. Consumers have

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1 not realized increased transaction costs due to the
2 adoption of new technology in marketing real estate. In
3 fact, online searches are a definite time-saver in the
4 way they empower the customer to select a buyer or
5 seller's agent and narrow their home search process from
6 the comfort of their own home. What the internet does
7 very well is to act as a marketing tool to promote
8 transactions. It's a search tool for customers and an
9 advertising and communication tool for sales associates.

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

21 The ultimate cost of a wrong decision on a real
22 estate purchase is significant. The role of technology
23 in our business, accordingly, is pretty difficult to
24 predict. Undoubtedly, because of the competitive nature
25 of the business, there will be winners and losers just

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1 like there have been over the past many decades.
2 Respectfully, I would suggest that there is really no
3 need for the Federal Government to intervene to fix what
4 really isn't broken.

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

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

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

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

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

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

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

16 Thank you.

17 MS. QUINN: Thank you, Alex.

18 (Applause.)

19 MS. QUINN: Philip?

20 MR. HENDERSON: Thank you, Lee.

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

25 I first want to thank the Federal Trade

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

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

17 Before I do that, I want to tell you a little
18 bit about RealEstate.com so you can understand why we
19 use that practice and what our business is about.
20 RealEstate.com has built a network of local brokers and
21 agents. These are brokers and agents who have joined
22 our network because we deliver value to them. We can do
23 for them things that they could do for themselves, but
24 they opt to have us cooperate with them in a partnership
25 relationship. Many of the things that Alex mentioned

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1 that are costly and difficult to do for an individual
2 broker, those individuals can become more efficient by
3 partnering with other entities. It's not true for every
4 brokerage, but some use it and find value in it.

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

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

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

17 It's often cast as a consumer issue, right? The
18 consumer should have the ability to get value back. But
19 what I'd like to stress today is it's a brokerage. It's
20 good for brokers to have the ability to compete, to use
21 tools to increase its market share and to gain
22 consumers, and I think that's a theme throughout many of
23 the subjects that we've talked about today, is that it's
24 about unleashing brokers to have the ability to use new
25 methods and tools to expand, to succeed, and to succeed

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1 in this market that is competitive in many ways. There
2 are many brokers and agents out there. Giving them new
3 tools to compete will help the industry.

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

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

23 The other is different, and I think it had a
24 more legitimate genesis, and it's the anti-inducement
25 statutes, laws that said -- I think they were originally

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1 designed and aimed at third parties from receiving fees
2 to induce a transaction, but they've been interpreted
3 and used to say brokers can't give a rebate because it's
4 an inducement to do a deal. I think it falls into the
5 category that Alex touched on about whether consumers
6 should be persuaded by the rebate to hire a specific
7 broker.

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

20 So, to sum up, what we see, I think, on a number
21 of fronts, and in particular with rebates, is brokers
22 and agents in the industry seeking to use new methods
23 and models and practices to compete and to succeed, and
24 I think our message to the leadership of the industry
25 and to policy makers is that these barriers deserve

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1 significant scrutiny, and we have to ask, is there a
2 real pro-consumer, pro-industry argument for them? I
3 think in many cases, barriers don't stand up to that
4 scrutiny.

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

9 MS. QUINN: Thank you, Philip.

10 (Applause.)

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

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

25 People used to talk about our real estate

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1 campaign, and one little boy said, "Oh, I understand
2 you're in real estate. You have no life." And
3 sometimes that -- you know, it is a very highly
4 intensive activity that you do when you are representing
5 your customers and clients.

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

20 Certainly the first thing that the buyer needs
21 to have information about are properties that are
22 available, and over the last ten years, we have seen so
23 much expansion in the capability of the consumer to have
24 information online that they may do research, not only
25 about what properties are available, but about the

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1 process of buying and selling real estate. In the
2 Multiple Listing Service, which has been touched on
3 today, that is a very valuable tool for me as a real
4 estate professional. What it brings to me is
5 information about listings that have been provided by
6 all brokerages. Anyone who is a member of the realtor
7 organization, whether they are a discount broker, a
8 limited service broker or a full-service broker, have
9 their listings in the Multiple Listing Service, and in
10 that broker-to-broker cooperative compensation
11 environment, that is real time information for me to be
12 able to deliver to my customer or client, the buyer, and
13 real time is important, especially if you happen to be
14 in a seller's market, because the advertising vehicles
15 that are out there on the internet are not real time,
16 and by the time even that a consumer might be able to
17 see something online, it could be gone.

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

25 Actually, writing the offer, the offer itself

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

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

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

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

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

24 So, in the world of competition, there are
25 multiple players in this story, and the buyer's ultimate

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1 objective is to make sure that he or she is sitting at
2 the closing table, signing the mortgage documents,
3 seeing everything necessary to be able to close, and the
4 rest of it is just the beginning and the middle, but the
5 most critically important factor to them is actually
6 closing.

7 (Applause.)

8 MS. QUINN: Thank you very much.

9 Tom?

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

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

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

24 Everything I hear about these minimum services
25 says it's a good thing for the consumer. The problem is

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1 the only person they're talking about when they're
2 talking about the consumer, they're talking about the
3 sellers. When 90 to 95 percent of the complaints that
4 are filed by consumers are filed by buyers, why are we
5 looking at these minimum level services for sellers?
6 We're looking at them because the real estate industry,
7 the organized real estate industry, is losing listings.
8 They're losing sellers. They're not losing buyers.
9 They're trying to find a way to stop the bleeding.
10 They're trying to find a way to stop the loss of the
11 listings to the traditional setting of brokerage.

