Consumer Federation of America

# THE RELATIONSHIP OF RESIDENTIAL REAL ESTATE COMMISSION RATES TO INDUSTRY STRUCTURE AND CULTURE

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## Executive Summary

Most real estate agents are compensated for their work with buyer and seller clients by receiving a percentage of the home sale price. In a price-competitive market, these commission rates would vary among sales because of differences in the amount of agent work, the quality of this work, type of representation, and agent and firm competitiveness.

An analysis of more than 10,000 home sales in 21 cities in the eastern half of the U.S. shows that buyer agent rates are highly uniform. In eight of the cities, more than 80 percent of the rates were identical; in 14 cities, more than 88 percent of the rates ranged between 2.5 and 3.0 percent; and in all but one city, at least 72 percent of the rates ranged between 2.5 and 3.0 percent. Using these rate data and other information sources, the estimated median rate on total commission ranged from five percent to six percent in 20 of the cities.

The high degree of rate uniformity can be explained largely by:

- The lingering effects of past rate-setting by the industry.
- Current industry rules, especially the requirement that agents listing properties in local multiple listing services (MLSs) include a mandatory offer of buyer agent compensation, so that listing agents (and sellers), not buyers, determine buyer agent compensation.
- The policies of many large firms to set or constrain rates.
- An informal industry "gag rule" that has discouraged firms and agents from talking about commission rates let alone market them.
- A surplus of agents, relative to the number of properties sold, that convinces most agents that they must agree to maintain high, uniform rates in order to maintain their incomes.

The report concludes by recommending that Federal agencies and the courts seek to prohibit the coupling (or tying) of listing agent and buyer agent commissions so that buyers can negotiate buyer agent compensation rather than having it set and paid by listing agents (and sellers). This uncoupling would increase competition in broker fees (now at least $100 billion annually), align agent compensation to a much greater extent with agent service, and increase value received by consumers.

## Introduction

There is a dearth of information available to the public about residential real estate commission rates. These rates are the basis for agent compensation in the sale of nearly all homes.[1] Other than a minority of home sales where one agent works with both home seller and buyer, pocketing the entire amount, commissions are split between a listing agent and a buyer agent.[2] The listing agent collects the entire commission from the seller then pays a portion of that amount to the buyer agent when the sale is closed.

The commission offered to the buyer agent must be included in the Multiple Listing Service (MLS) listing of that home where it is accessible to buyer agents but not to buyers.[3] The last published study of buyer agent commissions in multiple urban areas was commissioned by the National Association of Realtors (NAR) and published using MLS data from home sales between 2000 and 2007.[4] Since then, several individual researchers have managed to gain access to data collected by a single MLS.[5] Yet, individual researchers have not sought, or have sought and failed, to gain access to data in multiple MLSs. Accordingly, there has been no published research that reveals patterns of buy-side commission rates in many geographic areas since 2009, and this research was limited to seven metropolitan areas.

However, much more is known (outside the industry) about buyer agent commissions than about listing agent commissions.[6] The latter are not reported to local MLSs. They are included by mortgage lenders on a Closing Disclosure form submitted to the U.S. Department of Housing and Urban Development, but this information on agent compensation is not available to the public.[7] Several individual companies have made efforts (discussed later) to estimate total commissions by contacting a sample of agents or agencies. Yet, none of these samples is truly representative, so it is no surprise that various estimates of a typical or average commission rate nationwide range from under five percent to nearly six percent.

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[1] In some sales of homes with low prices, as will be shown later, buyer agent compensation takes the form of a dollar amount not a percentage rate.
[2] In the industry, a buyer agent is also called a seller or selling agent, a source of some confusion to outsiders.
[3] Except in most of Washington State where the major MLS allows agents to list buyer agent rates.
[4] Ann B. Schnare, Robert Kulick, "Do Real Estate Agents Compete on Price? Evidence from Seven Metropolitan Areas," in Edward Glaeser, John M. Quigley, Housing Markets and the Economy: Risk, Regulation, and Policy (Lincoln Institute of Land Policy, 2009).
[5] The most extensive and useful research on specific rates, some of which will be cited later, has been undertaken by Panle Jia Barwick, working with Parag Pathak and Maisy Wong, using MLS data from eastern Massachusetts.
[6] As one researcher of commission rates put it: "There is not much to talk about. This is largely because the data needed to talk about it are very closely kept." John C. Weicher, "The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such As It Is," Real Estate Law Journal (Summer 2006), p. 138.
[7] The Federal Trade Commission examined these completed forms in the late 1970s, and presumably both the FTC and the U.S. Department of Justice have that ability today.

This report has two principal purposes. The first is to use old and new data – including samples of buy-side commissions in at least 500 consecutive residential sales from each of 21 different local multiple listing services (MLS) in the eastern half of the U.S. (Northeast, Midwest, and Southeast) – to show the current uniformity or near-uniformity of commissions in almost all of these areas. (Subsequent CFA research will examine commission rates in the West.)

The second purpose is to try to explain this uniformity in terms of the structure and culture of the current industry. This explanation will place great emphasis on historic industry practice, industry rules, industry norms, the current surplus of agents (in relation to available sales), and the lack of information about rates available to the public, while also noting some recent erosion of uniformity. The report will conclude by discussing two reforms, on which there is growing consensus outside, and to a limited extent even inside the industry, about practical ways to facilitate greater competition by agents and firms related to their fees and services.

The report is organized in the following sections:

- Why Commission Rates Should Vary Considerably
- The Near-Uniformity of Buyer Agent Commission Rates in Individual Markets
- The Relationship of Buyer and Seller Commission Splits and an Estimate of Typical Commission Rates in the Eastern Half of the U.S.
- How Industry Structure and Culture Explain Rate Uniformity
- Practical Measures That Would Greatly Increase Brokerage Price Competition

## Why Commission Rates Should Vary Considerably

There are compelling reasons why real estate commission rates should vary greatly. Selling a home is somewhat different than selling a commodity such as a box of cereal or an automobile. In a home sale, there are usually two sales agents involved, both of whom expect compensation. These agents rarely can be certain, when they price their services, of the amount of work involved. Their work is more similar to that of attorneys representing one client against another client (and their attorney) than of commodity manufacturers, whose products (and prices) are widely known and usually sold through the Internet or large chain stores.

