

# **Competition in the Residential Real Estate Brokerage Industry: A Report on the AAI Symposium**

**by Norman W. Hawker<sup>1</sup>**

## Introduction

On November 8, 2005, the American Antitrust Institute held its Symposium on Competition in the Residential Real Estate Brokerage Industry. The papers presented by the participants examined the industry from legal, economic and political perspectives.<sup>2</sup>

Both the large number of firms and the low barriers to entry found in the brokerage industry are normally associated with competitive markets, but the brokerage industry has a documented history of collusion to raise prices and exclude rivals (Hawker). While such naked restraints of trade by real estate brokers are largely a thing of the past, significant anticompetitive conduct and harm can occur in markets that cannot facilitate collusion that directly raises prices or excludes rivals (Lande and Marvel). The Symposium papers identified three areas of concern: (1) commission rates, (2) Multiple Listing Services (MLS's), and (3) anticompetitive regulation, especially at the state level.

First, most observers believe that brokerage firms charge a commission rate of between 5% and 6% with very little variance among firms, among housing markets or over time, but neither the quantity nor the quality of publicly available empirical data is sufficient to support any firm conclusion about the current level of commission rates or their rigidity (Weicher). Even if the lowest estimates of 5.1% prove correct, this would still be considerably above the 1.5% to 3% commission rate that one might expect based on comparisons with price levels in other countries (Delcours and Miller). Moreover, any reduction in average commission might simply reflect reductions in the commissions paid on the highest priced properties, where sellers have the most sophistication in bargaining as well as the strongest incentive (and leverage) to bargain. Given that the broker's costs do not increase significantly with the selling price of the home, commission rates in a competitive market should vary inversely with the home's price rather than remaining constant (White).

Second, although the use of MLS's greatly enhances the efficiency of the residential real estate market, it also raises some antitrust concerns (Hahn, Litan and Gurman). Access to the MLS is essential for any broker to survive, making it one of the reasons for the incredible organizational and political success of the National Association Realtors® (NAR) (Grey). Incumbent firms control MLS's through local boards affiliated with the NAR and can limit the ways in which firms may use MLS data. For example, the Department of Justice is currently challenging the NAR rule allowing a listing broker to prohibit competing brokers from posting the MLS data on their web sites.<sup>3</sup>

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2. The papers will eventually be published. This report attempts to bring their basic content and import to public notice at an earlier time.

3. See Amended Complaint, United States v. National Association of Realtors, Civil Action No. 05C-5140 (N.D. Ill.

Third, for a variety of reasons, the NAR and its affiliates have had exceptional success as an advocacy group (Grey), which may explain some of the anticompetitive regulations that have been proposed and, in some cases, enacted. For example, a number of states have or are considering regulation that would prohibit brokers from rebating a portion of their commission to consumers. Similarly, “minimum service” laws require consumers to pay for the full package of services offered by brokers regardless of the particular consumer’s needs or preferences.

A number of recommendations might be derived from the discussions at the Symposium. No votes were taken and a wide range of interests were present, so these reflect the views of the author, who played the lead role in organizing the symposium. First, the need for more empirical data regarding commission rates cannot be overstated, and the Federal Trade Commission is in the best position to collect this data (Bush). Second, the DOJ should continue to scrutinize the use of MLS’s as exclusionary devices. Third, the DOJ, FTC, and others should continue to lobby state legislatures and agencies to undertake pro-competitive actions that would allow new types of firms with new business models into the market. Similarly, at the federal level, pro-competitive actions would include adoption of regulations to allow banks and other financial institutions entry into the brokerage market.<sup>4</sup>

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2005), *available at* <<http://www.usdoj.gov/atr/cases/f211700/211751.htm>>.

4. As discussed *infra*, two of the papers advocate entry by banks. The GAO report, however, found that entry of state chartered banks into the market has yet to have a significant impact on competitive conditions. While entry by nationally chartered banks would clearly be pro-competitive in terms of bringing in new competitors with new strategies, other legitimate political and economic goals may also be relevant to the public policy considerations at stake.

