

Obstacles to Price Competition in the Residential Real Estate Brokerage Market

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INTRODUCTION

With between 1.4 and 2 million active real estate agents competing to sell about 5.3 million homes in a year, there is intense competition for listings in almost all markets in the nation.¹ Yet agents for the dominant, traditional brokers have successfully resisted pressures to compete on price. Those listing agents/brokers typically insist on a 6 percent commission which they tend to split evenly with the agent/broker representing the buyer. How can such commission levels and the pricing structure survive over decades in an intensely competitive industry with technologies greatly reducing listing agent marketing costs and shifting most of buyer search costs from agents to buyers? This article finds that the current environment exists because traditional brokers have used anti-competitive tactics to effectively hamper the growth of new entrants offering

1. While the Association of Real Estate License Law Officials (ARELLO) estimates that there are about 2 million active real estate licensees in the U.S., see *Quick Real Estate Statistics*, NAT'L ASS'N REALTORS, www.nar.realtor/research-and-statistics/quick-real-estate-statistics (last visited Feb. 19, 2020) [hereinafter NAR Stats], the 1.4 million members of the National Association of Realtors (NAR), *id.*, is probably a better estimate of the number of active agents. Meanwhile, there were only about 5.3 million homes sold in the U.S. in 2018. *Id.* Still, Real Trends estimates that the number of listings per member fell below 1.5 in 2017. *Average Commission Rate to Listings per Member*, REAL TRENDS (June 2018), at 7-8, <https://www.realtrends.com/blog/wp-content/uploads/2018/05/Membership-listings-graph.png> (last visited Oct. 8, 2019) [https://issuu.com/tsaxton9/docs/rt_0618news] [hereinafter Real Trends data graph].

lower rates and price competition. It proposes four policies for combating those practices.

Now the average commission rate that real estate agents charge has declined somewhat over the last decades from about 6 percent in 1991 to around 5.4 in 2000 and 2013, and 5.1 percent in 2017.² Yet that appears due primarily, if not exclusively, to two factors: (1) more homes are selling for prices above \$1 million, and commissions are more commonly 5 percent or even less for much higher-priced homes; and (2) discount brokers, who charge much lower rates, have captured a small share of the market.³ Meanwhile, because those rates are tied to housing prices, and those prices have risen faster than inflation over the past few decades, the inflation-adjusted fees that agents collect have significantly *increased*.⁴

Given the way the internet has reduced agent costs, why aren't inflation-adjusted commissions falling dramatically? Listing agent costs are falling dramatically due to portals like Zillow, paperless platforms for documents and signatures, automated scheduling, and lower cost analyses of home prices.⁵ Furthermore, about half of buyers today are finding the home they buy themselves online (up from 2 percent in 1997),⁶ greatly reducing the time buyers' agents spend assisting those buyers.⁷ Under these circumstances, one would expect results similar to the commissions that stockbrokers and travel agents used

2. Although there is no official compilation of gross real estate broker commissions, the most relied upon statistics in the industry have been those compiled by Steve Murray's Real Trends. *See* Real Trends data graph, *supra* note 1; 2007 DOJ/FTC Rep., *infra* note 50, at 38-45; Lydia DePillis, *The internet didn't shrink 6% real estate commissions. But this lawsuit might*, CNN BUSINESS, May 15, 2019; Class Action, *infra* note 55, at para. 12 (stating that in 2016 the CEO of Keller Williams reported to other industry participants that its average co-op fee had only dropped from 2.8% in 2002 to 2.71% in 2015); Andrea Riquier, *Meet the tech-savvy upstarts who think they can finally give Realtors a run for their money*, MARKETWATCH, Aug. 25, 2018; Nadel, *infra* note 11, at 6 n.15, 7 nn.20-22, and accompanying text.

3. Some traditional brokers have created affiliates to match the practices of new entrants. *See* Nadel, *infra* note 11, at 7 n.19; 2007 DOJ/FTC Rep., *infra* note 50, at 17.

4. The inflation-adjusted price of housing appears to have increased about 36% from 1991-2017, Tim McMahon, *Inflation Adjusted Housing Prices*, INFLATIONDATA.COM, <https://inflationdata.com/articles/inflation-adjusted-prices/inflation-adjusted-housing-prices/> (last visited Feb. 19, 2020), while commission rates fell by about 15%, *see supra* note 2, for a net increase in commission fees of about 20%.

5. *See* Paul Hagey, *2 startups charge flat fees for listings, revamping the real estate brokerage model*, INMAN, Apr. 27, 2015 (Houwzer's founders "determined the bloat was on the listing side, given that technology has made listing agents' lives so much easier."); Brian E Adams, *The Future of Real Estate Agents in 2020 and Beyond* (Jun. 21, 2019), <https://hooquest.com/the-future-of-real-estate-agents-in-2020-and-beyond/>; Telephone conversation with Douglas Miller, Realtor (Apr. 19, 2020). *But see* MOLLIE W. WASSERMAN, *THE END OF 6%: HOW TO GET THE REAL ESTATE EXPERTISE YOU NEED WITHOUT PAYING COMMISSIONS* *UNLESS YOU WANT TO 56* (2010) (ebook) ("[A]ll the great technology not only fails to save a good agent any net time on a transaction, but it has greatly driven up the average agents' expenses.").

6. According to an NAR survey, 49% of buyers found the home they purchased online in 2017 (51% in 2016). NAT'L ASS'N REALTORS, 2018 PROFILE OF HOME BUYERS AND SELLERS: TEXAS REPORT 85 (Exhibit 3-9) (Dec. 2018) [hereinafter NAR 2018 Rep.]. Furthermore, many other buyers find their homes after reviewing automated emails that they received advertising homes that fit their parameters. *See* Miller, *supra* note 5.

7. *But see* WASSERMAN, *supra* note 5, at 56 ("Realtors put in as many, if not more, hours into each transaction as they did fifteen years ago. Our time now is just spent differently") (sic.).

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to collect. Both of those fees were also based on a transaction price unrelated to the quantity or quality of service or incremental value they provided to consumers. Prior to 1968, stockbrokers charged commissions based on the number and price of shares they traded,⁸ and, prior to about 2002, the commissions airlines paid to travel agents were based on the price of the tickets sold.⁹ In both cases, however, when technology and regulators permitted new entrants to offer lower cost-based prices, competition forced incumbents to adopt sweeping price changes to reflect costs.¹⁰

In many markets there is an economic rationale that enables fees set as a percentage of a transaction price to survive in the face of effective price competition, as for personal injury attorneys, where liability is uncertain. There is no basis for such pricing by real estate agents.¹¹ The claim that the current typical 6 percent commission aligns the interests of the agent and the seller has also been rejected by many econometric studies¹² and is easy to debunk. For example, if an agent expected that spending 30 extra hours would increase the selling price of a home by about \$10,000, the 3 percent listing agent's commission on that increase (\$300), translating to $\$300/30 = \$10/\text{hour}$, or more likely \$7/hour,¹³ would hardly seem likely to motivate the agent to invest the time.¹⁴ To better align the interests of a listing agent and seller, the agent should receive a radically higher rate, e.g., 30 or even 50 percent, but only of the incremental value they produced, as discussed in section V.B, below.¹⁵

In addition, the formula perversely incents buyers' agents to encourage their clients to bid higher rather than secure a lower price. In this respect, the pricing

8. Under that system, trading 10,000 shares of a stock cost 100 times more than trading 100 shares of it. See generally Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?*, 35 REAL EST. L.J. 11, 20-26 (2006).

9. See *infra* notes 220-221 and accompanying text.

10. See *infra* notes 221-223 and accompanying text.

11. In a competitive market, labor compensation will be equal to the marginal product of labor or value added by the worker. While a percentage commission rate represents that value-added portion in many industry segments, see Mark S. Nadel, *A Critical Assessment of the Standard, Traditional Residential Real Estate Broker Commission Rate Structure (Unabridged)*, at 10-21 (2007), <https://ecommons.cornell.edu/handle/1813/70631> (discussing salespeople selling items with a profit margin, lawyers bringing personal injury lawsuits, or those in co-ventures, among others), and asserting that its only application to real estate agents is discussed *infra* section V.B.

12. See, e.g., Steven Levitt & Chad Syverson, *Market Distortions When Agents Are Better Informed: The Value of Information in Real Estate Transactions*, 90 REV. ECON. & STATS. 599 (2008) and studies noted in Peng Liu & Jia Xie, *Optimal Contract Design in Residential Brokerage*, REAL ESTATE ECON. 1, (forthcoming, Apr. 29, 2019 version)

13. Actually, both buyer and seller agents usually share their commissions with their brokers, with the agents typically retaining 70% of the commission. So here, the agent would receive 70% of the $\$300 = \210 for 30 hours.

14. Many scholars have recognized that a 6 percent commission gives an agent too little incentive to invest in generating incremental value. See, e.g., STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 8-9, 72-73 (2005); Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, 36 J. L. & ECON. 503, 506 n.7 (1993); but see Jai Xie, *Who Is "Misleading" Whom in Real Estate Transactions?*, 46 REAL ESTATE ECON. 527 (2018).

15. And just as agents should be fairly rewarded for the incremental value they produced, they should also be penalized for failing to secure more than the minimally acceptable price. See *infra* section V.B.

practices of realtors seem to make as much sense as tax preparers setting their fees as a set percentage of their client's gross income, irrespective of the complexity of preparing the return or the incremental savings the preparer could secure for the client.

So, why haven't new entrants with lower and different pricing models undermined the current pricing structure of the approximately \$90+ billion/year residential real estate brokerage market,¹⁶ and led prices to spiral downward¹⁷ to reflect the decreasing costs of providing the services, as one expects in a competitive market? Certainly, many have tried: TRELORA, Redfin, Foxtons and Purplebricks from England, REX, and Real Estate Café are only a few, some of whom have abandoned their efforts.¹⁸ Yet the market share of traditional real estate brokers remains dominant. The problem for those entrants is that the residential real estate industry is structured to require peer cooperation to complete transactions. Thus, innovative entrants offering to compete on price have been stymied by traditional real estate brokers acting as an informal cartel. This article will discuss the ways incumbents have managed to use industry rules and practices to protect their elevated fees,¹⁹ despite the cost to consumers and society.²⁰

First, traditional listing brokers generally avoid disclosing or discussing their prices, and they maintain the anti-competitive practice of setting co-op fees, the fees they offer to buyers' agents. A fall 2019 survey by the Consumer Federation of America (CFA) found that only 11 of 263 "realtor" websites surveyed (4 percent), including only one traditional broker, disclosed any information about their commission levels.²¹ Meanwhile, a 2007 survey found that 58 percent of

16. Stephen Brobeck estimates commission levels at \$100 billion. See STEPHEN BROBECK, HIDDEN REAL ESTATE COMMISSIONS: CONSUMER COSTS AND IMPROVED TRANSPARENCY 1 (Oct. 2019) [hereinafter CFA 2019 Hidden Prices]; see also Ryan Tomasello & Jade Rahmani, Keefe, Bruyette & Woods, *Is Real Estate on the Cusp of a Digital Sea Change*, CRE FINANCE WORLD, Winter 2020 at 53 (estimating commissions at \$80-90 billion/year); Alex Rampell, When Software Eats the Real (Estate) World (Nov. 29, 2018), <https://www.youtube.com/watch?v=IRPH3K1GXj0&feature=youtu.be> at 6:00 (estimating 2017 commissions at \$100 billion).

17. In 2015, the National Association of Realtors released the "DANGER Report," which detailed 50 threats, risks, and challenges the industry was facing or expected to face. Number seven on the list of 10 dangers facing the industry was "commissions spiral downward." Swanepoel Group, D.A.N.G.E.R Report, at 22 (2015) <https://www.dangerreport.com/usa/>. See also Andrea V. Brambila, *T3 Sixty 'Danger' report emerges as latest hitch in NAR lawsuit*, INMAN NEWS, Oct. 18, 2019.

18. See Riquier, *supra* note 2; Tomasello & Rahmani, *supra* note 16, at 68-73 (discussing Redfin, Compass, REX, Nested, and others); PATRICK WOODALL & STEPHEN BROBECK, CONSUMER FED'N OF AM., NONTRADITIONAL REAL ESTATE BROKERS: GROWTH AND CHALLENGES (2006).

19. Bryn Kaufman, Opinion, *Why the class action lawsuit against NAR and the big brokers makes sense*, INMAN NEWS, Jun. 3, 2019, ("You don't have to be a rocket scientist to figure out the buyer's agent commission is held artificially high by the current way we do business."); See *infra* section II.A.

20. For a list of studies concluding that the current industry rules are either conducive or resistant to price competition, see Justin D. Benefield, C. Stace Sirmans & G. Stacy Sirmans, *Observable Agent Effort and Limits to Innovation in Residential Real Estate*, 41 J REAL EST. RES. 1, 30 n.3 (2019).

21. See CFA 2019 Hidden Prices, *supra* note 16, at 3-4 (elaborating that the one traditional broker who disclosed information was pretty vague, with a wide range of 5 to 7 percent). See also What's New in Residential Real Estate Brokerage Competition: An FTC-DOJ Workshop session III at 10-11 [hereinafter III: 10-11] (Jun. 5, 2018) <https://www.ftc.gov/news-events/events-calendar/2018/04/whats->

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recent home buyers and sellers thought that commissions were set by the industry, by the agents, or by the government.²² Clearly, many, if not most, home buyers and sellers do not fully understand how agents are paid.²³ When fees may vary by tens of thousands of dollars, regulators should be suspicious of brokers' reluctance to publicize prices.

Consumers' lack of knowledge about commissions is understandable, since individuals generally only buy and sell a home every seven to ten years. Moreover, when they do, they are usually overwhelmed with issues relating to selecting a new home: mortgages, down payments, inspections, closing costs, etc., that the issue of commissions can fall by the wayside.²⁴ There is also the matter that government regulators have permitted listing agents that advertise their commissions to advertise only the portion that they will retain themselves, e.g., 3 percent or less. They are not obligated to disclose that they will also insist on charging at least double that to cover the commission for the buyer's agent.²⁵

Many, if not most home buyers have accepted the myth that their agents cost them nothing,²⁶ and the National Association of Realtors (NAR) Code of Ethics explicitly permitted agents to confirm this.²⁷ (In its November 2020 consent decree with U.S. Department of Justice (hereinafter 2020 Consent Decree), however, the NAR agreed to prohibit that message.²⁸) Yet this is clearly wrong. True, the buyer doesn't pay directly, but an example suggests that buyers bear the full amount indirectly, although others may contend that some of that fee is borne by the seller. Consider a seller willing to accept a bid of \$500,000 and to

new-residential-real-estate-brokerage-competition-ftc-doj [hereinafter FTC/DOJ 2018 Workshop] (Stephen Brobeck discussing the difficulty prying pricing information from brokers). Furthermore, only 3 percent of realtors advised sellers to ask agents about fees. CFA 2019 Hidden Prices, *supra* at 4.

22. See FTC/DOJ 2018 Workshop, *supra* note 21, at III: 13 (Stephen Brobeck).

23. *Id.* at 6-7; Jim Dalrymple, *Redfin to publicly display buyer's agent commissions on its listings*, INMAN NEWS, Aug. 29, 2019; FTC/DOJ 2018 Workshop, *supra* note 21, at I: 24, II: 12-13 (stating consumers are confused and don't realize who is paying the commission). See also Andrea V. Brambila, *Buyer's side commission confusion? Survey shows alarming results*, INMAN NEWS, Mar. 11, 2019.

24. See Video recording: Zoning, taxing, hoarding: Housing policies for the middle class, panel 2, held by the Brookings Institution's Future of the Middle Class Initiative and the Center on Regulation and Markets (May 8, 2019,) <https://www.brookings.edu/events/zoning-taxing-hoarding-housing-policies-for-the-middle-class/> (or https://www.youtube.com/watch?v=Ah2gwG_byro) at 33:28 - 34:47.

25. *Id.* at 34:48-35:48

26. See, e.g., Thomas O'Shaughnessy, *The Role of the Real Estate Agent*, LISTWITHCLEVER (Apr. 20, 2020), listwithclever.com/real-estate-blog/the-role-of-the-real-estate-agent/ (finding that approximately 45% of homeowners don't know they pay the buyer's agent commission when a home sells); FTC/DOJ 2018 Workshop, *supra* note 21, at II: 12-13.

27. Prior to a 2020 revision, NAR Standard of Practice 12-2 stated "REALTORS may represent their services as 'free' or without cost if they expect to receive compensation from a source other than their client provided that the potential for the REALTOR to obtain a benefit from a third party is clearly disclosed at the same time." See ASS'N OF REALTOR, CODE OF ETHICS AND STANDARDS OF PRACTICE (2018), <https://www.nar.realtor/sites/default/files/documents/2018-Code-of-Ethics-and-Standards-of-Practice.pdf>. See also Andrea V. Brambila, *NAR: Commission Lawsuits Could Be 'Disastrous' for Both Buyers and Sellers*, INMAN NEWS, July 26, 2019 (Russ Cofano and NAR's Jack Bierig discuss how buyers are misled to believe that buyer agents are free to buyers).

28. See *United States v. Nat'l Ass'n of Realtors*, No. 1:20-cv-3356 at V.F. (D.D.C. 2020), <https://www.justice.gov/opa/press-release/file/1338631/download> (proposed final judgment) [hereinafter 2020 Consent Decree].

pay a 6 percent broker commission (\$30,000 split evenly between the seller's and buyer's brokers' firms) and so willing to accept net proceeds of \$470,000. Since the seller's broker has agreed to accept a \$15,000 commission for its own services, the seller should accept a \$485,000 bid if there is no buyer's broker to compensate.²⁹ If, however, a buyer's broker must be paid \$15,000 by the seller, then the seller must demand \$15,000 more (\$500,000) to clear \$470,000. Thus, in this instance, the buyer pays the full amount of the buyer's broker fee.³⁰ So the buyer's agent fee should be recognized as an avoidable cost if the buyer does not use an agent.

Buyers' misunderstanding of this helps explain they do not typically attempt to negotiate with their agent over the agent's fee.³¹ In these cases, the fee defaults to the fee set by the seller, which the NAR encouraged, if not required, to be hidden, until the 2020 Consent Decree.³² This practice is harmful in an environment where buyers expect their agents to be loyal to them, not the seller. To top it off, in ten states, even buyer's brokers willing to rebate part of their co-op fee to the buyer are prohibited from doing so.³³

A second obstacle that new, non-traditional entrants face is probably the most significant: the resistance of traditional agents to cooperate with them—in this inherently cooperative business—by steering. Steering in real estate takes place when an agent or broker guides a buyer to or away from a particular property for their own selfish reasons rather than the best interests of the buyer. Currently, new entrants can and do advertise much lower prices than traditional buyer agents, even offers rebates, but they face heavy headwinds. Traditional agents often steer their buyers away from properties because the co-op fee that lower-priced agents offer to buyers' brokers is below the rate offered by traditional agents.³⁴ Moreover, even if the traditional broker expects to collect the same fee from the discount listing broker, traditional agents are reluctant to do business with them. After all, their very existence threatens to collapse the informal cartel that protects the inflated fees of traditional brokers. If discount brokers begin to

29. See, e.g., Blanche Evans, *Agents Can Win the Discount Game*, REALTY TIMES, Apr. 20, 2006 (instead of seeking rebates of the commission their broker collects, "buyers can come out just as well by asking for the same percentage off the cost of the home").