**The work and related costs of agents vary:** The work of listing and buyer agents differs. Listing agents can do as little as develop and post a listing on the local MLS then wait to be contacted by buyer agents. At the other extreme, as well as posting the listing, they can arrange high-quality home photos and video, develop and distribute sales materials, hold open houses, plan home "staging" (including bringing in new furniture), and/or actually meet customers with an interest in purchasing the home. Similarly, the work of buyer agents can vary considerably. An important variable is the number of listed homes that clients wish to visit, ranging from only one to well over a dozen, given the industry requirement that buyer agents accompany their clients. Another important variable is the amount of time the client wishes to communicate with the agent. This time can vary, after initial meetings, from practically nothing to very frequent, even daily.

**The work and related costs of agents do not vary but their compensation often does:** Agents may work the same amount to sell an inexpensive property as they would to sell an expensive one, yet are often compensated at the same commission rate.[8] The dollar difference can be enormous. For example, the total agent commission at a 5 percent commission rate varies from $5,000 on the sale of a $100,000 home to $50,000 on the sale of a $1,000,000 property. Also, when an agent works with both seller and buyer on a home sale, their work rarely doubles but their compensation frequently does. In fact, some agents have suggested that double-ending a sale (one agent working with both seller and buyer) sometimes involves less work than having to work with an agent for the other party. It may involve less work if an agent is effectively facilitating the sale than if they are required to negotiate with a fiduciary to the other party.

**The quality of agent services varies:** The quality of services provided by individual listing and buying agents often varies depending on agent experience, competence, and effort. A highly knowledgeable agent with many years experience can usually price or negotiate a more favorable sales price for their client than can an agent who has just obtained a real estate license, and the difference may involve as much as tens of thousands of client dollars. On the other hand, a less experienced agent who works very hard, and consults more experienced agents, may serve a client more effectively than an experienced agent with many clients who tries to minimize time spent on each sale and/or delegates important client work to inexperienced members of their team.

**The nature of agent representation varies:** Many home sellers and buyers work with fiduciary agents who are required to be totally loyal to them. But other sellers and buyers work with a dual agent, a transaction broker, or fiduciary agent or subagent to the other party in the sale. Fiduciary agents have more responsibility and liability than non-fiduciary agents so in general merit higher compensation.

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[8] See discussion in Stephen Brobeck, Double-Dipping by Real Estate Agents: Risks and Costs to Home Buyers &Sellers (Consumer Federation of America, May 2021), pages 2-3, which draws from sources such as: Robert Foley, "Why Do Agents Double Dip," Flat Fee Real Estate (November 28, 2011). Bill Gassett, "What is Dual Agency: Why Buyers & Sellers Should Avoid It," Maximum Real Estate Exposure! (April 10, 2017), p. 13. Vrinda Kadiayali et. al., "Is Dual Agency in Real Estate a Cause for Concern?" Johnson School Research Paper Series No. 08-07 (July 2012), p. 9

**In a price-competitive market, agents would vary their commission rates:** In a price-competitive marketplace, even agents with the same experience and effort spent would often charge different rates. These agents might lower their rate in order to gain greater market share. (For several decades, real estate broker discounters have been trying to establish a foothold in the industry.) Or, particularly if agents have any dominance in a relatively small market, they might raise their rates to try maximizing income. Moreover, rates may vary from market to market depending on population size and density or on the number of agents related to this size and density.

**Other factors might influence commission rates:** There are a number of other factors, some closely related to those discussed above, which could influence rates.

- Homes sold in auctions often involve less agent work than homes sold on the open marketplace. Typically, the listing agent has to deal with only one potential purchaser.
- Newly-built homes, which often are sold in batches, may be easier to sell than older homes, whose quality is often more difficult to assess, sometimes just because buyers prefer new to used.
- Agents may be willing to lower rates to those with whom they have a personal relationship (e.g., friend or family), to repeat customers, or to those with whom they are working on both a sale and a purchase.
- Listing agents may be willing to lower the MLS listed buyer agent commission before closing, with the approval of the buyer agent, in order to financially facilitate the sale (or in exchange for some other consideration).

## The Near-Uniformity of Buyer Agent Commission Rates in Individual Markets

**Description of Data:** CFA has gained access to information about buyer agent commission rates in 21 urban markets in the eastern half of the U.S. We have examined these rates in at least 500 or more consecutive sales in each city during the year 2021. The data include rates on "sold" listings for cities ranging regionally from Portland, ME to Miami, FL; from Baltimore, MD to St. Louis, MO; and from New Orleans, LA to Minneapolis, MN.[9] The city sample includes very large cities with over a million people – Brooklyn, NY and Chicago, IL – and very small cities – Harrisburg, PA and Roanoke, VA – with fewer than 100,000 people.

[9] It was not clear to us that the buyer compensation listed was always the final compensation rather than the compensation offered in an earlier property listing. These data depend on individual agents conscientiously recording any changes in compensation to the MLS sold listing.

The data are drawn from an MLS serving each area.[10] In most of the 21 areas, the property sample was made up of single-family houses, townhouses, and condos, but in several areas, only single-family houses were included. Each sold listing also includes information on characteristics of the property and sale, including the agents involved, which allows research on factors that may affect any variation in commission rates. This report focuses on rate uniformity but subsequent research will seek to better understand how factors such as double-ending, sale price level, and specific brand affect commission levels and how these levels affect factors such as time to sell.

The compensation categories vary somewhat from city to city, in part reflecting differences in state agency laws.[11] However, almost all states have a buyer agent (or broker) rate category (called cooperative compensation in Chicago and New Orleans) with a rate for all or almost all "solds." These rates represented a large majority of those we used. There were other rate categories used by some MLSs, such as transaction broker or subagent that sometimes listed rates. In the few instances where there was no buyer agent/broker rate, but there was a rate for some other rate category, we used the latter. In Florida, for example, transaction brokerage is widely practiced so this rate category for Miami and Jacksonville usually listed a rate.

