



Consumer Federation of America

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NONTRADITIONAL REAL ESTATE BROKERS: GROWTH AND CHALLENGES

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Summary

Nontraditional residential real estate brokers offer service, price, and representation options different from those offered by traditional brokers who are supported by the National Association of Realtors and state Realtor Associations. New service options include limited service functions such as listing, but not negotiating, and provision of information through the Internet rather than face-to-face. New pricing options include fixed fees, reduced commissions, and rebates, which all have the effect of reducing consumer costs. New representation options include exclusive representation as well as explicit facilitating. Over the past decade, services offered by these nontraditional brokers have expanded considerably.

Traditional brokers, and often their trade associations, have used various strategies to limit or prevent the growth of nontraditional brokerage services. These strategies range from passing state minimum service laws to restricting access to web-based information to disparagement of services and service providers. Commendably, the U.S. Department of Justice and Federal Trade Commission have sought to block several of these anti-competitive strategies. State real estate commissions, legislatures and attorneys-general need to supplement the efforts of these federal agencies to promote a free, non-discriminatory residential real estate brokerage marketplace. In addition, consumers and nontraditional brokers should pursue legal remedies to allow them to participate freely in such a marketplace and to recover costs related to past discrimination.

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Introduction

In October 2006, the Federal Trade Commission (FTC) announced some enforcement actions and settlements with local multiple listing services (MLSs) that were restricting the flow of information about properties for sale.¹ In 2005, the U.S. Department of Justice (DOJ) filed suit against the National Association of Realtors (NAR) for limiting competition from internet brokers.² Moreover, for the past several years the DOJ has sought to discourage discriminatory state minimum service laws that could require, for example, brokers offering local real estate services to maintain offices in these areas. And in 2005, the Government Accountability Office (GAO) released a report showing how price competition is restricted in residential real estate markets.³

These government initiatives reflected the growth of nontraditional residential real estate brokerage services offering price, service, and representation options that differed from, and threatened, those offered by many traditional brokers. The Internet allowed nontraditional brokers and other service providers to provide greatly expanded information about properties for sale. As dollar commissions grew along with housing prices, consumers increasingly demanded, and nontraditional brokers sought to offer, pricing options different from, and less expensive than, the 5 to 6 percent commissions typically charged. And after the vaporization of subagency in the mid-1990s, there was significant growth of exclusive representation, especially to buyers, and even, in some states, of pure facilitation. Additionally, a host of other ancillary real estate services blossomed which provide prospective buyers and sellers a range of tools to find and sell homes by providing additional information to the consumer.⁴

Traditional brokers, however, did not passively accept all these new service, price, and representation options. They used a variety of anti-competitive strategies including passing restrictive state laws, approving more restrictive association membership requirements, refusing to do business with nontraditional brokers, and just making life difficult for these brokers in their everyday conduct of business. One result of these discriminatory actions was intervention by federal regulators.

¹ Federal Trade Commission, press release, "FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services," October 12, 2006.

² Department of Justice, press release, "Department of Justice Amends Antitrust Lawsuit Against National Association of Realtors," October 4, 2005.

³ See Government Accountability Office, "Real Estate Brokerage: Factors that May Affect Price Competition," August 2005, GAO-05-947.

⁴ Although this report focuses primarily on non-traditional brokerage models, a wide range of new services have become available to consumers. For example on-line advertising and listing services like MLX.com provides a fee-based rental and sale property search engine for New York City and trulia.com provides a real estate search engine for a wider geographic area. Google Base and Craigslist connect sellers and buyers on the internet. The somewhat controversial service of helping to price real estate properties can be facilitated by on-line services like zillow.com and visitant.com, which also offers a host of other real estate related services. Other mapping tools allow consumers to see property listings with more advanced overlays such as school districts, crime figures, neighborhood home prices and other factors.

This report describes different types of nontraditional residential real estate brokers and their services. It discusses the various strategies utilized by traditional brokers to restrict competition from the nontraditional brokers, with inclusion of dozens of recent examples of such discrimination. And it suggests ways in which the residential real estate brokerage marketplace could be made more competitive and less discriminatory.

Types of Nontraditional Brokers

Nontraditional brokers offer services, charge prices, or provide (or do not provide) representation in ways that differ from, and usually threaten, traditional brokers.

Variation Services: Traditional brokers tend to offer “full services.” For sellers, this includes helping price a house, listing it on the local MLS, marketing the listing in various ways, helping to stage the home, dealing with potential buyers, and assisting at the closing. For buyers, these full services include searching the MLS, visiting houses with buyers, dealing with house sellers, and assisting at the closing. Many nontraditional brokers, however, do not offer such a full range of services. For example: HomeGain makes available rich information about houses to buyers but refers them to discount agents to complete transactions. ZipRealty represents sellers and buyers, offers discounts and offers various packages of services and prices. ForSalebyOwner.com provides a web hub for buyers and sellers to communicate directly with each other without brokers. And Redfin only gives buyers access to the local multiple listing service in their search, which encourages buyers to visit properties on their own, but provides full services for the offer and closing.

