ENCOURAGING PRICE COMPETITION AMONG NEW JERSEY'S RESIDENTIAL REAL ESTATE BROKERS: REFORMS TO PROMOTE THE GROWTH OF ALTERNATIVE BROKERAGES AND REDUCE TRANSACTION COSTS

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I. INTRODUCTION

The legal and regulatory environment in New Jersey must be changed to encourage price competition[1] among residential real estate brokers,[2] which will in turn lower transaction costs for both buyers and sellers. Alternative brokerages, such as those with discount, flat-fee, or fee-for-service business models, are the key to driving increased price competition among the state's traditional brokerages.[3]

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[1] Professor Deardorff defines price competition as "[c]ompetition among firms by reducing price, as opposed to by changing characteristics of the product." ALAN V. DEARDORFF, TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS 214 (2006), *available at* http://www-personal.umich.edu/~alandear/glossary/p.html. In that regard, when this Comment refers to price competition, it is referring to the price of brokers' commissions.

[2] "*Real estate brokers* are licensed professionals who help sellers and prospective buyers of homes, and are often part of a brokerage firm or franchise." Press Release, Fed. Trade Comm'n, Buying a Home: It's a Big Deal (May 2007), *available at* http://ftc.gov/bc/edu/pubs/consumer/alerts/zalt001.pdf; *see also* N.J. STAT. ANN. § 45:15-3 (West Supp. 2007) (New Jersey's definition of a real estate broker).

[3] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY 37 (2007), *available at* http://www.ftc.gov/reports/realestate/V050015.pdf [hereinafter FTC/DOJ] ("Some commenters identified discount and fee-for-service brokers as key drivers of price competition. One agent claimed that, due to the prevalence of discount brokers, real estate agents 'are confronted with the question how much can you reduce your commission? It is a standard question now.'").

New Jersey's rebate ban[4] makes it difficult for these alternative brokerages[5] to enter and succeed in the state's market. This law, along with a lack of proactive state action to combat the anticompetitive practice of "steering,"[6] has created a legal and regulatory framework that disfavors alternative brokerages, and thereby reduces price competition while increasing transaction costs for the consumer.[7]

This Comment does not seek to explore what brokers should earn based upon services provided, but rather stands for the proposition that price competition is in the public's best interest. To encourage price competition, alternative business models should be allowed to compete vigorously within New Jersey without having to face unnecessary statutory constraints and enforcement problems that limit their ability to survive.

New Jersey's courts have long recognized a public trust[8] placed in residential real estate brokers (brokers). These decisions show that the courts view the residential real estate industry as being "affected with a public interest"[9] in which brokers are held to higher du-

[4] N.J. STAT. ANN. § 45:15-17(k) (West Supp. 2007) (preventing brokers from rebating a portion of their commission to the buyer or seller).

[5] The Federal Trade Commission (FTC) defines alternative brokerages as "those brokerage firms whose business practices differ substantially from the norm in either commission rate or in type, level, or variety of service offered." FED. TRADE COMM'N, STAFF REPORTS, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY: LOS ANGELES REGIONAL OFFICE STAFF REPORT VOLUMES I AND II AND THE BUTTERS REPORT 20 (1983), *available at* http://www.ftc.gov/bc/realestate/workshop/index.htm (scroll to bottom of webpage, and then use hyperlinks to access PDF versions of the report) [hereinafter FTC 1983].

[6] For a definition of steering, see FTC/DOJ, *supra* note 3, at 68 ("Steering refers to any action taken by a broker or agent to avoid cooperating with a particular competitor."). The form of steering discussed in this Comment is based on economic and competitive factors, as opposed to the racial steering discussed in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

[7] *See generally* Norman W. Hawker, Competition in the Residential Real Estate Brokerage Industry: A Summary of the AAI Symposium (Fall 2006), http://www.antitrustinstitute.org/archives/files/535.pdf.

[8] Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 856 (N.J. 1967) ("There can be no doubt that the business of the real estate broker is *affected with a public interest.* The Legislature has marked it off as distinct from occupations which are pursued of common right without regulation or restriction.") (citation omitted) (emphasis added); Coldwell Banker Residential Real Estate Servs., Inc. v. N.J. Real Estate Comm'n, 576 A.2d 938, 941 (N.J. Super. Ct. App. Div. 1990) ("The occupation of a real estate broker is permeated by *considerations of public policy.*") (emphasis added); Grillo v. Bd. of REALTORS of the Plainfield Area, 219 A.2d 635, 643 (N.J. Super. Ct. Ch. Div. 1966) ("[I]n addition to the public concern with monopolistic practices, there is *a specific public interest* in the real estate business—shown by the scheme of regulation provided by statute . . . .") (emphasis added).

[9] *Ellsworth Dobbs*, 236 A.2d at 856.

ties as fiduciaries.[10] Better enforcement is needed to ensure that brokers fulfill those fiduciary duties, namely by putting the interests of their clients above their own.

New Jersey courts have also shown that they value competition among brokers.[11] In *Grillo v. Board of REALTORS of the Plainfield Area*, the Superior Court found that the best form of competition involves a variety of competitors: "It has been recognized that effective or workable competition requires 'the presence in the market of several sellers, each of them possessing the capacity to survive and grow, and the preservation of conditions which keep alive the threat of potential competition from others.'"[12]

The *Grillo* court's logic is also shared by economists, regulators, and interest groups who expound the benefits of a market containing many different competing brokers with diverse business models.[13]

[10] *Id.* ("The broker was and is looked upon as a *fiduciary* and is required to exercise fidelity, good faith and *primary devotion to the interests of his principal*.") (citation omitted) (emphasis added).

[11] The concept of competition as a public good is seen in the *Grillo* and *Oates* decisions: "It is the policy of the common law to encourage competition." *Grillo*, 219 A.2d at 644 (citation omitted). "The lessening of competition—a public evil—is incontrovertibly present." Oates v. E. Bergen County Multiple Listing Serv., Inc., 273 A.2d 795, 803 (N.J. Super. Ct. Ch. Div. 1971).

[12] *Grillo*, 219 A.2d at 647 (citation omitted) (emphasis added).

[13] "From an economist's perspective, the more different types of folks who might get to share [real estate] listings, the more likely it is that the consumers are likely to be presented with a wide array of choices." Dr. Robert Hahn, Executive Dir. of the Am. Enter. Inst.-Brookings Joint Ctr., Statement at Competition Policy and the Real Estate Industry: A Public Workshop Hosted by the Federal Trade Commission and Department of Justice 32 (2005), *available at* http://www.ftc.gov/opp/workshops/comprealestate/051209transcript.pdf [hereinafter *Workshop*]. "It's a complicated market . . . but that's all the more reason to have different competitive models out there and different kinds of services being offered to the consumer." *Id.* at 49.

> The Progressive Policy Institute, a Washington think tank, has estimated that these newer internet-based business models could save consumers close to half of that $60 billion currently spent on real estate commissions. If that's true, or if it's even partially true, that would represent a huge savings obviously to consumers.

Id. at 136 (Jon Leibowitz, Comm'r, Fed. Trade Comm'n, Statement). Regarding those consumers who wish to pay less in exchange for limited services:

> New business models offering unbundled real estate services have been created to fill this demand. In areas where barriers to this business model have not been created consumers who are experienced in real estate transactions . . . as well as other consumers who take the time to understand the process, have saved substantial amounts on real estate sales transactions.
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> . . . .
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> [A]HGA believes that were there no barriers to new business models their penetration would be much greater and the average commission today would be much lower.

Based upon these principles, New Jersey must change its statutory and regulatory structure and the methods by which those laws and rules are enforced to give alternative brokerages the "capacity to survive and grow," and to help create the "conditions which keep alive the threat of potential competition from others."[14] By doing so, the state can put price pressures on traditional brokerages and reduce transaction costs for New Jersey's buyers and sellers.

In an effort to spur effective legal and regulatory change, in Part II this Comment provides a background of the current state of New Jersey's residential real estate market. This involves analyzing the various brokerage business models already present in the state and the business models of those brokerages that are prevented from entering New Jersey because of its rebate ban. Part II also describes the general lack of price competition in the residential real estate industry. In Part III, this Comment supports A373, an Assembly bill aimed at repealing New Jersey's rebate ban.[15] Part III discusses the arguments both for and against rebates, New Jersey's rationale for its rebate ban, and why the ban must be repealed. Finally, in Part IV this Comment suggests a framework to combat steering. Part IV discusses the legal and ethical problems with steering, along with the code and enforcement changes that the state should make to reduce the effects of steering while fostering increased price competition among residential brokers.[16]

II. THE GROWTH OF ALTERNATIVE BROKERAGES IN NEW JERSEY MUST BE PROMOTED TO COMBAT THE GENERAL LACK OF PRICE COMPETITION

New Jersey has many different kinds of brokerages present in the state and many which have yet to enter. There are four major varieties of brokers in New Jersey: traditional, full service discount, flat-fee Multiple Listing Service (MLS)[17] access, and fee-for-service. Some of

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Comments of the American Homeowners Grassroots Alliance, submitted to the U.S. Fed. Trade Comm'n and the U.S. Dep't of Justice for the Public Workshop on Competition Policy and the Real Estate Indus. (Oct. 25, 2005), *available at* http://www.americanhomeowners.org/AHGA/DoJ-FTC10-25-05.htm [hereinafter AHGA].

[14] *Grillo*, 219 A.2d at 647 (citation omitted).

[15] Gen. Assem. 373, 213th Leg., 2008–2009 Leg. Sess. (N.J. 2008) (A373 was first introduced in the 2006–2007 legislative session as A3567).

[16] The analysis within this Comment is meant to apply statewide, despite the differences in closing procedures in northern and southern New Jersey. Also, the question of what constitutes a fair wage for a broker's services is beyond the scope of this Comment.