Some listings included the buyer agent rate as zero or missing. The sold data suggest two reasons that account for a large majority of these missing rate data. First, many of the listings with absent data involved a sales agent who did not belong to that MLS. MLSs require agents to record only the compensation received by agents that belong to that MLS. Second, many of the remaining listings with absent data involved double-ended sales in which one agent worked with both seller and buyer. In these instances, it appears that listing agents either reported zero buyer agent comp or omitted listing any comp because there was no buyer agent strictly speaking, only themselves as a listing agent, dual agent, or transaction broker. However, as will be documented later, in most instances double-dipping agents, who were required by MLSs to provide information on buy-side rates, split the total commission in two, usually in equal parts but sometimes unequal parts with the buyer agent rate usually being less than the listing agent rate. We included these buyer agent comp rates, even when they were as low as one percent, in our sample population of rates knowing that they would tend to depress reported rates and rate uniformity a bit.

However, we did not include the zero or missing buyer (or seller) agent rates in our analysis of rates. Nor did we include those solds in which buyers were compensated by fixed dollar amounts. Several of these sales were for $1 (probably to comply with the MLS

[10] A large majority of home listings – NAR estimates three-quarters – are listed on local MLSs. Many of the remaining listings are controversial "pocket listings" kept within individual firms and usually sold by the listing agent or a colleague.

[11] See discussion of these state laws in: Stephen Brobeck, Why Required Real Estate Agent Disclosures About Representation Fail and How They Can Be Improved (Consumer Federation of America, January 2020).

requirement). The remaining 231 sales with dollar compensation represented only two percent of total sales examined and usually involved the sale of homes with low prices. Nearly two-fifths (39%) of these homes were purchased for less than $50,000, and three-quarters (75%) of the homes were sold for less than $100,000. Only 15 percent of the 231 homes were sold for more than $150,000, with ten of the 34 being in Charlotte, North Carolina.

The data on buyer agent compensation for all 10,640 solds in the 21 cities can be found in Appendix A.

**Near-Uniformity of Commissions:** Given the many factors that would encourage variation in buyer agent commissions, the uniformity of rates is striking, as can be seen on Table 1 below.

- In eight cities (including Minneapolis with a dominant 2.7 percent rate), more than four-fifths of the rates were identical, and in four of these cities – Grand Rapids, Memphis, Roanoke, and Minneapolis – at least 93 percent of the rates were the same.
- In 14 cities, more than 88 percent of the rates ranged between 2.5 and 3.0 percent.
- In all cities except Brooklyn, at least 72 percent of the rates ranged between 2.5 and 3.0 percent.
- With a median buyer agent rate of 1.25 percent, the Brooklyn market is an anomaly that will be discussed later in the report.
- There was some variation in rate distribution, especially between cities. This issue will also be discussed later.

This table, based on data in Appendix A, excludes those specific solds with buyer/seller agent compensation that is missing, zero, or in dollars. Note that rates between 2.5 and 3.0 percent are not listed separately but are included in the fifth column containing percentages of all rates from 2.5 to 3.0 percent. Very few rates, when Brooklyn's are excluded, are less than 2.0 (62 solds) or more than 3.0 (51 solds) so they were omitted in order to simplify the table.

### Table 1: Buyer Agent Commission Rates (%)

| City | N | 2-2.4 | 2.5 | 3 | 2.5-3 | Median |
|---|---|---|---|---|---|---|
| Atlanta, GA | 499 | 4.1% | 8.2% | 87% | 95.8% | 3 |
| Baltimore, MD | 492 | 5.1 | 83.7 | 3.9 | 87.6 | 2.5 |
| Birmingham, AL | 480 | 3.8 | 57.5 | 36 | 94.1 | 2.5 |
| Brooklyn, NY | 343 | 10.2 | 5.2 | 1.2 | 6.4 | 1.25 |
| Buffalo, NY | 477 | 0.8 | 26.8 | 71.3 | 99 | 3 |
| Charlotte, NC | 490 | 11 | 44.5 | 42 | 88.2 | 2.5 |
| Chicago, IL | 493 | 22.7 | 75.1 | 1.8 | 76.9 | 2.5 |
| Columbus, OH | 496 | 2.6 | 6.7 | 88.9 | 96.7 | 3 |
| Grand Rapids, MI | 495 | 0.2 | 3.2 | 95.8 | 99.6 | 3 |
| Harrisburg, PA | 490 | 1.2 | 33.7 | 62 | 95.4 | 3 |
| Hartford, CT | 494 | 9.7 | 84 | 5.9 | 90 | 2.5 |
| Indianapolis, IN | 493 | 22.9 | 74.8 | 1.8 | 76.6 | 2.5 |
| Jacksonville, FL | 497 | 9.7 | 43.1 | 39.2 | 82.3 | 2.5 |
| Memphis, TN | 489 | 2.2 | 4.3 | 93 | 97.3 | 3 |
| Miami, FL | 498 | 9.8 | 25.3 | 62.4 | 88 | 3 |
| Minneapolis, MN | 589 | 1 | 8.7 | 1.6 | 98.3 | 2.7 |
| New Orleans, LA* | 463 | 27.2 | 38.2 | 31.3 | 72.4 | 2.5 |
| Portland, ME | 499 | 19 | 74.1 | 5.4 | 80.4 | 2.5 |
| Roanoke, VA | 497 | 0.4 | 4.2 | 95.2 | 99.6 | 3 |
| St. Louis, MO | 480 | 4.2 | 26.3 | 1.7 | 93.1 | 2.7 |
| Trenton, NJ | 466 | 5.6 | 53.6 | 38 | 92.7 | 2.5 |

*68 listed buyer agent rates were 3/2, which reflected a 3 percent charge on the first portion of a sale price, sometimes $100,000, and a 2 percent charge on the remaining portion of the price. We treated these rates as 2.5 percent in the table.

## The Relationship of Buyer and Seller Commission Splits and an Estimate of Total Commission Rates in the Eastern Half of the United States

**Commission Splits:** As noted earlier, there is no accessible, comprehensive data source on commissions paid by sellers to listing agents. For these fees, researchers must rely on survey data and anecdotal information from agents. The conventional wisdom is that commission splits between listing agents and buyer agents are even or almost always even. For example, the Wikipedia entry on real estate agents notes that "typically this commission is split evenly between the seller's and buyer's agents."