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

22 The introduction and the growing awareness of
23 buyer agency turned everything upside down within the
24 industry. We in the industry now found ourselves with
25 the potential of having two clients as buyers began to

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1 expect full representation, too. How can one firm,
2 which has a major incentive to bring a transaction
3 together, fully represent adversaries? Attorney firms
4 don't represent adversaries because they recognize the
5 inherent conflicts of interest. Who would agree that a
6 buyer and seller aren't in an adversarial situation?

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

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

22 The majority of the industry made other choices.
23 These choices ranged from facilitation, commonly known
24 as transaction brokerage, which provided no higher level
25 duties -- and by the way, no fiduciary duties -- to

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1 designated agency. Designated agency allows licensees
2 from the same firm to purport to offer full
3 representation as a fiduciary to opposing parties in the
4 same transaction from the same brokerage with no
5 conflicts of the -- just no disclosure of the conflicts
6 of interest that are inherent in dual agency.

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

19 The common law of agency has now been replaced
20 in roughly 26 states by designated agency legislation,
21 making legal that which was previously unethical and
22 illegal under the common law. Now, agents from the same
23 brokerage can represent opposing sides without the
24 cumbersome informed consent disclosure required under
25 dual agency. In every instance, it has been the state

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1 realtor associations which have called for, written and
2 paid for with PAC dollars, passed this legislation, just
3 as we are seeing done today with minimum level services.

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

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

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

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

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

19 This brings us to the last issue that I
20 mentioned I would be addressing, and that's realtor
21 procuring cause. I'm going to be real short on this,
22 because it's considered by the industry to be an insider
23 thing, and it really doesn't involve the consumers and
24 so on and so forth. Nothing could be further from the
25 truth. Do buyers know that working with a realtor, in

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1 most cases the listing agent, that they jeopardize their
2 ability to be fully represented? This is never
3 discussed, it is never disclosed, it is never mentioned,
4 and if that buyer decides they don't want to work with
5 the seller's agent and they don't want to accept the
6 conflicts of interest that come with working with the
7 buyer's agent from the same firm that is represented by
8 the seller, what good does that do?

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

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

23 (Applause.)

24 MR. LEWIS: I'd like to begin by thanking the
25 FTC and the Department of Justice for including RE/MAX

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1 in this workshop, but more importantly, I'd like to
2 thank the DOJ for not including us in your lawsuit.

3 UNIDENTIFIED SPEAKER: There's still time.

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

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

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

25 To Mr. Farmer who spoke this morning, RE/MAX

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1 knows about competition. We know about breaking into an
2 industry. We know about lies and misrepresentations.
3 But today, more real estate is sold under the RE/MAX
4 brand than any other brand. How did RE/MAX overcome our
5 competition and reach the pinnacle of our industry?
6 Well, one thing is for sure. We did it without the
7 intervention of the Federal Government. We did it
8 because we had a better model, and we made it successful
9 the old-fashioned way, through hard work and customer
10 service. The marketplace recognized the value of the
11 RE/MAX business model and rewarded it.

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

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

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

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

18 How do you explain the lack of increase in agent
19 income given the rising housing prices? Well, I think
20 the explanation is due to the large increase in the
21 number of agents entering the industry. NAR's reported
22 a 26 percent increase in membership over the past two
23 years and a 40 percent increase over the past five
24 years. These agents are being drawn in by the increase
25 in housing prices. I think also a lot of these agents

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1 are coming from the downsizing that has occurred in
2 corporate America.

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

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

23 The internet has not affected prices for doctors
24 or attorney services, newspaper advertising or
25 subscription rates, landscaping or a myriad of other

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1 industries, including, I might add, government services.
2 Not every industry is going to be impacted by the
3 internet the same as airline ticket vendors,
4 stockbrokers or book sellers. After all, these
5 industries are selling commodities. Real estate agents
6 are selling unique properties and providing
7 individualized services. An experienced real estate
8 professional provides a value-added service that assists
9 sellers to obtain the best price for their homes and for
10 buyers to find the best home at the lowest price.

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

15 Despite misrepresentations to the contrary, the
16 new internet listing display policy adopted by NAR does
17 not allow a broker to withhold his listings from the
18 MLS. Every broker in the MLS has the right to receive
19 the listings of all other brokers. The Multiple Listing
20 Service, as has been explained today, was designed as a
21 B2B vehicle, not a business-to-consumer vehicle. It was
22 designed as a mutual sharing of information by industry
23 peers to facilitate the sale of and search for
24 properties by customers. The idea was that brokers and
25 agents would work to earn their own customers using

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1 their own assets. The concept is simple. You earn a
2 customer, you get to use the MLS with the customer. The
3 concept is not you get free access to the MLS, and then
4 you use it to advertise the properties on it in order to
5 attract a customer.

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

19 If I can make an analogy to the sale of an
20 automobile, you have a number of options when you sell
21 an automobile. One is to simply take it and trade it in
22 when you buy a new car. Another is to sell it yourself,
23 using the papers, other vehicles that you have to
24 advertise it. Many of you have probably seen, and I
25 have used this tactic myself, take a vehicle and park it

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1 in a high-traffic area with a for sale sign in the
2 window. I don't think any of us would presume that we
3 would have the right to drive our vehicle onto the lot
4 of one of the largest brokers on auto row and park it
5 right next to the street and put a for sale sign in the
6 window. That lot is proprietary to the broker, just as
7 the MLS is a system that brokers have agreed to use with
8 each other. It is not a system that's a public utility
9 that's open to third parties who are not engaged in the
10 real estate brokerage business.