[17] For a description of the MLS, see *Grillo*, 219 A.2d at 644. *See also* AHGA, *supra* note 13 ("The MLS is an electronic database of information about the homes of the fiduciaries of participating brokers. Most [MLS databases] are owned and governed

the firms not currently operating within the state employ a rebate-based business model. The New Jersey market is rich in real estate professionals. According to the New Jersey Real Estate Commission (NJREC),[18] as of July 31, 2006, there were 88,126 real estate salespersons, 7940 broker salespersons, and 3743 brokers of record in the state.[19] Over 57,000 of those agents are members of the New Jersey Association of REALTORS® (NJAR®),[20] a trade organization which falls under the auspices of the National Association of REALTORS® (NAR®).[21]

A. *Alternative Brokerages in New Jersey*

A key to price competition in the residential real estate industry is the growth and survival of alternative brokerages.[22] This Comment focuses on three of the business models employed by New Jersey's alternative brokerages: full-service discount, flat-fee MLS access, and fee-for-service. Changes are needed to allow alternatives brokerages to better compete in New Jersey and to encourage those not yet in the state to enter the market.

Before delving into the alternative brokerage industry, it is important to understand the role of "traditional" brokers. Traditional brokerages dominate the marketplace across the country.[23] Tradi-

by those brokers . . . [M]ost MLS's [sic] now also feed partial MLS listing information to the consumer-facing websites of participating brokers.").

[18] NJ Real Estate Commission, http://www.state.nj.us/dobi/division_rec/index.htm (last visited Nov. 5, 2008) (stating that the NJREC was formed to "administer and enforce" the state's real estate licensing law, issue licenses, and establish "standards of practice" for the profession).

[19] NJ Real Estate Commission: Licensing and Education, http://www.state.nj.us/dobi/division_rec/licensing/reclic_menu.htm (last visited Nov. 1, 2008).

[20] NJAR® Press Kit, Frequently Asked Questions, http://www.njar.com/pressroom/presskit/FAQs.pdf (last visited Nov. 5, 2008); *see generally* New Jersey Association of REALTORS®, http://www.njar.com (last visited Nov. 1, 2008).

[21] NAR®, http://www.realtor.org (last visited Dec. 30, 2007); *see generally* About REALTORS®, http://www.realtor.org/realtororg.nsf/pages/AboutREALTORS?OpenDocument (last visited Nov. 1, 2008) (the REALTOR® designation is given to brokers who are members of NAR and follow its Code of Ethics).

[22] FTC/DOJ, *supra* note 3, at 37. For a definition of alternative brokerages, see FTC 1983, *supra* note 5.

[23] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE H. COMM. ON FIN. SERVS., H. R., REAL ESTATE BROKERAGE, FACTORS THAT MAY AFFECT PRICE COMPETITION 12 n.21 (2005), *available at* http://www.gao.gov/new.items/d05947.pdf [hereinafter GAO] ("Consultants to NAR estimated that discount, full-service brokerages, Internet-oriented full-service brokerages, broker referral services, and other nontraditional brokerage models collectively represented buyers and sellers in less than 2 percent of all real estate brokerage transactions in 2003.").

tional brokers are those who charge the "going rate" for commission[24] and offer a full range of services.[25] Some examples of traditional brokerages in New Jersey are Prudential Real Estate, Coldwell Banker Real Estate LLC, Weichert Realtors®, Diane Turton Realtors®, The Mary Holder Agency, GMAC Real Estate, Sotheby's International Realty,[26] and hoards of independent brokerages.[27]

The first variety of alternative brokerages is the full-service discount firms which compete on price by offering full service at a reduced commission.[28] In New Jersey, a few brokerages utilize different variations of the full-service discount model, including Assist-2-Sell[29]

[24] *See id.* at 10 (average commission rates stand at approximately 5.1%).

[25] Those services include, on the seller side, helping to determine the appropriate list price for the home, placing the listing in MLS, advertising the home, offering open houses, showing the home and arranging appointments for other brokers to show the home, procuring offers and aiding in the negotiation process, and helping to get the deal to closing. PATRICK WOODALL & STEPHEN BROBECK, CONSUMER FED'N OF AM., NONTRADITIONAL REAL ESTATE BROKERS: GROWTH AND CHALLENGES 3 (2006), *available at* http://www.consumerfed.org/pdfs/Nontraditonal_Real_Estate_Brokers-Growth_and_Challenges.pdf. On the buyer side, the traditional broker helps the buyer select which properties are appropriate for the buyer based upon price and features, shows the properties, drafts the contract, negotiates the sale price, and assists the buyer in getting the deal to closing by recommending inspectors. *Id.*; *see* William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179, 182 (1981); Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?*, 35 REAL EST. L.J. 11, 13 n.6 (2006).

[26] Find Real Estate, http://www.prudentialproperties.com (last visited Nov. 1, 2008); Coldwell Banker Real Estate LLC, http://www.coldwellbanker.com (last visited Nov. 1, 2008); Weichert.com, http://www.weichert.com (last visited Nov. 1, 2008); Welcome to Your New Jersey Florida Real Estate Connection, http://www.dianeturton.com/customization/dtr/newsite (last visited Nov. 5, 2008); A Tradition of Success, http://www.maryholder.com/ (last visited Oct. 20, 2007); GMAC Real Estate, http://www.gmacrealestate.com/ (last visited Nov. 1, 2008); Luxury Real Estate & Homes for Sale, http://www.sothebysrealty.com (last visited Nov. 1, 2008).

[27] In one small Monmouth County town alone—Atlantic Highlands—as recently as late 2008 there were four independent brokerages (Britton Real Estate LLC, Lesher Associates, Maddalena Realty LLC, and Raymond Passaro Realtors®). The economic slow-down has caused that number to dwindle to two in 2009.

[28] GAO, *supra* note 23, at 5.

[29] Assist-2-Sell is a discount/fee-for-service hybrid with six New Jersey offices. Assist-2-Sell, http://www.assist2sell.com/Default.aspx (follow "Find an Office" hyperlink; click on "NJ" icon) (last visited Nov. 5, 2008). It offers a menu of service programs with a sliding scale for commissions. Information for Home Sellers, http://www.assist2sell.com/Default.aspx (follow "Find an Office" hyperlink; click on "Selling a Home") (last visited Nov. 5, 2008). These services include a paperwork only "flat fee" fee-for-service component where no listing contract is required, a "Direct to Buyers" office-exclusive program, and their discounted full-service package, "MLS for less." *Id.*

and Cara Realtors®.[30] Foxtons—a former giant in the New Jersey full-service discount market[31]—recently declared bankruptcy,[32] leaving a large void in this segment of the industry.

Next, the flat-fee business model, in which sellers are charged a small flat-fee for access into the MLS system, provides a minimum level of services, such as compiling a listing, taking pictures of the home, and providing a lockbox and flyers.[33] Examples of flat-fee MLS access firms operating in New Jersey are Realmart Realty,[34] ForSale-ByOwner.com, and Fsbonj.com.[35]

Another popular alternative brokerage business model in New Jersey is fee-for-service. These brokerages compete on price by offering an à la carte menu of services.[36] Fees are thus based on services

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[30] Cara Realtors® offers full service listings at 3.9%. Cara Realtors, http://www.cararealtors.com/aboutus.html (last visited Nov. 5, 2008). It is an independent brokerage with one office in Point Pleasant Beach. Cara Realtors—Point Pleasant Beach NJ Real Estate, http://www.cararealtors.com/contactUs.html (last visited Nov. 5, 2008).

[31] Foxtons was a full service discount firm that offered to list properties at commissions as low as two percent. James T. Prior, *Cohen's yhd Foxtons Offers Realty Reality*, BNET, Dec. 1, 2002, *available at* http://findarticles.com/p/articles/mi_qa5311/is_200212/ai_n21321492. Its North American corporate headquarters was located in West Long Branch. *Id.* Foxton's agents were on salary rather than paid via commission, and they had an extensive support staff to handle different aspects of the transaction. *Id.*

[32] Michael L. Diamond, *Foxtons' Debts Top $40 Million*, ASBURY PARK PRESS (Neptune, N.J.), Oct. 9, 2007, at A1.

[33] Get Your Flat Fee MLS Real Estate Listing in New Jersey (NJ) with no listing commission, http://www.flatfeemlsdirect.com (last visited Nov. 5, 2008).

[34] Realmart Realty, the local agent for flatfeemlsdirect.com, offers a $395 flat-fee MLS listing. *Id.* The seller may also pay $495 for a "showcase" listing. *Id.* The seller receives an MLS listing, photos of the home, a lockbox, forms, yard signs, and house flyers. Flat Fee MLS NJ, http://www.flatfeemlsdirect.com/selling_plans.htm (last visited Nov. 5, 2008). The seller takes all calls for availability, appointments, and questions. FAQ about MLS listing, FSBO, selling and buying agents, http://www.flatfeemlsdirect.com/faq.htm (last visited Nov. 5, 2008). The listing agent reviews the contract. *Id.* The flat fee goes to Realmart and the seller pays a normal commission to the cooperating broker (generally two to three percent of the sale price). *Id.* According to their broker, Realmart Realty averages 200 listings per month, and often times the owners of these properties are sales associates from traditional brokerages looking to save on commission. Telephone Interview with Gary Ragusa, Broker/Owner, Realmart Realty, in Highlands, N.J. (Aug. 10, 2007) [hereinafter Ragusa Interview].

[35] FSBO: For Sale By Owner-FAQs, http://www.forsalebyowner.com/help.html?clickID=topNav (last visited Nov. 5, 2008); FSBONJ.com-For Sale By Owner NJ, http://www.fsbonj.com (last visited Nov. 5, 2008).

[36] *Workshop*, *supra* note 13, at 8–9 (Deborah Platt Majoras, Chairman of the Fed. Trade Comm'n, Statement); *see* GAO, *supra* note 23, at 5; Erin Johansen, *Help-U-Sell Gains Converts*, DENV. BUS. J., Apr. 30, 2004, *available at* http://denver.bizjournals.com/denver/stories/2004/05/03/newscolumn2.html?page=3 ("This fee-

provided rather than on a percentage of the sale price.[37] Two examples of fee-for-service brokerages in New Jersey are Help-U-Sell[38] and Real Estate Consultants.[39]

B. Alternative Brokerages Not Present in New Jersey

Some growing alternative brokerages have yet to enter New Jersey, such as Redfin[40] and Buyside Realty.[41] Both of these brokerages use a rebate-based business model, which involves the broker returning a portion of his commission to the client, resulting in substantial cost savings for the buyer or seller.[42] Because of the state's current

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for-service concept is different than discount brokers who simply decrease their commission rate but don't give sellers the option to handle parts of the process on their own.").