30. At least a few courts appear to understand this. See Matthew M. Collette, Note, *Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399, 440-41 n.218 (1988). While the buyer's broker's fee appears to come solely from the buyer, the seller's broker's fee may come out of the buyer or seller's pocket, depending on the elasticity of demand.

31. Most do not even make much effort to search for a buyer agent. See PANLE JIA BARWICK & MAISY WONG, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY: A CRITICAL REVIEW 17 (2019). In many, if not all states in the US, one can generally pay a lawyer a flat fee to handle a standard closing. Glenn Kelman said that about half the people working with a real estate agent asked the agent for a deal. See FTC/DOJ 2018 Workshop, *supra* note 21, at I: 15.

32. See 2020 Consent Decree, *supra* note 28, at section V.C & D

33. See *infra* section I.D.

34. See *infra* section I.B.1.

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thrive, traditional realtors would likely see their incomes drop dramatically, if they were not forced out of the business entirely.³⁵

Third, brokers have long sought to handle both sides of a sale by using practices like “pocket listings,” whereby a listing broker limits access to a property to only agents affiliated with their broker. This is likely to compromise the interests of sellers by denying them access to any attractive bids made by buyers represented by unaffiliated agents. Although many sellers are willing to give up the chance for a better price if they can avoid most of the time and hassle of the normal sales process, it appears that pocket listings and the relatively new entry of corporate buyers, or iBuyers, are not the best way for sellers to achieve those goals.³⁶

Fourth, some new firms have sought to allow buyers or sellers to do most of the work themselves, and only charge them for the services they desire—such as placing a listing in the multiple listing service (MLS) (the database of homes for sale in an area). Yet more than a dozen states have responded by requiring brokers to provide a specific minimum bundle of services, unnecessarily raising their costs.³⁷ In some ways, this situation resembles the American funeral industry, which Jessica Mitford expertly exposed in 1963 in *The American Way of Death*.³⁸ Consumers arranging for funerals were regularly asked to pay a single price for a bundle of services, many of which they did not want, but their ignorance (and psychological state) led them to accept.³⁹

Interestingly, despite often grossly excessive fees, the typical real estate agent does not appear to be overpaid given the time they spend on their job.⁴⁰ As an illuminating 2003 article by Chang-Tai Hsieh and Enrico Moretti explained, the current industry business model is seriously flawed: it attracts an oversupply of agents who spend much, if not most, of their time and effort prospecting for clients, with little benefit to consumers.⁴¹ (Today this also includes paying

35. See *infra* section II.A.

36. See *infra* section III.

37. See *infra* section IV. Note, nine additional states allow consumers to waive such requirements. *Id.*

38. The 1963 version was updated in JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* (1998). See also Bill Davidson, *The High Cost of Dying*, *COLLIER'S*, May, 1951 (“Even this honest majority [of undertakers] is guilty of accepting a mysterious, nation-wide fixing and raising of prices”) quoted in *id.* at 238.

39. After a long and extensive investigation of the industry, the FTC found that many consumers were led to purchase many services that they did not want as part of a bundle. In response, the agency adopted its “Funeral Rule,” which required funeral homes to provide consumers with itemized price lists and other data to help them to purchase only the specific services they desired. See *Funeral Industry Practices*, 47 Fed. Reg. 42260 (1982).

40. According to the NAR, the median gross income of Realtors was \$41,800 in 2018 for about 35 hours per week of work. NAR Stats, *supra* note 1. See also U.S. BUREAU OF LAB. STATS., *OCCUPATIONAL EMP. STATS.* (May 2018), <https://www.bls.gov/oes/current/oes419022.htm> (last visited Feb. 19, 2020) (estimating the median salary at \$48,690).

41. See Chang-Tai Hsieh & Enrico Moretti, *Can Free Entry be Inefficient? Fixed Commissions and Social Waste in the Real Estate Industry*, 111 *J. POL. ECON.* 1076, 1088-89 (2003); Lu Han & Seung-Hyun Hong, *Testing Cost Inefficiency Under Free Entry in the Real Estate Brokerage Industry*, 29 *J. BUS. & ECON. STATS.* 564, 577 (2011) (finding the cost inefficiency in the real estate broker industry is due

significant amounts to lead generators.⁴²) Hsieh and Moretti estimated that if commissions were subject to price competition they would fall by about half.⁴³ In 2007, this author estimated that a lack of effective price competition led home buyers and sellers to pay commissions inflated by more than \$30 billion per year,⁴⁴ and in 2019 that figure is likely to be as much as \$50 billion.⁴⁵ Furthermore, Panle Jia Barwick and Maisy Wong elaborate on the secondary harms that those inflated fees cause: harms to consumer mobility and even durable expenditures, not to mention the overallocation of agents to the industry.⁴⁶ One beneficiary of an excess of agents, however, is the NAR, which collects about \$200 million annually in dues from agents.⁴⁷

Over the last 40 years, the federal government has investigated and filed lawsuits against the industry many times, repeatedly identifying anti-competitive practices. The Federal Trade Commission (FTC) issued a major report about the industry in 1983,⁴⁸ and the Government Accountability Office (GAO) issued a

largely to agents' inability to compete on commissions); Justin Wolfers, *How to Get a Better Deal from a Real Estate Agent*, N.Y. TIMES, Oct. 27, 2019, at BU 3. These marketing efforts are called "farming" or "prospecting" for clients; FTC 1983 Rep., *infra* note 48, at 63-64; Geoffrey K. Turnbull, *Real Estate Brokers, Nonprice Competition and the Housing Market*, 24 REAL EST. ECON. 293 (1996). An environment with lottery-like payoffs for successes generally leads to rent-seeking behavior, whereby competitive marketing efforts dissipate any surplus value associated with a success. *Cf.* Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 797-803 (2004).

42. See Stephen Brobeck, Consumer Federation Of America, Public Comments to FTC/DOJ 2018 workshop <https://www.ftc.gov/policy/public-comments/2018/04/initiative-747>, [hereinafter FTC/DOJ 2018 Workshop Public Comments] #57 at 7-8 (Jun. 5, 2018/July 31, 2018); Gary Lucido, *How Zillow and Realtor.com Keep Real Estate Commissions High*, CHICAGO NOW, Oct. 19, 2017 (stating agents pay referral fees of about 25% of the commission they collect); FTC/DOJ 2018 Workshop *supra* note 21 at I: 21, 33 (Glenn Kelman); II: 8, III: 2. Zillow responds that it has merely replaced the older, less efficient media agents used for prospecting. See Zillow Comments, FTC/DOJ 2018 Workshop Public Comments *supra*, at #61 at 5-6 (July 31, 2018) [hereinafter Zillow 2018].

43. Hsieh & Moretti estimated that the social loss represented more than half of the total commissions earned in 1990, Hsieh & Moretti, *supra* note 41, at 1116, suggesting that more than half of current commissions might be eliminated by competition. One 2003 study estimated the total *excess* charges to home buyers for brokerage mortgage, and related services at \$39 billion annually, including about \$14 billion for real estate agent services. See Natalya Delcours & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the U.S. Brokerage Industry*, 5 INT'L REAL EST. REV. 12, 29 (2002) (finding that U.S. broker fees should equal something closer to 3 percent versus 6 to 7 percent, implying excess fees of as much as \$30 billion or more annually); see also Daniel Kadlec, *The Commission Squeeze*, TIME, Jan. 31, 2005, at 50 (quoting University of California, Berkeley professor Peter Sealey's prediction that commissions will ultimately be cut in half); Elizabeth Lesly, *How Your Realtor Rips You Off*, WALL ST. J., Nov. 30, 1990 at A14 (reporting that an FTC official reported being told by a former president of the California Board of Realtors that "2 percent is closer to what a competitive rate would be if there were not these artificial structures in the real estate industry").

44. See Nadel, *supra* note 11 at 8.

45. This is simply the author's own extrapolation from his 2007 estimate and estimates of commissions circa 2020.

46. See BARWICK & WONG, *supra* note 31, at 18-19; see also Hsieh & Moretti, *supra* note 41, at 1113-18 (discussing the misallocation of agents into the industry).

47. The 1.3 million members pay dues that were raised to \$150/year for 2019. See Andrea Brambila, *NAR Board Approves \$30 Annual Dues Increase for 2019*, INMAN NEWS, May 19, 2018.

48. From 1978 through 1981 the Los Angeles Regional Office of the Federal Trade Commission (FTC), working in conjunction with the Seattle Regional Office and the FTC's Bureau of Economics, conducted a nationwide investigation of the residential real estate brokerage industry. The investigation was coordinated with the FTC's Bureaus of Competition and Consumer Protection, under their general

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report in 2005.⁴⁹ The FTC and U.S. Department of Justice, Antitrust Division (DOJ) held a workshop on the industry in 2005 and issued a report in 2007.⁵⁰ The two held another joint workshop in 2018.⁵¹ The FTC and DOJ have also attempted to prevent states from imposing anti-competitive laws.⁵² In 2008, the DOJ and NAR reached a 10-year consent decree, which prevented brokers from withholding information about listings from competitors.⁵³ Most recently, in November 2020, the DOJ announced a lawsuit against the NAR and another consent decree.⁵⁴ In that consent decree, the NAR agreed to revise its rules and the rules of the MLS's of its members to:

- (1) enable buyers to view the formerly hidden co-op fees that listing agents offered to buyers' brokers,
- (2) prohibit its members from indicating that buyers' agents were free or available at no cost to buyers,
- (3) prohibit MLS participants from filtering listings that are displayed to buyers based on the fee offered to the buyer's agent, and
- (4) allow any licensed real estate agent access, with seller approval, to locked boxes of properties listed in the MLS.

Meanwhile, in 2019, five law firms—including one that successfully sued the tobacco industry—brought a class action antitrust lawsuit against the NAR and the four largest real estate brokerage firms in the country.⁵⁵ The lawsuit argues that the industry violates section 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracy to unreasonably restrain interstate trade.⁵⁶ The primary theory, as discussed in section I, below, is that the industry practice of requiring listing agents to set a hidden commission rate for buyers' agents

sponsorship. FEDERAL TRADE COMMISSION STAFF REPORT, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY, Vol. I., at 11 (1983), <http://www.ftc.gov/opp/workshops/comprealestate/index.htm> [<https://web.archive.org/web/20051130083414/http://www.ftc.gov/opp/workshops/comprealestate/index.htm>] [hereinafter FTC 1983 Rep.].

49. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REAL ESTATE BROKERAGE: FACTORS THAT MAY AFFECT PRICE COMPETITION 6 (2005) [hereinafter GAO 2005 Rep].

50. U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (2007) [hereinafter DOJ/FTC 2007 Rep].

51. See FTC/DOJ 2018 Workshop, *supra* note 21.

52. See, e.g., Maureen K. Ohlhausen, Competition Issues in Real Estate Brokerage, Antitrust Source at 4-7 (2005), <https://ssrn.com/abstract=2670702>; DOJ/FTC 2007 Rep, *supra* note 50, at 50-53. See also *infra* note 232.

53. See *United States v. Nat'l Ass'n of Realtors*, No. 05 C 5140, (2008) (consent decree), <https://www.justice.gov/atr/case-document/final-judgment-142>. One of the plaintiff's law firms helped secure \$206 billion from the tobacco industry in 1998. See Aly J Yale, *Lawsuit Alleges Collusion, Inflated Commissions Among Realtors*, *Forbes*, Mar. 19, 2019.

54. See David McLaughlin & Patrick Clark, *U.S. Opens Antitrust Probe of Real Estate Brokerage Industry*, *BLOOMBERG* (May 22, 2019), <http://bloomberg.com/news/articles/2019-05-22/u-s-opens-antitrust-probe-of-real-estate-brokerage-industry>.

55. Consolidated Amended Class Action Complaint at para. 1, *Moehrl et al. v. Nat'l Ass'n of Realtors et al.*, Civil Action No. 1:19-cv-01610 and 1:19-cv-2544 (N.D. Ill. Eastern Div. Jun. 14, 2019), motion to dismiss, denied, 2020 WL 5878016 (Oct. 2, 2020) [hereinafter Class Action].

56. 15 U.S.C. § 1.

inhibits price competition among buyers' agents. Other private lawsuits have followed.⁵⁷

To foster effective price competition and innovation in this market segment, this article recommends at least four main policy changes:

1. Prohibit listing agents from setting the fees for buyers' brokers (this would also moot the need for any states to repeal their prohibitions on rebates).
2. Take actions to deter traditional agents from steering clients away from transactions involving non-traditional brokers.
3. Permit brokers to offer real estate services on an unbundled, à la carte basis.
4. Ensure the widest dissemination of seller listings and related information consistent with the interests of the seller.

I. ALLOWING LISTING AGENTS TO SET AND COLLECT CO-OP FEES HAS MANY ANTI-COMPETITIVE EFFECTS AND NO BENEFITS TO THE PUBLIC

The first anti-competitive practice of traditional brokers that this article will examine is the custom of letting listing agents set the commission (even if it will no longer be hidden in the brokers' database⁵⁸) that buyers' agents will collect for the services that they provide to their clients. This practice is at the heart of the just-mentioned, class action lawsuit against the NAR. This section will review the history of the practice and its anti-competitive tendencies.

The norm in retailing is for salespeople to be loyal to their employer. While salespeople typically help buyers find suitable choices, they are often biased by the potential for higher commissions or other incentives for sales of particular items. Thus, they will generally not alert a customer to their best choice if it is not in inventory, unless the seller has no suitable alternative. The Macy's Santa Claus in the classic film *Miracle on Thirty-Fourth Street*—who placed consumers' interests first—attracted wide attention for deviating from this norm.

When buyers desire unbiased advice, they can pay for it directly by consulting impartial product reviewers, like *Consumer Reports*, *Wirecutter* and *Consumersearch.com*, as well as reviewers of local services, like *Washington Checkbook*. Some wealthy shoppers even pay for personal shopping consultants. While this author expected the internet to stimulate the emergence of many other paid, unbiased, personalized selection assistants,⁵⁹ shoppers appear to strongly

57. See First Amended Class Action Complaint, *Sitzer et al. v. Nat'l Ass'n of Realtors et al.*, No. 4:19-cv-00332-SRB (W.D. Mo. Jun. 21, 2019). *Sawbill Strategic, Inc. v. NAR et al.* (U.S. Dist Ct. N.D. Ill., Case No. 1:19-cv-02544) was filed Apr. 15, 2019 and later consolidated with the *Moehrl*. See Andrea Brambila, *Bombshell Suit Against Real Estate Firms Could Get Even Bigger*, INMAN, Jun. 26, 2019; E.B. Solomont, *A Trifecta! NAR Sued Again over Buyer-broker Commissions*, THE REAL DEAL (Jun. 8, 2020), <https://therealdeal.com/2020/06/08/a-trifecta-nar-sued-again-over-buyer-broker-commissions/>.

58. See 2020 Consent Decree, *supra* note 28, at section V.C & D.

59. For a discussion of the possible emergence of a new class of consumer product selection assistants. See Mark S. Nadel, *The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options*, 14 HARV. J. L. & TECH. 183 (2000), revised version available at www.ssrn.com/abstract=247818.

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prefer guidance that is free of charge, even if a bit slanted.⁶⁰ Then again, the norm in the market of financial investments (and a home is usually a family's largest investment) is for the investment advisor to act in the best financial interests of the investor.

As noted above, the price a buyer pays for a home includes the avoidable price of the buyer's agent, so the buyer should be free to negotiate that latter price based on his or her preferences. Allowing listing agents to set the default fee the buyer pays only frustrates competition.⁶¹

A. *Historical Basis for this Practice*

The practice of listing brokers setting and collecting the buyers' agents' fees arose because, until the 1990s, the agents who worked with home buyers were recognized in most states as sub-agents of the seller's agent.⁶² That is, the salespeople worked for the seller. Listing brokers used the MLS to make a blanket offer of sub-agency to the agent who found a buyer. And as subagents of the seller, agents working with buyers were actually duty-bound to serve the seller's best interests, including, surprisingly, passing on to sellers' agents any secrets buyers shared with them about how high they would bid!⁶³ Still, circa 1980, more than 70 percent of buyers *and sellers* believed that the agent aiding the buyer was representing the buyer's interests and thus some courts interpreted the common law of agency to that effect.⁶⁴ Yet when courts began holding listing brokers liable for the services of buyer brokers,⁶⁵ the industry quickly shifted to

60. Because investors in internet startups in the 1990s were willing to finance free internet content to attract an audience, individuals grew to expect to have access to content at no charge, making it difficult for websites to operate as economically viable businesses by charging for the valuable information they provide. *Id.* at 202-04; Michael E. Porter, *Strategy and the Internet*, HARV. BUS. REV., Mar. 2001, at 63, 76-77.

61. See Kaufman, *supra* note 19.

62. See Collette, *supra* note 30, at 406-08.

63. See Ann Morales Olazabal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. LEG. 65, 113-14 (2003); RAY WILSON, BOUGHT, NOT SOLD: SINGLE AGENCY, BUYERS' BROKERS, FLAT FEES, AND THE CONSUMER REVOLUTION IN REAL ESTATE 83 (1998). One mid-1980s survey, however, found that agents working with buyers only passed on the highest price buyers would pay about half the time and, furthermore, selling agents who knew the lowest price that sellers would accept passed this on to buyers half the time! See Royce de R. Barondes & V. Carols Slawson, Jr., *Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents*, 84 OR. L. REV. 681, 693-94 (2005); FTC 1983 Rep., *supra* note 48, at 23-24 (finding that 66 percent of sellers surveyed indicated that brokers had told them how high they thought particular buyers would go).

64. For example, the 1983 FTC report found that more than 70 percent of buyers (and sellers) thought that the broker working with the buyer was "representing" the buyer, although state laws of sub-agency held otherwise. FTC 1983 Rep., *supra* note 48, at 14. On the other hand, some state court decisions found that buyers were due common law agency duties of agents, see Barondes & Slawson, *supra* note 63, at 691-93 (discussing common law and other principles); Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25, 35-36 (1995); Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560 (1987); FTC 1983 Rep., *supra* note 48, at 180-81.