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

21 On the subject of state law restrictions on
22 limited service providers, if I were looking for someone
23 in support of these, after hearing all of our panelists
24 today, I think I'd feel a little bit like I believe it
25 was Diogenes in Greek mythology, searched with a lantern

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1 looking for an honest man. There doesn't seem to be
2 anybody today willing to stand up and support these
3 laws. RE/MAX believes this is a determination left to
4 the individual state legislatures.

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

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

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1 agree with that.

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

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

22 Another area state legislators should address,
23 if it determines to allow limited service providers, is
24 proper protection of and compensation to a full-service
25 agent involved in one side of the transaction. RE/MAX

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1 is increasingly hearing complaints from its agents who
2 encounter parties in a transaction who expect the RE/MAX
3 agent to pick up the responsibility of the other side
4 who has contracted for limited service. In addition to
5 this being economically unfair for the full-service
6 agent, it also puts them in a difficult position with
7 respect to their fiduciary responsibilities and their
8 agency relationship with their own client.

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

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

20 Thank you very much.

21 (Applause.)

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

25 MR. DelBIANCO: Thank you, Lee.

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

9 NetChoice members includes some Ecommerce giants
10 like America Online, eBay and Oracle, but also our
11 founding members included some Ecommerce pioneers,
12 1-800-CONTACTS, Orbitz and eRealty. Do you know who the
13 pioneers are? They are the ones with all the arrows
14 sticking in them.

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

21 Now, eRealty.com is a startup company that I
22 became involved with in 1998 as an angel investor --
23 don't try that at home -- and as a director of the
24 company for six years. ERealty was a licensed
25 brokerage. They were part of the club, Bob Hahn called

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1 it, right, a licensed brokerage that's in the club,
2 playing by the rules. They had licensed agents, also
3 club members, and they used innovative technology.
4 Their mission was to better serve internet-savvy home
5 buyers with the convenience of online search, something
6 we called incubation, which was to monitor and then
7 quickly report the instant any listing came up that fit
8 a profile that you pre-established with eRealty, and
9 then communicate instantly through email or any device
10 you needed and assist you through the scheduling of
11 appointments and the whole scheduling of the transaction
12 all the way through to close, as Ms. Whatley has talked
13 about.

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

25 Now, eRealty built their systems from the ground

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

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

22 Now, Judge Nowlin, thankfully, he concluded
23 right away that the way that eRealty happened to deliver
24 listings to its bona fide buyers could not be treated
25 any differently than the way other brokers delivered

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1 their listings, whether by fax, hand, hard copy paper or
2 by email, and that made it very expedient that the
3 Austin Board of Realtors would settle that case, because
4 the Judge painted clearly that they could not
5 discriminate just based on the way that eRealty was
6 delivering information.

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

17 The lawsuit itself is very clear, shows the
18 circular arguments that are being employed today. The
19 circular argument says that there's so much competition
20 and alternative business models that we don't need a
21 lawsuit, but at the same time, the lawsuit seeks to stop
22 brand new NAR rules which would stop some of those new
23 business models from even coming into existence. You
24 see, the circular argument there just doesn't make any
25 sense, but all this is probably getting too much into

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1 the weeds. Let's see if I can step it up a level.

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

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

20 The demographics, pretty obvious, a generation
21 of Americans are now comfortably and constantly
22 connected to the internet and to Ecommerce. They
23 instinctively start with the internet before they search
24 to buy anything. They do extensive research online. It
25 makes them easier to serve even if they did the search

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1 and went into a traditional real estate agent.

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

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

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

22 Now, this rising generation of buyers and
23 sellers, they're going to expect internet technology to
24 both improve service and to drive efficiencies that
25 eventually, we're told by the economists, driving

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1 efficiencies eventually leads to lower prices, but the
2 court will have to be the one to determine whether NAR
3 is guilty of antitrust violations, but the court of
4 consumer expectations with this rising generation is
5 starting to pay attention, and here's what they see.

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

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

21 Now, brokers running these virtual broker web
22 sites, brokers like eRealty, had their club keys taken
23 away and their data feeds downgraded, which made it
24 impossible to maintain portfolios of homes in order to
25 serve their buyers better. And then web-savvy home

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1 shoppers on the buy side will be suspicious that big
2 franchise brokers want to restrict the co-branding
3 relationships with favorite internet destinations, like
4 a Yahoo, an MSN, an eBay or a LendingTree.

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

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

20 The court of public opinion, regardless of what
21 this court does, but the court of public opinion is
22 smart enough to know when consumer protection is really
23 being used to justify competition prevention, and it's
24 true that some big brokers are actually gearing up to
25 serve information-driven consumers with better tools for

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1 search, monitoring and scheduling, but we've heard today
2 that the biggest franchisors will allow the use of the
3 MLS only on their own terms, that B2B club of theirs,
4 that says it's really only about -- what, everyone? --
5 cooperation and compensation if and when they're ready.

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

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

21 So, nobody expected Cendant and NAR to be so
22 bold, actually, in their response to the Justice
23 Department's two-year investigation. I don't think they
24 were all paying attention ten years ago in this town to
25 what happened in the antitrust trial against Microsoft,

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1 because one of the tactics you would not want to do is
2 you wouldn't want to moon the giant like that by
3 releasing new rules despite a two-year investigation
4 cautioning you against the new rules.