While most splits do appear to be even, much evidence suggests that there are many exceptions. In some markets, a large majority of the splits are uneven. In the eastern half of the U.S., these exceptions usually favor listing agents. A researcher for Clever Real Estate, a national flat-fee real estate broker, surveyed 915 real estate agents from around the country – 547 were from the Northeast, Midwest, and Southeast -- to learn the commission rates in their areas. He found that commission splits favored listing agents in the Northeast (53% v. 47%), the Midwest (52% v. 48%), and the Southeast (51% v. 49%).[12]

These figures disguise much variation. CFA interviewed a dozen listing agents and a couple dozen buyer agents who, in the closing of home sales, had noted listing agent commissions on mortgage loan Closing Disclosure forms required by the U.S. Department of Housing and Urban Development (HUD). The following agent comments suggest that commission splits are usually even but more often favor listing agents than buyer agents.

- Massachusetts/New Hampshire: In Boston, even splits. Outside the city, frequently 3 percent for listing agents, 2 percent for buyer agents.
- New York City: Usually 50-50 split.
- Long Island, New York: Most evenly split but in 10-15 percent of sales, listing agent gets 0.5 to 1.0 percentage points more than buyer agent.
- Philadelphia, Pennsylvania area: Usually 50-50 split.
- Baltimore, Maryland: Usually 50-50 split but in about one-quarter of sales, listing agents receive 3.5 percent while buyer agents get 2.5 percent.
- Washington, DC area: One researcher reports that on a typical sale with a 5.25 percent commission, the listing agent receives 2.76 percent while the buyer agent gets 2.5 percent.[13]
- Charlotte, North Carolina: Some splits are even but the listing agent often receives 0.5 to 1.0 percentage points more than the buyer agent.
- Savannah, Georgia: Usually 3.6 percent for listing agent, 2.4 for buyer agent. This split is "pretty common in Georgia."
- Fort Lauderdale, Florida area: Started to see commission splits favoring listing agents fairly recently.[14]

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[12] Bailey Peterson, "Average Real Estate Commission Rates by State (2021)," Clever Real Estate (July 26, 2021). In October 2021, Peterson provided us with additional information about the sample population. Peterson also found, and this finding was supported by our conversations with agents, that splits in the western half of the country slightly favored buyer agents.

[13] Jamie Ayers, "Average Real Estate Commission in Washington, D.C.: What's Fair in 2021," realestatewitch.com (September 9, 2021).

[14] This may reflect in part listing agent ability to readjust the splits because consumer demand has exceeded supply in markets with low inventory. On the other hand, as indicated below, unequal splits have apparently been lessening in the Minneapolis area.

- St. Louis, Missouri: The typical commission is 6.0 with the listing agent receiving 3.3 percent and the buyer agent 2.7 percent.
- Minneapolis, Minnesota: Until recently, listing agents usually received 3.3 percent while buyer agents got 2.7 percent. Now there's an increasing number of listing agents who receive only 3.0 percent.

**Total Commission Rate Levels:** Several sources have provided estimates of average commission rates using data-sets. The most widely used estimates are provided by Real Trends, a real estate information firm that is closely associated with the industry.[15] Each year it sends survey forms to more than 500 real estate agencies, and in 2020 received responses from 130 companies. It estimates that the national average commission rate is now below five percent, which is the lowest national estimate based on broad data and raises several questions: Are the 130 surveyed firms, which were involved in fewer than 300,000 sales, representative of the whole industry? Given the current controversy about commission rates, were the firms charging low rates the most likely to submit information in response to the survey?[16]

Further, was the company's stated method of estimating a national average rate by dividing gross commission income by the sales price, the most accurate way to estimate this average?[17] Much research has shown that realtors tend to charge lower rates on high-priced properties, which would depress the estimated average rates of Real Trends.[18] To use an exaggerated example: Using the apparent Real Trends method, the average rate for a sample of a one million dollar sale at 4 percent and ten $100,000 sales at 6 percent would be only 5 percent. This rate may have meaning for realtor income but would mislead the general public about typical commission costs.

[15] The current senior advisor at Real Trends, also a co-founder and past president, has consulted for NAR affiliates for several decades.

[16] Earlier this century, a researcher discussing the evidence on real estate commissions raised other questions as well about the accuracy of the Real Trends commission rate estimates. Weicher, "Price of Residential Real Estate Brokerage," loc. cit., pp. 121-124.

[17] In an article on its website ("Inventory, Brokerage Models and Referral Fees: How These 3 Factors Impact Commissions"), Real Trends states: "When REAL Trends and others track the national average commission rate we use Gross Commission Income (GCI) divided by the sales price." When we asked the company for an clarification of their method, they initially responded by referring to "annual production volume and transaction sides," yet have not yet answered our follow-up question: "I had assumed then that you asked each of the 130 firms that responded to your 2020 survey for their annual sales volume and the commissions collected, then somehow combined these data from all the firms to arrive at a national estimated average. Could you clarify your use of 'annual production volume and transaction sides'?"

[18] See for example discussion of this relationship in Competition in the Real Estate Brokerage Industry: A Report by the Federal Trade Commission and U.S. Department of Justice (April 2007), pp. 42-45. Schnare and Kulick (loc. cit.) also found, in six of seven markets studied, an inverse relationship between price and rate.

Other research suggests that the average national commission rate is higher than five percent:

- In the Clever Real Estate research, an investigator surveyed nearly 915 individual agents in all areas of the country to ask them what typical commission rates would be in their area. From these data, the estimated average state and national rates. State rates varied from under five percent – California, Massachusetts, and New Hampshire – to 6 percent or higher – Kansas, New Mexico, North Dakota, and Vermont. The estimate of a national average rate was 5.5 percent.[19]
- HomeLight, a national real estate portal and referral service, estimates local and national average real estate commission rates "using real estate transaction data from thousands of home sales each year." While the specific characteristics of these data are not disclosed, HomeLight estimates that the national average rate is 5.8 percent.[20]
- In 2019, the Consumer Federation of America spoke with 200 agents spread across 20 cities to learn their quoted rate and also learn more about rates in their area. Seventy percent quoted a rate of six percent while another 22 percent quoted rates between five percent and 5.8 percent. Without prompting, several also mentioned that their rate was "typical" or "standard" for their area.[21]

Given the information presented thus far in this report, we estimate that typical commission rates in a large majority of urban areas in the eastern half of the U.S. range from five percent to six percent. Just doubling the median buyer agent commissions in 20 of the 21 cities we researched yield this result. More buy-side commissions are below 2.5 percent than above three percent, yet in a significant minority of commissions, the listing agent's split is higher than the buyer agent's. In addition, the buy-side commission rates we reported are depressed a bit by the inclusion of buy-side solds by double-dipping agents who may have felt obligated to report a buy-side percentage to their local MLS.