Less Expensive Prices: Traditional brokers, depending on their area, usually try to obtain a commission of 6 or 7 percent and, particularly for more expensive properties, usually charge 5% to 6%. Many nontraditional brokers, however, charge less by discounting this commission, by rebating a portion of the commission, by charging a flat fee, or by charging for specific services rendered. For example: Redfin charges home sellers a flat fee of \$2,000. Help-U-Sell charges three levels of flat rates depending on the price of the home. ForSalebyOwner.com charges monthly flat rates of \$90 for listings though may charge upwards of \$899 a month for more extensive services, including listing on local MLSs. Foxtons in New York and New Jersey charge a 3 percent commission. ZipRealty rebates 20 percent of the commission split to buyers and 25 percent to home sellers it represents. Buyside rebates 75 percent of the commission split to buyers. RealEstate.com, operated by IAC/InterActiveCorp which owns LendingTree, refers buyers and sellers to agents who may bid for their services. Consumers register online and prospective agents contact consumers to discuss services and price. Agents pay around 30 percent of their commissions back to RealEstate.com which rebates the about half that amount to the consumer in the form of gift cards.⁵

⁵ Hagerty, James R. and Ruth Simon, “Realtor Commissions Face New Pressure; Discount Options for Selling a

Exclusive Representation Versus Facilitation: Until the mid-1990s, houses were typically sold under subagency, in which both listing and cooperative agents were legally required to represent the interests of sellers. After this practice was “exposed” in news coverage, traditional brokers realized buyers would no longer accept it, so sought alternatives in which agents working with sellers and buyers could continue to cooperate to facilitate sales. In many states, listing agents were permitted to select “designated agents” within their own firm to “represent” buyers. During this period, the concept of exclusive buyer representation grew in popularity. Exclusive buyer brokers do not accept listings so do not face the conflict of interest involved in representing sellers whose listings they either would or would not push to buyer clients, disadvantaging one or the other. In the same period, a model of low- or no-representation developed where the agents facilitate the transaction but do not represent either party. In some states like Florida the concept of facilitation also grew in popularity. Facilitators do not act as agents for either sellers or buyers; they simply try to “facilitate” the sale by providing information, advice, and mediation.

The following matrix indicates which services some of the more prominent nontraditional brokers offer and how they are priced.

Type of Listing Broker	Description	MLS Listing	Pricing	Marketing	Staging or Showing	Accepting Offers/ Negotiating	Closing	Cost
Full Service	Traditional, full-service real estate brokers promise to provide the entire range of real estate services including pricing, listing, marketing, showing, accepting and negotiating offers and closing the sale.	Yes	Yes	Yes	Yes	Yes	Yes	5 to 7 percent of sales price
Undivided Seller Agency	Traditional broker that represents only the seller and is only interested in selling its clients' homes for the highest possible price in the shortest possible time.	Yes	Yes	Yes	Yes	Yes	Yes	5 to 7 percent of sales price
Web Brokers	Internet companies provide marketing, legal, paperwork and negotiating and closing services.	Yes	Maybe	Yes, Internet marketing probably not newspaper advertising, some offer services to perform mailings	No	Maybe. Some web based brokers primarily offer negotiating and closing services with especial focus on the paperwork burden and filling out forms as well as the completing the closing details.		
Web-Based Referral Services	Provide a clearinghouse for buyers and sellers to find lower priced brokerage services.	No	No	No	No	No	No	Some offer discounts or rebates of up to a third of the traditional commission which are paid by real estate brokers that gain client leads from the service.
Flat-Fee or À la Carte	Flat fee brokerages offer a menu of real estate services to home sellers for a fixed schedule of fees rather than a percentage of the sales price. Consumers choose which services they wish to purchase. Homeowners can perform some services themselves and purchase some services. Home sellers can choose to pay the buyer's agent the market commission split or a lower commission and save the commission they would pay the listing agent. At a minimum, these brokers list properties on the local MLS, but most offer a range of services that are priced individually or a range of packages with different service options. This allows sellers to choose to show their own home to save money but rely on a real estate professional to help negotiate the offers and the closing, for example.	Yes	Maybe	Maybe	Maybe	Maybe	Maybe	Prices range based on services. Some will list only for a few hundred dollars and each additional service adds to the cost. One firm charges nearly a thousand dollars more to show a property. Some firms shift to a discount model for full service and offer one or two percent commissions for full service.
Full Service Discount Brokers	Some brokers offer full services for a reduced sales commission that is not a set fee but a percentage of the sales price that is lower than the prevailing price offered by the cartel.	Yes	Yes	Yes	Yes	Yes	Yes	Typically full commission to buyers broker, discount to selling broker so in total 3% + discount list from as low as 1% so in total 4% or higher

Type of Listing Broker	Description	MLS Listing	Pricing	Marketing	Staging or Showing	Accepting Offers/ Negotiating	Closing	Cost
Rebate Brokers	Some firms cut their commission levels by discounting some of the commission they receive back to the buyers. Both brick-and-mortar and Internet-only brokers use this model. On the listing side, rebaters generally reduce the commission they charge to home sellers.	Yes	Yes	Yes	Yes	Yes	Yes	Generally, these brokers lower the listing side commission. Some lower all commissions by negotiating with buyer brokers. One broker in the Northeast offers services for a total of 3 percent.
FSBO or List-Only	List-only brokers or For Sale By Owner services typically offer the very minimum bare bones support to home-sellers. These firms list properties on the local Multiple Listing Service and provide ancillary services such as lock-boxes for other realtors to show the properties, yard signs and flyers or postcard advertising. Some of these firms also offer a broader range of services and can essentially act as a la carte, limited services firms.	Yes	No	No	No	No	No	Generally, these brokers offer their services for as little as a few hundred dollars for merely listing properties.