65. The trigger point litigation was probably the \$18.2 million loss by a Minnesota real estate broker. See *Dismuke v. Edina Realty, Inc.*, No. 92-8716, 1993 WL 327771 (Minn. Dist. Ct. June 17, 1993); *Bokusky v. Edina Realty, Inc.*, No. 3-92 CIV 223, 1993 WL 515827 (D.Minn. Aug. 6, 1993). And other lawsuits followed. See Brown et al., *supra* note 64, at 45-50.

require agents to disclose who their primary client was (although such disclosures are often neglected).⁶⁶ Today, the fiduciary loyalties of agents vary from state to state and are confusing.⁶⁷

In the late 1970s, when innovative broker Bill Broadbent introduced the concept of a broker who was loyal to the buyer, he expected that buyers would negotiate to set buyers' brokers' fees.⁶⁸ Although this is clearly the economically appropriate approach,⁶⁹ the industry has strongly resisted this. The NAR's Buyer Broker Commission Rule requires a listing broker to make a blanket, unilateral offer of compensation (a percentage of the gross sale price of the home or a definite dollar figure) to buyer-brokers when entering a home in an MLS owned by a local NAR association.⁷⁰ That rule has many anti-competitive effects.

B. Allowing the Listing Agent to Set the Co-op Fees Creates a Conflict of Interest Between the Buyer and the Buyer's Agent

Co-op fees set by the listing agent can incent buyer agents to favor those offering the highest co-op fees and away from those offering the lowest, and when that fee is based on the sale price, it leads buyers' agents to encourage their clients to bid higher.

66. See NATIONAL ASSOC. OF REALTORS, 2005 PROFILE OF HOME BUYERS AND SELLERS (2006) [Hereinafter NAR 2005 Survey] (reporting that less than one third of buyers in 2005 were told by their agents at their first meeting who the agent represented); Kenneth R. Harney, *Agents Falling Short on Disclosure*, WASH. POST, Mar. 18, 2006, at F1.

67. See Stephen Brobeck, *Why Required Real Estate Agent Disclosures About Representation Fail and How They Can Be Improved*, CONSUMER FEDERATION OF AMERICA (Jan. 2020). The best histories of state treatment of agents appear to be Olazabal, *supra* note 63; Matt Carter, *From Subagency to Non-agency: A History*, INMAN NEWS, Feb. 17, 2012; Stephen Brobeck, *The Agency Mess*, CONSUMER FEDERATION OF AMERICA (Jan. 14, 2019). For a good discussion of the fiduciary rule, see Quinn Curtis, *The Fiduciary Rule Controversy and the Future of Investment Advice*, 9 HARV. BUS. L. REV. 53 (2019).

68. See WILSON, *supra* note 63, at 9-10, 79, 89-95.

69. See, e.g., Brian Larson, *The End of MLS as We Know it Redux*, Dec. 15, 2010, (part 1 of 3-part articles), larsonskinner.com/2010/12/15/the-end-of-mls-as-we-know-it-redux-part-1; BARWICK & WONG, *supra* note 31 at 19-21 (as is done in other countries); Editorial, *Jim Crow South? No*, *Long Island Today*, N.Y. TIMES, Nov. 27, 2019, at A22; WILSON, *supra* note 63, at 92; BERNICE L. ROSS, WAGING WAR ON REAL ESTATE'S DISCOUNTERS 291 (2005); Abdullah Yavas & Peter Colwell, *Buyer Brokerage: Incentive and Efficiency Implications*, 18 J. REAL EST. FIN. & ECON. 259, 262 (1999); *Why Does it Cost So Much to Sell a House?*, FORBES, Oct. 15, 1972, at 35, 36 [hereinafter 1972 Forbes Cover Story] (quoting Williams Farnsworth, executive in the Beverly Hills office of Coldwell, Banker). *But see* Mark Bagnoli & Naveen Khanna, *Buyers' and Sellers' Agents in the Housing Market*, 4 J. REAL EST. FIN. & ECON. 147 (1991) (concluding that society is better off if buyers' agents are paid by sellers). Still, courts have not found it improper for an agent whose duty is to serve the buyer to be paid by the seller's agent. See *Brean v. N. Campbell Pro. Bldg.*, 548 P.2d 1193, 1197 (Ariz. App. Div. 2 1976); *Duffy v. Setchell*, 347 N.E.2d 218, 221 (Ill. App. 1976).

70. See *Division of Commissions, Section 5: Compensation Specified on East Listing*, HANDBOOK ON MULTIPLE LISTING POLICY 65 (NAR 2020), <https://cdn.nar.realtor/sites/default/files/documents/NAR-HMLP-2020-v2.pdf> ("In filing a property with the multiple listing service of an association of REALTORS®, the participant of the service is making blanket unilateral offers of compensation to the other MLS participants, and shall therefore specify on each listing filed with the service, the compensation being offered to the other MLS participants. Specifying the compensation on each listing is necessary, because the cooperating broker has the right to know what his compensation shall be prior to his endeavor to sell.*"); see *Class Action*, *supra* note 55, at paras. 60-61, 73.

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1. *Buyers' Agents Will Steer Buyers Based on Co-op Fees (Steering I)*

Like most self-interested salesmen, buyers' agents will favor listings that offer them the highest commissions.⁷¹ As a Manhattan broker explained, "Let's say I have 10 studios, one [offering a co-op fee of] 10 percent, one at 6, one at 4 and one at 2, . . . Which one do you think I'll show?"⁷² Listing brokers recognize this tendency and use high co-op fees to steer buyers' agents. In 2005, the president of Realogy (the largest residential real estate brokerage company in the world), explained this to an audience at a U.S. Department of Justice (DOJ)/FTC workshop on real estate competition. In a market where buyers were scarce, he might appeal to buyers' agents by offering a co-op fee up to 5 percent rather than the typical 3 percent level.⁷³ Another broker, writing in a 2008 *Cornell Real Estate Review* article, observed that "desperate sellers are now offering buyers' agents up to 10% commission to help them sell their property."⁷⁴

These practices encourage buyer agents to place their own interests (and those of the sellers) ahead of their buyer clients. If the Realogy broker was willing to forgo two out of the 3 percent of his own commission to try to attract a seller, why didn't he recommend a 2 percent making the home more attractive to buyers by cutting its price by 2 percent? Similarly, if a seller is willing to offer a 10 percent commission, (4 percent more than the standard 6 percent level) to sell the house in a slower market, why not reduce the price of the home by 4 percent to make it more appealing to buyers? Their experience in the industry, however, has convinced these brokers that it is more effective to appeal to the financial interests of buyers' agents than to those of the buyers themselves.⁷⁵

As noted above, there is nothing wrong with employers offering special inducements to their salespeople to sell particular items. Yet even where states do not require buyer agents to act as fiduciaries, the NAR Code of Ethics does not appear to permit agents to place their own financial interests ahead of their

71. See Rob Hahn, Update on NBER's Realtor Commission Study, Sept. 28, 2015, <http://notorious-rob.com/2015/09/update-on-nbers-realtor-commission-study/> (discussing Randy Ora's listing presentation video); Peter Coy, *Home Buyer, Beware*, BUSINESSWEEK.COM (Dec. 14, 2006); Robert J. Bruss, *Realtor Says Raising the Commission Pays Off*, INMAN NEWS, July 17, 2006 (offering a 4 percent commission to the buyer's agent did the trick).

72. Mary McAleer Vizard, *For Brokers' Commissions, It's Not Just a 6 Percent Solution*, N.Y. TIMES, May 28, 1995, §9 at 1.

73. See DOJ/FTC Competition Policy and Real Estate Industry Oct. 25, 2005 Workshop Transcript, at 194-95. <http://www.ftc.gov/opp/workshops/comprealstate/051209transcript.pdf> [hereinafter DOJ/FTC 2005 Workshop Transcript]; FTC/DOJ 2018 Workshop, *supra* note 21, at II: 26.

74. See Barbara Nichols, *A Response to "A Critical Assessment of the Traditional Residential Real Estate Broker Commission Rate Structure"* (abridged) by Mark S. Nadel, 6 CORNELL REAL EST. REV. 37, 40 (2008).

75. This includes offering buyer agents higher commissions, vacations, and other gifts. See FTC 1983 Rep., *supra* note 48, at 75; ROBERT IRWIN, TIPS AND TRAPS WHEN SELLING A HOME 176 (3rd ed. 2004); James R. Hagerty & Ruth Simon, *Do Real-Estate Agents Have a Secret Agenda?*, WALL ST. J., Nov. 9, 2006, at D1; Robert J. Bruss, *Sell My Home, Win Vacation, Electronics*, INMAN NEWS, Oct. 2, 2006; Damon Darlin, *Location, Location, Location. Research, Research*, N.Y. TIMES, Nov. 5, 2005, at C1.

client's interests.⁷⁶ Under these circumstances, a listing agent's offer of a 10 percent commission on a particular home (in a field in the MLS database that is not easily viewable by buyers) entices buyers' agents to steer their clients to buy that particular home over more suitable options. That offer is a solicitation to the buyers' agents to violate any fiduciary duty they owe to their buyer clients.⁷⁷ In fact, offering a fee to a party to cause them to favor the payor's interests ahead of their client's interests is essentially the definition of a bribe, and should be recognized as such.⁷⁸ Rules that permit this type of co-op fee facilitate attempted bribery. The 2020 Consent Decree will take a step toward addressing this problem by allowing buyers to see the co-op fees their agents will receive for each property, but it is not clear whether any such disclosures will come in time to allow most buyers to attempt to negotiate a reduced fee.

On the flip side, the lower co-op fees often offered by lower-priced new entrants lead agents to steer their clients away from such properties.⁷⁹ If buyers specifically ask to see a home, the agent may emphasize, if not exaggerate, the drawbacks of the property. Thus econometric studies have found that lower commission listings are less likely to sell and take longer to sell.⁸⁰ According to Keller Williams University course materials, offering less than a 3 percent co-op fee "will reduce the number of willing and qualified buyer that will see your

76. In fact, Article 1 of the NAR Code of Ethics requires agents to act in the interest of their clients, and case #1-26 specifically addresses this issue. See Bruce Aydt, *Ethics: Q&A: In Whose Interest?*, REALTOR MAGAZINE ONLINE (Jun. 1, 2006), <http://www.realtor.org/rmomag.NSF/pages/ethicsjun06?OpenDocument> (observing that the NAR Code of Ethics and Standards of Practice requires its realtors to place their clients' interests ahead of their own interests). For concerns about steering in other industries, see Panle Jia Barwick, Parag A. Pathak & Maisy Wong, *Conflicts of Interest and Steering in Residential Brokerage*, 9 AM. ECON. J.: APPLIED ECON. 191, 191 n.1 (2017).

77. Even if they thought the home was actually the most suitable, the buyer deserved to enjoy the benefit of the seller's effective price reduction.

78. See Douglas Miller, CAARE, FTC/DOJ 2018 Workshop Public Comments, *supra* note 42, at #52 at 5 (July 26, 2018).

79. See *Re/Max Int'l Inc. v. Realty One Inc.*, 173 F.3d 995, 1010 (6th Cir. 1999); *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 1983-2 Trade Cas. ¶ 65,718, 1983 WL 2199, at *3, *5 (C.D. Cal.), *aff'd* 786 F.2d 1400 (9th Cir. 1986); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1059 (5th Cir. 1985); FTC/DOJ 2018 Workshop, *supra* note 21, at II: 16 (comment of Joshua Hunt); Rob Hahn, *Do Not Minimize Ragnarok: Very Serious Legal Threat, Part 2* (Mar. 13, 2019) <https://notorious-rob.com/2019/03/do-not-minimize-ragnarok-very-serious-legal-threat-part-2/> (providing and discussing the words of Joshua Hunt); DOJ/FTC 2007 Rep., *supra* note 50, at 66-69; FTC 1983 Rep., *supra* note 48, at 12, 14, 39-40, 75; BARWICK & WONG, *supra* note 31, at 13-14 (noting dominant firms are even less likely to assist in the purchase of low commission rate listings); DePillis, *supra* note 2; WOODALL & BROBECK, *supra* note 18, at 11-13; Blanche Evans, *Buyer Wants to Know Why Broker is Showing Agency Listings Only*, REALTY TIMES, July 1, 2005; Robert J. Bruss, *Home Sale Goes South When Sellers List with Broker Friend*, INMAN NEWS, Aug. 15, 2005. This can also arise when traditional brokers discriminate against new entrants by offering them only an "adverse split" of the total commission. See *infra* note 91.

80. See, e.g., BARWICK & WONG, *supra* note 31, at 11 ("[W]e consistently find that lower commission listings are less likely to sell and take longer to sell."); See also Barwick et al., *supra* note 76; Steven D. Levitt & Chad Syverson, *Antitrust Implications of Outcomes When Home Sellers Use Flat-Fee Real Estate Agents*, 2008 BROOKINGS-WHARTON PAP. URB. AFF. 47. Moreover, the carrying cost of a protracted sales process could easily outweigh the savings on commissions, not to mention that a delayed payment could delay the seller's opportunity to make a down payment. See BARWICK & WONG, *supra* note 31 at 8.

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home.”⁸¹ For example, when one buyer’s agent called REX about a home his buyer wanted to see and he discovered that he would not receive any co-op fee—instead the seller agreed to add whatever commission he negotiated with the buyer to the price of the home—the buyer’s agent said he would not show the home to his client.⁸² The 2020 Consent Decree should at least allow buyers to discover the low co-op fees offered for homes that they are attracted to if agents do not identify them.

It will be most effective, however, at shutting down another anticompetitive practice. Some traditional brokers, like the Greater Las Vegas Association of Realtors, trained their agents to use a software program called Matrix to screen out listings offering low co-op fees (below 2.5 percent) when generating email lists of available, suitable homes to send to buyers.⁸³ This result scared some sellers away from discount brokers, and some blame it for the failure of Foxtons.⁸⁴ The 2020 Consent Decree prohibits that practice.⁸⁵ The FTC hypothesized that the ability of brokers to steer their customers to homes associated with agents charging the going commission rate “is the most important factor explaining the general uniformity of commission rates in most local markets.”⁸⁶

So listing brokers strongly resist seller suggestions to set the co-op fee below the going rate.⁸⁷ Rather, many discount listing brokers offer to pay buyers’ brokers the going rate in the market, limiting their discounts to reductions in only their share of the commission.⁸⁸ Interestingly, even if home sellers offer co-op fees at the going rate, buyer agents may still shun them. Buyers’ agents worry that those not using full-service agents, like For Sale By Owner (FSBO) sellers, will burden the buyer’s agent to take responsibility for handling loose ends that arise before closing, like providing HOA documents or ensuring that all agreed upon repairs have been made, tasks normally handled by a listing agent.⁸⁹ To avoid such uncompensated extra work or the awkwardness of requesting a higher

81. See Class Action, *supra* note 55, at paras. 64, 85.

82. Audio tape: phone call, <https://www.politico.com/f/?id=00000175-f224-d27b-a5f7-f23419a40000>.

83. See Class Action, *supra* note 55, at paras. 70-71.

84. See Bradford Muller, *Encouraging Price Competition Among New Jersey’s Residential Real Estate Brokers: Reforms to Promote the Growth of Alternative Brokerages and Reduce Transaction Costs*, 39 SETON HALL L. REV. 665, 684 (2009).

85. See 2020 Consent Decree, *supra* note 28, at sections V.C & D.

86. FTC 1983 Rep., *supra* note 48, at 12, 55.

87. See CFA 2019 Hidden Prices, *supra* note 16, at 8.

88. See, e.g., DePillis, *supra* note 2 (“TRELORA . . . tried to offer flat fees to buyers’ agents, but stopped after their listings got way less interest and switched back to the standard 3% . . .”); FTC 1983 Rep., *supra* note 48, at 154 (most lower-priced brokers split their commissions 50-50 with buyer agents, but many offer cooperating agents the going rate); James R. Hagerty, *Discount Real-Estate Brokers Spark a War Over Commissions*, WALL ST. J., Oct. 12, 2005, at A1 (discussing Sharon Jebavy); Hal Cohen, *Death of a Sales Commission*, BUSINESS REPORT, Feb. 14, 2006 (quoting broker David LaPointe).

89. See Blanche Evans, *New Study with Implications for MLSs Shows Freeloaders Unwelcome*, REALTY TIMES, Apr. 10, 2006; Geoff Lewis, *Competition in the Residential Real Estate Brokerage Industry*, Comment 9 (Oct. 4, 2005).

fee, which may be misunderstood as extortion, buyer agents might just not show their clients such listings.⁹⁰

Traditional brokers also harm their seller clients' interests when they try to discourage buyers with non-traditional brokers, by offering the latter lower co-op fees than traditional agents, i.e., "adverse splits" or even nothing,⁹¹ or refuse to show homes to clients of non-traditional brokers, as discussed in more detail in section II, below.⁹² Again, their fiduciary duties should not permit such tactics.

Buyers have generally seemed unaware of the differing co-op fees and their possible effect on which homes their agent will steer them towards or away from.⁹³ Although MLSs have a field that indicates the size of the co-op fee, and also a comment field that may offer a bonus to agents that sell multiple homes listed by the broker, MLS rules have long prohibited those fields from being displayed to home buyers,⁹⁴ making it easier for agents to surreptitiously steer buyers to the homes most rewarding to the agents rather than the buyers.⁹⁵ That began to change in Seattle, on Oct. 1, 2019 when the broker-owned Northwest MLS no longer required sellers to provide a co-op fee in the MLS and stopped hiding those fees.⁹⁶ The 2020 Consent Decree's requirement that those co-op fees be displayed to buyers applies that disclosure approach nationally. This is

90. See Audio tape, *supra* note 82; Miller, *supra* note 78, at 4.

91. See *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1000-01, 1003 (6th Cir. 1999) (defendants offered plaintiff's agents only a 70-30 or 75-25 split instead of the standard 50-50 split); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1059 (5th Cir. 1985); WILSON, *supra* note 63, at 91-92; FTC 1983 Rep., *supra* note 48, at 160; William L. Trombetta, *Using Antitrust Law to Control Anticompetitive Real Estate Industry Practices*, 14 J. CONSUMER AFF. 142, 146-47 (1980); Roberts, *supra* note 88; Glenn Roberts, Jr., *N.Y. Realtor Group Cautions Members on Rate Setting*, INMAN NEWS, Nov. 17, 2005; Jim Bourgoin, *Buyers Advantage*, Comment, Nov. 28, 2005 <http://www.usdoj.gov/atr/public/workshops/rewcom/213405.htm>. The NAR handbook recommended that splits be designed to "encourage cooperation," as opposed to competition, FTC 1983 Rep., *supra* note 48, at 139, and it permits brokers to send a letter to particular brokers to inform them that the broker will not pay them the split indicated in the MLS listing, but rather a specific alternative fee. But this cannot be retaliation. See NJ State ruling, <http://www.state.nj.us/dobi/acrobat/recadvisory051220.pdf>. (prohibiting adverse splits as retaliation); Glenn Roberts, Jr., *Real Estate Regulator Advises Fair Play in Discourage Commission Splits*, INMAN NEWS, Dec. 20, 2005. See also Valerie Cotsalas, *Brokers Who Represent Buyers*, N.Y. TIMES, Apr. 16, 2006, §11, at 12 ("[M]any listing agents offer no commission to buyer's agents.").