## Discussion

### Anticompetitive Conduct in Otherwise Competitive Markets

Price-fixing agreements, group boycotts and other naked forms of anticompetitive behavior normally occur in markets with a limited number of competitors. As the number of competitors increases, it also becomes increasingly difficult for the competitors to coordinate their behavior, monitor each other's compliance with the agreement, and discipline cheaters. The residential real estate brokerage industry lacks many of the characteristics that facilitate these traditional forms of collusion. For example, the market has a vast number of firms and few barriers to entry, characteristics that normally associated with robust competition.

Lande and Marvel,<sup>5</sup> however, provide an analysis of collusive behavior that may explain the lack of price competition among brokers. Traditionally, the courts have focused on two types of collusion. Classic or "Type I" collusion occurs when competitors agree to raise prices or divide markets. Competitors can also collude to discipline rivals or raise their costs. By disadvantaging rivals, "Type II" forces these rivals to raise their prices, which in turn enables the colluding firms to raise their prices or expand market share at the expense of higher-priced rivals.

Both legal precedent and economic analysis suggest the existence of a third type of collusive behavior that does not depend on the existence of the market characteristics associated with Type I and Type II collusion. In fact, Lande and Marvel indicate that Type III collusion arises in "anomalous cases" that typically involve heterogeneous products, "individually - negotiated or otherwise non-transparent prices," and "[m]ost importantly, ... cartel members continue[] to set prices and output independently." Type III cartels do not aim to directly control prices or discipline maverick rivals. Instead, Type III collusion sets the rules of competition "in a manner that lessens [even if does not eliminate] price competition among cartel members." Type III collusion often involves the maintenance or creation of information asymmetries between consumers and sellers, including agreements to limit advertising in ways that "make consumer comparisons of the products offered by rivals suppliers more difficult," agreements that increase consumers' search costs, and agreements not to solicit customers of rivals. Type III collusion also includes agreements that facilitate price discrimination.

Well established economic analysis of Type I and Type II collusion demonstrates their harmful effects on consumer welfare, and courts generally condemn these agreements as illegal *per se*. Lande and Marvel point out that while the "welfare effects of Type III cartels are even more numerous and complex" than Type I and Type II cartels, the economic analysis of Type III collusion that controls the flow of information to consumers or inhibits consumers ability to collect information also has a clearly deleterious effect on consumer welfare. Like price discrimination itself, Type III collusion that facilitates price discrimination may, under certain circumstances, "result in lower prices for some consumers." On

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5. Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941, reprinted in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005) (At the Symposium, Professor Lande spoke about the implications of this previously published research).

balance, however, Lande and Marvel believe that the presumption should be that “the agreements are anticompetitive in intent and effect.” With respect to all forms of Type III collusion, the harm to competition and consumer welfare does not result from replacing competition with monopoly cooperation, but from the shaping and softening of competition among the cartel members. Consequently, the legality of Type III cartels “should not be judged by whether they ultimately contribute to the formation of price fixing or of any type of traditional stable cartel, but rather in terms of their immediate impact on prices and resource allocation.”

### Pricing in the Residential Real Estate Brokerage Services Market

As the cases and literature cited by Hawker<sup>6</sup> reveal, notwithstanding the ease of entry and fragmented structure of the brokerage industry, it was once able to maintain uniform commissions through over agreement, *i.e.*, what Lande and Marvel would characterize as Type I collusion. By the early 1980’s, however, both the case law and the secondary literature suggest that antitrust enforcement had all but completely the practice of express price-fixing.

Lande and Marvel suggest that when firms cannot eliminate price competition, they may attempt to limit or soften price competition, and as noted in Weicher,<sup>7</sup> “[t]here is fairly widespread view that brokerage is not a competitive industry.” Weicher, therefore, attempted to test this perception against the empirical data. He found that the appalling lack of data regarding real estate commissions makes it difficult to reach any firm conclusions.