Types of Purchasing/Co-Operating Brokers		Searching for Properties	Visiting	Making/ Negotiating Offers	Closing
Traditional Full-Service	Offer a full range of services from looking for properties on the MLS to visiting homes to closing the sale. Brokerages may represent the buyer and/or the seller through different agents working for the same firm.	Yes	Yes	Yes	Yes
Dual Agency Individual Agent Service	Within the same company, some individual agents will represent the seller (with an incentive to seek a higher price) and others will represent the buyer (who seek a lower price).	Yes	Yes	Yes	Yes
Exclusive Buyer Agency	Represents only buyers and is only interested in finding the home that most suits the needs and wants of the buyers and representing the interests of its buyer.	Yes	Yes	Yes	Yes
Web Brokers	Brokers encourage consumers to do the initial legwork of finding properties they are interested in buying and then the brokerages provide closing assistance to the homebuyers for lower costs.	Yes	No	Sometimes	Yes

Growth of Nontraditional Brokers

There is considerable evidence that, over the last decade, nontraditional brokers have grown in number and in market share of sales. According to *Wall Street Journal* articles, from 2002 to 2005, the proportion of home sellers using traditional brokers declined from 74 percent to 70 percent. According to the consulting group RealTrends, during the same period the share of sales involving nontraditional brokers rose from two percent to 11 percent.⁶ This growth parallels the expansion of nontraditional brokers and their associations. For example: From 2002 to 2005, Help-U-Sell franchises grew from 200 to 800. And from 2001 to 2004, the membership of the National Association of Real Estate Consultants, a trade association representing some fee-for-service brokers, rose from 250 to 1,400. In 2006, a new trade association for flat-fee and discount brokers named AREBA was formed. Membership in the National Association of Exclusive Buyer Agents tripled over the past decade rising from 221 in 1995 to over 700 in 2006.⁷ In Washington state, one flat fee broker saw the number of unique visitors to the company website increase by 67 percent between September 2005 and September 2006.⁸

Some of the publicly traded non-traditional real estate service providers have reported significant growth over the past few years. RealEstate.com has increased its number of real estate closings from 7,000 in 2003 to 14,200 in 2005 – more than doubling in two years.⁹ Similarly, ZipRealty reports that its real estate closings increased from 5,394 in 2003 to 12,317 in 2005 – more than doubling the number of closed transactions in two years.¹⁰

As one measure of the growth of nontraditional brokers, CFA examined the Yellow Pages listings of real estate agents in ten cities and found that, over the past decade, there has been a large increase in advertising by nontraditional brokers. Between 1995 and 2005, discount, flat-fee, and For Sale by Owner business directory listings increased by 152 percent in these ten cities. In the same period, exclusive buyer agent (EBA) listings rose by 20 percent. Also during this decade, nontraditional brokers were increasingly willing to pay for prominent placement within the business pages of Yellow Pages listings. Between 1995 and 2005, the prominent and pricey display advertising for all nontraditional real estate business (exclusive buyer agents as well as discount, flat-fee, and FSBO) increased by 31 percent while the use of boxed listings increased by 73 percent.

⁶ Testimony of Pat Vredevoogd-Combs, National Association of Realtors, Hearing Before the House Financial Services Subcommittee on Housing and Community Opportunity, “The Changing Real Estate Market,” July 25, 2006.

⁷ Communications on file with CFA.

⁸ Communications on file with CFA.

⁹ IAC/InterActiveCorp, Fourth Quarter 2005 Earnings Report, Supplemental Financial Information and Operating Metrics, February 8, 2006 at 8.

¹⁰ ZipRealty SEC 10K filing, Fiscal Year December 31, 2005 at 34-35.

City		1995/6	2005	%Change
10 City	EBA Listings	33	43	30%
	All Other Alternative Listings	29	73	152%
	Advertising: Display	13	17	31%
	Advertising: Box	15	26	73%
Akron	EBA Listings	2	2	0%
	All Other Alternative Listings	1	1	0%
	Advertising: Display	1	0	-100%
	Advertising: Box	0	1	NA
Austin	EBA Listings	7	15	114%
	All Other Alternative Listings	2	8	300%
	Advertising: Display	3	2	-33%
	Advertising: Box	0	4	NA
Boston	EBA Listings	8	9	13%
	All Other Alternative Listings	2	3	50%
	Advertising: Display	2	1	-50%
	Advertising: Box	4	2	-50%
Columbia, SC	EBA Listings	2	3	50%
	All Other Alternative Listings	1	1	0%
	Advertising: Display	1	0	-100%
	Advertising: Box	2	2	0%
Columbus	EBA Listings	8	11	38%
	All Other Alternative Listings	2	10	400%
	Advertising: Display	1	3	200%
	Advertising: Box	2	5	150%
Des Moines	EBA Listings	0	0	NA
	All Other Alternative Listings	0	0	NA
	Advertising: Display	0	0	NA
	Advertising: Box	0	0	NA
Miami	EBA Listings	1	0	-100%
	All Other Alternative Listings	9	17	89%
	Advertising: Display	2	1	-50%
	Advertising: Box	2	2	0%
San Jose	EBA Listings	1	1	0%
	All Other Alternative Listings	8	21	163%
	Advertising: Display	2	5	150%
	Advertising: Box	2	4	100%
Seattle	EBA Listings	2	1	-50%
	All Other Alternative Listings	2	11	450%
	Advertising: Display	0	5	NA
	Advertising: Box	1	4	300%
Washington, DC	EBA Listings	2	1	-50%
	All Other Alternative Listings	2	1	-50%
	Advertising: Display	1	0	-100%
	Advertising: Box	2	2	0%