## How Industry Structure and Culture Explain Rate Uniformity

**Historic Rate Setting:** To an extent, current rate uniformity reflects historic rate-setting by the industry. The Federal Trade Commission's 1983 report on the residential real estate and brokerage industry explains the development of industry rate-setting in the mid-1900s.[22] Before then, industry groups in most areas issued rate schedules that by the 1930s, had largely stabilized commission rates in these areas. However, not all brokers complied with the schedules, and rates

[19] Peterson, "Average Real Estate Commission Rates," loc. cit.
[20] This national average is found with estimates of local average rates on the HomeLight website.
[21] Stephen Brobeck, Hidden Real Estate Commissions: Consumer Costs and Improved Transparency (Consumer Federation of America, October 2019), pp. 8-12.
[22] Federal Trade Commission, The Residential Real Estate and Brokerage Industry: Los Angeles Regional Office Staff Report (1983), pp. 195-222.

in different areas were not consistent. One industry leader complained in 1936: "There are many brokers who are operating under lower commission charges than provided by the schedule. They are injuring themselves very definitely, and making it harder for the others to receive adequate compensation for their services."[23]

In a 1939 article, the industry leader reported: "It is the intention of the National Association to work out a guide to be used as a model for Boards through the United States." The article was titled, "Fine Work on Schedules Aids Brokers Make More Money."[24] By June 1940, that leader noted: "The trend seems to be for various states to adopt uniform schedules for the individual states, and some of the adjoining states are working together to have the uniform schedules over more than one state."[25] By the 1950s, the five percent commission was nearly uniform across the country, and in 1958, there began a general increase from five to six percent, which led to little consumer resistance. A National Association spokesperson explained to some industry members worried about the reaction of consumers that the average home seller had no idea what a commission rate ought to be.

In the late 1940s, the U.S. Department of Justice (DOJ) filed an antitrust suit against the industry for fixing commission rates, and it was upheld by the U.S. Supreme Court. Shortly after this decision, the industry shifted its position to "recommending" or "suggesting" commission rates. However, this policy change led to little change in broker practice. A DOJ investigation of recommended fee schedules in the 1960s persuaded the National Association of Realtors (NAR) to issue "fourteen points," one of which prohibited the use of recommended fees. Numerous DOJ lawsuits against local boards and member firms led to consent orders that helped to curtail the practice.

Nevertheless, many groups in the industry continued to practice what the FTC report called "covert price-setting." Some of these industry efforts were opposed in lawsuits filed by both the Department of Justice and a number of states. Yet, as the FTC report noted: "We have no evidence that efforts at stopping these per se unlawful conspiracies produce significant change in rates….Overt collusion has generally not been necessary to maintain uniform prices because the brokerage system is, by its very nature, self-enforcing."[26]

**Industry Rules:** The structural core of the industry is 580 regional multiple listing services (MLS) with strict rules governing participation. By listing properties for sale, the MLSs provide a local source of information about these homes that greatly facilitates the work of real estate agents and, now that real estate portals such as Zillow and Trulia have access to this

[23] Ibid., p. 198.
[24] Ibid., p. 196.
[25] Ibid., p. 196.
[26] Ibid., p. 202.

information, also greatly benefit consumers searching for homes. Real estate agents cannot list properties for sale or access information on a local MLS unless they belong to that MLS.[27]

MLSs require that each property listed include a mandatory offer of buyer agent compensation. In other words, listing agents determine the amount of this compensation for buyer agents. (The MLS serving most of Washington State permits firms to include this buyer agent compensation in their marketing, and some do.) So with few exceptions, consumers do not have access to any information about buyer agent compensation until closing.[28] More importantly, most buyers cannot negotiate this compensation with their agents (though a few agents are willing to offer rebates on commissions to their clients).[29]

This system predisposes listing agents in an area to offer the same commission rates to buyer agents. They know, but buyers do not know, what these rates are. If listing agents offer a commission rate below the local norm, they risk their property not being shown by buyer agents who "steer" their clients to higher rate properties. This steering has been documented and is not disputed.[30] If listing agents, on the other hand, offer buyer agents rates well above the local norm, they not only decrease their own compensation but also threaten the sales of other agents who are offering lower rates. In this research, we found relatively few buyer agent rates above three percent (0.5%).

**Industry Norms:** These structural disincentives to offer buyer agent commission rates outside the norm are reinforced by the "cooperative" culture of the industry in which all agents are expected to be "team players." In its 1983 report, the FTC concluded: "The greatest impact of MLSs on inter-firm competition may result not from formal rules but from the interdependence among brokerage firms and from the customs and beliefs that have arisen in the course of the interdependent relationship the MLS institutionalizes."[31]

The dominant culture in the industry is sustained by industry associations, firms, and agents mainly through word of mouth because of the perceived legal and political risks of documenting rate-setting. Nevertheless, a number of policy manuals of different firms throughout the country, either available online or leaked by real estate agents, have suggested guidance on commission rates. All manuals appear to have been in use sometime in the past decade, most fairly recently.

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[27] For a good description of the MLS system, see: Competition in the Real Estate Brokerage Industry: A Report by the Federal Trade Commission and U.S. Department of Justice (April 2007), Chapter I.

[28] In mid-November of this year, the NAR decided that MLS data on buy-side rates could be disclosed by brokers, agents, and portals such as Zillow and Realtor.com. If the portals were to use this access to publish the rates in their listings, these rates would be available to all consumers on all MLS properties.

[29] The most detailed analysis of barriers to rate competition can be found in the recently published article: Mark Nadel, "Obstacles to Price Competition in the Residential Real Estate Brokerage Market," Berkeley Business Law Journal, v. 18, n. 1 (2021).

[30] The most influential study on steering was undertaken by Panle Barwick, Panag Pathek, and Maisy Wong: "Conflicts of Interest and Steering in Residential Brokerage," American Economic Journal: Applied Economics (July 2017).