92. See Damon Darlin, *The Last Stand of the 6-Percenter?*, N.Y. TIMES, Sept. 3, 2006, §3, at 1.

93. In the 1980s, most buyers believed that the agent working with them was trying to serve their best interests. See FTC 1983 Rep., *supra* note 48, at 183-84, 192 n.580.

94. See Class Action, *supra* note 55, at para. 75. And when broker tried to reveal that data, the MLS cracked down. See Paul Hagey, *Broker Pulls Commission Data from Listing Site After MLS Demand*, INMAN, Feb. 13, 2015.

95. See Matthew Magura, *How Rebate Bans, Discriminatory MLS Listing Policies, and Minimum Service Requirements Can Reduce Price Competition for Real Estate Brokerage Services and Why It Matters*, U.S. DEP'T JUST. ECON. ANALYSIS GRP. at 8 n.21 (2007) ("[B]uyers are never aware when their agents select out the homes with lower priced commission offerings.").

96. See Andrea V. Brambila, *Northwest MLS Breaks the Mold to Allow Public Display of Agent Commissions*, INMAN NEWS, July 23, 2019; Katherine Long, *Buying a Home in Seattle Area May Get Thousands of Dollars Cheaper, After Rule Change by Agents*, SEATTLE TIMES, Sept. 30, 2019. See also Russ Cofano, *Bombshell Lawsuit Could Wreck Havoc for Buyers*, INMAN NEWS, Mar. 28, 2019 (advocating that the NAR mandate a requirement that MLSs make the co-op fee publicly available).

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certainly a step in the right direction—by exposing the bias⁹⁷—but the timing of the disclosures could undermine its purpose, and it does not address the essence of the problem, which is that listing agents should not be setting even default buyer broker fees.

2. A Percentage Co-op Fee Incentivizes Buyers' Agents to Urge Buyers to Bid Higher

As explained above, basing broker commissions on the sale price of the home is problematic,⁹⁸ in part because the typical co-op fee incentivizes buyers' agents to encourage buyers to bid higher. Absent some good reason to support this approach, this ethical flaw is yet another reason to ban percentage co-op fees set by sellers. Buyers in a bidding war should not have to worry that one of the reasons their agent recommends that they raise their bid by \$5,000 is that the agent's commission will rise by \$90.⁹⁹ Certainly, a judge would not approve an arrangement where a husband agreed to pay his wife's divorce attorney a fee that, at least in part, increased as the estimated fair market value of the property allocated to the husband increased. As discussed, in section V.B, below, it is not clear how to tie a buyer's agent fee to the sale price of the home, but it would need to be inversely related to the final sale price.

C. Allowing Listing Agents to Incorporate Co-op Fees into the Listing Agreement Inhibits Buyers from Saving Money by Going It Alone

As 95 percent of buyers use the internet, it should not be surprising that 50 percent discover the home they eventually purchased themselves online.¹⁰⁰ In these situations, many, if not most buyers might want to follow the practice in Australia and the United Kingdom and handle the tasks up to closing with only the help of a real estate lawyer for a flat fee.¹⁰¹

Consider a buyer, having found the perfect \$800,000 home herself, and wanting to save the \$24,000 (half of the \$48,000 (6 percent commission)) co-op fee allocated for her agent. The buyer should be able to pocket that \$24,000 for forgoing a buyer's agent, just as the 7 percent of sellers who choose to forgo the use of a listing agent by going FSBO save the cost of a listing broker.¹⁰² She will find it difficult, however, to recover any portion of that \$24,000 allocation from

97. Disclosure would appear to stifle efforts at bribery. See Roman Inderst & Marco Ottaviani, *Competition Through Commissions and Kickbacks*, 102 AMER. ECON. REV. 780, 803 (2012).

98. See text accompanying notes 11-15, and following paragraph *supra*.

99. This assumes that the buyer's agent will get 60% of the \$150 increase from the 3% buyer's broker's fee.

100. See NAR 2018 Rep., *supra* note 6 at 85, 88 (exhibits 3-9 & 3-12).

101. See Stefanos Chen, *The U.S. Has Some of the World's Highest Real Estate Commissions*, WALL ST. J., Oct. 7, 2016; See DePillis, *supra* note 2. In many countries, purchasing a home without an agent is common. See BARWICK & WONG, *supra* note 31 at 8. In many, if not all, states in the US, one can generally pay a lawyer a flat fee to handle a standard closing.

102. See NAR 2018 Rep., *supra* note 6 at 114 (exhibit 6-31).

the \$800,000. In the 10 states that prohibit rebates,¹⁰³ the standard contract converts the amount to a bonus to the listing broker. In the remaining states, if she had found it at an open house without engaging a broker, the listing broker would likely claim the fee under the doctrine of “procuring cause,” as the agent who found her.¹⁰⁴ To get any part of the \$24,000, she would need to have selected a broker offering rebates before her visit. The problem is that once a seller has signed the standard listing agreement, which allocates a specific commission on a sale, the co-op fee designated for the buyer’s agent is not available for the seller to refund to the buyer who wants to go it alone. MLS rules actually prohibit listing brokers from adjusting co-op fees after the buyer has made a bid, even if the seller asks that the arrangement reflect the buyer’s situation and preferences concerning a broker.¹⁰⁵ By effectively forcing buyers to pay the cost of a buyer’s broker—whether they use one or not—it should be no surprise that even those who find the home they will buy on their own still use real estate brokers.¹⁰⁶

D. Co-op Fees Set by Listing Agents Prevent Price Competition in the 10 States That Prohibit Rebates

The law in most states permits buyers’ agents to compete on price indirectly by offering rebates of a portion of the co-op fees that they will collect, e.g., 1 percent of a 3 percent commission. Agents such as Seattle-based Redfin, Chicago-based BuySide Realty, and Mid-Atlantic-based IHS Realty all initially offered buyers in those states large rebates from the commissions they received, while expecting those buyers to do more of the home searching themselves.¹⁰⁷ Although many of those rebate levels have fallen, many buyer brokers now set discount fees and agree to rebate any additional amount they receive from the seller’s broker.¹⁰⁸ Yet NAR rules prohibit buyers from making offers that modify the buyers’ broker’s commission.¹⁰⁹

103. See *infra* section I.D.

104. See Beth Nagalski, *Ending the Uniformity of Residential Real Estate Brokerage Services: Analyzing the National Association of Realtors’ Multiple Listing Service Under the Sherman Act*, 73 BROOK. L. REV. 771, 785-86 (2008); FTC/DOJ 2018 Workshop, *supra* note 21, at I: 26; Blanche Evans, *Buyers Mad They Can’t Cut Threshold Agent Out of the Deal*, REALTY TIMES, Aug. 24, 2005.

105. See Kaufman, *supra* note 19; Class Action, *supra* note 55, at paras. 14, 88-90. Once a buyer has submitted an offer, the seller-broker is prohibited from attempting to unilaterally modify the buyer-broker commission that was offered on the MLS. NAR Standard of Practice 3-2, cited in Class Action, *id.*

106. *Id.*

107. See, e.g., James R. Hagerty, *Real Estate Brokers Step Up Rebates*, WALL ST. J., Apr. 5, 2006, at D1; Jessica Swesey, *Internet Stock Brokerage Pioneers Enter Online Real Estate*, INMAN NEWS, Apr. 6, 2006.

108. See *infra* section III.A.

109. See NAR Code of Ethics Standard of Practice 16-16, <https://www.nar.realtor/sites/default/files/policies/2012/code-of-ethics-article-16-2012-08-30.pdf> (“Realtors, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker’s offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker’s agreement to modify the offer of compensation.”).

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Ten states, however, prohibit this by prohibiting rebates.¹¹⁰ While it is clearly in the public interest to prohibit rebates that represent hidden kickbacks, which disguise conflicts of interest, rebates to consumers are generally pro-competitive. In fact agreements not to offer discounts are ordinarily *per se* violations of antitrust law.¹¹¹ After all, prohibitions against price competition over buyer broker fees reduces social welfare,¹¹² merely to protect the revenues of traditional brokers.¹¹³ Thus both Republican and Democratic-controlled DOJ's, FTC's, and the *Wall Street Journal* have criticized and opposed such laws successfully in Kentucky, Montana, South Dakota, and West Virginia.¹¹⁴ In addition, New Jersey repealed its ban on rebates in 2010.¹¹⁵ Of course, this issue would become moot if there was a prohibition against listing-agent setting default co-op fees, leaving those fees to be set directly in the competitive market.

The prohibitions against rebates illustrate the political power of the real estate brokerage industry. As the 1.3-million-member NAR,¹¹⁶ the largest trade association in the nation, has asserted, “realtor associations have the right to lobby for favorable legislative and regulatory action even if the effect of such action would be anti-competitive.”¹¹⁷ The presence of its members’ in every voting district of every state legislature and its large campaign contributions make it one of the most powerful lobbyists in the nation.¹¹⁸ As one state official

110. Four states expressly prohibit rebates. See ALA. CODE § 34-27-36(a)(12); KAN. STAT. ANN. § 58-3062(a)(4)(Supp. 2002); MISS. CODE ANN. § 73-35-21(1)(j)(2000); TENN. CODE ANN. § 62-13-302(b) (bans cash rebates). Six or seven others base their prohibitions against rebates on laws prohibiting the sharing of real estate commissions with anyone but a licensed agent. See ALASKA STAT. §08.88.401(d)(1) (Michie 2002); LA. REV. STAT. ANN. § 37:1446 (A) & (B) (West 2000); OKLA. STAT. ANN. 59 § 858-312(21) (West Supp. 2004); OR. REV. STAT. §696.290(1) (West 2003). Missouri bases it on a statute prohibiting inducements. See MO. REV. STAT. 339.100(13), 339.150(2). Finally, Iowa prohibits rebates when the consumer uses two different brokers. See IOWA CODE § 543B.60A(3)(b) (West Supp. 2003). (Amended 2005 by House File 882). New Hampshire has declined to enforce N.H. REV. STAT ANN. §331-A:26(XXIV).

111. See Sherman Act, 15 U.S.C. §1; *Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980) (per curiam).

112. See Han & Hong, *supra* note 41, at 577 (“our results demonstrate that the antirebate policies are welfare-reducing”); Anupam Nanda, John Clapp & Katherine Pancak, *Do Laws Influence the Cost of Real Estate Brokerage Services? A State Fixed Effects Approach* 44 REAL EST. ECON. 918 (2016).

113. Although the NAR takes no official position on anti-rebate laws, the laws appear to result from NAR state affiliates, and the NAR’s general counsel published an April 22, 2005 memo that observes that even anti-competitive state laws are generally exempt from the federal antitrust laws. See Blanche Evans, *Steel Magnolia v. The Men in Black*, REALTY TIMES, Apr. 26, 2005.

114. See DOJ/FTC 2007 Rep., *supra* note 50, at 50-53; U.S. DEP’T OF JUST., *Enforcing Antitrust Laws in the Real Estate Industry* (July 2, 2015), <https://www.justice.gov/atr/enforcing-antitrust-laws-real-estate-industry>.

115. Until 2010, NJ STAT. REV. ANN. §45:15-17(k) (West 1995 & Supp. 2003) banned rebates in NJ. See N.J. Dept. Banking & Insurance, Real Estate Commission, *Rebates of Real Estate Commissions* (Feb. 5, 2010), https://www.state.nj.us/dobi/bulletins/blt10_03.pdf.

116. See NAR Stats, *supra* note 1.

117. See Glenn Roberts, Jr., *A Leading Lobbyist for a Powerful Lobby*, INMAN NEWS, Nov. 2, 2004 (first in a five-part series); Glen Justice, *Lobbying to Sell Your House*, N.Y. TIMES, Jan. 12, 2006, at C1 (quoting from a letter from NAR general counsel, Laurie Janik to state associations).

118. *Id.* The association spent about \$150 million on federal lobbying and elections in the 2018 cycle, the 2nd most of any industry on lobbying. See CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/orgs/summary.php?id=d000000062&cycle=2018>; (last visited Feb. 19,

noted “virtually no proposed legislation relating to real estate has a chance of passage unless it is approved by the state association of realtors.”¹¹⁹ Then again, the passage of the 2017 tax cut challenged that view, since the law sharply reduced deductions for mortgage interest and property paid by homeowners.¹²⁰

E. The Use of Co-op Fees Facilitates Price-Fixing

The industry has long favored cooperation over competition, including the splitting of the listing broker fee equally with the buyer’s agent.¹²¹ In 1950, the NAR’s code of ethics stated that “every Realtor . . . should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.”¹²² So even after a 1950 Supreme Court decision found the brokers guilty of price-fixing in violation of antitrust laws, such practices continued. Many brokers argued that the decision only applied to Washington, D.C. brokers, not to those in the states.¹²³ It wasn’t until 1971 that the NAR officially adopted a policy of “hands off” regarding commission rates,¹²⁴ and the DOJ had to file lawsuits to end “suggested fee” schedules.¹²⁵

Combining (1) the inertia from this long history of fixed prices, (2) the reluctance of listing agents to set co-op fees below the prevailing rate displayed to them in the MLS, given the practices of buyer agents, discussed above,¹²⁶ (3) the general aversion of traditional agents to price competition,¹²⁷ and (4) the ability of agents to punish deviators, as discussed below,¹²⁸ the result is a strong

2020); FTC 1983 Rep., *supra* note 48, at Vol. II, App. C, at 5-7; Virginia Gray, *On the Political Power of the Real Estate Broker*, in AMERICAN ANTITRUST INSTITUTE REAL ESTATE PROJECT: SYMPOSIUM ON COMPETITION IN THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY (2005); David E. Rosenbaum, *In a Test of Lobbying Muscle, Realtors Prevail*, N.Y. TIMES, July 13, 2003, §1 at 14.

119. FTC 1983 Rep., *supra* note 48, at 98.

120. See Stephen Fishman, *How Does the Tax Cut and Jobs Act Affect Homeowners?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-does-the-tax-cuts-and-jobs-act-affect-homeowners.html> (last visited Feb. 19, 2020).

121. See, e.g., The 1913 first Code of Ethics, adopted by the National Association of Realtors’ predecessor group and stating as a realtor’s eighth duty to other members: “. . . always be ready and willing to divide the regular commission equally with any member of the Association who can produce a buyer.” Available at <https://www.nar.realtor/about-nar/history/1913-code-of-ethics> (last visited Feb. 19, 2020).

122. *U.S. v. Nat’l Ass’n of Real Est. Bds.*, 339 U.S. 485, 488, 494-95 (1950). Realtors justified this as necessary to protect the public against excessive rates. See *U.S. v. Nat’l Ass’n of Real Est. Bds.*, 84 F.Supp. 802, 803 (D.D.C. 1949), *rev’d*, 339 U.S. 485 (1950).

123. See Norman G. Miller & Peter J. Shedd, *Do Antitrust Laws Apply to the Real Estate Brokerage Industry?*, 17 AMER. BUS. L.J. 313 (1979). It wasn’t until *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) that that issue was laid to rest.

124. The NAR issued its “Fourteen Points” multiple listing policy statement. See FTC 1983 Rep., *supra* note 48, at 133-35 n.354.

125. See FTC 1983 Rep., *supra* note 48, at 195-99 (offering a short history of fee schedules and listing DOJ cases). See also *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 228 (9th Cir. 1974); *United States v. Foley* 598 F.2d 1323 (4th Cir. 1979) (finding explicit price fixing).

126. See *supra* section I.B.

127. See John William Hatfield, Scott Duke Kominers & Richard Lowery, *Collusion in Brokered Markets* 43 (Harv. Bus. Sch. working paper No. 20-023, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450767.

128. See *infra* section II.B.

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incentive to maintain fixed co-op fees.¹²⁹ While the fall 2019 CFA survey mentioned above concerned agents for sellers, not buyers, it found that only 27 percent said that they would or might be willing to negotiate a rate reduction.¹³⁰ And one would expect that an even smaller share of buyer agents would negotiate given that they may not discover the co-op fees until it was too late to do so.¹³¹

F. Co-op Fees Deter Rates Based on Quality-of-Service or Market Conditions

In some markets, the administrative costs of setting different prices for different levels of service leads providers to charge a single price. For example, most haircuts are priced the same even though some stylists may provide clearly superior service than others,¹³² and balding customers, like this author, are quicker to serve than the average customer. Uniform prices may also emerge for services that are sufficiently routine that excellent quality can be provided with relatively little experience.

But for most professional services from lawyers, accountants, and the like, less experienced professionals generally charge much lower-than-average rates, while those at the top of their fields and in high demand generally charge relatively high rates. This gives consumers the chance to use lower-priced options for tasks where they do not need great expertise and the top-flight, highest priced talent only when they think the cost is justified.

Given the size of the fees paid to buyers' brokers, one would expect brokers to price their services based on their skill level and experience or the perceived difficulty of the task, i.e., how much time it is likely to require. Yet, because in most cases it is sellers who set the co-op fee paid to buyers' brokers, negotiations for lower priced service is foreclosed in states that prohibit rebates. (In states where rebates are permitted, less-experienced buyer agents can offer low prices, rebating any excessive co-op fees, if their brokers permit it.) In the coming environment of non-opaque, if not hidden co-op fees, however, buyers would likely be confused about why some agents were offering rebates (i.e., negative prices), some charged "no direct fees," while the most highly valued buyer agents set fees that required buyers to supplement the co-op fees. An environment

129. And price-fixing has long been recognized. See Bruce Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate*, 29 STAN. L. REV. 931, 947-48 (1977).

130. See CFA 2019 Hidden Prices, *supra* note 16, at 5, 9-11 (stating that 70 percent of agents quoted a rate of 6%, 19 percent quoted a rate of 5%). But see Ann Schnare & Robert B. Kulick, *Do Real Estate Agents Compete on Price? Evidence from Seven Metropolitan Areas*, in HOUSING MARKETS AND THE ECONOMY: RISK, REGULATION, AND POLICY 317 (Edward L. Glaeser & John M. Quigley, eds., 2009) (referencing a 2006 Real Trends study that found that 62% of sales professionals felt pressure to negotiate their commissions and that 31% were willing to negotiate the commission).