The REAL Trends annual survey is the most significant source available for measuring real estate commissions, and it shows “a downward trend in the average commission rate between 1991 and 2004.” Weicher found, however, that after adjusting for inflation, “the average commission *in real dollars* increased by 11 percent.”

Weicher, however, identified a number of concerns about the conclusions suggested by the REAL Trends survey. First, REAL Trends treats the underlying data in the survey as confidential, proprietary information. Since REAL Trends does not publish underlying data, it is impossible to test the conclusions reached by REAL Trends. Second, given that it “appears that the survey is weighted toward more expensive homes as well as larger brokers,” there is doubt as to whether it accurately reflects trends in the market as a whole. Third, Weicher found discrepancies in the data that is reported by REAL Trends.

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6. Norman W. Hawker, *Overview of AAI’s Real Estate Competition Project: Highlights from the Existing Literature on Broker Competition*, in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

7. John C. Weicher, *The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such as It Is*, in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

Weicher found the four extant academic studies equally problematic. Three of the four, not surprisingly, focused on local, college-town markets. Only one included data for more than one metropolitan area.

The academic studies suggested that the “popular view that all commissions are six percent ... is surely incorrect,” but that commission rates are becoming more rigid over time. Also, brokers seem to receive lower commission rates on new homes and higher priced homes than on existing or lower priced homes. Weicher concluded from this that “it is not clear how much the rate dispersion in these studies results from the variability in the transactions and how much from actual variability in commission rates.”

The lowest reported average of commission rate, 5.1%, comes from REAL Trends. Yet even this rate appears to be above competitive levels. Using data from 1999, Delcoure and Miller<sup>8</sup> compared real estate commissions as well as broker productivity from around the world with those in the United States. Commission rates in other industrialized countries tended to be less than 5%. In the United Kingdom, for example, Delcoure and Miller found that “1%-2% is typical; in very competitive areas 0.5-0.75%; in low priced areas as high as 3.5%.” Ultimately, they concluded that, “based on global data, the US residential brokerage fees should run closer to 3.0%.” The volume of sales per broker tends to be higher other highly industrialized countries. While there may be other differences between the US industry and the brokerage industry elsewhere which might account for higher commission rates in the US, what those differences are is not obvious.

Delcoure and Miller also observed that in more competitive markets such as the United Kingdom, commission rates tended to vary with inversely with the selling price of the home. Similarly White<sup>9</sup> stressed the apparent failure of commission rates to vary inversely with the home sales price in the US market was particularly troublesome. “If the agents’ costs of selling the two houses were approximately the same ... , then we would expect that competitive pressures would cause agents’ fees to approximate those costs ... , thus leading to a tapering of the percentage fee with respect to higher-value houses.” White noted that entry into real estate brokerage surges when housing prices boom. When coupled with fee rigidity, this “suggests something less than vigorous price (fee) competition among real estate agents.”

The problematic nature of the quantity and quality of extant data makes it impossible to draw firm conclusions about the level and nature of pricing for brokerage services. Weicher, therefore, ultimately calls for additional research, but “we first need data, in order to do the research.” Hahn, Litan and Gurman encountered the same problems resulting from the lack of pricing data as Weicher, and like Weicher, they were unable to reach any definitive conclusions regarding commission rates, stating that “[c]learly there is a need more data to be collected, especially by an impartial source.”

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8. Natalya Delcoure & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry*, 5 *International Real Estate Review* 12 (2002), *reprinted in* American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

9. Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?*, in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

Getting the needed will be no small task, but as Bush noted, the Federal Trade Commission has a number of tools at its disposal, including the authority to request annual or special reports, a technique that requires clearance from the Office of Management and Budget. But there is no other feasible mechanism to collect the data since, as Bush pointed out, the data will have almost certainly have to come from multiple local real estate boards and “there in a lot of data in *each* potential relevant market.”