[37] The logic behind this method of pricing is best described in the following quote from a broker on the Jersey Shore:

> I ask people "If you were to bring a 10 year old economy car and a brand new luxury car to be washed, what do you think you would pay?" Well, the same of course because the cost of the wash has nothing to do with the value [of] the car. The same is true in real estate and I just reflect that.

E-mail from Daniel Desmond, Broker / Owner of Help-U-Sell Bay Beach Realty, to Bradford W. Muller (Aug. 10, 2007, 05:04 EST) (on file with author).

[38] Help-U-Sell Real Estate, http://www.helpusell.com (last visited Nov. 5, 2008). Help-U-Sell has four New Jersey offices. Office Locator, http://www.helpusell.com/office_locator_map.asp?state=NJ (last visited Nov. 5, 2008). It applies fees for each individual service that the seller wants, including showing the home and running an open house. Help-U-Sell Real Estate: Save The Help-U-Sell Way, http://www.helpusell.com/sellers_save.shtml (last visited Nov. 5, 2008); *see* Johansen, *supra* note 36.

[39] Real Estate Consultants has multiple New Jersey offices. Real Estate Consultants in New Jersey, http://www.recnj.com/contact.cfm (last visited Nov. 5, 2008). It is a fee-for-service brokerage, offering a menu of plans with increasing commissions based upon the services provided: 2% Participation Plan, Associate Plan, and MLS Plan. *Id.*

[40] Damon Darlin, *2 Web Sites Push Further into Services Real Estate Agents Offer*, N.Y. TIMES, Feb. 8, 2006 at C3 ("Redfin.com, introduced an unusual new service last week. . . . [T]he feature automates the process of bidding on a house online. . . . [T[hen it rebates to the buyer two-thirds of the buyer's agent's commission . . . .").

[41] Buyside Realty, http://www.buysiderealty.com (last visited Nov. 5, 2008). Buyside Realty offers sixty-six percent commission rebates to their buyers. *Id.* Steve Otis, Buyside's General Counsel, says that this saves the average buyer $11,000. Telephone Interview with Steve Otis, General Counsel, Buyside Realty (Sept. 4, 2007) [hereinafter Otis Interview].

[42] Glenn Kelman, the president and CEO of Redfin noted:

> We've refunded over $3 million in commissions to our customers . . . [w]hen we're the buyer's agent, we take our commission, which is usually three percent. We keep one-third of it. And we give two-thirds of it back to the buyer. So, on a $1 million house, we would get $30,000 normally. But we only keep $10,000 and give $20,000 back to the buyer.

ban on rebates, these brokerages are precluded from entering New Jersey without drastically changing their approach.[43] Altering their respective business models could severely hurt these companies' ability to succeed within the state.[44]

ZipRealty[45]—an internet-based real estate brokerage with the same basic rebate approach as Redfin and Buyside Realty—has been forced to change its business model to comply with New Jersey's rebate ban. Now instead of offering rebates to New Jersey's consumers, ZipRealty offers to make a donation to the buyer's charity of choice equivalent to twenty percent of their commission.[46] The lack of success this commission-donation inducement is having as compared to a pure buyer-rebate is evidenced by ZipRealty's ardent support for the elimination of New Jersey's rebate ban.[47]

C. *Competition in the Residential Real Estate Industry Is Focused on Non-Price Dimensions, as Traditional Brokerages Stifle Price Competition*

Generally, despite the existence of alternative brokerages, there is a lack of price competition[48] in the residential real estate industry.[49]

CBS News: Chipping Away at Realtors' Six Percent (CBS television broadcast May 13, 2007), *available at* http://www.cbsnews.com/stories/2007/05/11/60minutes/printable2790865.shtml.

[43] Posting of JanelleS to Redfin Real Estate Forums, http://forums.redfin.com/rf/board/message?board.id=SiteQuestions&thread.id=57 (Aug. 22, 2007, 15:32 EST) ("FYI, there are 11 states that do not allow rebates, therefore Redfin cannot set up shop with our current business model of rebating 2/3rd of the commission back to the buyers[.]"). Redfin has not yet assessed how it would change its business model to conform to New Jersey's rebate ban should it decide to enter New Jersey. E-mail from Cynthia Pang, Senior Communications Manager, Redfin Corporation, to Bradford W. Muller (Aug. 30, 2007, 13:27 EST) (on file with author); *see infra* note 44.

[44] Mr. Otis stated that if Buyside decides to enter New Jersey, it will not be as successful in the state because it would have to drastically change its business model to conform to the rebate ban. Otis Interview, *supra* note 41.

[45] ZipRealty Real Estate, Homes for Sale, MLS Listings, Real Estate Agents, http://www.ziprealty.com/ (last visited Nov. 5, 2008).

[46] ZipRealty Real Estate—Buy a home and get 20% of our commission back!, http://www.ziprealty.com/buy_a_home/rebate.jsp?donate= (last visited Nov. 5. 2008).

[47] At the February 6, 2007, hearing before the NJREC on A3567 (currently A373)—the Assembly bill that would repeal New Jersey's rebate ban—Patrick Lashinsky, President of ZipRealty, was the lead presenter and laid out his company's case for allowing rebates. *Presentation by ZipRealty and Discussion on Assembly Bill A-3567: Hearing on A-3567 Before the N. J. Real Estate Comm'n of the Dep't of Banking and Ins.* (N.J. 2007) [hereinafter *Presentation*].

[48] Deardorff, *supra* note 1.

The focus of brokers' efforts to procure customers instead lies mostly in non-price competition.[50] Thus, rather than attracting clients by offering lower commissions, and therein reducing consumers' transaction costs, brokers instead focus on such non-price competition as increased advertising, drawing more agents to the brokerage to increase sales volume, offering a larger variety of services, and other measures.[51] Sometimes, this non-price competition is wasteful, resulting in services being offered that consumers do not want or need.[52]

A major reason for the focus on non-price competition is that alternative brokerages are often punished by their fellow brokers for attempting to compete on price via reduced commissions.[53] Traditional brokerages levy punishment by disparaging the alternative broker, directly soliciting the alternative broker's current clients, and steering their buyers away from the alternative broker's listings.[54] In New Jersey, steering from traditional brokers and the rebate ban makes running a profitable business difficult for alternative brokerages and therefore discourages price competition.

III. THE REBATE BAN IS A MAJOR IMPEDIMENT TO PRICE COMPETITION IN NEW JERSEY AND MUST BE REPEALED

In the majority of states, brokers are allowed to rebate a portion of their commission to their clients at closing.[55] A rebate lowers

[49] FTC 1983, *supra* note 5, at 42 ("While price competition generally is not considered a useful method of competing in this industry, non-price competition for an increased share of the business being done in the market is intense.").

[50] *Id.*; FTC / DOJ, *supra* note 3, at 47 ("Hsieh provided empirical evidence at the Workshop consistent with competition in the brokerage industry occurring primarily in non-price dimensions.").

[51] GAO, *supra* note 23, at 11.

[52] *See* GAO, *supra* note 23, at 11 ("Although some of [the non-price competition] can benefit consumers, some economic literature suggest that such actions lead to inefficiency because brokerage services could be provided by fewer agents or at a lower cost."); *Workshop*, *supra* note 13, at 246 (Dr. Chang-Tai Hsieh, Assoc. Professor of Economics at the Univ. of California, Statement) ("[I]t's clear there's an enormous amount of competition in the real estate brokerage business, but what we should try to do is think of ways in which competition translates into lower prices, higher quality of service, *not into this kind of waste*.") (emphasis added).

[53] Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L.J. 271, 315, 317 (1992).

[54] *Id.*; Ragusa Interview, *supra* note 34 (Mr. Ragusa claims to have been the victim of blatant steering and disparaging remarks by fellow brokers).

[55] DOJ/Antitrust: Rebates Make Buying a Home Less Expensive, http://www.usdoj.gov/atr/public/real_estate/rebates.htm (last visited Nov. 5, 2008) [hereinafter DOJ/Antitrust]. Rebates are currently prohibited in twelve states: Alaska, Alabama, Kansas, Louisiana, Mississippi, Missouri, Montana, New Jersey, North Dakota, Oklahoma, Oregon, and Tennessee. *Id.* Additionally, "Iowa prohibits

transaction costs and encourages price competition among brokers, especially those representing buyers.[56] In fact, rebates appear to be one of the only viable ways to achieve buyer-side price competition.[57] Therefore, to promote both increased price competition and cost savings for the state's consumers, New Jersey's Legislature must repeal its rebate ban.

A. *Both Public and Private Groups Have Presented Strong Arguments in Favor of Allowing Rebates*

In a letter to the Speaker of the Tennessee House of Representatives—in an attempt to prevent Tennessee from passing a rebate ban similar to New Jersey's—the Department of Justice (DOJ) outlined its argument for allowing rebates:

> The structure of the typical real estate contract makes brokers' freedom to offer rebates important. As you know, the seller and seller's broker typically agree on the rate of the commission to be paid and how the commission is allocated between the seller's and buyer's brokers. As a result, there is no opportunity for the buyer to negotiate with his or her broker for a lower commission rate.... *Rebates are important under this typical structure because they often present the only viable way for a buyer's broker to compete for business on the basis of price.* If the buyer's broker were simply to reduce his or her share of the joint commission, the savings would go directly to the seller's broker, not to the home buyer or the home seller. Thus, lowering the commission does not bring the buyer's broker more business or save his customers money. *Rebates, in contrast, go directly to the buyer or the seller, and are powerful tools for competition among brokers.*[58]

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rebates when the consumers use the services of two or more real estate brokers during a transaction." *Id.*

[56] *Workshop*, *supra* note 13, at 155 (Philip Henderson, Vice President of Lending Tree, LLC, Statement) ("If a broker wishes to use price competition . . . it's very difficult for the buyer side to do that, because the custom in the industry . . . is for the seller's broker to split its commission with the buyer's broker. . . . *but a rebate helps to facilitate that price competition* . . . .") (emphasis added).