131. See BARWICK & WONG, *supra* note 31, at 20. Sellers trying to coordinate their price fixing will usually favor simple pricing schedules, even though quality differences go unrewarded. See White, *supra* note 8 at 8.

132. At some high-priced hair salons or the like, where demand for some popular servers exceeds their availability, servers may charge more by requiring a significant tip just to be able to get into one of their time slots.

where buyers are led to believe that their agent's services are free makes it awkward for buyer brokers to raise the issue of their fees,¹³³ and thus the misinformation discourages price competition by buyer agents.

G. Buyers Should be Able to Amortize Their Buyer Agent Fees in a Mortgage

Some complain that forcing the buyer to negotiate a buyer's broker fee separate from the sale price of the home would saddle buyers with an additional large closing cost. They assume that because the fee would not be part of the purchase price, it could not be amortized as part of the mortgage.¹³⁴ But as long as the fee a buyer pays to a buyer's broker is legitimate, mortgage lenders should be willing to view the fee as part of the purchase price of the home for the purposes of the mortgage, as it is now. Mortgage lenders should not care whether a buyer's broker is paid directly by the buyer or indirectly by the listing broker, and that should be reflected with a definition of "sale price"—for the purpose of setting the maximum level for a mortgage—that includes the amounts paid to both buyer and seller brokers as listed on the standard closing form.¹³⁵

FSBO sellers generally allow the buyer to include the commission for a buyer's broker in the price of house, making it easy for mortgage brokers to amortize it. Similarly, non-traditional listing brokers, like REX, which does not pay co-op fees, are willing to roll that cost into their selling price.¹³⁶ To the extent that a traditional listing agent wants to hinder non-traditional buyer agents, they might refuse to bake the buyer agent's fee into the selling price, but a mortgage broker should still be willing to do so. Any lack of availability of this option today is probably due to a lack of demand. If it became illegal for listing brokers or sellers to pay the buyer's agent, then one would expect lenders to formally define the sale price to include the buyer's broker fee, even if it was separate from what was paid to the seller.¹³⁷

133. See Larson, *supra* note 69 (discussing an informal survey where less than a third of agents raised the issue with buyers); Robert J. Ringer, *Salting the Record*, REALTY TIMES, Feb. 6, 2006.

134. See NAR Comments, FTC/DOJ 2018 Workshop Public Comments, *supra* note 42, #60 at 4 (July 31, 2018); DePillis, *supra* note 2; Brambila, *supra* note 27 (quoting NAR attorney Jack Bierig); Cofano, *supra* note 96 ("a buyer's agent's fee is not presently something that can be financed.").

135. See WILSON, *supra* note 63, at 146-47; Marcie Geffner, *Home Sale Commission Financing Would Benefit All*, INMAN NEWS, July 21, 2006; Brian Larson, *An Alternative to Interbroker Compensation*, INMAN NEWS, Aug. 16, 2006; Telephone conversation with Barry Miller, Founder, Real Estate Buyer Agent Council (Aug. 26, 2006). The former HUD-1 closing form has been replaced by the TRID form. <https://www.consumerfinance.gov/policy-compliance/know-you-owe-mortgages/new-disclosures-streamline-process/>.

136. See Audio tape *supra* note 82.

137. See E-mail from Douglas Miller to author (Nov. 3, 2019) (on file with author).

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H. In Conclusion: Listing Agents Should be Prohibited from Setting Buyer Agent Fees

Given the many anti-competitive effects of allowing listing brokers to set a default co-op fee for buyers' brokers and the lack of any reasonable benefit to consumers, it is hard to understand why such an anachronistic practice is not prohibited as an anti-consumer, protectionist policy for preserving real estate agent fees. The 2020 Consent Decree's requirement that the previously hidden co-op fee be available to buyers should help deter steering, but the NAR was probably unwilling to accept a complete decoupling of buyer and seller commissions absent an unfavorable decision at trial. In light of the class action lawsuit in progress,¹³⁸ the DOJ may have believed that some partial, but more immediate, relief was its best option. Still, it would have been better if the disclosure requirement also required buyers' agents to disclose (1) any bonuses a seller offers them (as indicated in a hidden field of the MLS), as well as (2) whether they will commit to show the buyer all of the homes that meet their criteria, irrespective of co-op fees offered to the buyer agent.¹³⁹ Given the power of the NAR and the industry as a whole, legislation to prohibit listing agents from setting buyers' agent fees is unlikely. However, the private class action lawsuit could lead to a court decision or settlement with the NAR securing this result.

II. TRADITIONAL AGENTS HAVE THE MEANS AND THE MOTIVATION TO STEER THEIR CLIENTS AWAY FROM TRANSACTIONS INVOLVING DISRUPTER BROKERS (STEERING II)

In addition to steering their clients away from homes offering lower co-op fees, as discussed in section I.B.1, above, traditional brokers and agents have a strong incentive to steer their clients away from transactions involving any real estate brokers competing on price in their market. Traditional brokers want to prevent disrupters from succeeding and undermining the traditional business model.¹⁴⁰ One might expect that agents would be unable to steer buyers and sellers away from such homes and buyers, respectively, now that 95 percent of buyers use the internet and search for homes themselves.¹⁴¹ Yet when buyers decide to use an agent—whether because they think it would be helpful, free, or that they are paying for it anyway (as noted above)—they are apt to rely on their agent to identify the most suitable choices. They may welcome emails the agent's software generates when homes that meet their criteria come available, freeing them to focus on their other responsibilities. Moreover, even when a buyer discovers some omissions and challenges their agent, skilled buyer agents

138. See 2020 Consent Decree, *supra* note 55.

139. Still, under current practices, buyers' agents may not be obligated to show homes if the seller does not set a co-op fee. See REVISED CODE WASH. 18.86.050(1)(e)(ii).

140. See Magura, *supra* note 95, at 9-10.

141. See NAR 2018 Rep., *supra* note 6, at 88 (Exhibit 3-12).

can always apologize for the oversight or explain it away by listing the property's flaws.

A. *Traditional Agents Have as Much as a \$50 Billion/Year Self-interest in Preserving the Traditional Business Model with its Lack of Effective Price Competition*

Agents have a strong incentive to favor cooperation over price competition that could threaten the current business model, which produces around \$90 billion/year in commissions.¹⁴² A review of real estate agent commissions around the world suggests that if competition were to drive prices down to agent costs, commissions could fall by 50 percent or more.¹⁴³ As of 2015, agent commission rates were between 1 and 2 percent in Australia, Ireland, Netherlands, Norway, Singapore, and the United Kingdom; and 3 percent or less in Belgium, Canada (usually), China, and Finland.¹⁴⁴ Since real estate brokers in comparable Western nations are making a profit at those rates, their costs must be even less, and one would think that brokers in the United States could also be profitable at those rates.¹⁴⁵ American brokers might respond that they use expensive MLSs, which most other countries have been slow to embrace, but there are two answers to that. First, MLSs are recognized as an efficient way to manage real estate listings,¹⁴⁶ and thus would presumably reduce, not increase, costs. Second, brokers in New York City do not use an MLS and yet do not charge lower rates than other brokers.

Using Hsieh & Moretti's estimate that a competitive marketplace could reduce commissions by more than 50 percent, consumers could expect to save as much as \$50 billion/year, reducing real estate agent income by that same amount. This could easily lead half of the current active agents to leave the business,¹⁴⁷ cutting annual NAR membership fees in half. Clearly, brokers, agents, and the NAR have a lot at stake in protecting and preserving the status quo. As an agent for a traditional, large, national brokerage firm explained in an email to a friend who listed her home with a flat rate (discount) broker:¹⁴⁸

I love you guys but why would I want to sell your property? Most full-service agents in ... County want to remain full-service agents and I am one of them. Why would any full-service agent want to help a flat rate broker? None of us do. We don't want

142. See note 16, *supra*.

143. See Chen, *supra* note 101 (displaying a chart of the real estate broker Surefield's survey results); Norm Miller, The US Residential Real Estate Brokerage Industry's Resistance to Commission Rate Competition with Some Speculating on the Future of the Industry, presented at AAI, Washington, D.C. (Nov. 8, 2005), <https://www.antitrustinstitute.org/wp-content/uploads/2018/09/464f.pdf> at slide 3; Delcours & Miller, *supra* note 43, at 16-17, 37.

144. See Miller, *supra* note 143.

145. See Kadlec, *supra* note 43; Lesly, *supra* note 43,

146. See *infra* note 210.

147. See *supra* note 46.

148. E-mail received by real estate agent, (Sept. 20, 2006) (on file with author. The county name has been omitted to protect the writer's privacy). See also Cohen, *supra* note 88 (discussing emails received by Della Neely).

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to become flat rate agents and if flat-rate agents become successful then we would all have to become flat-rate agents. They have a VERY small % of the business out there. We want to keep it that way. If I can avoid showing Help U Sell properties or Assist to Sell properties. I also will not show them. When you list with a full-service agency then you have the co-operation of most of the agents in ... County. A 3% commission with a bonus is not enough incentive to put a nail in the coffin of our industry. . .

Undoubtedly, traditional agents may occasionally choose to favor their own short-term interests and those of their clients by dealing with a non-traditional broker to close a sale. Yet, absent stronger legal incentives, a combination of peer pressure and their own long-term interests will lead most traditional agents to try to avoid such transactions.

B. The General Need for Two Agents to Make a Deal Empowers Traditional Agents with the Means to Hinder New Entrants

In addition to the motive to resist competitors threatening to undermine their cash cow, traditional agents also have a particularly good opportunity to do so, because real estate transactions almost always require cooperation between the listing and buyer's agents—what the FTC's 1983 Report recognized as “interdependence.”¹⁴⁹ While the NAR undoubtedly recognizes that an explicit boycott of non-traditional agents would trigger antitrust lawsuits,¹⁵⁰ more subtle and passive forms of collusion appear to be common.¹⁵¹ Moreover, agents can explain their reluctance to pursue a transaction with a non-traditional broker as a preference for avoiding the higher risk of dealing with a less established partner. Given clients' general strong aversion to risk, whether they are buying a first house or coordinating a sale and purchase, agents can defend a strong preference for dealing with trusted traditional brokers with whom they have longstanding relationships.

Collusion is generally easier and thus more likely when it requires only a small number of entities to conspire together,¹⁵² and so one might think that most local real estate markets are not concentrated enough to maintain such a conspiracy.¹⁵³ Still, a 2019 economic analysis finds that even “an extremely unconcentrated industry, such as real estate brokerage, can still support collusive pricing” because brokers must work with each other to complete transactions.¹⁵⁴

149. The FTC's 1983 report recognized that the tremendous interdependence among agents facilitated efforts to discourage price competition. FTC 1983 Rep., *supra* note 48, at 2, 11, 32-42. *See also* White, *supra* note 8, at 16-17; Levitt & Syverson, *supra* note 80, at 50, 54; BARWICK & WONG, *supra* note 31, at 16.

150. *See infra* note 162.

151. *See* Magura, *supra* note 95, at 11-13; Levitt & Syverson, *supra* note 80, at 50-51.

152. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 199 (2d ed. 1980); Levitt & Syverson, *supra* note 80, at 54-55.

153. *See* Schnare & Kulick, *supra* note 130, at 311, 312; Levitt & Syverson, *supra* note 80, at 58.

154. *See* Hatfield et al., *supra* note 127, at 22, 36; Levitt & Syverson, *supra* note 80, at 49-51. The model used by the former indicates that eliminating rebate bans reduces the scope of collusion and eliminating co-op fees can weak the ability of industry participants to maintain high prices. Hatfield et al., *supra* note 127 at 36.

Meanwhile, it appears that more concentrated local real estate markets lead to higher prices.¹⁵⁵

Also, there are many ways that brokers can punish disrupters or traditional agents that deal with such disruptors.¹⁵⁶ A buyer's agent needs the listing agent to be available for showings at convenient times and not to be late or otherwise disrespect the buyer's agent or embarrass them in front of their buyer client. The buyer's agent needs the listing agent to answer questions that a buyer might have in a timely manner and respond quickly to bids. If a tentative deal is struck, the buyer's agent needs the listing agent to ensure that the seller makes promised repairs or meets other requests in a reasonable time.¹⁵⁷ Buyers also want to know about homes that are "coming soon" before they are listed in the MLS. Listing agents need to rely on buyers' agents to ensure that their buyers are actually qualified for a mortgage and that they will show up for appointments on time.¹⁵⁸ If buyers get cold feet or have financing problems, listing agents want to hear quickly from buyers' agents so that they can respond appropriately.¹⁵⁹

Traditional agents have also had little reason to worry that their actions to frustrate non-traditional entrants would trigger punishment from regulators. Given how difficult it can be to prove anti-competitive practices, policing such behavior is not a high priority for regulators.¹⁶⁰ As the *Wall Street Journal* recognized, sanctions for breach of ethics due to such practices have been non-existent.¹⁶¹ Also, since each agent could claim that their actions were taken based solely on their own individual aversion to entry of the disrupter, boycotts may qualify as unilateral refusals to deal. Given that agents individually lack monopoly power, such unilateral refusals are not recognized as violating the antitrust laws.¹⁶² Furthermore, traditional agents willing to offer rebates to

155. See BARWICK & WONG, *supra* note 31 at 10. But see Jason Beck Frank Scott & Aaron Yelowitz, *Competition and Market Structure in Local Real Estate Markets*, 40 REAL EST. ECON. 422 (2012) (finding no evidence that market concentration might create problems for competition).

156. See Levitt & Syverson, *supra* note 80, at 58-60.

157. See FTC/DOJ 2018 Workshop, *supra* note 21, at 1: 26 (Luke Glass, Realtor.com).

158. See Susan M. Wachter, *Residential Real Estate Brokerage: Rate Uniformity and Moral Hazard* in 10 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF URBAN PROPERTY RIGHTS 189, 195, 204 (Austin J. Jaffe ed. 1987) ("The full rate firm may claim 'difficulty' in getting in touch with or arranging to view the discount broker's listings. . . . Full rate brokers may procrastinate in returning phone calls from discount brokers or in informing their listing customer of a potential buyer who is represented by a discount broker."). But see Glenn Roberts, *Lawsuit Alleges Real Estate Commission-Fixing in Illinois*, INMAN NEWS, Dec. 20, 2006 (discussing lawsuits charging broker with refusing to present offers to the seller).

159. See Magura, *supra* note 95, at 5 n.14 & 15 n.49.

160. See Wachter, *supra* note 158, at 195 ("Passive non-cooperation and disparagement may take subtle forms that either are difficult to police or are perfectly legal."). For example, one would generally expect agents to return the calls and fulfill the requests of "friends" and favored colleagues before others; Nichols, *supra* note 74, at 39 ("Rarely, if ever, do our overburdened courts, prosecutors and departments of real estate have the time, finances or personnel to prosecute any agent or seller for fraud, let alone violation of fiduciary duty.") notes that an agent's violations of his or her fiduciary duty is a matter for civil litigation.

161. See *infra* note 180.

162. Although group boycotts are violations of section 1 of the Sherman Act, *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985); *Fashion Originators' Guild of Am.*

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customers (from their own share of the commission) often feel pressure to act secretly out of fear of being shunned by their colleagues, if not fired by their broker!¹⁶³

C. *Traditional Agents Portray Disrupter Brokers as Inferior and Sabotage Them*

Traditional agents also try to dissuade buyers and sellers from using lower-priced new entrants by disparaging them,¹⁶⁴ heralding the old adage: “you get what you pay for.”¹⁶⁵ Traditional agents imply that brokers with lower prices *must* be skimping on quality and/or services¹⁶⁶ compared to the “full service” offered by traditional brokers, although they conveniently fail to define full service.¹⁶⁷ This is easy to refute by noting that if brokers who charge a 6 percent commission (\$18,000 on a \$300,000 home) can afford to provide full service, then brokers charging *only* a 4 percent commission on a \$1 million home (\$40,000) can, too. There is also empirical data finding that discount brokers do not secure significantly lower prices.¹⁶⁸ Yet when media firms criticize protectionist tactics of traditional brokers or praise new firms, vocal brokers accuse the media of being misinformed and biased.¹⁶⁹

v. FTC, 312 U.S. 457 (1941), mere conscious parallel conduct alone, is not enough, although inferences about group understandings may be drawn. See *ES Development, Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 555 (8th Cir. 1991); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985); Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L.J. 271, 319-20 (1992); Trombetta, *supra* note 91, at 147-48; Owen R. Phillips & Henry N. Butler, *The Law and Economics of Residential Real Estate Markets in Texas: Regulation and Antitrust Implications*, 36 BAYLOR L. REV. 623, 649 (1984).

163. See Glenn Roberts, Jr., *Brokerage Terminates Agent Who Founded Rebate Network*, INMAN NEWS, Mar. 9, 2006; Timothy J. Mullaney, *Real Estate Brokers Are Racing for Shelter*, BUS. WEEK, Apr. 10, 2006, at 75.

164. See WOODALL & BROBECK, *supra* note 18, at 15-16, and more generally 13-17.

165. See DePillis, *supra* note 2 (“‘We receive a bunch of pushback from traditional agents,’ Doubet said. ‘They badmouth us. The classic refrain is, “you get what you pay for,”’ Doubet said.”); Kelly A. Spors, *What You Need to Know About Commission Rates*, WALL ST. J. ONLINE, Sept. 20, 2004 (quoting Steve Cook, a spokesperson for the NAR: “Most people want a full-service agency to help them. In the end, you get what you pay for.”).

166. See IRWIN, *supra* note 75, at 52 (warning that agents who offer to accept a lower commission may fail to disclose that they expect to do less work, e.g., merely list the property in the MLS). See also FTC 1983 Rep, *supra* note 48, at 154, 164 (noting that 22 percent of sellers reject non-traditional agents because they provided less service, although most of them offered “full service.”).

167. See Miller, *supra* note 143, at slide 9 and oral presentation. The main response to the observation that residential real estate agents in other developed nations like England, Ireland, Australia, etc., charge only 2 to 3 percent commissions is that brokers in these countries do not offer full service. Miller’s research, however, finds that the only significant difference between the services provided and costs incurred is that agents in the U.S. generally find it necessary to protect themselves against lawsuits by buying liability insurance. *Id.* at slide 3 and oral presentation.

168. See Igal Hendel, Aviv Nevo & Francois Ortalo-Magne, *The Relative Performance of Real Estate Marketing Platforms: MLS Versus FSBOMadison.com.*, 99 AMER. ECON. REV. 1878 (2009) (finding that sellers are unlikely to get a significantly lower price by using a limited-service broker).