### The Role of the National Association of Realtors®

Although Lande and Marvel concentrate on establishing the existence of Type III collusion and the harm it does to consumer welfare, one cannot help but notice the frequent involvement of trade associations in the cases cited by Lande and Marvel. For example, trade associations played important roles in all three of the leading Type III cases used by Lande and Marvel as examples of agreements to limit advertising. While the presence of a trade association may not, by itself, trigger Type III collusion in any given market, trade associations seem to have a great potential for facilitating Type III collusion in markets where competitors are looking for ways “to manipulate the rules under which the independent decisions of the colluding firms were made.”

As Gray demonstrates, one of the things that distinguishes the residential real estate brokerage market is the presence of an exceptionally strong and influential trade association, the National Association of Realtors® (NAR). Gray points out that free riding or the “collective action problem” is as much a problem for trade associations as it is for business firms. Furthermore, most trade associations do not survive for long. Yet the NAR has overcome the collective action problem and flourished for nearly 100 years.

Gray attributes NAR’s success at solving the collective action problem to the selective and solidary benefits NAR membership offers. First, there is the designation as a Realtor®, a protected trademark of the NAR that carries “earnings potential that could only be gotten by joining the organization.” The federated structure of the NAR meant that local boards could “put a lot of social pressure on agents and brokers to join” as well as offering social functions with a fraternal atmosphere and a shared “aspiration to make selling real estate a profession and thereby achieve middle-class status for realtors.” Other benefits created by the NAR and the local boards included “the commission fee structure, a code of ethical business practices, and, most importantly, the multiple-listing system (MLS).”

Many of the benefits of NAR membership are laudable and perhaps even pro competitive, but others have served as flash points for antitrust concern and litigation. For example, as Hawker noted, from the end of World War II to the mid-1970’s, the federal government engaged in repeated and successful challenges to the commission fee structure as illegal per se. Social pressures and allegedly specious ethics violations against discount brokers have served as the basis of private antitrust suits. Similarly, courts have struck down restrictions on access to the MLS, and the Department of Justice is currently challenging the NAR’s rules governing the use of MLS data on the Internet. Whether by design or accident, part of the NAR’s attractiveness may be the ways in which it can restrain competition.

According to Gray, the NAR’s extraordinary longevity results from its ability “to fully occupy its niche space” as the industry’s trade association. Gray found that while estimates on the number of active brokers and agents varied widely, the “NAR has captured half or all of the real estate workforce”

depending on the estimate used. Rivals have not emerged partly as a result of the various benefits provided by NAR membership and partly because there have been no divisive issues within NAR. Gray found that the NAR has a “quite single-minded ... focus on their core business, ... ‘to help its members become more profitable and successful,’ ... a simple and straightforward [purpose] on which all members can agree.”

Not only has the NAR avoided divisive issues, “it has effectively managed its lobbying and in so doing has captured its niche space” as *the* trade association for the real estate brokers and agents. In pursuit of its narrow range of issues, the NAR has employed all three of the major resources that trade associations typically offer legislators: information, votes and money. When it comes to votes, Gray noted that NAR has members in every politician’s district. Although the Gray found that the real estate industry makes significant contributions in political races, her suggests that the NAR places more emphasis on the information or lobbying. The financial resources devoted to lobbying in the state and federal capitals is dramatically enhanced by the NAR’s “grassroots online communications system” that can effectively mobilize its members to contact their representatives regarding votes on specific legislation, and “[R]ealtors® are persuasive communicators who know how to present a case.

The issues pursued by the NAR have also served as flash points for antitrust concern. The Federal Trade Commission and the Department of Justice have expressed concern over “minimum service” legislation pushed by the NAR and its affiliates in Missouri, Texas and other states. In Kentucky, the Department of Justice successfully pursued a lawsuit against the Real Estate Commission to prevent a ban on real estate commission rebates. At the federal level, the NAR has thus far successfully lobbied Congress to deny funding for the adoption of regulatory rules which would allow banks and other financial institutions from entering the brokerage industry.