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

12 Thank you.

13 (Applause.)

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

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

22 MS. WHATLEY: Well, certainly from the extent
23 that the National Association of Realtors is very much
24 into cooperation, and we are in the representation of
25 consumer business, I would say that I think that a

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1 number of the comments that were stated by Steve were
2 unfounded in my mind. I'll allow, you know, more of
3 that to come as conversations come out, but I think he
4 is totally off base in a number of his comments.

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

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

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

21 MR. EARLY: Opening my brokerage in 1989 as an
22 exclusive buyer broker, being one of the first people in
23 the country, I have to take exception with those who say
24 that NAR is looking for choice and is open to choice and
25 is open to competition. I got my brains beat out for

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1 the first three years as an exclusive buyer's agent. We
2 were introducing a brand new concept to the industry,
3 the representation of a buyer into an industry that had
4 represented sellers 100 percent of the time at all
5 times. We were not welcomed.

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

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

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

25 MS. QUINN: Anyone else? Steve?

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

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

19 MS. QUINN: Well, I've gotten several questions
20 that we can move on from here just a little bit, which
21 is we recognize some of the problems with the system,
22 and the questioners are concerned about what should come
23 next, and does it still make sense for the buyer and
24 seller's agents to be paid through the seller rather
25 than separately arranged or negotiated by the buyer and

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1 the seller? In other words, the buyer hires his agent
2 and pays it, the seller hires her agent and pays it.

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

5 MS. QUINN: Okay.

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

15 MS. QUINN: Anyone else?

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

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1 making the decisions in many cases, not just the broker.

2 When I listed my house a year ago to move, I
3 talked to my listing agent about the strategy of what
4 she would retain and what we would offer to a buyer's
5 broker in the market. She didn't say, "Here's what I'm
6 going to give." We talked about that as a strategy.
7 Now, I may have said -- the market was very active at
8 that point. I may have said, if there were a lot of
9 properties on the market, "Heck, I'll offer 4 percent or
10 5 percent to the buyer's broker to make my property
11 stand out," and that's how I think this business works.
12 We need to have that flexibility in there. It's not
13 just the brokers who are competing or the agents. It's
14 many times the seller having to make decisions about
15 what will make my house more attractive.

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

24 Keep your co-op. We don't want it. Set your
25 fee with your client for the services you provide to

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1 your client. Leave my fee alone. I will work that out
2 with my client. I can't stress that strongly enough. I
3 don't need your co-op. I don't need you telling me I'm
4 worth 2 and a half percent. I don't need you to telling
5 me I'm worth 3 percent. I don't need you telling me
6 what I'm worth at all. That's between me and my client.

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

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

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

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

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

25 MS. WHATLEY: Well, and he can do that today as

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1 long as it will meet the appraisal issue.

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

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

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

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

23 Earlier today, it sounded as though that was an
24 automatic decision made solely by the broker with no
25 client input, and from what I hear from agents, I know

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1 when I was an agent back in the seventies and eighties,
2 I always had that conversation with my client, just to
3 say here's what I charge, here's what I think we should
4 charge or what you should allot for a buyer's agent
5 coming to the property.

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

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

17 MS. QUINN: Anyone else?

18 Steve?

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

21 MS. QUINN: Yes.

22 MR. DelBIANCO: If you don't mind, I'd like to
23 try to address that. I really believe that NAR should
24 simply rescind the new rules that were proposed, the
25 rules that are the subject of the case, just tear them

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1 up, settle the case, and it will all be over, and we can
2 all get back to work, back to work on innovation,
3 efficiency and competition within the MLS.

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

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

25 You're focusing a lot on the brokerage world,

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1 but there are a lot of things within the transaction
2 itself that bring capabilities for the buyer to have a
3 strength in a buyer's market, but in a seller's market,
4 when you have no inventory and you have one house
5 available and 40 customers who are wanting it, I mean,
6 your capabilities of negotiating are extremely limited,
7 and so it's a function of supply and demand.

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

17 Whether that's through the exclusive buyer
18 agency relationships where you are bringing that
19 strength to the buyer, to say, you know, your best
20 opportunity to be able to secure that one home when
21 you're one of 40 is to have my representation, because I
22 know exactly what it is I'm doing, or whether that's
23 through an online environment where they have the
24 capability to capture that, it's still there. It's
25 still a work in progress, and you know, I'm just not

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1 being tasked by my customer buyers or my customer
2 sellers to say this is a huge issue to them. They know
3 that they've got options out there, and they are looking
4 at them, and then they're making the decision that they
5 think is in the right interests for their personal
6 situation.

7 MS. QUINN: Tom?

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

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

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1 properties again.

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

12 MR. PERRIELLO: Lee, can I respond?

13 MS. QUINN: Alex.

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

21 You know, when a person lists their house, the
22 agent, the listing agent, the listing broker, then
23 assumes all of the costs, all of the responsibility to
24 market that house with the expectation that at some
25 point in the future, that house is going to sell, and

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1 what you hear about all the time is the house that sells
2 in one day for an exorbitant price and the agent didn't
3 work real hard.