169. See Blanche Evans, *Are Banks, Newspapers Behind Recent Real Estate Industry Rants?*, REALTY TIMES, June 21, 2006; Blanche Evans, *Rotten Media Spin on Realtors Begins Anew*, REALTY TIMES, Sept. 12, 2005; Blanche Evans, *Vitriolic Washington Post Attack Confirms Conspiracy of Disinformation*, REALTY TIMES, May 19, 2005.

Non-traditional entrants have also faced threats and sabotage. One discounter reported that after he offered a discounted co-op fee in the MLS, “[w]e’ve had bricks thrown through car windows. We’ve had our cars egged. We’ve had hate mail sent to our sellers.”¹⁷⁰ The Executive Director of Consumer Advocates in American Real Estate reports that innovative entrants are not only boycotted by traditional agents, but also litigated out of business.¹⁷¹ An FTC survey of non-traditional brokers that posted listings on the MLS found that 49 percent frequently experienced refusals by other brokers to show their homes and a similar percentage reported threats as a frequent problem.¹⁷² That survey also found that newspapers had refused to print ads from more than one-third of discount brokers due to threats from other agents.¹⁷³

Because of buyers’ and sellers’ strong aversion to risk and fear of inferior results, noted above, merely planting seeds of doubt about the quality of non-traditional brokers is often enough to scare buyers and sellers away from engaging them.¹⁷⁴ In addition, homes handled by non-traditional agents sell more slowly, less frequently, albeit at prices only slightly lower those represented by traditional brokers.¹⁷⁵ The carrying cost of a protracted sales process alone could outweigh the savings on commissions, not to mention that a delayed payment could delay the seller’s opportunity to make a down payment on a new home.¹⁷⁶ Jim Gillespie, a real estate agent “coach” from Temecula, Calif., told *Money Magazine* that he advises agents to use the specter of boycotts to dissuade sellers from listing with discounters.¹⁷⁷

D. *Helping Consumers Defeat Steering*

A 2005 *Wall Street Journal* editorial complained that steering by real estate agents represents “a clear breach of the fiduciary duty of the agent to find the

170. See FTC/DOJ 2018 Workshop, *supra* note 21, at II: 7 (comments of Joshua Hunt). See also DOJ/FTC 2007 Rep., *supra* note 50, at 68-69.

171. See Miller, *supra* note 78, at 3.

172. See FTC 1983 Rep., *supra* note 48, at 157.

173. See Hsieh & Moretti, *supra* note 41, at 1086 n.16.

174. See FTC 1983 Rep., *supra* note 48, at 41-42, 142 (noting that disparagement of non-traditional brokers is neither new nor ineffective). An FTC’s survey found that 83 percent of non-traditional brokers indicated that they had experienced lost or cancelled listings due to disparagement. *Id.* at 159. Article 15 (then Article 23) of the Realtors’ Code of Ethics discourages such actions against other realtors, but apparently not against non-traditional agents. *Id.* at 41. See also Roberts, *supra* note 158 (claiming disparagement).

175. See Magura, *supra* note 95, at 13.

176. See BARWICK & WONG, *supra* note 31, at 12-13; Hendel, at al, *supra* note 168. *But see* Levitt & Syverson, *supra* note 80, at 70-73 (noting that net price is still better for a seller using a discount broker).

177. See Jon Birger & Joan Caplin, *The 4½ % Solution*, MONEY, Oct. 2004, at 105. Such statements are likely to deter risk-averse seller from using discount brokers. See Wachter, *supra* note 158, at 195, 204-05. The statements are also known to be made to sellers who have listed with non-traditional brokers in an effort to get them to switch brokers. See FTC 1983 Rep., *supra* note 48, at 156.

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best home at the lowest price for clients.”¹⁷⁸ Not only does the practice of steering violate duties imposed by state laws of agency, but it also conflicts with the first principle of loyalty in the NAR’s “stringent, enforceable” code of ethics.¹⁷⁹ Yet, the *Journal* observes: “To our knowledge, neither the National Association of Realtors nor the state real estate commissions have ever sanctioned a real estate agent for this breach of ethics.”¹⁸⁰

This type of steering should be recognized as a violation of antitrust laws, but it is not clear how to effectively enforce such a prohibition.¹⁸¹ Requiring additional disclosures would seem ineffective, given that consumers seem unlikely to notice another warning among the multitude of forms they already sign, usually without reading. A better approach might be to create some informative and engaging videos illustrating this issue, which home buyers would want to watch. Schools—in courses on basic financial skills or home economics—and the press could also do a better job of educating consumers about this practice.

The lack of better options has led some to strongly recommend that policymakers act to permit national banks, with their trustworthy reputations, to enter the real estate brokerage market in the hopes that they will embrace disruptive, non-traditional, and lower-priced business models.¹⁸² Other trusted national brands that might fill this niche, include Google, Zillow, or other firms with a reputation for low prices, but quality goods, like Costco.

178. Editorial, *The Realtor Racket*, WALL ST. J., Aug. 12, 2005, at A8. See also *Fiduciary Duties Of A Real Estate Agent*, BUYER’S BROKER INC, <http://www.realestatebuyersagents.com/duties.htm> (last visited Feb. 19, 2020).

179. See Aydt, *supra* note 76.

180. Editorial, *supra* note 178. Douglas Miller also reports “I have filed a couple of dozen licensing complaints at the state level. The bias in favor of Realtors - especially big companies is brazen. I’ve provided cases of documented forgery to the MN DOC and had them look the other way. . . .” Miller, *supra* note 5. The lack of formal legal action, however, may be due to a state’s failure to authorize prosecutions of such anti-competitive actions. See ARELLO, *Impact of Industry Members Serving on Real Estate Commissions on Boards*, July 2006, [http://img.realtytimes.com/rtimages/article_20070628_blanche/\\$file/arelloposition.pdf](http://img.realtytimes.com/rtimages/article_20070628_blanche/$file/arelloposition.pdf) at Point 2. There have also been private lawsuits. See Cohen, *supra* note 88 (describing broker Brandy Farris’s lawsuit).

181. See Owen, *supra* note 129, at 963 (suggesting that antitrust lawsuits may be the most effective response).

182. See Robert W. Hahn et al., *Bringing More Competition to Real Estate Brokerage*, 35 REAL EST. L.J. 86, 110-11 (2006); White, *supra* note 8, at 28-29; see also Harrison K. Bishop, Note, *The Great Turf War of the New Millennium: Can Banks Engage in Real Estate Brokerage and Management Activities?*, 6 N.C. BANKING INST. 391, 397-401 (2002); Lew Sichelman, *Bill Would Allow Banks in Real Estate*, REALTY TIMES, June 8, 2005; Patrick Barta, *Realtors Organize to Stop a Threat from Banks*, WALL ST. J., Jan. 25, 2001, at A2.

III. BROKERS SHOULD NOT BE PERMITTED TO LIMIT THE DISSEMINATION
OF LISTINGS AND RELATED INFORMATION UNLESS THAT IS IN THE
BEST INTERESTS OF THE SELLER

Most home sellers want to get the highest price they can for their home within a reasonable waiting period. It is in their interest to expose their listing to all bona fide potential buyers who are considering their geographical location.¹⁸³ While listing agents also want to sell their clients' homes for top dollar and quickly, they also use listings in ways that can compromise the interests of their clients.

A. *Listing Agents Violate Their Fiduciary Duty to Sellers When They Withhold Listings to Benefit Their Own Interests*

1. *Using Pocket Listings to Double End Can Hurt Sellers*

When agents gain a new listing, their optimal goal is often to find a buyer among their own or their broker's clients, thereby securing commissions on both sides of the sale, so-called "double ending."¹⁸⁴ Thus, agents may initially only share information about a "coming soon" or "office exclusive" listing with colleagues at their brokerage firm and then maybe a wider circle of colleagues before placing the listing in the MLS for other agents to see. This practice is called "pocketing" the listing.¹⁸⁵ Some agents and brokers may pocket most listings for a day or more leading to as many as 10 to 20 percent of listings being pocketed.¹⁸⁶ While the NAR adopted a rule in 2019 requiring listing brokers to

183. See FTC/DOJ 2018 Workshop, *supra* note 21, at I: 13 (Matt Siegel, DOJ); See BARWICK & WONG, *supra* note 31, at 26; Diana Olick, *Un-advertised listings distort the housing inventory*, CNBC, July 22, 2014 (video clip of interview of Lawrence Yun, chief economist of the NAR, observing that "putting [a home] on the [MLS] will get the widest exposure, most potential buyers."); Bernice Ross, *Free Web Sites Can Maximize Real Estate Marketing*, INMAN NEWS, Mar. 3, 2006; FTC 1983 Rep., *supra* note 48, at 28. In fact, sellers' desire for maximum exposure prior to the establishment of MLSs led them to prefer "open listings," which offered the whole commission to the buyer's broker. *Id.* at 112.

184. See Lingxiao Li & Bennie D. Waller, *Causation of Dual Agency Transactions? Buyer Choices or Broker Manipulation: Theory and Evidence* (Dec. 6, 2018); Glenn Roberts, Jr., *SoCal Real Estate Company Wants Both Sides of the Transaction*, INMAN NEWS, Oct. 4, 2005. Most MLSs, however, require members to submit their listings within 72 hours or some such period. See Glenn Roberts, Jr., *Real Estate Agents Face Fines for Not Sharing Listings Data*, INMAN NEWS, Oct. 14, 2005. Still, U.S. Bancorp Piper Jaffray analyst, Jeff Evanson said "in a hot market, most homes get sold before they reach the Web," see David A. Patton, *The Best Way to . . . House Hunt: The Web Can Make Your Search for a New Home a Lot More Efficient*, WALL ST. J., Dec. 6, 1999, at R43.

185. See Olick, *supra* note 185; FTC 1983 Rep., *supra* note 48, at 179; Michael Carney, *Costs and Pricing of Home Brokerage Services*, 10 J. AM. REAL EST. & URB. ECON. ASS'N 331, 343, 352 n.22 (1982).

186. See FTC/DOJ 2018 Workshop, *supra* note 21, at III: 24 (Katie Johnson, referring to Art Carter's estimate). While it appears that the number of double-ended deals by a single agent has fallen, the number of agents involved has increased by a lot more. See FTC/DOJ 2018 Workshop, *supra*, at I: 27 (Art Carter, CRMLS) (finding that single agent double-ending has fallen 20% over ten years, while the number of agents involved has doubled). Some agents defend the practice as a response to portals that post listings to attract traffic and bury the listing agent's contact info so that potential buyers must go through the portal, requiring a referral fee for attracting a new client for the portal. See FTC/DOJ 2018 Workshop, *supra*, at I: 25 (Glenn Kelman, reporting about markets in Boston and San Francisco).

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submit a listing to the MLS within one business day of marketing a property to the public,¹⁸⁷ this does not prevent brokers from using their internal databases for limiting access to listings before seller complaints force them to “market to the public” by placing them in the MLS.

These practices severely undermine non-traditional buyer agents who cannot offer their clients access to the full list of available homes that other brokers are offering. Buyers worried about losing the chance to bid for homes before they get to the MLS may forgo less established, non-traditional brokers, even when the buyer has just used the latter broker to sell their multi-million dollar home.¹⁸⁸ One longtime exclusive buyer agent in the inventory-starved Boston market even lost the opportunity to act as buyer agent for his two adult daughters who told him, “Dad, you don’t know about the listings before they go into the MLS.”¹⁸⁹ If the industry really wanted to eliminate pocket listings, the NAR might require that listings be entered into the MLS within one business day after the seller *commits* to a listing with the broker.¹⁹⁰ While sellers seeking a quick sale may be content to agree to an “in house” sale, their agents should make them aware of an option that could attract higher bids at little additional cost, as discussed in section IV.B, below.

2. *Withholding Listings from Competitor Websites so as to Attract New Buyer Clients Hurts Sellers*

Similar to retail store owners, real estate brokers recognize the value of attracting potential buyers to their spaces, and listing agents have long used open houses this way: to attract buyers who have not yet selected an agent, and thus who they may secure as new clients.¹⁹¹ Sellers may believe that holding open houses is an effective way to appeal to potential bidders, but less than 7 percent of buyers actually discover the house they will buy through an open house.¹⁹²

As searches shifted to the internet, brokers seeking to use their listings to entice buyers objected to third parties copying their listings onto third party websites because that allowed buyers to view the listing without also attracting

187. See Andrea V. Brambila, *NAR Board Overwhelmingly Approves Pocket Listing Policy*, INMAN, Nov. 11, 2019. However, this policy has been challenged. See *Top Agent Network v. Nat’l Ass’n of Realtors*, No. 20-cv-03198 (N.D. Cal. May 11, 2020); *PLS.com v. Nat’l Ass’n of Realtors*, No. 20-cv-04790 (C.D. Cal. May 28, 2020).

188. See FTC/DOJ 2018 Workshop, *supra* note 21, at I: 21, 23 (Glenn Kelman).

189. E-mail from Bill Wendel, real estate agent and commentator, realestatecafe.com, to author (Nov. 25, 2019) (on file with author).

190. The date that the seller committed to a listing was the trigger event for previous requirements for listings to be placed in the MLS. See DOJ/FTC 2007 Rep., *supra* note 50, at 10.

191. Listing brokers have long recognized that the primary value of an initial open house is to attract new buyer clients. See WILSON, *supra* note 63, at 44-52; Robert J. Bruss, *Is Open House Effective Way to Market Real Estate?*, INMAN NEWS, Dec. 29, 2005. About 7 percent of buyers meet their agent at an open house. NAR 2005 Survey, *supra* note 66, at 51.

192. An estimated 7 percent of buyers find the home that they purchase through an open house or “for sale” sign in front of the house. See NAR 2018 Rep., *supra* note 6, at 59 (Exhibit 3-9).

traffic to the broker's own website with its other listings.¹⁹³ Brokers fought those republications of their listings as a violation of copyright law¹⁹⁴ since the listing contract most sellers sign grants their listing broker full control over their listing.¹⁹⁵ Yet limiting the dissemination of listings so as to enhance the listing's value as bait for attracting new buyer clients¹⁹⁶ conflicts with the seller's interest in reaching the most potential buyers so as to secure the best price.¹⁹⁷ A listing broker should welcome any actions that might expose the listing to additional potential bona fide buyers.

Technology soon permitted brokers to establish virtual office websites (VOWs)—offering their clients access to the MLS listings online—and in 2003, the NAR adopted a policy that gave listing brokers the right to restrict the online republication of their listings by competing brokers.¹⁹⁸ In 2005, however, the DOJ challenged that policy as anti-competitive. It reported that the chairman of the NAR's working group on the rules admitted that refusing to share a listing with others “may not be in the seller[']s best interest,” and that “he took comfort in the fact that the rule did not require brokers to disclose to clients that their listings would be withheld from some prospective purchasers . . .”¹⁹⁹ In 2008,

193. See Brian Adams, *The War Between Zillow and Realtors*, HOOD HOMES BLOG (Dec. 20, 2015), <https://www.hoodhomesblog.com/real-estate-industry/the-total-war-between-zillow-and-realtors/>; Blanche Evans, *The Threat of a Collapsing MLS System is Real*, REALTY TIMES, May 10, 2005; David Bank, *Microsoft Offers Home Buyers On-Line Site*, WALL ST. J., July 13, 1998, at B6 (quoting Laurie Janik, general counsel of the NAR, as stating “[d]o you think a broker wants consumers to come to a site that's made valuable as a result of his hard work and then be shuttled off to another escrow company or another mortgage broker? That's not in his best interest.”).

194. See, e.g., Andrea Brambila, *Neighborhood Hit with MLS Copyright Lawsuit*, INMAN, Apr. 24, 2012.

195. See Thomas Kunz, President and chief executive officer of Century 21 Real Estate, DOJ/FTC 2005 Workshop Transcript *supra* note 73, at 127-28. In the words of NAR vice president Steve Cook, “the sellers don't own their listings. The data did not exist before the broker.” Clay Risen, *Realtors v. the Internet*, NEW REPUBLIC, May 2, 2005, at 14, 15; see Glenn Roberts, Jr., *NAR Takes More Time to Review Listings Ownership Issues*, INMAN NEWS, Nov. 1, 2005.

196. Brokers see listings as their valuable assets. See Daniel Castro & Michael Steinberg, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help*, CTR. FOR DATA INNOVATION (Nov. 6, 2017), <http://www2.datainnovation.org/2017-open-apis.pdf>; As one REMAX broker admitted, “I believe that if a homeowner who was trying to sell his or her home knew how we [realtors] were protecting all the listings, he or she would be incensed.” Doug Palin, *Letters to the Editor*, INMAN NEWS, Mar. 4, 2005.

197. See *supra* note 183, and accompanying text (sellers' interests) Glenn Roberts, Jr., *Real Estate Search Sites Hit Data Control Sore Spot*, INMAN NEWS, Jan. 23, 2006.

198. See Patrick Barta & John R. Wilke, *Realtors' Limits on Web Listings Face a Federal Antitrust Inquiry*, WALL ST. J., Oct. 24, 2003, at A1. Back in 2001, the NAR lobbied Congress to make it harder for non-members of the NAR to place MLS listings on their websites. See Patrick Barta, *Home Rules: Real-Estate Listings on the Web are Loosening the Grip Realtors Have Long Had on the Market*, WALL ST. J., Oct. 29, 2001, at R12. The industry defended its position by observing that MLSs were established and remain as a business-to-business resource for brokers to share information cooperatively among themselves, not as a retail service for buyers and sellers. One industry advocate complained that requiring brokers to give consumers direct access to the MLS would be like requiring designer showrooms to give shoppers direct access to their clothes. See Blanche Evans, *Are Minimum Service Rules a Disservice to Consumers?*, REALTY TIMES, Mar. 8, 2005. Yet while it is impractical to modify designer showrooms to handle retail customers, providing buyers with access to all available listings is the norm.

199. Amended Complaint at ¶ 7, *United States v. Nat'l Ass'n of Realtors*, No. 05C-5140, (N.D. Ill. Oct. 4, 2005), <http://www.usdoj.gov/atr/cases/f211700/211751.htm>.

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the NAR signed a 10-year consent decree which required new entrants to receive access to the VOW content on a non-discriminatory basis.²⁰⁰ Although the consent decree has now expired, VOWs have since been overtaken by Internet Data eXchange (IDX), and no similar problems appear to have arisen.²⁰¹

To the extent that aggregators that can help buyers efficiently identify the most suitable options emerge, listing agents should work to include their sellers' listing in those compilations. MLSs should not refuse to share this information with aggregators unless the seller has some specific reason for wanting to withhold that data.²⁰²

B. Sellers Who Prefer to Sell Quickly and Easily (or Secretly) Rather Than Getting the Best Price Should be Offered Multiple Options

It turns out that more than a third of home sellers are not as concerned with getting the highest price they can for their home as they are with a quick and easy sale.²⁰³ These sellers may need funds quickly, find selling a home to be too anxiety provoking, or have other pressures that lead them to forgo even tens of thousands of extra dollars simply to get the deal over with.