[31] FTC 1983 Report, loc. cit., p. 18.

- The 2021 policy manual for Century 21 states: "Our Company policy is 6% for residential listings…and a minimum commission of $4,000 for properties that, even if taken at the percentages in this paragraph, would result in a commission below $4,000."
- A Better Homes and Gardens Policy Manual for Kansas City Homes (dated 10/5/16) states: "Commission Volume will be adjusted as follows: Any Better Homes and Gardens Real Estate Kansas City Homes side greater than 3% will receive a pro-rated increase of Commission Volume. Any Better Homes and Gardens Real Estate Kansas City Homes side less than 3% will receive a pro-rated reduction of Commission Volume unless [the company] receives its full company dollar based on the above stated percentage….There will be a minimum commission of $2,500, $1,250 on each side of the sale."
- A Berkshire Hathaway Texas Realty policy and procedure manual (dated 12/12/2014) states: "The company's expectation of company dollar on a transaction will be calculated at 3% of the sales price on the listing side and 3% of the sales price on the selling side, less the franchise fee and the Associate's split."[32]
- A Berkshire Hathaway Home Service Gallo Realty [DE, MD] policy and procedures manual (updated on 1/11/16) states: "Gallo Realty normally charges a commission of 5%-6% of the sales price…with a minimum commission of $2,500."
- A William Raveis manual (2017) found online states: "Sales Agents are not permitted to negotiate, agree to, or accept payment of any reduced commission for a transaction in any amount, which would reduce the Company Commission, by more than five hundred dollars ($500.00) without the prior written approval of the Company's Regional Senior Vice President or President."
- A Danforth Coldwell Banker [WA] Policy and Practices Manual for 2016 states: "All Selling Office Commissions (SOC) will be offered at market commission rate. 6% is considered a market commission, although we allow our brokers to negotiate the listing side of the commission as needed."
- A Coldwell Banker Paradise [FL] Policy Manual (8/2017) states: "Commission to be charged by Coldwell Banker Paradise and its associates shall be a minimum of the following: Home and condominiums 6%. Newly constructed homes and condominiums 5%. 2 or more listings simultaneously by the same owner 5%...If needed, agent may agree to accept a 1% commission reduction if they are the listing and selling agent….Listings may be taken below these commission rates with the approval of a manager. Any adjustment to the company portion of a commission must be made in writing and approved by a manager in writing prior to the commission reduction."

[32] This policy was mentioned in the class action lawsuit, Moehrl v. NAR.

While NAR frequently states publicly that commissions are negotiable, the organization encourages its members not to negotiate. A 2017 blog on the association's current website advises agents: "So the next time a buyer or seller tries to negotiate your commission, what will you say? Really you only have two choices. You can demonstrate the value of what you can do for your client, or you can sacrifice your future and self-esteem by accepting less than you deserve."[33]

This NAR advice is echoed in a Coldwell Banker undated agent script suggesting how to respond to client questions: "How much is your commission? …Learn and practice dialogues on 'protecting your commission.' Stand firm." Or later on: "Will you cut your commission? Other agents will."

- "You know, you're right, there are a lot of desperate agents out there and I'm a little concerned…can I tell you why? (Yes.)
- Do you own anything more valuable than this home? (No.)
- Would you say that it is your most value possession? (Yes.)
- If an agent is so desperate that they are willing to broadcast the fact that they don't think they have any value as a real estate sales associate, then I'm confused.
- Is that the type of person you want sitting across from the negotiating table trying to negotiate you a better price?
- We are talking about a person who has already admitted that he or she doesn't even see value in himself or herself…
- Is that the type of person you want to represent you in the most valuable transaction of your life? (No.)
- Good. If that were the case then I should not have even come over, considering I work 14 hours a day and my assistant works 8 hours a day to get your home sold and that's very valuable…don't you think?
- Top agent alternative:
  - They may feel they are worthless. If they will reduce their price at the listing table, what will they do at the negotiating table? I will be tough and professional on both my fee and your price, particularly at the negotiating table.
- Top agent alternative:
  - Commissions aren't negotiable with agents that sell homes daily. They are only negotiable with realtors who don't believe in the services that they offer. Now you told me you had to be gone in 90 days, right? You need a strong service agent that sells homes, right?"

[33] Doug Devitre, "Are You Worth the Commission You Charge for Representation?" Blog on NAR's website under the title, "How to Answer the Commission Question." (January 5, 2017).

A core norm of the culture is not talking or writing about commission rates except to say that they are negotiable. The industry does not make available information on either buyer or listing agent commissions to those outside the industry.[34] [35] The one exception – a NAR-commissioned report on buyer agent commissions in seven cities (published in 2009 and previously cited) – may have been in response to the 2007 report by the U.S. Department of Justice and Federal Trade Commission of their 2005 Workshop, which stated: "Unfortunately as one author recently noted, 'There is not much empirical evidence on commission rates. The data are usually proprietary and not readily available to the public or to academic analysts.' Consistent with this observation, none of the Workshop participants or commenters provided data on commission rates or fees."[36]

Moreover, individual firms and agents make it difficult for consumers to learn about rates. As our earlier research documented: "Traditional firms that dominate the residential industry brokerage industry choose not to advertise their commission levels or disclose these levels on their websites. General phone inquiries to real estate firms usually do not elicit information about commission levels during those calls. When asked directly by a home seller about the commission charged, many agents are reluctant to discuss these costs."[37]

Even in their dealings with individual clients, commissions often are not discussed. That is especially true for buyers who often do not raise the issue and, when they do, are typically informed that buyer agent commissions are paid for by the seller.[38] Unless buyers ask explicitly what this compensation will be, they will never learn it. While the industry repeatedly states that commissions are negotiable,[39] nearly three-quarters (73%) of 200 listing agents we talked to as a potential home seller informed us that they do not negotiate their commission rate.[40] Sellers inquiring about the buyer agent rate they pay are advised not to lower this rate (below the area norm) to avoid the real risk of their property not being shown.[41]

There is a strong disincentive and incentive for agents and firms not to talk about rates. Industry leaders communicate to realtors, mainly through mandatory courses, that any discussion