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

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

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

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

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

24 MS. QUINN: Thank you.

25 Steve?

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

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

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

25 MR. HENDERSON: Is there another question?

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

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

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

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

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

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

20 MR. HENDERSON: You know, one of the interesting
21 things, you know, earlier in the day, we heard a lot
22 about fiduciary duty, particularly with regard to
23 minimum service brokerages and the need to emphasize
24 that the agent is, in fact, an agent and is working on
25 behalf of the consumer. One question is, with regard to

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1 both opting out, you know, letting brokers prevent
2 listings from being displayed on internet sites as
3 opposed to being printed out, and with regard to
4 preventing new kinds of brokers from joining the MLS, I
5 would ask the brokerages who are fighting for those
6 policies, how does that help your seller?

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

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

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

18 MR. EARLY: Well, Phil, I'll say something to
19 that. It has to do with the in-house transaction; it
20 has to do with doubling your income on the sale of a
21 property. I mean, we've skirted around this all day
22 long. We've never talked about the double-dip or the
23 dual agency or the double income. I haven't heard it
24 mentioned once in the entire day. Take the in-house
25 transaction, double-dip transaction off of the table as

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1 a problem in our industry, and we have no problems. We
2 have no problems.

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

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

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

22 If you and I were competing brokers in the same
23 marketplace where we both belonged to the same MLS, we'd
24 open up the same thing and we'd see the same thing. We
25 would see exactly the same information, and you could on

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1 the internet communicate that then to your customer, and
2 I could either do that online, I could fax it to my
3 customer, or I could pick up the phone and call them.
4 We have the same information available to us.

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

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

20 Most real estate companies, most real estate
21 agents, have access to IDX sites right on their own web
22 sites, and so, you know, to say that that's somehow
23 limiting your ability to share information with the
24 consumer, what you see in the MLS is more detailed
25 information, but again, you have access to that, and you

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1 can provide that to the consumer just like I can in
2 whatever avenue or vein you might elect to do that.

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

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

23 So, the competitive pressure will keep everyone
24 sharing listings, but it's giving that broker that
25 failsafe, if you will, if they wanted to use it, and I

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1 think that with the new policy, the ILD policy, adding
2 that feature where the customer makes the final choice I
3 think is an excellent feature, because then it takes it
4 out of the broker's hands into the customer's, and to
5 say to the seller, "Do you agree with this? If you do,
6 fine. If not, you can opt in." I think that's a good
7 feature and a good resolution to it.

8 MS. QUINN: Go ahead, Steve.

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

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

24 So, selective opt-out is something that's -- is
25 it really off the table? It's certainly not out of the

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1 minds of NAR, but it's off the table now because --
2 because of what? Not because of competitive pressure
3 that Alex just described. It's off the table now
4 because the Justice Department for two years has been
5 saying it's against the law. So, we need the kind of
6 antitrust enforcement that we have in this case to keep
7 the MLS system from running afoul of antitrust laws.

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

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

23 MS. QUINN: Anything else?

24 Well, we have a question from the audience that
25 says what, if anything, precludes proponents of new

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1 business models from cooperating to form their own
2 accumulation of listings? Isn't that competition? How
3 would you respond to that audience member?

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

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

22 The objection is that it's on the internet. And
23 so our position is that competition is good, just like
24 with the rebates, you want to allow brokers to use
25 different tools, to use available technology, to serve

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1 buyers, to serve sellers. The same concept applies in
2 other areas of the industry. Let's allow brokers to use
3 technology and available tools to compete.

4 MS. QUINN: Steve?

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

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

25 So, again, it's all about don't preclude

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1 competition, but by golly, the first time it shows up,
2 regulate it.

3 MS. QUINN: Anyone else?

4 (No response.)

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

10 (Applause.)

11 (A brief recess was taken.)

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

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

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1 systematic review of the evidence based on a coherent
2 analytical framework.

3 We're fortunate today to have two outstanding
4 economists as panelists to help us in that effort.

5 Dr. Lawrence Yun is the Managing Director of
6 Quantitative Research at the National Association of
7 Realtors, where he manages the Statistics and
8 Forecasting Groups of the Research Division. He writes
9 regular columns on real estate market trends, creates
10 NAR's forecasts, and participates in many economic
11 forecasting panels, including Blue Chip and the Harvard
12 University Industrial Economist Council.

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

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

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

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

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

15 I will ask Dr. Yun to start us off.

16 DR. YUN: Thank you very much.

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

23 My graduate school specialty was in industrial
24 organization, which is the study of the competitiveness
25 of the industry, and I am very happy to have taken on

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1 this topic to sort of refresh some of the things that I
2 learned at graduate school and sort of apply it.

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

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

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

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1 range of choices.

2 From the supplier point of view, let's look at
3 the figures. Currently, 1.25 million realtor members;
4 2.53 million service providers who have licenses; 98,000
5 active firms in over 200,000 local offices; and again,
6 choice available for consumer is for-sale-by-owner,
7 which is over one million per year.

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

20 Let's look at the past housing cycles. There
21 was a recession back in the early 1980s. Paul Volcker,
22 Chairman of the Federal Reserve, his goal, cut back on
23 inflation. The way to do that, drastically increase
24 interest rates. Average interest rates, mortgage rates,
25 at 18 percent at one point. During that time, home

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1 sales declined by 50 percent. So, if you were a realtor
2 in the business, you lost half of your business.

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

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

22 In studying the industry structure, economists
23 here at FTC, as well as in DOJ, they would generally
24 look towards the concentration ratio to see whether the
25 industry is concentrated and can exert some market

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1 power, if they can collude. This is the concentration
2 ratio among the firms in the real estate industry, real
3 estate brokerage firms.