### Multiple Listing Services as a Source of Concern

Sawyer, Wigand and Crowston,<sup>10</sup> in a study funded by the National Science Foundation and the National Association of Realtors, examined the role of Multiple Listing Services (MLS) in the process of buying and selling a home. Usually, the local realtors organization or board owns the MLS, and membership in both the board and the NAR is required for access. Sawyer, Wigand and Crowston indicate that having a property entered into the MLS is contingent on the seller’s agreement to pay “to any agent who introduces the buyer [to the seller] one-half of the the total agent commission.” Thus, “the MLS goes far beyond a simple information conduit to include these agreements.”

The MLS also enables brokers to play a crucial role in the buyers search for a home since only agents who belong to the MLS “can search the MLS database for properties that fit their clients’ needs.” MLS membership also gives a broker access to the “lock box” which in turn gives the broker physical access to the property and which records “who has viewed the property.” As Sawyer, Wigand and Crowston note,

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10. Steve Sawyer et al., *Redefining Access: Uses and Roles of Information and Communications Technologies in the U.S. Residential Real Estate Industry from 1995-2005*, in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

“the MLS is more than just an information repository since it includes services and agreements that shape the relationship among agents and becomes an important element within the value chain.”

Hahn, Litan and Gurman<sup>11</sup> pointed out that “the MLS delivers substantial efficiency gains to all who use it,” “the cooperative networking relationship among agents in a regional MLS has the potential to give rise to uniformity in services provided and fees charged.” While express agreements on commissions have been held illegal per se since 1950, Hahn, Litan and Gurman noted that the MLS could easily facilitate tacit collusion. For example, the terms of admission to most MLS’s are coordinated through the NAR’s national policy, “and they can design it to keep membership limited to firms who will conduct their business in a particular manner.” Furthermore, as White suggested, “the ability of the collective members of a MLS to exclude rivals ... can be a powerful way of enforcing a high-fee structure and thus of maintaining the collective exercise of market power.”

“The Internet could, and probably should, have a radical impact on real estate brokerage services,” according to Hahn, Litan and Gurman, yet access to the MLS has impeded firms have attempted to capitalize on the Internet’s ability to lower search and brokerage overhead costs. The NAR’s “opt-out” policy gives brokers the power to prevent cooperating brokers from distributing the listings to potential home buyers through the web. Not only does this allow the listing broker “to fend off unwanted competition,” a clear antitrust concern, according to Hahn, Litan and Gurman, it also raises ethical and fiduciary concerns since the listing broker has a “duty to promote the home seller’s interests, which in most cases surely means giving the seller’s listing maximum exposure, to get the highest price possible or the quickest sale.” Hahn, Litan and Gurman also point to prohibitions of listings by “network brokers” who refer customers to agents as an example of anticompetitive and unjustified local MLS requirements.

Sawyer, Wigand and Crowston confirm that the Internet is having an impact on the process of buying and selling a home. Even with the current restrictions access to MLS data over the Internet is shifting the search function to buyers as well as making buyers and sellers “more knowledgeable about local comparisons with price, location, schools, etc.” Although although one might expect these trends to enable consumers to by-pass brokers the way it has enabled consumers to by-pass intermediaries in other industries, “FSBO sales have stayed relatively constant over the past 10 years.” Thus far, the shift of the search function from the broker to the buyer has “just altered the roles played by the agents and the MLS,” with the buyer contacting the broker after the search and the broker then taking “on the traditional role of linking buyer and seller.”

It is not entirely clear why disintermediation has not followed the shift in the search function to buyers. Sawyer, Wigand and Crowston point out that the industry is experimenting with new business models but that real estate transactions still “take place through an intricate set of social networks ... primarily driven by the professional ties that real estate agents develop in their work.” Although Sawyer, Wigand and Crowston believe changes in information access and control, “including the form and standards for shar[ing] and the ownership and fair uses of both property and transaction data” seem “dangerous,” they concede that current “NAR policy make it difficult for those not a member of the

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11. Robert W. Hahn et al., *Bringing More Competition to Real Estate Brokerage*, in American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry (2005).