[34] "MLSs generally disseminate not only information about housing but also information of competitive use. This competitive information traditionally included the full commission rate contracted for with the client by the listing broker. In 1980, however, the NAR adopted a policy against disseminating such information." FTC 1983 Report, loc. cit., p. 18.
[35] As noted earlier, in mid-November of this year NAR decided to allow buy-side rates in MLS listings to be disclosed by agents, brokers, and apparently, portals. If portals such as Zillow and Realtor.com include rate data in their MLS listed properties, buyers can learn what this buyer compensation is for all MLS property listings.
[36] FTC/DOJ, Competition in the Real Estate Brokerage Industry, loc. cit., p. 38.
[37] Brobeck, Hidden Real Estate Commissions, loc. cit., p. 1.
[38] One requirement of the industry settlement of DOJ's 2020 lawsuit (later withdrawn by DOJ) was that buyer agents not inform buyers that their services were free.
[39] Ann Carrns, "A Challenge to Real Estate Commissions Gains Ground," New York Times (October 9, 2020).
[40] Brobeck, Hidden Real Estate Commissions, loc. cit., p. 5.
[41] Ibid., This report quotes a number of agents to that effect.

of rates raises antitrust concerns.  As explained to us by industry insiders, whenever questions are raised in these courses about rates, instructors say something like, "we cannot discuss commission rates because of antitrust issues."  The incentive for agents and firms to keep mum is the risk of greater price competition, lower rates, and lower incomes in an industry where more than half of all realtors earn below the national median household income, as explained below.

**Surplus of Agents and Uniform Rates:** More than 1.5 million agents are realtors who belong to the NAR and a local MLS.  In 2020, about six million new and existing homes were sold – 12 million "sides."  Approximately 10 percent of sales did not involve a realtor while more than five percent were double-ended, so there were perhaps only ten million sides in which a realtor participated.  In its 2020 survey of realtor members, NAR reported that the median number of residential sides for brokers was 13 while the median number for non-broker agents was nine.  Given the fact that a large majority of commissions must be shared with another agent, it is not surprising that the median gross income of realtors in 2020 was only $43,330.[42] While the COVID-19 pandemic reduced sales and income in 2020, in most years, gross median income has hovered around $50,000, which then must cover work-related expenses.  These expenditures include state licensing fees, NAR/MLS membership fees, and any monthly fees paid to agencies as well as marketing expenses.  The latter include about $1 billion annually that agents spend on Zillow advertising.[43]

In most consumer service areas, these numbers would lead to a dramatic shrinkage in the number of sales agents.  However, that has not occurred in the residential real estate brokerage industry for several reasons.  People are attracted to real estate sales because:

- Agents can exercise a great deal of control over their time compared to most other service workers.  Many agents are free to work from home, take days off, or work part-time.  Eighty-eight percent of realtors are not directly employed by firms but work as contractors.[44]
- Agents can easily qualify as an agent.[45] In many states, training lasts less than a month while the course and license fees often cost less than $1,000.  As one industry expert noted:  "A friend's son just dropped out of high school and she told me he was going to real estate school.  YIKES.  In Texas a manicurist goes to school three times longer than a real estate agent."[46]

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[42] The information above was taken from NAR's Quick Real Estate Statistics (November 11, 2020).
[43] Amy Fontinelle, "Why Zillow is Free and How It Makes Money," Investopedia (June 5, 2019).
[44] Ibid.
[45] Academic researchers have agreed that entry is free or easy.  Note the title of one fairly recent study:  Panle Jia Barwick and Parag A. Pathak, "The costs of free entry:  an empirical study of real estate agents in Greater Boston," RAND Journal of Economics (Spring 2015), pp. 103-145.  These economists found that easy "agent entry reduces average service quality" and that lower commission rates would reduce the number of agents, increase transactions for the average agent, and increase social savings.
[46] Comment of Sissy Lappin, author and Co-Founder of ListingDoor, Quora website (date unknown).

- Agents can dream of a million dollar, double-dipped sale resulting in a $50,000 payday. In this sales profession, unlike many, this dream sometimes does come true (though for relatively few of the some 1.5 million realtors).

The high proportion of the number of agents to the number of home sales reinforces industry efforts to maintain high and relatively uniform commission levels. A typical agent with ten annual sales of homes averaging $300,000 in price is aware that the difference between a two and three percent commission on these sales is the difference between $60,000 and $90,000 in annual income.

**The Partial Erosion of Commission Rate Uniformity:** Despite the near uniformity of rates in most cities, in some cities, there is more rate variation than others. Two factors appear especially important in accounting for this variation. The first is a general trend to lower rates. In the late 1900s, surveys revealed that the majority of total commission rates were six percent with most of the remaining rates at seven percent.[47]

Data we have presented suggests that the large majority of total commission rates currently range from five percent to six percent, with those areas having bimodal rate distributions likely in transition. We hypothesize that this decline largely reflects the inability of the industry to justify seven percent rates to the public and to policy-makers, in part because of some awareness of advertised discount rates and lower rates in many other countries. Regardless, the decline has not eroded industry commission income. Recently this annual income has grown to a record $100 billion or perhaps even higher.[48]

A second factor is rapidly increasing home prices coupled with the willingness of agents to discount related commissions on high-priced properties, often by a full percentage point.[49] This discounting, though, is not universal. In cities with few or no million-dollar sales studied by this report, such as Roanoke, Virginia, and Harrisburg, Pennsylvania, nearly all buyer agent rates are a uniform three percent. Even in Miami, Florida, with a large number of million-dollar sales, few of these purchasers receive a commission rate break.[50]

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[47] In late 1979 and 1980, the FTC staff surveyed home buyers and found that 85 percent were quoted a commission rate of either six or seven percent. FTC/DOJ, Competition in the Real Estate Brokerage Industry, loc. cit., p. 42. In 1991, CFA called 500 firms in 27 major urban areas and learned that the typical rate was six percent in most areas and seven percent in some areas. Stephen and Susan Brobeck, Real Estate Agents and Home Sales: An Evaluation (Consumer Federation of America, October 1991).
[48] Noah Buhayer, "Real Estate Agents Target Record $100 Billion as Sales Boom," Bloomberg Wealth (July 9, 2021). CFA's analysis of sales and commission rates suggests that widely used industry figures understate industry fee income.
[49] See discussion in FTC/DOJ, Competition in the Real Estate Brokerage Industry, loc. cit., pp. 42-45.
[50] Nor did purchasers of high-price Miami homes in the 2009 Schnare report. One could speculate that many of these purchases were by wealthy foreigners who assumed the rates were inflexible.