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

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

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

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

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

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

25 Now we have seen that small firms are able to

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1 survive. How is that? Well, the Multiple Listing
2 Service, the great Multiple Listing Service, is putting
3 everyone on equal footing. If you want to start a
4 business and assume that you don't have any access to
5 Multiple Listing Service, it's very difficult to obtain
6 clients, but Multiple Listing Service allows, whether
7 large or small firms, on equal footing, equal
8 information, and small firms can survive over time.

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

20 I would contend that it is a professional
21 service that requires a lengthy amount of time, and not
22 only that, requires many, many paperwork. I was a
23 first-time home buyer several years back, and I have a
24 Ph.D. in economics. I didn't realize how daunting the
25 home-buying process could be. But we believe that, you

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1 know, real estate service is not a commodity, and hence,
2 we really don't see why the internet would necessarily
3 bring a drastic decline in prices as one would purchase
4 an airline ticket or purchasing an item in stock.

5 Are we producing a perfectly competitive
6 outcome? In Econ 101, perfectly competitive market
7 structure would say that there is no excessive economic
8 profit. Any abnormal profit will induce new entry, and
9 the profit will be eaten away. The realtor income,
10 \$52,000 in 2002, that's the median, and again, as
11 someone alluded to earlier, that is before business
12 costs, before health insurance costs and other fees.

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

20 Also, the commission rates, often mentioned
21 source REALTrends, 5.5 percent to 5.1 percent decline.
22 I would question the reliability of the data. Now, I'm
23 not really questioning the reliability, but at the same
24 time, because NAR has been -- well, when I first came to
25 NAR, they said, "One thing you should never do is study

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1 commissions," and I think the reason for that is in
2 honor of the latest Nobel Prize winner in economics,
3 Thomas Schelling, which say basically in large
4 organizations, coming out with some kind of figure
5 represent a focal point for others to collude. So,
6 whatever figure NAR come out with, maybe other people
7 will sort of use that as a collusion point.

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

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

24 One, economic mobility. While home sales is
25 very dynamic, one of the most dynamic in the world in

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1 the U.S., I think that's a good proxy to represent that
2 there is a lot of economic mobility in the United
3 States, and I think that's a good thing. In Japan,
4 there's very, very little mobility. In fact, most of
5 the home sales are new home sales, not existing home
6 sales.

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

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

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

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

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

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

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

25 And also, currently, real estate is all local,

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

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

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

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

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

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

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

24 Shopping malls, heck, got a lot of flea market
25 vendors out there who can sell it for lower price. Open

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1 up the shopping mall, hopefully all these flea market
2 vendors will enter and let the consumers benefit. I
3 hear that the pharmaceutical drugs from Canada and
4 Mexico are a little cheaper. What would CVS, Walgreen's
5 react to that if they allow that to be a public utility
6 so that consumers would benefit?

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

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

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

25 Private ownership. Private ownership always

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1 seems to work. Any time there is a little interference
2 in the private ownership, unintended consequences
3 sometimes occur. As one Swedish economist mentioned,
4 "There's two ways to destroy a city: One is through a
5 bombing; one is to just set a rent control and just wait
6 30 years." The same thing.

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

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

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

22 (Applause.)

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

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

8 So, what do we mean by the "Tragedy of the
9 Commission," and for those of you who have taken an Econ
10 101 class, I'm basically making an allusion to the
11 tragedy of economics. So, what is it that is puzzling?
12 What was it that got us started in this, because if you
13 note, I am not a person who specializes in real estate,
14 but what got me really interested in this is that the
15 real puzzle in the real estate business is why does
16 there seem to be this relatively fixed commission
17 structure?

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

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

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

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

24 Now, you know, this might seem like a great deal
25 for brokers. It might seem the case that brokers who

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1 operate in my area are going to earn extraordinary
2 profits, because in one given transaction, they can walk
3 away with \$35,000, right? But that's actually not the
4 right way to think about it, and this is something,
5 again, that a lot of other people have alluded to,
6 because there's relatively free entry into the
7 profession and into the real estate brokerage business,
8 and basically what that does is that it basically
9 dilutes the profits for everybody, and at the end of the
10 day, realtors don't make any more money in the San
11 Francisco Bay area than in a city like Pittsburgh, but
12 people like me, we're paying much, much more for these
13 services than somebody that lives in the City of
14 Pittsburgh.

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

22 But let's think about two cities, and we picked
23 these two cities, Boston and Minneapolis, because they
24 look quite similar among a bunch of dimensions. They
25 are cities of roughly similar size, cities have similar

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1 demographics, cities have similar racial composition,
2 they -- but the thing that strikes out, that really
3 jumps out at you when you want to think about Boston
4 versus Minneapolis, and this is data for 1990, is that
5 housing in Boston is a lot more expensive than what it
6 is in Minneapolis. It costs twice as much, and
7 obviously if you look an analysis, my guess is that it's
8 going to be much, much higher, because there's been a
9 real housing boom in the Boston area.

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

18 I mean, if that were the end of the story, then
19 it would be like a story that you see in a lot of other
20 industries. Some people pay more for a service, and
21 other people gain from the service. So, you know, so
22 then the commission structure would just be a transfer
23 from consumers to the realtors, some people are worse
24 off, some people are better off, but at least some
25 people are happier as a result of the higher commission,

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1 but the tragedy of this business is that that's actually
2 not the right story, because what happens, and again,
3 for those of you who are in this field, there are many,
4 many more realtors in Boston than there are in
5 Minneapolis.