Discrimination By Traditional Brokers Against Nontraditional Brokers

Many traditional brokers and their trade association felt threatened by nontraditional brokers and their growing numbers. In particular, they objected to brokers who charged less than five to six percent commissions. But they also were threatened by exclusive buyer brokerage, which upset the prevailing cooperation among brokers focused on closing a sale, and by explicit facilitation, for which they believed consumers would expect to pay less. Their real objections to limited service options were related mainly to the lower prices of these options.

These traditional brokers, the National Association of Realtors, and state Realtor Associations did not passively accept changes in service, pricing, and representation options. They used their influence with state legislators and state real estate commissions, their effective control over multiple listing services, and perhaps most importantly the dependence of nontraditional brokers, the minority, on traditional brokers, the large majority, to try to suppress nontraditional brokerage services.

The ferocity of their opposition was stoked by the huge glut of licensed agents which made it impossible for most to earn incomes that were even as high as the U.S. household average. In a marketplace with two million agents but only seven to eight million sales, most agents can participate in only a handful of transactions annually. Accordingly, they felt it extremely important to maintain five to six percent commissions to support their incomes. At the same time, the NAR was heavily dependent on the dues of agents, which generates about \$100 million annually in income for the association and its state affiliates.¹¹ From its perspective, reduced commissions would drive agents from the industry, lowering its income from membership dues. As a result, both most traditional agents and their trade association had powerful incentives to try to restrict nontraditional brokerage services.

Traditional brokers used five main types of strategies to discourage or restrict the services of nontraditional brokers. These are discussed below with examples.

Denying Full Participation in Multiple Listing Services

Multiple listing services (MLSs) are the most comprehensive local listings of residential properties for sale. They are usually controlled either by the local association of realtors or by a few large local real estate firms. Each MLS sets rules governing who can access and list properties on their service, and how the properties are displayed both to brokers and to public websites such as realtor.com. For most MLSs there are two separate data streams – first, an all-inclusive listing of all available properties which is made available to brokers belonging to the MLS, and second, a more limited stream of the properties available and information available

¹¹ National Association of Realtors, Internal Revenue Service I-990 Filing, tax year 2004, November 17, 2005; Line 3, Membership Dues and Assessments, \$94.7 million.

about properties which is available on public websites. For example, some MLS's do not provide access to addresses or photographs on the public websites of the MLS or its member brokers.

Hurdles to Join: Because the property listings on MLSs are so extensive, it is important for brokers to have access to these listings. But to gain this access, they are required, by more than four out of five (84 percent) of the top 100 MLSs in the U.S., to belong to the local realtor trade association.¹² Sometimes nontraditional brokers have difficulty securing this membership. For example, a flat fee broker in Oklahoma found it difficult to join the Stillwater Board of Realtors (thus allowing full access to the Stillwater MLS). After he repeatedly attempted to join this association, its membership committee “tabled” his application “due to some questions they have.”¹³

Prohibitions on Using “MLS” in Company Names and Websites:

Minnesota and Washington MLSs have approved rules that allowed those companies already using MLS in their name, which included longtime traditional realtors, to continue to do so but prohibited all other firms, which included many nontraditional firms, from doing so.¹⁴ Home buyers, however, may think that those firms using MLS in their name or on their website have more complete listings than do those firms which do not.

Restrictions on Information Listed: Most MLSs prohibit brokers from supplementing the display of MLS listings on the brokers' websites with additional information of potential use to buyers. For example, they do not allow brokers to add commentary about, or customer reviews of, listed properties.¹⁵ Some MLSs also deny consumers access, through public real estate firm websites, to information, such as addresses or photographs, available to brokers.

Segregation of Listings: Before the Austin (TX) MLS agreed to a consent decree with the Federal Trade Commission, this MLS segregated the listing of non-exclusive right to sell properties from internet websites.¹⁶ Specifically, it accepted the listing of properties that were limited service “exclusive agency listings,” where homeowners retain the right to sell property on their own without paying a commission if they find buyers, but refused to make these listings available to the general public on realtor.com, austinhomesearch.com (the MLS's website), or the websites of firms belonging to the MLS. When the listing segregation policy was first adopted, the share of exclusive agency listings declined from 18 to 2.5 percent.