[57] GAO, *supra* note 23, at 15 ("Proponents also note that offering a rebate is one of the few ways to reduce the effective price of buyer brokerage services since commissions are typically paid wholly by the seller."); FTC 1983, *supra* note 5, at 105 ("Rebating is a form of price competition that is used by a number of alternative brokers. [Rebating] *may be the only practicable method by which price competition can reach the buyer's end of the transaction.*") (emphasis added).

[58] Letter from John R. Read, Chief, Litigation III, U.S. Department of Justice Antitrust Division, to James O. Naifeh, Speaker of the House, Tennessee House of Representatives (May 12, 2007) (emphasis added), *available at* http://www.usdoj.gov/atr/public/comments/223252.htm.

The Federal Trade Commission (FTC) has also been a proponent of rebates, dating back to their heavily cited 1983 report on the residential real estate industry.[59] The FTC laid out the potential cost benefits of allowing rebates in its most recent report.[60] As an example, the FTC stated that a broker who rebates a third of his commission to his client creates overall commission savings of approximately sixteen percent on the total transaction.[61]

The American Antitrust Institute and the now-defunct American Enterprise Institute–Brookings Joint Center have been the standard bearers among private groups advocating for an end to rebate bans.[62] Meanwhile, even some major traditional brokerages have come out in favor of rebates, including Cendant,[63] the former parent company of Century 21, Coldwell Banker, Coldwell Banker Commercial, ERA and Sotheby's International Realty.[64] Another proponent of rebates is Prudential Fox & Roach,[65] whose Senior Vice President spoke before

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[59] FTC 1983, *supra* note 5, at 105.

[60] FTC / DOJ, *supra* note 3, at 50.

[61] *Id.*

[62] AEI-Brookings Joint Center, http://aei-brookings.org/publications/index.php?tab=topics&topicid=83 (last visited Nov. 5, 2008); American Antitrust Institute, http://www.antitrustinstitute.org (last visited Nov. 5, 2008); *see* Robert W. Hahn, Robert E. Litan & Jesse Gurman, *Bringing More Competition To Real Estate Brokerage*, 35 REAL EST. L.J. 86, 107 (2006) ("We see no compelling economic rationale for not allowing rebates as they represent a form of price competition that should improve efficiency by putting pressure on brokerages to provide better services at lower prices."); Hawker, *supra* note 7, at 18 ("[Commenters] 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 by state laws and regulations.").

[63] *Workshop, supra* note 13, at 151 (Alex Perriello, President and Chief Executive Officer of Cendant Real Estate Franchise Group of Cendant Corp., Statement) ("[S]ome states prohibit all forms of inducement by real estate licensees. . . . Simply put, we feel that those prohibitions on inducements are not necessary. The remaining anti-inducement states should remove those antiquated laws . . . and stop denying businesses the opportunity to offer rebates or inducements.").

[64] "These [Cendant] brands have more than 14,400 franchise and company-owned offices and 303,000 brokers and agents worldwide." *Id.* at 142 (Lee Quinn, Attorney with the Antitrust Division, Dep't of Justice, Statement). Cendant Real Estate is now a company called "Realogy". Cendant: Main, http://www.cendant.com/ (last visited Mar. 16, 2009).

[65] Prudential Fox & Roach is a traditional real estate brokerage, with offices in Pennsylvania, New Jersey, and Delaware. Find a Real Estate Agent or Broker at Prudential Fox & Roach Real Estate, http://www.prufoxroach.com/agentoffice/index.cfm (last visited Nov. 5, 2008). In total, the company has sixty-five offices and over 4000 sales agents. Sam Ali, *Real Estate Bait: Industry Insiders, Legislature Review Ban on Closing Gifts*, STAR LEDGER (Newark, N.J.), July 15, 2007, at 1 *available at* http://www.njar.com/pressroom/pdf/inthenews/071507.pdf.

the NJREC at an April 24, 2007, hearing in favor of a bill that would repeal New Jersey's rebate ban.[66] Finally, NAR—in its Code of Ethics and Standards of Practice—does not call the use of rebates unethical.[67]

B. Arguments Against Rebates Are Based on an Outdated Paternalistic Approach to Consumer Protection

Despite the clear consumer benefit offered by rebates, a minority of states disallow them,[68] including New Jersey.[69] The initial rationale behind most rebate bans was grounded in consumer protection, as states hoped to "avoid conflicts of interest between agents and customers by preventing brokers from giving a share of their commission to lawyers, title companies, or others involved in the real estate transaction."[70] Proponents now argue for a paternalistic approach, saying that consumers should not be allowed to receive rebates because lifting the bans would expose buyers and sellers to such evils as "false and misleading offers of rebates" and would undermine their ability to "choose brokers on the basis of quality of service rather than price."[71]

One organization that has long supported New Jersey's rebate ban, and has only recently become more amenable to the idea of rebates, is NJAR®.[72] The arguments provided by NJAR®'s Vice President of Government Affairs are typical of those who advocate against rebates:

> [W]e consider them to be distracting gimmickry . . . . The consumer's focus will not be on the choice of the firm providing the real estate brokerage services that best fit the needs of the consumer. The focus will be on who is offering the best rebate . . . .

[66] *Minutes of the meeting of the N. J. Real Estate Comm'n.: Presentation and Discussion of New Jersey Association of Realtors/United States Department of Justice/Zip Realty regarding Assembly Bill A3567-Rebate of Commissions* 2 (N.J. 2007) [hereinafter April 2007 Minutes].

[67] CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS® Standard of Practice 12-3 (2008), *available at* http://www.realtor.org/mempolweb.nsf/pages/printable2008Code ("The offering of premiums, prizes, merchandise discounts or other inducements . . . is not, in itself, unethical . . . The offering of any inducements to do business is subject to the limitations and restrictions of state law[.]") [hereinafter CODE OF ETHICS].

[68] DOJ/Antitrust, *supra* note 55.

[69] N.J. STAT. ANN. § 45:15-17(k) (West Supp. 2007).

[70] GAO, *supra* note 23, at 15 n.30; *see* Mariwyn Evans, *Share the Wealth*, REALTOR, Jan. 1, 2006, *available at* http://www.realtor.org/rmomag.nsf/pages/lawjan06 (noting that in many states, the intent of the rebate bans was not to stifle price competition, but rather "to prevent kickbacks in real estate transactions").

[71] FTC / DOJ, *supra* note 3, at 52–53.

[72] April 2007 Minutes, *supra* note 66, at 2.

> NJAR believes consumers should be selecting a real estate professional based on his or her qualifications, services and rapport—not whether he or she is offering any type of inducements . . . The focus of the home buying process should be on buying a home.[73]

The Appellate Division explored the rationale behind the state's rebate ban in *Coldwell Banker Residential Real Estate Services, Inc. v. New Jersey Real Estate Commission.*[74] At the time of *Coldwell Banker*, the NJREC had interpreted the rebate ban to prohibit brokers from giving clients rebates through department store coupons or discounted airline tickets.[75] The NJREC's reasoning for the interpretation was that these "gimmicks distracted the parties to real estate transactions from the essentials of the transaction, from what they should be focusing on with respect to the quality of the brokerage service they are going to receive as opposed to any add-ons or pre-offerings."[76] The *Coldwell Banker* court upheld that rationale.[77]

The *Coldwell Banker* decision is less persuasive today because it predated the DOJ's recent initiative to combat rebate bans.[78] Also, its

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[73] Ali, *supra* note 65. For similar arguments from NJAR®, see Glenn Roberts Jr., *Realtor Group Says No to Consumer Rebates*, INMAN NEWS, April 16, 2008, *available at* http://www.inman.com/news/2008/04/16/realtor-group-says-no-consumer-rebates.

[74] 576 A.2d 938 (N.J. Super. Ct. App. Div. 1990). Although the court did not reach the question of whether the coupons violated the rebate ban, instead invalidating them based on section 45:15-17(g) of the New Jersey Statute, it did support the rationale behind the Commission's claim that the coupons violated the rebate ban. *Id.* at 941; N.J. STAT. ANN § 45:15-17(g) (West Supp. 2007).

[75] *Presentation*, *supra* note 47, at 52–53 (statement of Robert Melillo, NJREC Comm'r).

[76] *Id.*

> As the Commission said; "[u]nsophisticated sellers or buyers or relocating buyers unfamiliar with real estate brokers in a particular area might choose a Coldwell Banker office based on the [inducement]."
>
> . . . .
>
> Finally, the Commission found that the programs operate 'as an extraneous inducement to consumers' to buy or sell through [Coldwell Banker] for reasons other than the quality of the professional services of the broker.

Coldwell Banker, 576 A.2d at 940.

[77] *Coldwell Banker*, 576 A.2d at 941 ("Distracting gimmickry creates dangers which are the legitimate concern of the Legislature and the Commission. . . . Extraneous inducements . . . can take the buyers' or sellers' eyes off the ball.").

[78] *See infra* notes 80–81 and accompanying text. The DOJ's Antitrust Division finds arguments about the potentially harmful effects of rebates unpersuasive: "Some have argued that refunds and incentives can tempt consumers into closing on real estate transactions against their best interests. The Antitrust Division has found no evidence that refunds and incentives harm consumers. On the contrary, they can dramatically lower the price that consumers pay for brokerage services." DOJ/Antitrust, *supra* note 55.

reasoning rings hollow when discussing cash rebates, which simply are "a form of providing the buyer with the same opportunity for a discounted service that the seller now has in New Jersey."[79] Finally, both NJAR®'s position and that of the *Coldwell Banker* court are based on the false assumption that consumers are unsophisticated, easily distracted, and unable to make intelligent decisions when faced with brokerages competing on price.