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

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

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

20 So, basically what we've documented is that this
21 is exactly the pattern, when you look across all of the
22 cities in the U.S., that if you look across the
23 approximately 300 metropolitan areas of the U.S. and if
24 you look at changes from 1980 to 1990 and you look at
25 cities where housing prices have gone up relative to the

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1 cities where housing prices have gone up by less, what
2 you're going to see is that in places where housing
3 prices have gone up by more, what you see are three
4 things.

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

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

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

9 So, what's on the Y axis this time is a number
10 of -- is a change -- again, all this is is the 1980 and
11 1990 -- anyway, it's the number of houses sold in a city
12 relative to the number of hours worked by a realtor.
13 You could also do it relative to the number of realtors,
14 but it's not going to make that much difference. We did
15 hours worked to try to account for the fact that there
16 may be changes in the amount of hours worked by
17 realtors.

18 And again, the slope looks like this. It's very
19 close to one. So, a 1 percent increase in price would
20 translate into a fall in sales per hour's work or sales
21 by almost one percentage point. So, the bottom line is
22 that in places where housing prices have gone up,
23 nothing happens to wages. So, basically what's here,
24 what's on the Y axis, is the wage of the realtor or the
25 income of the realtor as reported in the Census,

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1 relative to what we constructed as the alternative wage
2 of the broker, where basically we look at the
3 demographic characteristics of brokers, and we make an
4 estimate of how much they could earn if they did
5 something else with their time, and it looks incredibly
6 flat. And again, this is something that a lot of the
7 people here have already alluded to. Wages are no
8 higher in places where housing prices have gone up. So,
9 realtors are no better off despite the fact that
10 consumers are paying a lot more for those services.

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

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

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

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

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

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

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

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

24 I guess our claim is that the second type of
25 activities, prospecting, is really of little value to us

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1 consumers. What we value is the services that a realtor
2 usually provides in getting the right price for the
3 house and in negotiating the offer and in getting to
4 closing, all of the things that the previous panelists
5 talked about. That's of real value to us.

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

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

23 So, if you take your benchmark city as Athens,
24 Georgia, that is, you know, what do I mean by a
25 benchmark city? If you make the assumption that all the

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1 all of the time that realtors in Athens, Georgia are
2 putting in is actually of real use to us, that it's of
3 real social value to us, and brokers in all of the other
4 cities in the U.S. aren't as productive as brokers in
5 Athens, Georgia, if you were to take that, the waste,
6 the amount of time and effort that is put into
7 prospecting, that amounts to \$8.2 billion in 1990, which
8 are half of the revenues of the real estate brokerage
9 business in that year.

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

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

24 If I want to take the analogy that Mr. Yun gave
25 about the baseball vendors in the stadium, Mr. Yun just

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

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

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1 Thank you.

2 (Applause.)

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

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

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

25 Technology has developed so that it should be

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

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

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

20 Well, one thing that happened was that prices
21 were really high, and they were particularly high on
22 long distance routes. Just to take one example, in
23 1977, which is at the end of the regulatory period, the
24 average discounted round-trip fare from Los Angeles to
25 Washington was \$333 in 1977 dollars; that would be \$779

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1 in today's dollars. Last week on Travelocity, you could
2 buy a ticket for \$183. Now, that's not quite a fair
3 comparison, because that was the best price we could
4 find, so it's not the average, but still, the average
5 price on that route has surely come down dramatically.

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

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

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

22 Now, airlines aren't the only example of this
23 phenomena. Another is stock brokerage. We used to
24 regulate the minimum price per share that would be
25 charged for stock brokerage, and the consequence of that

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1 was that there was a lot of service competition to try
2 to get those rents that were built into the regulated
3 prices.

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

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

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

23 Another feature of Professor Hsieh's results
24 that are reminiscent of the airline industry are that
25 the productivity is particularly low in those areas

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1 where the prices seem to be high. In the airlines, we
2 would see lower load factors on the long distance
3 routes, where with the real estate industry, we're
4 seeing less productivity in the high price areas.

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

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

21 If we were to figure out a way to bring more
22 price competition to the current commission structure --
23 and I should hasten to add that I'm having my un-Rip Van
24 Winkle type feelings, because it has not proven so
25 simple to do so -- why wouldn't we expect to see a

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1 similar phenomenon with real estate brokerage? Why
2 wouldn't we expect prices in general to come down? Why
3 wouldn't we expect them particularly to come down in
4 areas with high real estate prices? And why wouldn't
5 those developments, on balance, be beneficial?

6 DR. YUN: Thank you for the question.

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

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

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

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1 system, so the information is widely available.

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

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

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

21 In the little document written by Thomas
22 Jefferson which says that every person has the right to
23 life, liberty and the pursuit of happiness, he did not
24 say happiness, he said pursuit of happiness. Sure, some
25 realtors go into the market, face bad business decisions

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1 and exit, but that's their right, that's their decision
2 to enter and exit.

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

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

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

18 DR. HSIEH: That's a great question, and I
19 really don't have the answer. I don't have the answer
20 for that question. I mean, as Dr. Yun said, it could
21 very well be the case that if you look at the data now,
22 commission rates have fallen a little bit, but still, I
23 think it's a little bit disingenuous to say that
24 commissions have fallen in a place like Bethesda, where
25 housing prices have tripled in the last 15 years. So,

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1 commission rates falling from 6 to 5.1, you know, you
2 are still paying more than twice as much for selling
3 exactly the same house, and again, it's not clear what
4 you are getting for the service.