¹² Clarke, Michael, “Report on Status of 101 Large MLSs,” March 2005.

¹³ Complaint of non-traditional broker, April 2006, on file with CFA.

¹⁴ Roberts, Glenn Jr., “Rules target Improper Use of ‘MLS’ in Company Names, Web Sites,” *Inman News*, August 3, 2006.

¹⁵ Glenn Kelman, President and CEO of Redfin Corporation, Testimony Before the House Financial Services Committee Subcommittee on Housing and Community Opportunity, July 25, 2006 at 4.

¹⁶ See Federal Trade Commission, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Austin Board of Realtors*, File No. 0510219, July 13, 2006.

Restrictions on Nontraditional Broker Website Listings: The National Association of Realtors allows brokers to keep properties they are marketing off the websites of competitors as long as they do not list the homes of competitors on their websites.¹⁷ Most of the properties that are excluded are listed by nontraditional brokers. For instance, a Northern Virginia online broker reported that his properties are not listed on some local IDX's, the internet data exchange brokers use to show the listings of other brokers within the MLS, because of the permitted boycotts.¹⁸ In September 2005, the Department of Justice filed an antitrust suit against the NAR's policy.¹⁹

Refusal to List Properties on Public Websites: The Detroit area MLS Realcomp II Ltd. refuses to send the listings of limited service brokers to popular public internet sites like realtor.com.²⁰ The rules of this MLS indicate that exclusive agency, limited service, and MLS-list only listings "will not be distributed to any Real Estate Internet advertising sites."²¹ Even on Realcomp's own website, prospective buyers have to affirmately select the type of listing they want to see. The default setting is to exclusive right to sell/full service (designated ERTS/FS) and consumers have to affirmatively check boxes on the search screen to select boxes labeled EZ, LS or MEO (exclusive agency, limited service or MLS entry only, but they are not clearly labeled as such).²²

MLS Rules Alleged to Prohibit For-Sale-By-Owner Signs: A large traditional broker in Cleveland informed a home seller who had listed with a discount agent that posting for-sale-by-owner signs on their lawn violated the rules of the local MLS.²³

Boycotting Nontraditional Brokers

Refusal to Show Homes With a Commission Split of Under 3 Percent: Because traditional brokers working with buyers are usually compensated with a "split" of the commission paid by sellers, the level of that split can and has influenced their interest in showing homes. Specifically, there is much evidence that traditional brokers are reluctant, or refuse, to show homes with commission splits under 3 percent.

A Tempe (AZ) full-service agent informed a flat-fee listing agent that he would not show homes that did not carry at least a 3 percent split. He told the agent: "Sorry, I don't give discount services, so I don't discount my commission. But if the seller is willing to do 3 percent I'll show

¹⁷ Justice, Glen, "Lobbying to Sell Your House," *New York Times*, January 12, 2006.

¹⁸ Letter from Frank Borges LLos, Realtor Frankly Realty, to DoJ/FTC, October 20, 2005, REW 0078.

¹⁹ U.S. v. National Association of Realtors, Civil Action No. 05C-5140, as amended, October 4, 2005.

²⁰ Hagerty, James R., "Real-Estate War Traps Consumers in the Middle," *Wall Street Journal*, June 17, 2006 at B1.

²¹ Realcomp II Ltd., Rules and Regulations, Section 1.2.3, Revised March 2005 at 3.

²² See www.realcomponline.com/asp/searh.asp.

²³ Hagerty, James R., "Discount Real-Estate Brokers Spark a War Over Commissions," *Wall Street Journal*, October 12, 2005.

the property. That is pretty standard for real estate professionals.”²⁴

An Oakland discount broker with more than 20 years of real estate experience reported: “Our clients have been told that no realtor would work with us because we reduce our fees. Our clients have also been told that no agent would even show their property if they listed it with us and we didn’t offer a 3 percent commission to them for showing it.”²⁵

Another California agent reported that some realtors are not willing to show properties if they pay only 2 percent commission splits. Considering that such a split on a \$600,000 home amounts to \$12,000, the agent noted that “I think that is defrauding their clients.”²⁶

A home seller in Port Richey, Florida listed with a flat-fee MLS listing service in January 2006 but had no showings or availability calls in the next four months. In conversations with traditional brokers, the seller was told the realtors would not show discount listings even when the commission split to the buyer broker was the typical market split but the split to the selling broker was lower.²⁷

A Milwaukee homeowner sent an inquiry to a full-service, full commission broker soliciting buyers for her home listed on a local for-sale-by-owner service for a 3 percent commission to the buyer thus saving the 3 percent commission to a selling agent. The full service agent at the “6 percent traditional company” replied in a letter that “Also you are only hurting yourself by a lesser commission, when a buyer has an agent looking for properties in your price range most agents will not want to show your property.”²⁸

Texas Discount Realty had difficulty acquiring leads from a national lead-generating company because of its refusal to deal with discount brokers.²⁹

Refusal to Show Homes Listed by Discounter: In April 2005, the Department of Justice began investigating full service brokers in Tulsa (OK) who refused to show homes listed by discount brokers.³⁰

In Stone Mountain, Georgia, a discount broker has found that full service real estate firms, especially Century 21 and Harry Morgan Relators, refuse to show his listings. They learned about this boycotting by keeping tracks of visits to homes from lockbox records.³¹

²⁴ Complaint from flat-fee broker, March 2006, on file with CFA.