C. Federal Action Will Be Ineffective in Bringing Rebates to New Jersey's Consumers Because of the State Action Immunity Doctrine

The FTC and DOJ have challenged states with rebate bans. The DOJ has scrutinized and occasionally challenged those limitations laid down by state real estate commissions, rather than by legislatures, to "bring the benefits of price competition to consumers."[80] Successful efforts have been mounted in South Dakota, West Virginia, and Kentucky.[81] However, because the New Jersey rebate ban was instituted by the Legislature, it is likely to be "immune from federal antitrust enforcement" because of the state action immunity doctrine.[82]

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[79] *Presentation*, *supra* note 47, at 53 (Dennis Casale, Attorney for ZipRealty, Statement).

[80] FTC / DOJ, *supra* note 3, at 50.

[81] *Id.* at 51 ("DOJ also investigated rebate bans by the South Dakota Real Estate Commission, the West Virginia Real Estate Commission, and the Tennessee Real Estate Commission. In response to these investigations, the South Dakota and West Virginia Real Estate Commissions rescinded their regulations prohibiting rebates . . . ."). In 2005, the DOJ filed an antitrust suit against Kentucky's Real Estate Commission (KREC) for restricting competition and "caus[ing] consumers to pay higher prices for real estate brokerage services" as a result of its rebate ban. *Id.* at 50–51. The lawsuit was settled a few months later, with the KREC agreeing not to enforce its rebate ban. *Id.*

[82] *Id* at 50. For an analysis of the state action immunity doctrine, see FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 1 (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

> The state action doctrine—first articulated in *Parker v. Brown*—shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is: (1) in furtherance of a clearly articulated state policy, and (2) actively supervised by the state. . . . Because the state action doctrine rests on principles of federalism, the doctrine shields sovereign activities of the State itself, including the actions of a state legislature, a governor, or a state supreme court, provided that these entities are acting in their sovereign capacity under the state constitution. The doctrine also extends to other, lower level entities—such as state regulatory commissions and licensing boards—provided that these entities are acting pursuant to a delegation of authority from a governmental actor with independent, sovereign status.

Id.

Therefore, any realistic hope for change must come through state legislation.

D. *The State Legislature Should Pass Assembly Bill A373 and Repeal New Jersey's Rebate Ban*

At the state level, A373/S139,[83] a bill co-sponsored by Assemblymen Patrick Diegnan, Paul Moriarty, and Joseph Vas, and State Senator Nicolas Scutari,[84] would repeal New Jersey's rebate ban.[85] The bill was discussed before the NJREC at five separate hearings held in 2007 and 2008.[86] According to Assemblyman Diegnan, A373 is designed to eliminate New Jersey's ban on consumer rebates to help buyers recover a portion of the commission, assisting them with their closing costs and making home buying more feasible.[87] The Assemblyman explained that his own daughter's real estate experience—one typical of the New Jersey middle class—helped drive him to sponsor this bill:

> My daughter is a teacher. She makes about $50,000 a year. She wants to buy herself a condo. She has been able to save about 20,000 for a deposit. The closing costs are what are really killing her . . . . And I know . . . middle class young people today, are,

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[83] The Assembly version of the bill, A373, was first introduced in the Assembly as A3567 and referred to the Assembly's Regulated Profession and Independent Authorities Committee on Oct. 23, 2006. New Jersey Legislature, http://www.njleg.state.nj.us/Default.asp (last visited Nov. 5, 2008) (go to "Bill Search"; type "A373" in the "Bill Number(s)" query box; to see legislative history for A3567, click "A3567" hyperlink). The bill was again introduced to the Assembly on Jan. 8, 2008 as A373 and was referred to the Regulated Professions Committee. *Id.* On June 23, 2008, the bill was transferred to the Consumer Affairs Committee. *Id.* On Sept. 25, 2008, the bill was transferred back to the Regulated Professions Committee. *Id.* The Regulated Professions Committee reported favorably on the bill with amendments on Jan. 15, 2009. *Id.* The bill passed in the Assembly on Mar. 16, 2009 by a 45-26-7 vote. *Id.* The Senate version of the bill, S139, was first introduced in the Senate as S2869 and referred to the Senate Commerce Committee on Nov. 8, 2007. *Id.*. The bill was again introduced in the Senate on Jan. 8, 2008 as S139 and referred to the Commerce Committee. *Id.*

[84] *Id.*

[85] Gen. Assem. 373, 213th Leg., 2008–2009 Leg. Sess. (N.J. 2008), *available at* http://www.njleg.state.nj.us/2008/Bills/A0500/373_I1.PDF.

[86] *Presentation*, *supra* note 47; April 2007 Minutes, *supra* note 66; *Minutes of the meeting of the N. J. Real Estate Comm'n.: Discussion Regarding Assembly Bill A-373-Rebate of Commissions/Zip Realty's Request* 2 (N.J. 2008) [hereinafter April 2008 Minutes]; *Minutes of the meeting of the N. J. Real Estate Comm'n.: Discussion Regarding Assembly Bill A-373-Rebate of Commissions/Zip Realty's Request (CONTINUED)* 5 (N.J. 2008); *Draft Minutes of the meeting of the N.J. Real Estate Comm'n.: Discussion Regarding Assembly Bill A-373-Rebate of Commissions/Zip Realty's Request (CONTINUED)* 6 (N.J. 2008).

[87] April 2007 Minutes, *supra* note 66, at 2; Telephone Interview with Patrick Diegnan, Assem. and Sponsor of Assembly Bill 3567, Gen. Assem., in Newark, N.J. (Aug. 31, 2007).

many times, out of the housing market not because of [the] down payment, [but] because of closing costs.[88]

Besides Assemblyman Diegnan, a number of individuals spoke on behalf of the legislation, such as the Senior Vice President of Prudential Fox & Roach,[89] the President of ZipRealty, the Executive Director of the Worldwide ERC Coalition, and attorneys from the DOJ.[90] Even Commissioner Melillo of the NJREC provided an argument in favor of the rebate bill: "I think certainly, there's [sic] a lot of seniors who unfortunately are looking to sell in New Jersey because they can't afford the carrying costs anymore [and] could probably benefit from a rebate on the commissions."[91]

With estimates of potential cost savings for New Jersey's consumers ranging from $200 million[92] to $596 million,[93] the benefits of legalizing rebates are simply too great to ignore. Therefore, the Senate should follow the Assembly's lead and pass A373 and repeal New Jersey's rebate ban.[94] Whatever limited consumer protection benefits

[88] *Presentation*, *supra* note 47, at 41–42 (statement of Assem. Patrick Diegnan, Sponsor, Assem. Bill 3567 (currently A373)).

[89] Ali, *supra* note 65, at 7 ("'Our experience has been that it has been very positive for the consumer' in Pennsylvania and Delaware, Constantino said. . . . '[F]rom our experience, it also empowers the consumer with more choices and gives them more flexibility without making them take their eyes off the ball.'").

[90] April 2007 Minutes, *supra* note 66, at 2.

[91] *Presentation*, *supra* note 47, at 50–51 (statement of Comm'r Robert Melillo of the NJREC).

[92] *The Changing Real Estate Market: Hearing Before the Housing and Community Opportunity Subcomm. of the H. Comm. on Financial Servs.*, 109th Cong. 5 (2006), *available at* http://financialservices.house.gov/media/pdf/072506kgb.pdf (statement of Kimberly Gorsuch-Bradbury, Senior Vice President, Real Estate Networks LendingTree, LLC) (In 2005, "there were approximately 160,000 sales of existing homes in New Jersey, and the average sales price of these homes was approximately $365,000. At that sales price, consumers using [LendingTree] could have each received a rebate of $1,250. Therefore, the potential savings to New Jersey consumers . . . [was] nearly $200 million . . . .").

[93] Ali, *supra* note 65 (According to Bennett Matelson, an attorney with DOJ's Antitrust Division, "[i]f buyers had received [a] 1 percent rebate on the sale of all 154,000 existing homes sold in New Jersey in 2006, buyers would have received over $596 million in cash[.]").

[94] Although the author supported A373 in its original form, he similarly supports the amendments to the bill made by the Assembly Regulated Professions Committee on Jan. 15, 2009. Some of the most important amendments include 1) making rebates available only to buyers of residential real estate; 2) providing that only a real estate broker, as opposed to individual licensees, can provide rebates; 3) mandating that the broker and buyer memorialize the rebate at the beginning of the relationship in a written contract; 4) requiring the broker to recommend to the buyer that he contact a tax professional to discuss any of the potential tax implications caused by the rebate; 5) requiring that the rebate only be in the form of a credit or check paid at closing; and 6) mandating that disclosure of the rebate be made to all parties

the rebate ban may provide do not outweigh the increased price competition and transaction cost savings that would be spurred by its repeal.

IV. STEERING IS THE GREATEST IMPEDIMENT TO PRICE COMPETITION IN THE REAL ESTATE INDUSTRY AND NEW JERSEY MUST COMBAT IT MORE EFFECTIVELY

The final and perhaps largest impediment to price competition in New Jersey is the anti-competitive practice of steering.[95] Steering occurs when traditional brokers refuse to show, or navigate interested clients away from, the listings of alternative brokers because of the lower commission offered or the alternative brokerage's business model.[96] The effects of steering, and its efficiency in curtailing price competition because of the importance of cooperation in the residential real estate industry, have been widely discussed.[97] Brokers are

involved in the transaction. ASSEM. REGULATED PROFESSIONS COMM., STATEMENT TO ASSEMBLY, NO. 373 WITH COMMITTEE AMENDMENTS, 213th Leg., 2008-2009 Leg. Sess., at 1–2 (N.J. 2009), *available at* http://www.njleg.state.nj.us/2008/Bills/A0500/373_S1.PDF (last visited Jan. 16, 2009).

[95] *Supra* note 6.

[96] The inter-dependant nature of the real estate industry means that steering can have profoundly negative effects on price competition:

> Commenters and participants in the real estate brokerage industry report steering behavior . . . . An example of steering would be a cooperating broker purposely failing to show his or her client a home listed by a discount broker notwithstanding the fact that the home matches the buyer's stated preferences. *Because listing brokers depend on cooperation from rivals, brokers have an opportunity to deter discounting by steering buyers away from discounters' listings.* Lack of cooperation will reduce the probability that homes listed by discounting brokers sell.