NAR to gain full access to the database.” And the GAO<sup>12</sup> noted in its study of competition in the industry that access to MLS data was key factor limiting “the extent to which the Internet is used in real estate transactions.” One cannot help but wonder that if consumers had full access to the MLS database, the need to pay brokers for information intermediation would end. And if this is true, then it would seem that the agreements among brokers to limit access to the MLS database constitute Type III collusion.

### Anticompetitive Regulation

White noted that all fifty states have agencies or commissions with some regulatory authority over brokers. While the “primary goal of these agencies is consumer protection, ... in some instances the agencies have adopted regulatory requirements ... that clearly favor incumbent full-service real estate agents at the expense of agents who would provide more price competition.” For example, prohibitions on commission rebates to consumers and mandatory minimum service requirements for listing agents have the effect of “eliminating competition from discount brokers whose primary service would be to provide access to a MLS.”

According to the GAO, ten states have or are considering minimum service requirements for brokers. Hahn, Litan and Gurman point out that not only is there “no reason to believe that agents who offer more narrowly tailored services and charge accordingly will do any worse of a job or harm consumers,” but that these maverick agents “have the potential to better serve consumer demand and make the market for services more efficient.”

The GAO also found that at least 14 states “appear to prohibit, by law or regulation, real estate brokers from giving consumers rebates on commissions or to place restrictions on this practice.” Hahn, Litan and Gurman note that commission rebates to consumers “have a positive impact on consumer welfare.” Even if “higher commissions are necessary to ensure the quality of service most customers want; this result, however, should be determined by consumers and producers via the market,” rather than state laws and regulations.

White along with Hahn, Litan and Gurman also pointed out that the NAR has strongly, and thus far successfully, lobbied Congress to prevent the adoption of regulatory changes need to allow banks to enter the real estate brokerage market. The GAO, however, found that where state chartered banks were allowed to enter the real estate brokerage industry, the impact had been limited.

### Other Sources of Concern

Although brokers have incentives to compete on price and that there is relatively free entry into the industry, the fragmented structure of the industry nationally is not true in all geographic markets. Hahn,

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12. U.S. Government Accountability Office, *Real Estate Brokerage: Factors That May Affect Price Competition* (2005), reprinted in *American Antitrust Institute Invitational Symposium on Competition in the Residential Real Estate Brokerage Industry* (2005).

Litan and Gurman found that “there are relatively few large brokerages in many areas,” including some large cities. Furthermore, they note that since brokers generally “control the fee policies among their agents, sustaining collusive behavior is easier than if each agent sets his own fee.”

White noted that any given broker operates on both the buyer and seller side of transactions and frequently interacts cooperatively with competitors in these transactions. “This sell-side/buy-side reversible interaction provides a concrete means where by agents who are the upholders of high fees can threaten to or actually discipline price-cutting rivals, even in the absence of a MLS.” For example, a high-price agent can steer buyers away from properties listed by discounters, and this “can happen without any formal agreement among the agents to maintain high fee levels, especially in a social climate where the importance of maintaining high fees is frequently discussed and remarked upon in informal settings.”

The GAO and Delcours and Miller made similar observations. The GAO concluded that “even without formal policies to maintain uniform rates, individual brokers’ reliance on the cooperation of other brokers to bring buyers to listed properties may help maintain a standard commission rate within a local area.” And while Delcours and Miller explained that to the extent that “firms depend on one another to share the total demand for their services, imitative pricing will be the rule of survival in local markets,” they nonetheless predicted that “if a few of the larger firms make a successful break from the common pattern of uniform commission rates, they could trigger a price revolution in the brokerage industry.”