²⁵ Letter from George Gadsby, Homes-Link Real Estate, to DoJ/FTC, October 18, 2005, REW 0253.

²⁶ Letter from Russ Otter to DoJ/FTC, October 22, 2005, REW-0140.

²⁷ Consumer complaint, April 2006, on file with CFA.

²⁸ Communication with Consumer Federation of America, February 2006.

²⁹ Written Statement of Aaron Farmer, Texas Discount Realty, for House Subcommittee on Housing and Community Opportunity, House Financial Services Committee, July 25, 2006 at 3.

³⁰ Birger, Jon, “Feds Probe Real Estate Agents,” *Money Magazine*, April 22, 2005.

³¹ Communication with CFA, July 2006, on file.

Pressure Placed on Flat-Fee Broker: A Baton Rouge flat-fee broker has had difficulty getting full service brokers to show homes she has listed. The discounter has received phone calls from traditional brokers complaining that she's "ruining everything for all the hardworking agents." And she once received an anonymous letter stating: "Do you think a real estate agent working with buyer clients will bother showing your house? Good luck."³²

A Boston-area homeowner, who used a flat-fee listing service, was told by the former head of a full service brokerage that major brokers refused to show his home. Later he sold his home through a private sale.³³

In Las Vegas, a flat-fee broker was informed by a traditional full-service agent that, if he dealt directly with the home seller, he would be terminated by his brokerage employer.³⁴

Refusal to Allow Home Purchase: A couple represented by Redfin, who attempted to purchase a Seattle condo, were told by a full service listing agent that he would not show them the condo again and would advise his client not to consider any offer they made.³⁵

Disadvantaging Nontraditional Brokers

Traditional brokers often make it difficult for nontraditional brokers to conduct their business freely in a marketplace where a glut of brokers and agents compete vigorously for a limited number of home sellers and buyers.

Refusal to Pay Commission Splits at Closing: In Illinois, many full service listing firms refuse to pay a commission split to buyers represented by exclusive buyer agents who are compensated by the buyers. Instead, the commission check is paid days or weeks later. When exclusive buyer agents have sought direct payments, in some cases listing brokers have not allowed clients to sign closing agreements even though the amount of commission is not at issue.³⁶

Refusal to Pay Commission Splits Available to Traditional Brokers: Zip Realty reports that they have been notified of commission splits that are less than those received by full service brokers.³⁷

Discouraging Buyers from Using Internet-Based Brokers: Full service brokers have discouraged buyers from using Internet-based brokers by trying to persuade buyers to use the

³² Cohen, Hal, "Death of a Sales Commission," *Greater Baton Rouge Business Report*, February 14, 2006.

³³ Consumer complaint, March 2006, on file with CFA.

³⁴ Complaint from flat-fee broker, October 2005, on file with CFA.

³⁵ Hagerty, James R., "Real-Estate War Traps Consumers in the Middle," *Wall Street Journal*, June 17, 2006 at B1.

³⁶ Communication from Illinois exclusive buyer agent to CFA, March 2006, on file.

³⁷ Carnahan, Ira, "Will Zip Get Zapped?," *Forbes*, August 16, 2004.

listing broker as a dual or designated agent and using procuring cause as a weapon. BuySide Realty recommends that prospective buyers that want to use its Internet brokerage present a BuySide business card to the listing agent but use BuySide to make offers and negotiate closings.³⁸ A Coldwell Banker listing agent in St. Louis tried to discourage a prospective buyer from using Buyside by offering \$2,000 if the buyer used another Coldwell Banker agent. The Coldwell agent then attempted to use procuring cause to prevent BuySide from receiving its commission split, thereby preventing the buyer from receiving a rebate.³⁹

Discouraging a Firm's Own Brokers from Discounting: A Northern Virginia real estate salesperson was fired by the Long & Foster brokerage, where he worked, for developing a referral network of salespeople to facilitate rebates.⁴⁰ The network had facilitated the ability of full service realtors to discretely provide a discount to sellers and a rebate to buyers.

Limiting Access to Marketing Vehicles: Some newspapers and magazines are afraid to carry ads for nontraditional brokers because they fear retaliation from traditional brokers.

The Waxahachie, Texas *Daily Light*, a daily newspaper for the Dallas suburbs, refused to run advertisements from a flat fee real estate broker in its weekly and real estate magazine section because it feared retaliation from full service brokers. In an email to the nontraditional broker, a newspaper advertising salesperson wrote: "I was told by several Real Estate Agents in Ellis County that they would not advertise with the HOMES magazine if we let Texas Discount Realty advertise. I was also told by several agents that our competitors (Homes & Properties Magazine and The Real Estate Book) would never let Texas Discount Realty advertise in their products."⁴¹

An exclusive buyer agent in Illinois reports that he has had difficulty obtaining free and paid media attention to his services. When the agent tried to place an advertisement in Harmon Homes Magazine, the publication refused to allow him to indicate that he showed FSBO homes and required that he rewrite the ad so that it did not distinguish his service from that of traditional realtors.⁴²

A California agent who discounts was told by a real estate advertising magazine that they would not run his ad offering reduced fee services. When the agent inquired why, he was told that, if the magazine ran his ad, other real estate companies would withdraw their own ads.⁴³

Disparaging Nontraditional Brokers

³⁸ See <http://www.buysiderealty.com/help/works.asp>.