5 Now, the direct answer to your question, I mean,
6 I really don't have an answer to the question. I mean,
7 it's something that has puzzled me a lot, and I'm sure
8 that it's puzzled Michael as well, because I recommend
9 that all of you go read the two volumes of the FTC
10 Report on the Real Estate Industry that was published in
11 1982, because a lot of the same issues are there, are
12 there in that 1982 staff report.

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

21 So, it's a case that's just ripe for the typical
22 principal/agent problems, and if you want to think about
23 other features of the real estate business, it seems
24 that a lot of other things seem to be consistent with
25 this story. For example, something that I haven't

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1 talked about, forget about the debate about whether
2 commissions should be 6 percent or 2 percent, which is
3 what it is in the U.K., but one interesting thing to
4 think about is why is the commission rate a fixed
5 percent of the total value of the house.

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

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

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

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

21 Why do we see the commission structure that we
22 see? Professor Hsieh has suggested that maybe we should
23 expect to see contracts with higher powered incentives.
24 The question here is what if we had salaried agents, and
25 in your comments, you said, well, the real estate

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1 transaction is different from, say, selling stocks or
2 airline tickets because it's not a homogeneous
3 transaction, but the typical real estate transaction has
4 a lawyer doing some work on it, and that piece of it is
5 not necessarily as homogeneous as stock brokerage or the
6 sorts of things that you see done on the internet, and
7 those are typically compensated by the hour. So, how do
8 you explain the percentage rate?

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

21 Of course, they have to get the approval from
22 the brokers, but it's not necessarily the percent now.
23 I think in today's market, people can actually talk
24 about the actual fixed dollars, and one thing that has
25 not been really discussed is that people are unhappy

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1 with 5 percent, 6 percent? Who are these people?
2 According to our survey, it's the people who want to do
3 for-sale-by-owner. That market is available, it has
4 always been available, yet people continue to seek the
5 professional service of the realtor agents.

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

21 DR. YUN: If there is a research within our
22 department on the commission, I would like to know. I
23 don't know. We have not conducted internal surveys.
24 Some brokers have actually asked us, well, why don't you
25 conduct possibly -- not even the actual percent

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1 distribution, but just the question, has the commission
2 increased, commission declined? And the people that I
3 report to say, "No, don't touch commissions. We could
4 get into trouble with antitrust." So, I really don't
5 know the answer to it.

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

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

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

19 DR. HSIEH: The only thing that I know about the
20 U.K. case, I haven't spent much time looking at this,
21 but the only thing that seems to be different from the
22 U.K. and the U.S. is that the legal work seems to be
23 separate in the U.K., whereas some of the legal work
24 might be done by realtors in the U.S., although when I
25 bought a house, I had to hire a lawyer to do a lot of

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1 the legal work, or in some places, you can use a title
2 company to do a lot of the legal work.

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

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

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

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

3 (Applause.)

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

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

21 Susan?

22 MS. CREIGHTON: Good afternoon. On behalf of
23 the FTC, I wanted to thank you for joining us today. As
24 you heard from Professor Hsieh, the FTC has been very
25 active in this area for a number of years now, and this

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1 workshop is one manifestation of our long-term interest.
2 I want to thank you for contributing to the panels
3 today, as well as for all of your comments, both those
4 that have already been submitted and those that may be
5 submitted in the future. I am sure they will contribute
6 considerably to our understanding going forward of the
7 many important issues in this policy debate.

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

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

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1 discriminatory treatment.

2 Since that time, the FTC has continued to be
3 active in enforcement in the real estate area, in the
4 area of enforcement. In the last ten years, between
5 1995 and 2005, we have conducted a total of 22 real
6 estate related matters. These include a mix of
7 investigations, cases, advisory opinions and advocacies,
8 but most were investigations. Not all investigations
9 led to filed cases, of course, but some did.

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

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

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1 constraints.

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

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

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

25 Now, let me end these short remarks by

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

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

13 MR. KRAMER: Thank you, Susan.

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

21 So, on the Department's behalf, I would like to
22 thank the industry participants, the scholars, the
23 consumer representatives and the regulators who took the
24 time to be here today on the panels and to share their
25 perspectives with us. Their ideas about and analyses of

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1 competition in the real estate industry sparked vigorous
2 discussions that we've heard today. I had a great time
3 sitting here today and listening to the panels. I found
4 it highly instructive.

5 I'd also like to thank you in the audience for
6 your active participation. I'd like to thank the FTC
7 for helping in sponsoring this event and for the use of
8 this conference facility. As the Acting Assistant
9 Attorney General stated this morning, although the
10 Department of Justice and the FTC have taken positions
11 on some of the issues discussed today, the purpose of
12 this workshop is to involve others in the debate by
13 providing a forum in which interested parties can
14 discuss these issues with differing points of view. As
15 the large turnout and the lively audience participation
16 have demonstrated, I think we have succeeded in
17 promoting dialogue about competition in an industry so
18 very important to American consumers.

19 Thank you for coming. Have a safe trip back.

20 (Applause.)

21 (Whereupon, at 5:09 p.m., the workshop was
22 concluded.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

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5 DATE: OCTOBER 25, 2005

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
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9 FEDERAL TRADE COMMISSION to the best of my knowledge and
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12 DATED: 11/8/05

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16 SUSANNE BERGLING, RMR

17

18 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

19 I HEREBY CERTIFY that I proofread the transcript
20 for accuracy in spelling, hyphenation, punctuation and
21 format.

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