FTC / DOJ, *supra* note 3, at 68 (emphasis added). "[S]teering may also occur for reasons having nothing to do with the attributes of the house. . . . They also may hold back from showing exclusive listings of those brokers (often alternative or 'discount' brokerage firms) who offer a less than attractive commission split." FTC 1983, *supra* note 5, at 75. "These differentials in the potential incomes of brokers who are dealing with prospective buyers appear to influence the showing patterns of such brokers. Brokers appear to steer buyers toward the house listed by the traditional, full commission broker." *Id.* at 39. "Because traditional brokers working with buyers are usually compensated with a 'split' of the commission . . . the level of that split can and has influenced their interest in showing homes. [T]here is much evidence that traditional brokers are reluctant, or refuse, to show homes with commission splits under 3 percent." WOODALL & BROBECK, *supra* note 25, at 11.

[97] FTC 1983, *supra* note 5, at 68. "[T]he allegations . . . appear to relate to . . . aspects of the industry which may tend to rigidify prices—*the ability of other brokers in a community, because of the largely interdependent nature of the brokerage system, to withhold cooperation and thereby single out for harm the business of a 'maverick.'*" FTC / DOJ, *supra* note 3, at 22 (emphasis added); FTC 1983, *supra* note 5, at 36–37 ("Individual brokers, we hypothesize, police the system by withholding cooperation in selling listings which carry a lower than customary 'split' or commission. In doing so, they engage

able to engage in steering because "an MLS listing gives brokers information on the commission that will be paid to the broker who brings the buyer to that property."[98] According to the U.S. Government Accountability Office (GAO), "[t]his practice potentially creates a disincentive for home sellers or their brokers to offer less than the prevailing rate, since buyers' brokers may show high-commission properties first."[99] Numerous scholarly articles and government reports discuss the MLS listing's function as an aide in steering.[100]

Steering also occurs when the commission offered to the buyer's broker is equivalent to what a traditional brokerage would offer. For example, although Realmart Realty, a flat-fee MLS access firm, typically offers a commission split to the buyer's broker similar to what they expect from a traditional company—two to three percent—Realmart still faces steering because of resistance to their business model.[101] It therefore appears that brokers understand that if they

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both in typical profit-maximizing . . . and also prevent a collective lowering of commissions generally.").

> Today broker A may represent a seller and broker B may represent a buyer; tomorrow the reverse may be true. This sell-side/buy-side reversible interaction provides a concrete means whereby agents who are the upholders of high fees can threaten to or actually discipline price-cutting rivals, even in the absence of a [sic] MLS. A high-fee-upholding agent who has a potential buyer may threaten to or actually boycott the listings of a price-cutting seller's agent. Similarly, a high-fee-upholding agent with a listing may make it difficult for a fee-cutting agent to bring buyers to see the property. Much of this "steering" 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.

White, *supra* note 25, at 6–7.

[98] GAO, *supra* note 23, at 1.

[99] *Id.*

[100] Essentially, the MLS listing acts as a tool which competing brokers can use to help enforce a near-uniform commission rate and drive out discounters:

> MLS listings do show how much sellers' brokers will pay other brokers for cooperating in a sale, according to industry participants. When choosing among comparable homes for sale, brokers have a greater incentive—all else being equal—to first show prospective buyers homes that offer other brokers the prevailing commission rate than homes that offer a lower rate. Therefore, 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, at least for buyers' brokers.

GAO, *supra* note 23, at 13; *see also* Hahn, Litan & Gurman, *supra* note 62, at 96; Bruce M. Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 948–49 (1977).

[101] Ragusa Interview, *supra* note 34.

sell an alternative brokerage's listing, they would be giving incentives to other sellers to list their homes with an alternative broker. Thus, by avoiding alternative brokerages' listings on the buyer side, traditional brokers are attempting to avoid price competition on the seller side.[102]

Besides anecdotal evidence of steering's existence, there is also quantitative support. In the FTC's much-cited 1983 report, its survey found that in their first year of operations, fifty-nine percent of responding alternative brokers suffered "frequent" refusals to show their listings by competing brokers, while ninety percent were faced with at least sporadic refusals.[103] The discrimination also continued past the first year, as fifty percent of the alternative brokers continued to face "frequent" refusals after several years in the industry.[104]

The effects of steering were made even clearer in New Jersey with the recent bankruptcy of Foxtons,[105] a former leader in the New Jersey discount real estate market.[106] Foxtons's business model failed largely because traditional brokers steered clients away from Foxtons's low commission listings. As explained by a competing broker:

> "I predicted this would happen a year and change ago," Marten said. Marten said the fees Foxtons paid brokers—which she said at times was [sic] as low as 1 percent to 1 1/2 percent—did not entice independent brokers or brokers who worked for other agencies to show homes listed by Foxtons. "I saw them finally go up to 2 percent, but their listings were languishing," Marten said. "The broker was only going to get 1 or 2 percent. There wasn't a lot of interest in showing their houses."[107]

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[102] The fact that most brokerages serve both buyers and sellers further complicates any effort to stifle steering:

> White noted 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 whereby agents who are upholders of high fees can threaten to or actually discipline price-cutting rivals, even in the absence of a [sic] MLS."

Hawker, *supra* note 7, at 19.

[103] FTC 1983, *supra* note 5, at 75.

[104] *Id.* at 75–76.

[105] Diamond, *supra* note 32.

[106] Foxtons had a major market share in New York and New Jersey, and at the time of their bankruptcy, they had 4400 listings in these two states. *Id.*

[107] James Bernstein, *Foxtons May File for Bankruptcy*, NEWSDAY, Sept. 27, 2007 (online article on file with author). A similar attitude towards Foxtons' listings was displayed by a Montclair broker who claimed that she and other brokers were refusing to show Foxtons' listings because of their commission structure and business model. Glenn Roberts Jr., *Realtors Slash Commission Splits With Discounter: Foxtons Com-*

A. Steering Raises Ethical and Legal Issues Because of its Negative Effect on Price Competition and Because It Directly Contravenes the Broker's Fiduciary Duty

The practice of steering raises both ethical and legal questions. Why should a broker not have the right to forgo dealing with a certain company because he believes his services are worth more than the commission offered? The simple answer to the ethical aspect of this question is that through stifling price competition, steering increases transaction costs and thereby hurts the consumer. Steering also raises serious legal questions about the broker breaking his fiduciary duties to his client.

As to the issue of price competition, cooperation from fellow brokers is necessary for a real estate brokerage to have any success.[108] If brokers refuse to cooperate with an alternative brokerage and fail to show its listings, they may run that broker out of the market, and thus stymie potential price competition.[109] This results in higher transaction costs for consumers. Even the NJREC, which has taken a hands-off approach to steering,[110] noted the importance of price competition in a 2005 advisory letter regarding discriminatory commission splits:[111] "Licensees may not discriminate or retaliate against a licensee who takes listings at lower commission rates . . . . Prohibiting retaliation against brokers who are taking listings at lower commission rates promotes competition, which results in lower commission fees to consumers."[112]

Perhaps even more importantly, those brokers who surreptitiously engage in steering breach their fiduciary duties to their cli-

plains About Perceived Unfair Practices, INMAN NEWS, June 8, 2005 (online article on file with author).

108 GAO, *supra* note 23, at 13 ("A discount broker may advertise a lower commission rate to attract listings, but the broker's success in selling those homes, and in attracting additional listings . . . depends in part on other brokers' willingness to cooperate (by showing the homes to prospective buyers) in the sale of those listings.").

109 *See generally* Braswell & Poe, *supra* note 53, at 317 n.244 ("Evidence indicates that it is much easier for discount brokers to obtain property listings than it is for them to sell the properties (as compared to traditional brokers); this discrepancy has been attributed to the practice of steering by traditional brokers.").

110 *See infra* note 149 and accompanying text.

111 For the regulation on discriminatory commission splits, see N.J. ADMIN. CODE § 11:5-7.6 (2004).

112 Letter from The N.J. Real Estate Comm'n to all Real Estate Licensees, School Directors, Instructors and Other Interested Parties 1–2 (Nov. 29, 2005), *available at* http://www.state.nj.us/dobi/division_rec/recadvisory051130.pdf [hereinafter Letter].

ents.[113] An agent is supposed to put the interests of his principal above all others, including his own. As the Supreme Court of New Jersey has stated, "[t]he broker was and is looked upon as a fiduciary and is required to exercise fidelity, good faith and *primary devotion to the interests of his principal. He cannot permit his interests to interfere with those of his principal*."[114] Brokers are in a unique position to influence the behavior of their clients, as they have the ability to "restrict[] the flow of information and thus reduce[] the consumer's access to the market."[115] Therefore, "transactions that might interest the consumer may never come to the consumer's attention."[116] By choosing not to show a home that otherwise meets the buyer's needs simply because the broker believes the commission offered to him is too low, that broker is putting his own interests above those of his client, thereby breaching the fiduciary duty of loyalty.[117] In that same vein, the NJREC's language regarding discriminatory commission splits could easily be applied to steering: "any discriminatory action . . . may, in particular factual circumstances, also constitute a violation of a licensee's fiduciary obligations to protect and promote the interests of his client."[118]

B. *Enforcement of Breaches of the Broker's Fiduciary Duty Will Effectively Stifle Steering*

The fiduciary relationship between a broker and his client demands that a more effective campaign be waged against steering; but

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[113] FTC/DOJ, *supra* note 3, at 61 n.299 ("Avoiding fee-for-service listings without disclosure to buyers, however, may raise issues concerning the fulfillment of fiduciary duties").

> In some states, real estate agents collude to boycott homes that are being sold by agents who provide commission discounts. This practice is a clear breach of the fiduciary duty of the agent to find the best home at the lowest price for clients. Instead, the brokers are in effect finding homes for their clients that will afford them the highest fee structure.

Editorial, *The Realtor Racket*, WALL ST. J., Aug. 12, 2005, at A8.

[114] Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 856 (N.J. 1967) (citations omitted) (emphasis added).

[115] FTC 1983, *supra* note 5, at 75.