³⁹ Hagerty, James R., "Real-Estate War Traps Consumers in the Middle," *Wall Street Journal*, June 17, 2006 at B1.

⁴⁰ Roberts, Glenn, Jr., "Brokerage Terminates Agent Who Founded Rebate Network," *Inman News*, April 18, 2006.

⁴¹ Email from *Waxahachie Daily Light* to Texas Discount Realty, November 30, 2005, on file with CFA.

⁴² Communication from Illinois exclusive buyer agent to CFA, March 2006, on file.

⁴³ Letter from George Gadsby, Homes-Link Real Estate, to DoJ/FTC, October 18, 2005, REW 0253.

Disparagement by traditional brokers of nontraditional brokers and their services is endemic.

Through Advertising: In radio, television, and print ads, even the National Association of Realtors has explicitly promoted the services of members and disparaged the use of for-sale-by owner.⁴⁴ In their recent \$25 million ad campaign, the NAR print ad includes the following messages: “I’m a do-it-yourself kind of guy. But selling a home is way out of my league....I asked my agent if he was a Realtor. Funny, he’d never been that quiet before....For sale by owner? Not this owner.”⁴⁵

Through Publications: Bernice Ross, noted real estate coach, has written a book, entitled *Waging War on Real Estate Discounters*, which attacks low-priced service providers. The blurb promoting the book states: “Your competitors are well-funded giants who are waging war on traditional brokerage by using one of the biggest lies in the real estate business. What is that Big Lie? Reducing the agent’s commission nets the seller more money.”⁴⁶

Through Realtor Conferences: At the 2003 National Association of Realtors convention, the association showed a video that morphed the visage of LendingTree owner Barry Diller into Osama bin Laden. That was because LendingTree threatened to undermine the industry’s commission structure or, as conference speakers noted, “waging war on real estate commissions.”⁴⁷

Through Internet Blogs: A Prudential affiliated full-service broker in Tampa Bay wrote a column on his blog suggesting that non-full service agents and brokers were largely incompetent and that homeowners would be risking their home’s sale price to use one to sell their home. It noted that discount brokers are “generally not as technically proficient” and may be “riskier to work with.”⁴⁸

Through Broker Workshops: An exclusive buyer broker in Maine attended a presentation ostensibly on buyer agency liability in which exclusive buyer brokers were attacked. The presenter commented on some “radical insurgents” in the industry, then projected the logo of the National Association of Exclusive Buyer Agents on the screen.⁴⁹

One nontraditional realtor reported “We have been called ‘whores’ in seminar rooms with [more than] 300 real estate agents in them....We have been vilified from the very beginning of our

⁴⁴ National Association of Realtors press release, “NAR Launches Public Awareness Campaign with Ads Targeting Unrepresented Sellers,” February 6, 2006.

⁴⁵ Print advertisements available from NAR’s website.

http://www.realtor.org/rodesign.nsf/pages/FS_2005PublicAware, accessed February 24, 2006.

⁴⁶ See <http://www.realestatecoach.com/wagingwar.html>.

⁴⁷ Swesy, Jessica, “Fear Still Rules Real Estate Industry,” *Inman News*, February 24, 2006.

⁴⁸ Weblog of Alan Plager of Prudential Tropical Realty at <http://www.skaffe.com/weblog/Alan/>, accessed February 24, 2006, on file with Consumer Federation of America.

⁴⁹ Letter from Janet Hagan, The Buyer’s Voice in Real Estate, to DOJ/FTC, November 10, 2005, REW-0355.

reduced fee system.”⁵⁰

Through Disparagement to Home Sellers and Buyers: A prominent Texas flat-fee broker has reported numerous efforts by traditional agents to deter clients from using his services. Clients of Texas Discount Realty have been told by traditional agents that his brokerage was on the brink of going out of business, that the brokerage’s business model violated state law, and that traditional agents would not show clients’ homes if listed by the discount realtor. Texas Discount Realty has also had yard signs stolen and, in one instance, had a billboard with an ad “ripped out of the ground.”⁵¹

ZipRealty reported that a full-service broker in Lexington, Massachusetts told a prospective homebuyer that the commission-rebate offered by ZipRealty was “unethical.”⁵²

A Texas discount broker commented that, as well as telling their clients they would not show their homes, full service brokers “sent home ‘hateful e-mails’ and ‘ridiculed’ his employees at industry events.”⁵³

Harassment by State Regulators

Lack of Protection Afforded Nontraditional Brokers: State real estate commissions fail to protect nontraditional brokers against harassment by traditional brokers. As a 2005 *Wall Street Journal* editorial noted, no realtor has been sanctioned by their state real estate commission for anti-competitive, anti-consumer behavior.⁵⁴ For example, when online broker Redfin prepared to file complaints about traditional realtors “meddling” with Redfin’s clients with the state real estate commission, the firm learned that commissioners included a representatives of firms that were harassing its clients.⁵⁵

More strikingly, many state real estate commissions have actively harassed nontraditional service providers.