Recognizing this surprisingly large segment of the market, a number of firms have emerged to provide just that service: “iBuyers.”²⁰⁴ Whether based on sophisticated AI algorithms or simply experienced local agents, these firms offer to provide sellers with quick cash in return for a discounted price on their home. The firms explain that while the discount appears steep, sellers using the conventional process would also see their gross sale price reduced by the typical 6 percent commission, plus repairs and other staging and carrying costs.²⁰⁵ Yet for iBuyers to cover all of their costs—capital, repairs, staging, marketing (even if they pay much lower commissions), and profit to their investors—they offer about 12 percent below market price,²⁰⁶ although they may be able to offer

200. See *United States v. Nat'l Ass'n of Realtors*, No. 05 C 5140, <https://www.justice.gov/atr/case-document/final-judgment-142> (N.D. Ill. Nov. 18, 2008) (consent decree).

201. Tait Militana, *What Is the Difference Between IDX and VOW?*, REALTYNA (Feb. 15, 2019), <https://realtyna.com/blog/difference-between-idx-and-vow/>.

202. See, e.g., Castro & Steinberg, *supra* note 196, at 6-7.

203. See O'Shaughnessy, *supra* note 26 (when asked “Would you rather sell your home quickly or wait longer to get a better price?”, 35.1% preferred the former); Andrea Brambila, *Homebuyers' Biggest Agent Gripe? 'Commissions are Too High,'* INMAN, July 11, 2019 (76.2% of respondents would be willing to lower their price to avoid dealing with the costs associated with home sales); FTC/DOJ 2018 Workshop, *supra* note 21, at I: 30 (Kathleen Philips, Zillow).

204. See Andrea Riquier, *Why Buying and Selling a House Could Soon Be as Simple as Trading Stocks*, MARKETWATCH, Dec. 29, 2019; Tomasello & Rahmani, *supra* note 16, at 54-67 (discussing Opendoor, Offerpad, Zillow, Knock, and others); Mike DelPrete, *2018 Emerging Models in Real Estate Report* 47, 53, 130-35 (Mar. 6, 2018) <https://www.mikedp.com/articles/2018/3/6/2018-emerging-models-in-real-estate-report> [Hereinafter DelPrete 2018]; Mike DelPrete, *Do iBuyers Like Opendoor and Zillow Make Fair Market Offers?* (Nov. 12, 2019), <https://www.mikedp.com/articles/2019/11/12/do-ibuyers-like-opendoor-and-zillow-make-fair-market-offers>.

205. See DelPrete 2018, *supra* note 204, at 47.

206. See Michael Sklarz & Norman Miller, *iBuyers: A New Choice for Home Sellers but at What Cost?*, COLLATERAL ANALYTICS (Aug. 7, 2019), <https://collateralanalytics.com/wp-content/uploads/2019/08/CA-RESEARCH-iBuyers-A-new-choice-for-home-sellers-but-at-what->

significantly more if they can also capture economic rents on related services.²⁰⁷ Of course, iBuyers may also have entered the business because it allows them to sell premium-quality leads to listing agents when sellers choose not to accept the iBuyer's offer.²⁰⁸

Given how big the market is of sellers eager to trade a big discount on the price of a home for quick cash, it is not clear why this segment of the market is not labeled as “need quick sale” the way homes may be labeled “foreclosure,” implying sellers will entertain low-ball bids. Agents for sellers preferring this approach might indicate strict conditions for bids, such as that all bids are due in 24 hours, and that the buyer must be willing to close in 14 days, pay all cash, and waive all financial contingencies. This would allow actual bona fide buyers who were willing and able to pounce quickly to compete against iBuyer firms and in-house buyers to the benefit of the sellers. Sellers would appear to have nothing to lose and a lot to gain from this option. Then again, an informed seller should have the ability to withhold their listing from any particular forum if they prefer to protect their privacy, as some celebrities and others might.²⁰⁹

C. *MLS Rules Should be Designed to Accommodate All Bona Fide Business Models*

The great value of an MLS, a shared, accurate, easily searchable database of listings available for sellers to place their listings and for buyers to search, is well recognized.²¹⁰ Yet, if the cost of maintaining the most efficient and useful MLS makes it a natural monopoly and an essential facility,²¹¹ then it makes sense that laws or regulations, if not voluntary rules, should require it to treat competitors in a non-discriminatory manner. Ideally, MLSs would be designed to

cost.pdf; HomeServices of America Comments, FTC/DOJ 2018 Workshop Public Comments, *supra* note 42, #56 at 2, 7-8; FTC/DOJ 2018 Workshop, *supra* note 21, at I: 26 (Glenn Kelman).

207. To the extent that an iBuyer can also capture some of the apparent monopoly rents on title searches and other similar services and enjoy economies on renovations and borrowing capital, and lower prices on appraisals and inspections, those additional income streams may allow the iBuyer to offer higher prices to sellers. *See, e.g.*, Rob Hahn, *60% of Home Sales by 2024 Will be iBuyer: For My Friend James Dwiggin*, NOTORIOUSROB (Mar. 19, 2019), <https://notorious-rob.com/2019/03/60-of-home-sales-by-2024-will-be-ibuyer-for-my-friend-james-dwiggin/>.

208. In fact, it appears that as of 2018, only a small percentage of sellers who have contacted Zillow about the iBuyer option have actually sold to Zillow. *See* Mike DelPrete, *Opendoor, Zillow, and the iBuyer Business Model*, <https://www.mikedp.com/opendoor-ibuyer-business-model> (last visited Aug. 27, 2020) (estimating only 1 percent actually sell to Zillow and that the rest can be sold as premium leads).

209. *See* FTC/DOJ 2018 Workshop, *supra* note 21, at I: 29 (Art Carter).

210. *See* Lingxiao Li & Adullah Yavas, *The Impact of a Multiple Listing Service*, 43 REAL EST. ECON. 471 (2015); Fredrick Flyer, *Procompetitive Benefits of Policies Limiting Access to Local Multiple Listing Service Data 3-5* (Apr. 5, 2018); DOJ/FTC 2007 Rep., *supra* note 50, at 9-14. *See also* B. Douglas Bernheim & Jonathan Meer, *Do Real Estate Brokers Add Value When Listing Services are Unbundled?*, 51 ECON INQ. 1166 (2013) (finding that more than 100 percent of the value that real estate agents provided to sellers was attributable to placing their listing in the MLS! That is, the impact of the remainder of their services was negative).

211. While sellers need not list their homes on the MLS, most buyer-brokers will not recommend such properties to their clients. *See* Class Action, *supra* note 55, at para. 50.

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accommodate all bona fide business models to the extent that that is practical.²¹² Thus, it is important that the Real Estate Standards Organization (RESO) not maintain standards that unfairly discriminate against non-traditional brokers and that those standards be fully embraced.²¹³ Brokers competing with MLS members also should have access to the up-to-date closing price information, at a reasonable price to enable them to have the ability to calculate timely comparable pricing.²¹⁴

Currently, the administrative costs of the MLS appear to be recovered through fees imposed on each broker or agent who wants to be able to place listings in the MLS, plus the revenue that the MLS receives from aggregators for providing MLS data to them. Certainly, the cost of maintaining each MLS and continuing to improve them needs to be recovered or the MLS would deteriorate, if not become obsolete and disappear, so any cost-recovery mechanism that cannot satisfy this is unacceptable.²¹⁵ Yet that mechanism must be fair to non-traditional brokers. Arguably, those costs should be fully recovered from sellers, who can then pass some portion of this cost on to buyers as part of the price of the home.²¹⁶ Imposing the cost on sellers could lead brokers to choose to avoid that cost by operating outside the MLS, like REX, depending, instead, on placing listings with aggregators and reaching out directly to buyers. Yet, if the MLS is operated efficiently, access costs are set at a reasonable level, and other rules are also reasonable, it would seem that almost all sellers and brokers would find it cost effective to list their homes in the local MLS.

IV. IN SOME STATES, LAWS OR MLS RULES REQUIRE MINIMUM BUNDLE OF REAL ESTATE BROKERAGE SERVICE, PREVENTING THE EMERGENCE OF THOSE OFFERING SPECIALIZED À LA CARTE SERVICES

The internet and other technological innovations have facilitated unbundling of the services offered in a number of major industries. Traditionally, consumers who wanted to purchase airline tickets or trade shares of stock worked with full-service travel agents and stockbrokers. These firms provided customers with research and advice, and also processed their transactions. Industries set their commission rates at levels designed to cover the cost of providing both the information and transaction services. The relatively simple rate structures the industries used—generally a 10 percent commission embedded as part of airline ticket prices and a schedule of per-share fees based on the price and number of

212. See BARWICK & WONG, *supra* note 31, at 25-26.

213. See, e.g., Castro & Steinberg, *supra* note 196, at 5-6.

214. Currently, the data analytics firm CoreLogic appears to handle almost all real estate industry data, including sale prices and mortgage info. See corelogic.com.

215. See Flyer, *supra* note 210.

216. The fee might be a two-part fee that increases the longer the home remains unsold in the MLS.

shares traded²¹⁷—did not reflect the amount of research, advice, or other, non-transactional services any particular customer desired or used.

Once the internet made it practical to process consumer transactions easily and cheaply, new firms began to offer “discounted” transaction services. For example, firms that only handled stock trading set prices that reflected their lower costs.²¹⁸ Customers who did their own research and only needed an entity to process their transactions were now able to get that service at cut-rate prices, if not at no charge.²¹⁹ Airlines responded by gradually cutting and then eliminating their commissions.²²⁰ Travel agents are now required to charge customers separately for research, advice, and time spent handling airline tickets, unless they can recover enough from fees on ancillary bookings.²²¹ Similarly, stock brokerage firms now recover their cost of research and advisory services by charging customers who desire only these services.²²² The shift toward unbundling the prices of previously bundled sets of services continues to change pricing structures in many industries.²²³

Back in the early 2000s, some predicted that the internet would make it much easier for home sellers to post their own listings online, including photos, leading the level of FSBOs to rise dramatically to as much as 40 percent of all homes sold.²²⁴ In an effort to offer brokers an option to earn income from FSBOs rather

217. See White, *supra* note 8, at 20-21.

218. See, e.g., See BARWICK & WONG, *supra* note 31, at 8.

219. See Tara Siegel Bernard, *Low-Cost Investing Can't Get Any Lower Than Free*, N.Y. TIMES, Oct. 2, 2019, at B1; Tara Siegel Bernard, *Yes, You Can Get Free Trading. But There's Often a Catch*, N.Y. TIMES, Nov. 30, 2019, at B6.

220. In February 1995, airlines began capping domestic commissions at \$50. In September 1997, commissions began to be cut to 8 percent, and in October 1999, to 5 percent. Finally, in March 2002, commissions began to be eliminated. See *ASTA: Representing Travel Advisors and the Traveling Public for 85 Years*, AM. SOC'Y TRAVEL ADVISORS, <https://www.asta.org/About/content.cfm?ItemNumber=752&navItemNumber=17788> (last visited Feb. 19, 2020). See also Janeen Christoff, *How Travel Agents Get Paid*, TRIPSAVVY (Jan. 24, 2019), <https://www.tripsavvy.com/how-travel-agents-get-paid-3259792>.

221. See *Frequently Asked Questions*, AM. SOC'Y TRAVEL ADVISORS, <http://www.astanet.com/about/faq.asp#13> [<https://web.archive.org/web/20060214181402/http://www.astanet.com/about/faq.asp>] (last visited Apr. 28, 2018); Martha Brannigan & Jesse Drucker, *Travel Agents Change Fee Structure*, WALL ST. J., Apr. 10, 2002, at D5.

222. See Bernard, *Yes, You Can . . . supra* note 219.

223. Medicare is also moving in that direction—recognizing that doctors should be compensated directly for the services they provide, rather than indirectly as a share of inflated drug prices. See Reed Abelson, *Pay Method Said to Sway Drug Choices of Oncologists*, N.Y. TIMES, Mar. 8, 2006, at C3. One would also expect a flat fee pricing model to emerge for independent insurance brokers.

224. See Gerri Willis, *Minimizing the Stress of Selling Your Home*, SMARTMONEY.COM (Mar. 18, 2003), <http://www.realestatejournal.com/buysell/agentsandbrokers/20030318-smartmoney.html> (predicting that, aided by the internet, over 40 percent of homes would be sold FSBO); JULIE GARTON-GOOD, REAL ESTATE A LA CARTE: SELECTING THE SERVICES YOU NEED, PAYING WHAT THEY'RE WORTH 17 (2001). See also Lynnket Browning, *The Sweet and the Sour of 'For Sale by Owner'*, N.Y. TIMES, June 6, 2004, §3 at 5 (emphasizing that, in October 2003, the NAR predicted that 25 percent of home sales could soon be FSBOs); GARTON-GOOD, *supra* at xi (highlighting that Gomez analyst estimates that the non-traditional segment of residential real estate brokerage could represent as much as 75 percent of total sales by 2005); John S. Baen & Randall S. Guttery, *The Coming Downsizing of Real Estate:*

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than losing their business altogether, farsighted broker Julie Garton-Good wrote a book proposing that real estate agents transition into consultants, offering à la carte services, like those listed in the table below, for reasonable fees.²²⁵

Tasks Home Sellers Might Want from Real Estate Agents	Tasks Home Buyers Might Want from Real Estate Agents
<ol style="list-style-type: none"> 1. Listing the home in the local MLS 2. Handling paperwork, and other tasks to close on a sale after the price has been set 3. Setting both an optimal selling price and optimal time to sell 4. Advertising beyond the MLS 5. Preparing the home for showings: repairs, cleaning, staging 6. Showing the home, including open houses and viewings by qualified buyers 7. Negotiations over price and terms 	<ol style="list-style-type: none"> 1. Handling paperwork, and other tasks to close on a sale after the price has been set 2. Formulating and revising a search profile 3. Identifying the homes to visit 4. Arranging for visits to the homes 5. Negotiations over prices and terms 6. Referrals for a mortgage, inspection, title search, other services

By early 2006, however, the NAR's fear of a great rise of FSBOs disappeared and the industry appeared confident that it could maintain its full-service traditional cost structure.²²⁶ So when FSBO sellers only wanted to pay a broker to place a listing in the MLS, some states expressed concerns that consumers might mistakenly believe that they were purchasing the traditional full-service package.²²⁷ Thirteen states and Washington DC adopted laws that require real estate brokers to provide home sellers with a specified package of services, effectively prohibiting their sale on an à la carte basis.²²⁸ Nine other states have

Implications of Technology, 3 J. REAL EST. PORTFOLIO MGMT. 1 (1997). *But see infra* note 226. For actual figures *see* NAR 2018 Rep., *supra* note 6.

225. *See* GARTON-GOOD, *supra* note 224. *See also* WASSERMAN, *supra* note 5, at 90-96 (Kindle). A more detailed description of the valuable services that real estate agents may provide is offered in Nadel, *supra* note 11, at 40-54. *See also* ACCREDITED CONSULTANT IN REAL EST., <https://theconsultingprofessional.com/home.html>.

226. The NAR reported that FSBO rates peaked at 18% in 1997, before falling to 13-14% in the mid 2000s, then to 8% in 2018. The all-time peak recorded by NAR was 20 percent in 1987. *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006), <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/HmBuyerSellerSurvey06?OpenDocument> [<https://www.alta.org/news/news.cfm?20060118-Home-Buyer—Seller-Survey-Shows-Rising-Use-of-Internet-Reliance-on-Agents>]. These statistics, however, do not appear to count a listing as a FSBO if the seller uses a broker to place a listing in the local MLS.

227. *See* DOJ/FTC 2007 Rep., *supra* note 50, at 57-58; Katherine A. Pancak, *A Critical Examination of Broker Minimum Service Laws*, 19 J. HOUSING RES. 17, 17 (2010).

228. *See* ALA CODE § 34-27-84 (c); DEL. CODE ANN. tit. 24, § 2936; DC CODE §§ 47-2853.191-192; IDAHO CODE § 54-2087(3); 225 ILL. COMP. STAT. ANN. 454/15-75; IND. CODE ANN. § 25-34.1-10-9.5 (b); IOWA CODE ANN. § 543B.56A; KAN. STAT. ANN. § 58-30,106, § 58-30,107; MO. REV. STAT. § 339.780(7); OR. REV. STAT. § 696.805, 696.810; SC CODE ANN. § 40-57-137(C); TEX. OCC. CODE ANN. § 1101.557(b); UTAH CODE § 61-2-27(2)(a); VA. CODE ANN. § 54.1-2131(A)(2)(b),(c); WASH. REV. CODE ANN. § 18.86.030(1)(c); W. VA. CODE § 30-40-26; *see also* DOJ/FTC 2007 Rep., *supra* note 50, at 54.

a similar default requirement, but permit sellers to waive their right to some of the identified services.²²⁹ At least four states adopted their restrictions despite active federal opposition.²³⁰

These laws prevent sellers in the first group of jurisdictions and many in the latter from engaging a broker solely to place a listing in the local MLS, just as they now pay a newspaper solely for displaying a classified ad that is accessible to buyers, but without any expectation of any additional assistance with the sale. As the DOJ, FTC, the *Wall Street Journal*, and academic research have all concluded, however, laws restricting à la carte services appear to hurt, rather than help, consumers.²³¹ Canadian policy makers seem to understand this, and a 2010 Canadian consent decree permits agents there to place listings in an MLS as an à la carte service.²³²

Rather than protecting consumers, state laws preventing real estate brokers from offering services à la carte in a state seem to protect traditional brokers against competition and illustrate the political power of the residential real estate brokerage industry, as discussed above.²³³ One empirical study questions this view, finding that minimum service laws may simply be a response to a large number of consumer complaints.²³⁴ The laws may also be meant to aid buyer agents who complain about having to close a sale when the lack of a full service listing agent leaves them to handle tasks that listing agents would otherwise handle without the associated compensation and may even expose them to liability as dual agents.²³⁵

229. See GA. CODE ANN. § 10-6A-4(a); OHIO REV. CODE ANN. §§ 4735.621; TENN. CODE ANN. § 62-13-404(3); VA. CODE ANN. § 54.2138.1; WIS. STAT. §§ 452.133(2)(am), (2)(d), (6). Other states permit waivers to be granted for some of the minimum services, particularly communicating offers and counter-offers. See FLA. STAT. ANN. § 475.278(2)(f); NEV. REV. STAT. ANN. § 645.254; OKLA. STAT. tit. 59, § 858-353(A); 63 PA. CONS. STAT. ANN. § 455.606a(a)(12); Glenn Roberts, Jr., *More States Plan Minimum-Service Real Estate Laws*, INMAN NEWS, Sept. 19, 2005; Glenn Roberts, Jr., *Law Would Allow Consumers to Opt Out of Real Estate Services*, INMAN NEWS, Dec. 13, 2005.