### What Would More Vigorous Competition Look Like?

White suggests that the experience of invigorating competition in the securities brokerage industry provides a basis for predicting what would happen if vigorous price competition came about in the residential real estate brokerage market. Many of the same arguments against competition in the real estate setting were also made regarding securities brokerage. For example, the opponents of competitive pricing in securities argued that competition on price “would mean that customers would not be provided with the services that they needed.” A similar argument has been made in defense of minimum service requirements for real estate brokers. As the SEC loosened restrictions on competitive pricing in the securities brokerage industry, prices fell, but “virtually all of the fears raised by the NYSE in its struggle to maintain its system of fixed and non-competitive commissions (except its argument concerning cross-subsidization [of small orders by large orders]) turned out to have little validity.”

The experience of the securities industry led White to suggest that vigorous price competition among real estate brokers would lead to the following:

- The “general level of commissions would surely fall.”
- A greater variety of services and prices would be available to sellers would emerge.
- New arrangements between buyers and brokers would likely arise.
- The industry would readily embrace new technologies for selling and buying homes as those technologies became feasible.

- Since competitive commissions would react flexibly to changes in housing prices, “the surges of people into (and out of) real estate brokerage should be considerably muted.”
- The industry would undergo some consolidation, although many local brokerage firms would survive “since local expertise is surely valuable but difficult to maintain and value in a larger national organization.” Consequently, unless the barriers to entry significantly increase, “the levels of concentration in any local market should remain moderate and should present little structural antitrust concern.”

Delcours and Miller reached the same conclusions based on their study of the brokerage industry in other countries.

### Policy Recommendations

Hahn, Litan and Gurman offered three policy recommendations. First, federal and state antitrust authorities “should carefully scrutinize efforts to limit competition in the residential real estate brokerage market,” especially efforts to deny any legitimate market player access to the MLS. Second, state legislatures and real estate commissions should not enact laws or rules that impede competition in real estate brokerage, *e.g.*, rebate bans and minimum service requirements. Finally, “Congress should not prevent the Federal Reserve Board and the Treasury Department from allowing banks to offer residential real estate brokerage services through separately capitalized affiliates.”

White also made three specific recommendations on how to achieve vigorous price competition in the real estate brokerage industry:

- Banks should be allowed to enter into the market. As new entrants from outside the current industry culture, banks “would be extremely valuable for introducing aggressive competition into this industry.” Banks often chose to enter the securities brokerage industry as discounters. Given the relative rarity of discount brokerage in residential real estate today, “having banks (with their brand name recognition) as purveyors of this form of service (if that is the route they choose) would likely be an extra benefit.”
- Antitrust enforcement authorities “should maintain a high level of scrutiny with respect to the use of MLSs as exclusionary devices and with respect to local groups of real estate agents excluding mavericks.”
- Vigorous lobbying of and, where appropriate, litigation against the states should continue “so as to urge pro-competitive actions on the part of their licensing agencies.”

As final caution, White noted that successful efforts to bring about vigorous price competition would produce unintended consequences in the real estate brokerage industry just as they had in the securities brokerage industry. While predicting unintended consequences is difficult, White suggested that “one possible reaction of the industry to heightened competition could be a lobbying effort to convince the states to tighten licensing procedures severely so as to restrict entry into the industry.”

## Conclusion

Lande and Marvel have demonstrated that anticompetitive conduct can occur in industries where naked restraints of trade such price fixing would be difficult to create and all but impossible to enforce. Therefore, the ease of entry into residential real estate brokerage market and the low level of concentration in brokerage market do not end the antitrust enquiry, especially given the industry's history of antitrust problems.

Consistent with the insights of Lande and Marvel, the AAI Symposium identified a number antitrust concerns. First, while additional empirical data are needed, the available evidence strongly suggests that prevailing commission rates far exceed competitive levels. Second, the rules governing access to and use of MLS data are skewed against innovative maverick firms that would compete on price. Third, a number of current and proposed regulations impede the entry of banks, internet firms, and other alternative business into the brokerage market.

Consumers stand to reap significant benefits from more vigorous competition. In addition to lower commission rates, vigorous competition can be expected to produce a greater variety of services and new models for bringing home sellers and buyers together.