Punishing Real Estate Websites Without Brokerage Licenses: In 2001, the California Department of Real Estate informed several real estate websites that they must have a brokerage license to advertise property in the state.⁵⁶ California real estate law stipulates this requirement

⁵⁰ Letter from George Gadsby, Homes-Link Real Estate, to DoJ/FTC, October 18, 2005, REW 0253.

⁵¹ Written Statement of Aaron Farmer, Texas Discount Realty, for House Subcommittee on Housing and Community Opportunity, House Financial Services Committee, July 25, 2006 at 2.

⁵² Stecklow, Steve, “From Cyberspace to Living Space,” *Wall Street Journal*, February 11, 2006.

⁵³ Downey, Kirstin, “Discount Firms Blast Realtors,” *Washington Post*, October 26, 2005.

⁵⁴ *Wall Street Journal* editorial, “Some States Now Limit Price Rebates to Borrowers,” August 12, 2005.

⁵⁵ Glenn Kelman, President and CEO of Redfin Corporation, Testimony Before the House Financial Services Committee Subcommittee on Housing and Community Opportunity, July 25, 2006 at 1.

⁵⁶ Ohlhausen, Maureen K., “Competition Issues in Real Estate brokerage,” *The Antitrust Source*, November 2005 at 4.

but makes an exception for general circulation newspapers, many of which list properties on their websites.⁵⁷ ForSalebyOwner.com challenged this rule and received a favorable ruling from the District Court of Sacramento.⁵⁸ In New York state, regulators suspended the broker's license for MLX.com which provided non-traditional access to property listings and lower fees to consumers but did not apply the same state law requiring an "information vendor" license to newspapers.⁵⁹ MLX.com agreed to take the information vendor license, but the Department of State continuously denied MLX.com the very license it said was required until the Attorney General's Office negotiated a settlement granting MLX.com an information vendor license and reinstating its broker license.

Punishing Flat-Rate Pricing: A Kentucky flat-fee broker was fined \$250 and ordered to attend nine hours of continuing education for advertising his \$2,495 commission "near" an MLS logo.⁶⁰

Filing Spurious Complaints: After selling more than 400 homes, a limited service agent in Kentucky had received no consumer complaints. However, the state real estate commission filed several official complaints against the agent.⁶¹

Filing Trivial Complaints: A Tulsa real estate broker had a complaint filed against her by a traditional broker, in one sale, for inadvertently incorrectly listing the square footage of one property and, in another, for recording the property value as courthouse recorded rather than appraised.⁶²

Disparaging Nontraditional Brokers in Advertising: The Kentucky real estate commission ran a series of radio advertisements stating that using non-full service agents would hurt sales prices. The ads emphasized that 3 percent of the selling price can be lost by not working with a Kentucky licensee that is a "trained negotiator," an effort to dissuade consumers from using discount or fee-based agents.⁶³

Needed Reforms

The Department of Justice and Federal Trade Commission have commendably been trying to give nontraditional brokers the same access to listings enjoyed by traditional brokers. And their initiatives have forced these brokers and their associations to stop discriminating against nontraditional brokers in certain fundamental ways. But this discrimination is too varied and

⁵⁷ National Association of Realtors, "Real Estate Web Ads Ok Without License," *The Letter of the Law*, February 1, 2005.

⁵⁸ Ohlhausen, Maureen K., "Competition Issues in Real Estate brokerage," *The Antitrust Source*, November 2005 at 4.

⁵⁹ New York Department of State, Published Rulemaking June 2005.

⁶⁰ Communication from Terry Shortt to CFA, July 23, 2006.

⁶¹ Letter from Cynthia Smiley, Sentry Realty LC, to DoJ/FTC, November 9, 2005, REQ-0349.

⁶² Communication with Consumer Federation of America, February 2006.

⁶³ Letter from George Gadsby, Homes-Link Real Estate, to DoJ/FTC, October 18, 2005, REW 0253.

frequent for federal agencies ever to adequately block completely. It is up to more independent and vigorous state regulators to conscientiously and fairly address every grievance filed by nontraditional brokers. And they must be willing to meaningfully sanction all egregious violations.

The single most important immediate measure that could be taken to prevent discrimination and promote competition is for state regulators to level the broker playing field by treating all brokers equally. These regulators should:

- intervene fairly in cases of anti-competitive actions against nontraditional brokers;
- prevent the use of frivolous actions by traditional brokerage to deter competition and poach clients;
- act in a timely and impartial manner in disputes; and
- study the state and local marketplace for bias against nontraditional real estate brokers and models.

State regulators also need to repeal or oppose anti-competitive laws or legislation such as minimum service and anti-rebate laws that exist in more than one-fifth of states. And they should direct state regulators to regulate the policies and practices of all service providers equally.

Consumers can also play a role in ensuring a more competitive, pro-consumer marketplace by shopping and negotiating for prices and services. They should also not hesitate to file a complaint with their state regulator when they see any evidence of discrimination against nontraditional services.