230. *Id.* at 108.

231. See What's New in Residential Real Estate Brokerage Competition Workshop (June 5, 2018) (transcript available at <https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj>); DOJ/FTC 2007 Rep. *supra* note 50, at 57-62; Editorial, *supra* note 178; Editorial, *Justice v. Realtors*, WALL ST. J., Sept. 14, 2005 at A20; Nanda et al., *supra* note 112 at 923. In fact, one study found that the sellers using an agent rather than just listing their home in a database actually *reduced* the selling price for their home by 5.9 to 7.7 percent! See Bernheim & Meer, *supra* note 210. But see Anupam Nanda & Katherine A. Pancak, *Real Estate Brokers' Duties to Their Clients: Why Some States Mandate Minimum Service Requirements*, 12 CITYSCAPE 105 (2010).

232. See The Competition Tribunal (Sept. 30, 2010), https://web.archive.org/web/20200221123511/https://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Registered%20Consent%20Agreement_75_38_10-25-2010_2647.pdf.

233. See *supra* notes 116-20, and accompanying text.

234. See Nanda & Pancak, *supra* note 231, at 122-23 (finding that minimum service laws are actually *less* likely in the states where markers of real estate broker power (i.e. strong industry associations and broker membership on licensing boards) appear highest, and *more* likely where the number of consumer complaints are highest).

235. See text accompanying *supra* note 89; Nanda & Pancak, *supra* note 231 at 109; DOJ/FTC 2007 Rep., *supra* note 50, at 61-62. See also Pancak, *supra* note 227, at 33 (pointing out that given the ambiguity of some of these laws and the limited resources many states have for enforcing them, it is possible that brokers do not abide by those requirements).

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Not only do prohibitions against unbundling prevent consumers interested in handling some of the tasks themselves to save money, but they also hinder the emergence of firms that specialize to offer one or a few of those services better than most others. Firms that chose to specialize, as in staging, could still be viable, offering to outsource the service for traditional brokers, but their dependence on a few large brokers and inability to market to sellers directly would likely inhibit entry and thus competition.

V. WHAT A DIVERSE MARKET FOR REAL ESTATE SERVICES MIGHT LOOK LIKE

Absent the anti-competitive actions of traditional brokers, one would expect real estate agent fees to approach their costs and competing firms to offer different fee structures as well as rate levels, appealing to differently situated consumers.²³⁶ Some practices starting to arise in the U.S. or in place elsewhere in the world offer examples of what may eventually become common practices. Some non-traditional brokers have addressed some of the co-op fee issues. While Redfin and REX listing brokers still base their fees on the sale price of the home (albeit a much lower rate, e.g., 1, 1.5, or 2 percent²³⁷), they do not lock in co-op fees. Redfin only encourages the seller to offer a co-op fee, while REX requires the buyer to arrange for any fee to pay to the buyer's agent.²³⁸ Douglas Miller provides legal services at about 1 to 1.5 percent and only adds a co-op fee if the buyer has an agent and includes free brokerage services. Yet in a market with effective price competition, it is unlikely that real estate agents would be able to charge more than the incremental value they provide in terms of time and quality efforts. The only fees based on the sale price of the home, then, would be those discussed in section V.B, below.

A. Flat Rates, Hourly Rates and à la Carte Offerings

Non-traditional brokers may offer consumers flat rates for a package of services, hourly rates, or a menu of different fee arrangements to choose from.

1. Flat Rates

Flat fees seem most suitable for services with relatively stable costs, including listing agents without special marketing plans or agents serving buyers who have already picked out their home. As one DC Broker reports, the internet

236. Some of the non-traditional business models have been around for a while. See, e.g., DOJ/FTC 2007 Rep., *supra* note 50, at 14-21. See also *supra* note 225, and accompanying text (identifying the different tasks that some consumers might want to handle themselves and tasks that agents might want to charge for based on actual costs or average costs).

237. See DelPrete 2018, *supra* note 204, at 77. Redfin has also felt pressure to lower that rate from 1.5 percent to 1 percent on the listing side. See FTC/DOJ 2018 Workshop, *supra* note 21, at I: 34 (Glenn Kelman).

238. See Audio Tape, *supra* note 82.

and technologically enhanced marketing tools have leveled out marketing costs—selling a \$1 million house costs the same as selling a less expensive listing—so she supports a flat fee, which she expects is the future of the industry.²³⁹ According to one Los Angeles broker, listing agents for high-end sellers collect fat paychecks for a lean amount of work.²⁴⁰ Brokers offering flat rates for listing a home include TRELORA, the former Purplebricks, Redefy, Door, US Realty, and Houwzer.²⁴¹ Their fees seem to vary from \$2,500 to \$9,900 depending upon what they include, such as staging or virtual reality tours.²⁴² Listing agents would ask the buyer what fee to add to pay the buyer’s agent, while co-op fees are still legal.²⁴³ Currently, some offer only one flat fee service, but others offer basic and premium levels; some demand fees up-front, while others collect after the sale.²⁴⁴ One well known Minnesota real estate attorney offers a combination of brokerage and legal services for only a staggered flat fee.²⁴⁵

Other professionals set flat fees based on the expected difficulty of the particular task.²⁴⁶ Rates appeared to vary on that basis in Sweden, Finland, Ireland, Mexico, and Belarus,²⁴⁷ and for at least some brokers in the U.S.²⁴⁸ Although levels vary among regions and somewhat from cold to hot markets,²⁴⁹ “the shrewd, entrepreneurial, risk-taking broker willing to base commissions directly on his or her own estimate of the difficulty of selling a particular property

239. See Michele Lerner, *A Spectrum of Service Models is Changing the Way We Sell Homes*, WASH. POST, Mar. 6, 2015.

240. See Hagey, *supra* note 5. But see NAR Comments, *supra* note 134, at 3 (noting that technology has also increased listing broker costs, as for high resolution photography and video).

241. See DelPrete 2018, *supra* note 204, at 40-41, 114-17, 120-25; Hagey, *supra* note 5.

242. *Id.* at 41; Lerner, *supra* note 239.

243. See *supra* section I.

244. See DelPrete 2018, *supra* note 204, at 145-50.

245. Telephone conversation with Douglas Miller 2020.

246. See, e.g., Jim Gillespie, *Are You Really a Top Agent, or Just a Commodity?*, REALTY TIMES, Apr. 15, 2005. But see David Giacalone, *The Use of Contingency Fees in Personal Injury Cases* (4 parts, April 2006), <http://blogs.law.harvard.edu/ethicalesq/contingency-fees-pt-1-of-4-market-failures/> (reporting that personal injury attorneys rarely vary their contingent fee based on risk levels).

247. See Delcours & Miller, *supra* note 43, at 29. See also Wachter, *supra* note 158, at 200 (finding considerable rate diversity among commercial real estate firms).

248. See Schnare & Kulick, *supra* note 130; Craig Venezia, *Roll the Dice on Commissions – That’s No Hard 6*, S.F. CHRON., May 6, 2007, at K7 (reporting that the percentage rate Jimmy Wanninger, in Mill Valley, charges “depends upon how quickly he believes the house will sell”); 1972 Forbes Cover Story, *supra* note 69, at 36 (discussing Andrew Barr’s sliding scale of 2 percent for easy, 6 percent for difficult); G. Christian Hill, *As Home Prices Rise, More Sellers are Using Reduced Rate Agents*, WALL ST. J., June 26, 1979, at 1 (discussing Los Angeles agent Barney Feldman, who charged 1 percent for a listing if the home sold within one month, 2 percent if it sold within two months, and 3 percent if it sold in three or more months).

249. See GAO 2005 Rep., *supra* note 49, at 9-10; FTC 1983 Rep., *supra* note 48, at 11 (“commission rates in all markets do tend to be roughly uniform from sale to sale.”). Some regions with lower-priced housing, like the South, have higher average commissions, e.g., 7 percent. See Jamie Baylis, *The Big Split*, WASH. POST, Dec. 30, 2000, at G1 (quoting Leonard V. Zumpano, director of the Alabama Real Estate Research and Education Center). Also, when the defense industry contracted in Southern California and a recession hit the Northeast around 1990, creating a severe buyer’s market, some sellers were offering real estate brokers commissions of 8 to 10 percent to successfully sell their homes. See Motoko Rich, *Nest Egg or One-Armed Bandit*, N.Y. TIMES, Sept. 15, 2005, at F1.

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appears to be absent from all geographic markets,”²⁵⁰ even though broker services are much more valuable to sellers in a cold market.²⁵¹ As of 2018, 20 percent of UK buyers paid fixed fees.²⁵² In cold markets, rather than offering especially high co-op fees, listing agents should allocate those amounts to reducing the price of the home to buyers. One might expect that in a hot market where a seller expected to get multiple bids as soon as the home was made available, listing brokers would be willing to charge a much lower fee, given the greatly reduced time and marketing efforts required. In that vein, one industry officer suggested that agents could even bid for seller listings,²⁵³ although it is not clear how that would work.

2. Hourly Rates

In cases where agent efforts might vary more or where an agent had special knowledge or skills that they wanted to offer à la carte, an hourly rate (like those charged by lawyers, accountants, consultants, and other professionals) would appear most appropriate.²⁵⁴ Those rates could vary widely. The highest rates would likely be justified for buyer agents with the most extensive knowledge of a community, including the character of individual neighborhoods and even streets, and the availability of relevant amenities. Such agents might even have advance knowledge about many “coming soon” homes before the sellers spoke to any agent, based on their awareness of divorce proceedings or that some homeowners were coming to the end of a two-year stay in the area. On the seller side, those with properties likely to have special appeal to a relatively narrow, niche audience might find it well worthwhile to select an agent with connections to that target niche. Such agents might offer to work for \$500/hour or more, which might well be worth it for a buyer with kids and special needs seeking an ideal long-term location. Similarly, both buyers and sellers might pay top dollar for great negotiators, or they may view themselves as excellent or satisfactory negotiators and not want to pay someone else to handle it.

Meanwhile, newer agents with minimal credentials but whose broker’s support team could handle the standard paperwork would be expected to charge relatively low rates for their time.²⁵⁵ Although they may not know much yet

250. FTC 1983 Rep., *supra* note 48, at 54.

251. *See, e.g.*, BARWICK & WONG, *supra* note 31, at 9; Ying Li & Abdullah Yavas, *Residential Brokerage in Hot and Cold Markets*, 51 J REAL EST. FIN. ECON 1 (2015) (an agent may even have a negative net value in a hot market). *See also* Schnare & Kulick, *supra* note 130, at 308, 342 (finding that agent rates did vary based on conditions, but the variations were very small).

252. *See* BARWICK & WONG, *supra* note 31, at 21.

253. *See* FTC/DOJ 2018 Workshop, *supra* note 21, at I: 35 (Kathleen Philips).

254. *See* Wolfers, *supra* note 41.

255. BARWICK & WONG, *supra* note 31, at 9; Sonia Gilbukh & Paul Goldsmith-Pinkham, *Heterogeneous Real Estate Agents and the Housing Cycle 5* (Jun. 4, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436797; Schnare & Kulick, *supra* note 130, at 309 & note 4 (finding that licensing requirements vary in the states, but “many require less than 60 hours of professional course work to receive a sales agent’s license, and not all require a high school diploma or

about the local area, their lower rates might be attractive to a buyer seeking only a starter home or a temporary location for a few years. Some newbie agents probably already offer discounted rates to attract business, assuming their brokers permit that. They might also be attractive to sellers who wanted to go FSBO, but with a little, low-cost assistance.

The current fee structure encourages the most capable agents to seek those clients dealing with higher-priced properties, and thus the highest commissions, even where the clients have no need for the agents' special skills. Charging hourly fees would be a better way to match the best agents with those who value them most. For instance, under the current system, a buyer seeking a \$500,000 home is only half as attractive to an expert agent as one seeking a \$1 million home, and so the best agents generally try to represent the latter buyers and sellers. Under an hourly rate system, though, the buyer seeking a \$500,000 home could purchase the expertise of the top agent simply by paying their fee.²⁵⁶ Similarly, one looking to sell a home that was apt to appeal to only a limited niche of buyers might well be willing to pay \$600/hour for the services of a listing agent with experience reaching that target audience, even if the home's selling price would not otherwise have attracted the agent. In a cold market, where it may have taken months to find a buyer, sellers might well be willing to pay such higher rates if they believed that the agent was likely to find a suitable buyer much sooner. Varying hourly rates would work even better if consumers could get reliable information about the quality of individual agents.²⁵⁷

Interestingly, many agents would favor hourly rates, but think that buyers would object. This may be because those agents assume that if they charged an hourly rate, the fee would be due when the services were rendered,²⁵⁸ rather than being contingent on a sale—the approach of one New Zealand firm.²⁵⁹ Certainly making the fee non-contingent and due up front would make it less attractive to buyers. Yet there is no reason that the use of hourly rates implies that they would have to be paid up front or that they could not also be contingent. There is no reason why the fees couldn't be either (1) payable at closing, particularly if they were intended to be financed with the mortgage and included on the TRID form,²⁶⁰ (2) paid when a buyer decided to abandon their home search, or (3)

general equivalency diploma (GED).”} Some argue that licensing standards are too low and should be raised. See Comment by Brandon Farrow, FTC/DOJ 2018 Workshop Public Comments, *supra* note 42, #53 (July 31, 2018).

256. See Levmore, *supra* note 14, at 507 (recognizing that the traditional uniform commission rate hindered the ability of those with more difficult needs to secure the desired agent's attention).

257. See BARWICK & WONG, *supra* note 31, at 22. Zillow claims to audit the agent reviews on its website. See Zillow 2018, *supra* note 42, at 6-7. https://www.ftc.gov/system/files/documents/public_comments/2018/07/00061-147652.pdf.

258. See Carl Spade, Comment (Jan. 21, 2019) to <https://notorious-rob.com/2019/01/the-machine-and-the-real-estate-agent/>.

259. See Jim Dalrymple, *Agents Skeptical that Taking Hourly Rates Could Work*, INMAN NEWS, Oct. 29, 2019.

260. See *supra* section I.G.

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postponed until the buyer resumed the search. As for the contingency, buyer agents might argue that they are willing to assume the risk of no deal today because the payoff is so big, but if the payoff was much smaller, they would not want to assume the risk that their time would be completely wasted. Agents could resolve that matter by offering home buyers the choice of a non-contingent fee or a contingent fee that included a surcharge to cover that risk of no-deal.

Still, fees based on hours of input have their own drawbacks, such as creating the perverse incentive to take more time than necessary on a project and to overstate the time spent. Hourly rates may also deter customers from communicating freely because they feel that they are “on the meter.” Nevertheless, the system seems to work acceptably for many other professionals, notably for lawyers. Still, it might be more practical for agents to set flat fees for particular standard tasks, such as posting in the MLS and handling a standard closing, and limit hourly rates to tasks where the time spent should be transparent to the client, such as creating a search profile, reviewing choices, visiting homes for buyers, and choosing and implementing a marketing approach, including staging and setting a pricing strategy for sellers, and negotiating for both.

3. *À la Carte Options*

A small number of firms have gone the way of à la carte options, mentioned above, offering consumers a choice among individual flat rate and hourly services.²⁶¹ Examples include Bill Wendel’s Boston realestatecafe and Carl Slade’s Restate. The latter serves almost exclusively sellers because few buyers engage agents in New Zealand. Restate charges (1) a flat engagement fee, (2) a marketing fee, depending on marketing costs, which are generally much less for properties that sell quickly or for sellers preferring more of a FSBO approach, (3) other billable hours, such as for negotiations, dealing with contractors, or legal issues that arise, and (4) a value-based bonus, along the lines of what is described next.²⁶² Furthermore, Restate offers sellers a choice of a contingent or non-contingent fee, with the contingent fee including a substantially larger bonus to Restate for a successful sale.²⁶³

B. Percentage Commissions Based on Incremental Value Produced

Although the six percent-of-sale-price commissions used by traditional brokers as well as the lower percentages used by most discount brokers have no real economic justification,²⁶⁴ there is a justification for paying agents a much larger percentage fee, even 20, 30, or 40 percent commissions. But, any such percentage-based commission should not be based on the sale price of the home,

261. See *supra* note 225 and accompanying text.

262. Telephone conversation with Carl Slade (Aug. 25, 2020).

263. *Id.*

264. See Nadel, *supra* note 11.

but rather on any incremental value that the listing agents are able to produce by getting a higher price than expected for the home. This would be in addition to a flat fee for simply selling the property for the expected price.²⁶⁵ Agents could create incremental value by making cost-effective improvements to make the home more attractive and valuable or use access to niche markets to lead to a higher bid and sale price. The incremental value would be measured against the baseline price of the home plus the cost of the improvements. If the sale price did not cover those costs, some portion of the difference might be subtracted from the listing agent's flat fee.

The biggest difficulty with this approach, though, would be setting the baseline "expected sale price of the home" for measuring the incremental value. One option would be to use the assessed value of the home, adjusted to reflect the average percentage of fair market value the community appraisals were set to reflect.²⁶⁶ Another would be to use the estimates produced by Zillow or Redfin, or by some other algorithm, adjusted up or down to reflect how those estimates compared to the most recent sales in the zip code or neighborhood. Finally, one could pay for an appraisal.

It is not clear whether there is any similar incentive-based way to pay buyer agents, other than a shared-savings arrangement for their negotiation skills anchored at the asking price for the home.

CONCLUSION

As discussed above, to foster innovation and effective competition, including of prices, this article advocates four main policies: (1) prohibit listing agents from setting the fees for buyer agents, (2) attempt to prosecute and otherwise deter agents who steer clients away from non-traditional brokers, (3) permit agents to offer services on an unbundled, à la carte basis, and (4) require agents to disseminate seller listings as widely as in the best interests of the seller. With these in place, one would expect much lower, cost-based real estate agent fees and less time wasted by part-time agents prospecting for clients.

265. Others have also suggested non-linear commission formulas. See Hsieh & Moretti, *supra* note 41, at 1087 n.17; Levitt & Syverson, *supra* note 12, at 610.

266. Thus, some communities set appraised value at only a fraction, for example, 50% of the actual fair market value of the property. See Julia Kagan, *Assessed Value*, INVESTOPEDIA (Aug. 14, 2020), <https://www.investopedia.com/terms/a/assessedvalue.asp>.