[116] *Id.* "Given the position of brokers as intermediaries between the buyers and the housing market, brokers can substantially influence the search behavior of the buyers." *Id.* at 38.

[117] Such behavior would also appear to run afoul of the high ideals set forth in the Preamble of the REALTOR® *Code of Ethics and Standards of Practice*, "The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. *No inducement of profit* and no instruction from clients ever can justify departure from this ideal." CODE OF ETHICS, *supra* note 67, at pmbl. (emphasis added).

[118] Letter, *supra* note 112, at 2.

that is a difficult proposition. Antitrust laws may be used, generally, when multiple groups of brokers collude to avoid showing alternative brokerages' listings.[119] A group boycott involves "'concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive object, or both.'"[120] That being said, proving collusion in the residential real estate industry is highly difficult.[121] Steering is a "particularly difficult behavior to root out [and] [b]ecause residential real estate sales generally require collaboration between competing firms, back-room deals aren't necessary to artificially prop up prices. [Instead,] [p]eer pressure and a modest grass-roots whisper campaign are generally enough to keep agents in line."[122] Because of this environment, it is very difficult to show that the brokers' actions are part of a "concerted refusal to deal"[123] rather than a non-actionable "unilateral refusal to deal."[124] With group boycotts being hard to prove in the residential real estate industry, a unilateral refusal to deal could also be actionable under antitrust laws, but it would likely be an unsuccessful battle.[125]

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[119] FTC/DOJ, *supra* note 3, at 69 ("It is well established that the antitrust laws prohibit an unreasonable agreement by a group of brokers that they will withhold cooperation from a particular broker.").

[120] Bruce D. Greenberg & Gary K. Wolinetz, *25 Years of New Jersey Antitrust*, 26 SETON HALL L. REV. 637, 650 (1996) (quoting Fuentes v. South Hills Cardiology, 946 F.2d 196, 202 (3d Cir. 1991)).

[121] *See* Hawker, *supra* note 7, at 19 ("[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.'").

[122] Jon Birger, *The 4 ½% Solution*, MONEY, Oct. 1, 2004, *available at* http://money.cnn.com/magazines/moneymag/moneymag_archive/2004/10/01/8186561/index.htm; *see* White, *supra* note 25, at 16–17.

[123] Braswell & Poe, *supra* note 53, at 320 (stating that cases brought by alternative brokers against local boards of REALTORS® or MLS organizations have been unsuccessful because the courts have concluded that the discriminatory treatment inflicted upon the alternative brokers was the result of the unilateral conduct of some brokerages, "rather than by a concerted refusal to deal").

[124] Erxleben, *supra* note 25, at 199 ("Even given the strong, interdependent culture of the industry and the history of reprisals against brokers who break industry competitive norms, *a member broker's avoidance of alternative brokers' listings may still be characterized as an individual unilateral refusal to deal,* rather than actionable concerted conduct.") (emphasis added).

[125] Proving that the offender had the necessary market power to sustain this type of cause of action would be near impossible in the residential real estate industry:

> Such a plaintiff could also bring an action against the MLS or the local board under Section 2 of the Sherman Act. Under this section, an individual, unilateral refusal to deal may be grounds for an antitrust violation if the plaintiff can prove that the defendant has enough control in the market to conclude that it has monopoly power, and if the re-

The group boycott requirement illuminates that antitrust laws generally become ineffective when unilateral decisions are made by individual brokers not to deal with an alternative brokerage.[126] Therefore, greater state action is needed to reduce the effects of steering. That state action can be premised on the breach of fiduciary duty which occurs when a broker surreptitiously steers his buyer away from a property that would otherwise be appropriate for the broker's own self-interested reasons, such as the low commission offered on the property or the desire not to work with an alternative broker.[127]

C. *Steering Is a Breach of the Broker's Fiduciary Duties of Loyalty and Disclosure*

The fiduciary duties of brokers in New Jersey are governed by code[128] and case law.[129] Four types of agency/non-agency relationships are recognized in New Jersey: sellers' agency, buyers' agency, disclosed dual agency, and transaction brokerage.[130] This Comment analyzes fiduciary duties in the context of buyers' agency, as it is in this relationship that a broker who engages in steering breaches his duties of loyalty and disclosure to the buyer.

> fusal to deal is motivated by an intention to acquire or maintain monopoly power. *Very few recent cases based on this theory have been successful, however, because courts rarely have found adequate proof that the defendant possessed the requisite market power.*

Braswell & Poe, *supra* note 53, at 321 (emphasis added).

[126] FTC/DOJ, *supra* note 3, at 66–67 ("The antitrust laws generally do not require firms to cooperate with their competitors."); *see* DAVID BARRY, NINE PILLARS OF THE CITADEL: A REPORT SUBMITTED TO THE FED. TRADE COMM'N/U.S. DEP'T OF JUSTICE WORKSHOP ON COMPETITION POLICY AND THE REAL ESTATE INDUS. 57 (Nov. 2005) (citing United States v. Colgate & Co., 250 U.S. 300 (1919)), *available at* http://www.usdoj.gov/atr/public/workshops/rewcom/213351.pdf (explaining that, absent a group boycott, the *Colgate* doctrine allows individual brokers to choose not to deal with alternative brokerages without running afoul of antitrust laws).

[127] FTC/DOJ, *supra* note 3, at 61 n.299 ("Avoiding fee-for-service listings without disclosure to buyers, however, may raise issues concerning the fulfillment of fiduciary duties[.]").

[128] N.J. ADMIN. CODE § 11:5-6.4(a) (2004) ("All licensees . . . shall strictly comply with the laws of agency and the principles governing fiduciary relationships. . . . [T]he licensee pledges himself *to protect and promote, as he would his own, the interests of the client or principal* . . . this obligation of absolute fidelity to the client's or principal's interest is primary . . . .") (emphasis added).

[129] Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 856 (N.J. 1967) ("The broker was and is looked upon as a fiduciary and is required to exercise fidelity, good faith and primary devotion to the interests of his principal. He cannot permit his interests to interfere with those of his principal. . . . He must show perfect good faith and openness of dealing.") (citations omitted).

[130] N.J. ADMIN. CODE § 11:5-6.9(h) (2004).

The New Jersey Administrative Code § 11:5-6.9(h) explains that the broker's fiduciary duties to his buyer "include reasonable care, undivided loyalty, confidentiality and full disclosure."[131] Similar duties are delineated both in the standard form "exclusive buyer agency" contract promulgated by NJAR®,[132] and within the NAR Code of Ethics and Standards of Practice.[133]

Steering is a breach of the broker's fiduciary duties of "undivided loyalty" and "full disclosure" to the buyer,[134] and a breach of the duty "to protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent."[135] By engaging in steering, a broker may also be breaching the duties set forth in the aforementioned exclusive buyer agency contract, which states that the buyer's agent shall "represent [b]uyer's best interests."[136]

The duty of loyalty requires the subordination of the broker's personal interests to those of the client.[137] To comply with that duty, the broker must make the client aware of all homes that are within the client's price range and that meet the specific requirements set forth by the client—such as neighborhood, number of bedrooms, lot size, and other metrics—regardless of the identity of the listing broker. If, without disclosing,[138] a broker fails to show the client a property which meets the client's needs simply because of the broker's own self-interest—the potential for earning a larger commission by selling a different home—the broker is breaching the duty of loyalty by putting his own interests above those of his client. Also, when a broker surreptitiously engages in steering without disclosing his actions to his client, he is in breach of his duty of full disclosure.

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131 *Id.*

132 NEW JERSEY ASSOCIATION OF REALTORS®, STANDARD FORM OF EXCLUSIVE BUYER AGENCY AGREEMENT (2001).

133 CODE OF ETHICS, *supra* note 67, at Duties to Clients and Customers Art. I ("When representing a buyer . . . REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary . . . .").

134 N.J. ADMIN. CODE § 11:5-6.9(h) (2004).

135 *Id.* § 11:5-6.4(a).

136 NEW JERSEY ASSOCIATION OF REALTORS®, *supra* note 132.

137 Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 856 (N.J. 1967) ("The broker . . . is required to exercise . . . primary devotion to the interests of his principal. He cannot permit his interests to interfere with those of his principal.") (citations omitted).

138 On the other hand, if the broker discloses his desire not to show the listings of an alternative broker to his client, and the client agrees to the practice, then there is no breach of fiduciary duty. For example, a New Jersey broker informed her clients that she would not be showing them homes listed by Foxtons because she disapproved of its business model, leaving them the option of viewing the Foxtons listings with another broker. Roberts, *supra* note 107.

D. A Multi-Faceted Approach Is Needed to Combat Steering, Including Increasing Consumer Awareness and Expanding Regulatory Enforcement

Tackling the problem of steering in New Jersey requires a multi-faceted approach. The first goal must be to better inform the consumer of the existence of steering and the ways it can be combated. This is achievable through some relatively minor code changes and a public awareness campaign. First, information on steering must be imparted to buyers before they begin the home search with their broker. Buyers should be encouraged to research available homes—by using the internet[139] and visiting desired neighborhoods—prior to hiring a broker. This message could be disseminated to prospective buyers through limited advertising in real estate publications and a public awareness campaign, consisting of editorial letters to local newspapers and appearances on local television programming.[140] Reaching buyers before they meet with a broker is of particular importance because when buyers perform research in preparation for their visit with a broker, they reduce their reliance on the broker's superior knowledge of the inventory of available homes.[141] Using this approach, a buyer will go into a brokerage knowing which specific homes he wants to visit, making it more difficult for the broker to engage in steering.[142]

139 For the effects of the internet on the residential real estate industry and steering, see FTC/DOJ, *supra* note 3, at 70 ("Going forward, the Internet offers consumers increased knowledge of homes available for sale and, consequently, may limit the ability of cooperating brokers to steer buyers away from desirable homes listed by discount and fee-for-service brokers."); Hawker, *supra* note 7, at 16–17 ("[A]ccess to MLS data over the Internet is shifting more of the search function to buyers as well as making buyers and sellers 'more knowledgeable about local comparisons with price, location, schools, etc.'").

140 The NJREC's Executive Director, Assistant Director, or President of the Real Estate Commissioners should author the editorial letters. The television appearances could also be made by one or more of these individuals. *See generally* N.J. ADMIN. CODE § 11:5-1.3 (2004) (organization chart for the NJREC). That being said, since the functions of the NJREC as described in section 11:5-1.3 do not include public awareness campaigns, this may be best accomplished through a joint project done in conjunction with the Office of the Attorney General, Division of Consumer Affairs. New Jersey Division of Consumer Affairs, http://www.state.nj.us/lps/ca/home.htm (last visited Nov. 5, 2008).

141 FTC/DOJ, *supra* note 3, at 27 ("[B]rokers can take advantage of their superior knowledge of market conditions by steering clients away from home listings that otherwise match the criteria identified by the consumers, but provide lower financial gains for the broker than other homes.").

142 *See* FTC/DOJ, *supra* note 3, at 28 ("[B]uyers' increasing use of the Internet may limit brokers' ability to steer buyers away from discounters' listings without their

The informational approach to increased consumer awareness should continue when buyers enter a broker's office. A "Warning Signs of Steering" poster—similar to the Fair Housing poster that is currently required[143]—should be mandated for the walls of every brokerage.[144] Also, a description of steering should be included in the Consumer Information Statement—a pamphlet which is required to be shown to clients before the agency relationship begins.[145] Finally, buyers should again be made aware of steering before they submit an offer on a home by requiring that brokers provide a steering memorandum to buyers at contract-signing, similar to the required Attorney General's memorandum on the Law Against Discrimination.[146] The broker should be required to have the client read the memorandum prior to signing the contract.

Another component of the informational approach should be to attempt to stop steering at its source by making a discussion on steering a mandatory component of the real estate salesperson training course and the broker training course.[147] For those salespersons and

knowledge. . . . If a [buyer] finds a discounter's listing . . . a broker likely will either have to show the [buyer] the discounter's listing or explain why he or she will not.").

[143] N.J. ADMIN. CODE § 13:8-1.3 (2004); EDITH LANK & JOAN M. SOBECK, ESSENTIALS OF NEW JERSEY REAL ESTATE 56 (9th ed. 2006).

[144] That poster should provide a brief, clear definition of steering, a suggestion that buyers do their own research of the available homes within the desired community, and the recommendation that buyers ask their broker whether they are being shown all of the homes that meet their specifications. The poster should conclude with an instruction that buyers should report steering behavior to the NJREC. Part of the text could read:

> WARNING: Are you being shown all available homes? Some brokers engage in a practice called steering, where they fail to show buyers homes that meet their needs because the compensation being offered by the seller's broker is lower than the standard rate. Make sure you do not fall victim to this practice. Research the homes available in your desired neighborhood through internet searches and visits to the area. Ask your broker whether you are being shown all available homes that meet your specifications. An informed buyer will be a satisfied homeowner.

[145] N.J. ADMIN. CODE § 11:5-6.9(e)(1)(i) (2004). The steering description in the Consumer Information Statement could echo the text of the "Warning Signs of Steering" poster. *Supra* note 144.

[146] N.J. STAT. ANN. § 10:5-1 (West 2002); N.J. ADMIN. CODE § 11:5-6.4(j) (2004). The memorandum should contain a text similar to the "Warning Signs of Steering" poster (described in note 144), and should also say that steering is a breach of the broker's fiduciary duty to the buyer, and that such behavior should be reported to the NJREC. *See supra* note 144.

[147] For the required subject matter of the salesperson and broker courses, see N.J. ADMIN. CODE § 11:5-2.1(f),(g) (2004). The Code currently requires that twelve of the seventy five hour salesperson's course be devoted to "[t]he laws of agency[.]" *Id.* § 11:5-2.1(f). This Comment suggests that a mandatory requirement of at least a one

brokers that are already licensed, the NJREC should draft and disseminate an advisory letter describing steering, its negative effects on both consumers and competition within the industry, how it is a breach of the fiduciary duty owed to the buyer, and how the NJREC will vigorously investigate and punish those licensees who engage in the practice.

Finally, breaches of the broker's fiduciary duty must be enforced. In New Jersey, there has been a lack of state action in enforcing the broker's fiduciary duty in relation to steering. The NJREC's website indicates few recent enforcement actions based on § 11:5-6.4,[148] none of which relate to steering.[149] This lack of regulatory enforcement is not limited to New Jersey, and was cited in a *Wall Street Journal* editorial which said that "[t]o our knowledge, neither the National Association of Realtors nor the state real estate commissions have ever sanctioned a real estate agent for [anti-competitive behavior]."[150] This is unacceptable.

The NJREC must take a proactive approach to combating steering.[151] Because the NJREC has investigative powers,[152] one method

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hour discussion on steering and how it is a breach of the salesperson's fiduciary duties be included within the twelve hour agency discussion requirement. Similarly, for the broker course, this Comment suggests at least a one hour discussion on steering be included within the thirty hour course on ethics and agency law, particularly within the section of the course that deals with "[t]he fiduciary duties owed by agents to their principals." *Id.* § 11:5-2.1(g)(6)(i).

[148] *See supra* note 128 and accompanying text.

[149] NJ Real Estate Commission—Disciplinary Actions, http://www.state.nj.us/dobi/division_rec/recdiscp.htm (last visited Nov. 5, 2008) (since 1999, only twenty-four actions have been based on section 11:5-6.4 and none appear related to steering).

[150] Editorial, *The Realtor Racket*, WALL ST. J., Aug. 12, 2005, at A8 (cited in WOODALL & BROBECK, *supra* note 25, at 16).

[151] Woodall and Brobeck similarly call for greater action by state regulators to "intervene fairly in cases of anti-competitive actions against nontraditional brokers[.]" WOODALL & BROBECK, *supra* note 25, at 18. One clear explanation for why the NJREC has not taken greater steps to stop steering is that the majority of its members are themselves brokers. *See* About the Real Estate Commission, http://www.state.nj.us/dobi/division_rec/reabout.html#REHearingsCommMembers (last visited Nov. 5, 2008). Woodall and Brobeck have shown that state regulators throughout the country, on the whole, have been very unsupportive of alternative brokerages. WOODALL & BROBECK, *supra* note 25, at 16–17. While this author believes that the NJREC would act against steering if it was given more resources and enough pressure was applied on it by the public, the federal government, and the other two branches of New Jersey's state government, others may wish to read *Nine Pillars of the Citadel*, which advocates for a more aggressive approach to ending steering: federal creation of a national MLS system which fully exposes commission information to buyers and sellers. Barry, *supra* note 126, at 63.

[152] N.J. STAT. ANN. § 45:15-16.41(f) (West Supp. 2007) ("The commission may . . . [m]ake any necessary public or private investigations within or outside of this State to determine whether any person has violated or is about to violate any provision of this

that could be effective is to begin random steering inspections. Such a program could be similar to the Fair Housing inspections that are currently performed in New Jersey by the Division on Civil Rights[153] and private enforcement groups,[154] in which testers are utilized to see if brokerages are complying with Fair Housing laws.[155] In these steering inspections, the NJREC could use investigators posing as prospective buyers to see if brokers are steering buyers away from alternative brokerages' listings despite their instructions to see all available homes in a specific price range or area of town. Finally, to add some teeth to its enforcement measures, the NJREC should use the breach of the broker's fiduciary duty as a rationale for fining, suspending, or revoking the licenses of those brokers that engage in steering.[156]

V. CONCLUSION

New Jersey needs an increased level of price competition among brokers to reduce transaction costs associated with buying and selling a home. The best way to achieve price competition is through changing the legal and regulatory environment to encourage the growth of alternative brokerages. Three changes are necessary to accomplish this goal. First, the Legislature must pass A373 and legalize consumer rebates. Second, the NJREC should adopt a number of new measures

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act, or to aid in the enforcement of this act or in the prescribing of rules and regulations and forms hereunder"); *see id.* § 45:15-17 (further describing the extent of the NJREC's investigative powers); *see also* N.J. ADMIN. CODE § 11:5-1.1 (2004) ("The Real Estate Commission is responsible for . . . the investigation and adjudication of disciplinary actions against licensees . . . .").

[153] Some examples of New Jersey Law Against Discrimination actions where testers took part include: Press Release, N.J. Dep't of Law & Public Safety, Division on Civil Rights Files Housing Discrimination Complaints (June 23, 2003), http://nj.gov/lps/newsreleases03/pr20030623a.html (last visited Nov. 5, 2008); Press Release, N.J. Dep't of Law & Public Safety, Attorney General Announces Findings of Probable Cause in Housing Case (Feb. 15, 2007), http://www.nj.gov/oag/newsreleases07/pr20070215a.html (last visited Nov. 5, 2008).

[154] Fair Housing Council of Northern New Jersey, http://www.fhcnnj.org/index.htm (last visited Nov. 1, 2008).

[155] The Supreme Court of the United States has held that testers have standing. Public Law Research Institute, Investigatory Testing as a Tool for Enforcing Civil Rights Statutes, http://w3.uchastings.edu/plri/spring98/testing.html (citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)) (last visited Nov. 5, 2008). Similarly, "tester" standing is allowed in the New Jersey courts. T.L. v. Toys R Us, Inc., 605 A.2d 1125, 1146 (N.J. Super. Ct. App. Div. 1992) (Skillman, J.A.D., dissenting) ("For example, in *Polk v. Cherry Hill Apartments, Inc.* . . . we held that black 'testers' could pursue a claim for unlawful discrimination in the rental of apartments even though they had no actual intent to rent an apartment.") (citation omitted). *See generally* LANK & SOBECK, *supra* note 143, at 62.

[156] N.J. STAT. ANN. § 45:15-17 (West Supp. 2007) (provides the punishment that the NJREC may levy against a broker).

to increase consumer awareness of the anti-competitive practice of steering. Third, the NJREC needs to proactively investigate steering and punish those brokers who behave anti-competitively. If New Jersey adopts this framework, the increased price competition sparked by the changes would allow home buyers and sellers across the state to save substantial amounts on commission costs.