The relatively high price of homes in Brooklyn, New York may help to explain the relatively low commission rates there. Agents we spoke with indicated that most total commissions in this area were between three and four percent. Our data on buyer agent commissions, with a 1.5 percent median, is consistent with the agent estimates. Zillow's recent estimate of the median home sale price in Brooklyn is $728,000, far higher than the median sale price in all of the other 20 cities we studied. Brooklyn agents may think that the $22,000 to $30,000 charged on a typical home sale provides adequate compensation for their services.[51]

We had thought that the prevalence of double-ending – one agent working with both seller and buyer -- might explain some of the rate variation. In our Brooklyn sample, an astonishing two-fifths (42%) of sales involved only one agent while an additional eight percent of sales involved two agents from one office. Agents retaining the entire commission, possibly prodded by questions from clients, might be prepared to discount it. However, in Brooklyn we found no relationship between double-ending and discounting, as the table below shows. Perhaps, though, the relationship between the two factors is real but more subtle. Might the frequency of double-dipping in the Brooklyn market, generating higher agent incomes, tend to reduce agent incentive to charge high rates on all sales?

### Table 2: Proportion of Brooklyn MLS Double-Ended Solds by Buyer Agent Commission Rates (n=500)

| Rates | Double-Ended (n=211) | Not Double-Ended (n=289) |
|---|---|---|
| 0% | 30% | 31% |
| 0.5-1.0 | 27 | 29 |
| 1.1-1.25 | 12 | 14 |
| 1.5 | 19 | 14 |
| 1.6-2.0 | 6 | 9 |
| 2.1-2.5 | 5 | 3 |
| 3 | 2 | 0 |

The relationship of rate variation to sale prices, double-ending and other factors – including varied agent experience and competence, level of agent services provided, and the presence of discount agents – needs more careful study. Our subsequent research will explore the influence of these and other factors using the database of more than 10,000 home sales.

[51] We also have access to some data on listed buyer agent commissions in other parts of Brooklyn and Manhattan that suggest they are higher there. Commissions appear to vary more in the New York City area than other areas of the country in part because the region is served by both NAR-related MLSs and competing REBNY listings, a subject for future investigation.

## Practical Measures That Would Greatly Increase Brokerage Price Competition

There are two measures that would over time significantly increase price competition in residential real estate markets, linking commission rates more closely to agent quality of service. The first, greater price transparency, has already been accepted in principal by leaders in the industry. The second, uncoupling (or untying) commission rates, is the subject of major class action litigation and has been targeted by the Biden administration. Implementing these two measures would fundamentally alter real estate markets. In our view, as well as benefitting consumers, it would also reward the most productive and pro-consumer agents and would enhance the long-term stability and reputation of the industry.

**Uncoupling Commission Rates:** As noted earlier, when commission rates are coupled or tied, the listing agent (and seller) determine the commissions of both the listing and buyer agent. Sellers have the opportunity to negotiate their listing agent's commission (though about three-quarters of listing agents surveyed refused to do so), but buyers have no opportunity to negotiate the commission of their buyer agent. Moreover, the required listing of buyer agent commissions by local MLSs tends to increase their uniformity primarily because listing agents (and sellers) fear that buyer agents will steer buyer clients away from low-commission properties.

Uncoupling these rates would act powerfully to increase rate competition and, on average, lower them.

- Discount brokers such as Redfin would be unshackled from the necessity of offering buyer brokers a typical rate paid in the MLS area. Instead they could offer lower rates to both sellers and buyers, and would likely increase their marketing of these lower rates.
- Buyer brokers would be expected to discuss their compensation with buyer clients. These clients – who would have been informed of competitive rates through discount broker marketing, news coverage, and other consumer information dissemination – would be more likely to ask buyer brokers if they would lower their rate and any fees. Buyer brokers would feel competitive pressure to do so.
- For the same reasons, so would listing agents discussing their rates with clients. Faced with price competitive pressures, the percentage of these agents willing to negotiate rates would increase.
- While variation in rates among transactions would increase, average rates, now high by world standards, would likely decline.[52]

[52] For international rate levels see: Panle Jia Barwick and Maisy Wong, Competition in the real estate brokerage industry: A critical review (Economic Studies at Brookings, December 2019), p. 8. "The Cost of Buying and

The industry has argued that uncoupling commission rates would force buyers to pay higher costs at closings, discouraging home purchase by lower-income households. This argument is a red herring. There is general agreement in the industry that most or all of buyer agent commissions is added by listing agents to the listed price of the property.[53] If sellers no longer had to pay buyer commissions, listing agents (and sellers) would not feel compelled to hike listed prices, and all buyers would benefit from lower sale prices. Furthermore, the mortgage lending and realtor industries would be highly motivated to allow and facilitate buyer financing of commissions in their mortgages. These industries have the political clout to remove any related regulatory barriers, especially since opposition would be weak or nonexistent.

There is a broad and increasing consensus outside the industry that commission rates should be uncoupled.[54] Studies published on the right (CATO) and left (Brookings) argue strongly for this untying.[55] Lawsuits filed by major class action firms seek to uncouple commissions.[56] The Biden administration's antitrust agenda targets tied commissions.[57] Even voices from the industry have suggested considering changes to current rate practices.[58] The interest of the U.S. Department of Justice in seeking to compel untying should strongly influence any resolution of the issue and its timing.

**Increasing Commission Rate Transparency:** As explained earlier, it is difficult for consumers and others outside the industry to learn about buyer agent, listing agent, and total real estate commissions. Except for discounters, who have very small market shares, real estate firms and their agents do not include information about rates in their marketing or on their websites. Calls to offices no longer elicit information about rates; buyer agents typically inform their clients that their commissions are paid by sellers; and most listing agents are reluctant to discuss, let alone negotiate, their commissions.[59]

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Selling Homes Is Too High: Ending America's Real-Estate Racket," The Economist (February 15, 2020). Even NAR's last DANGER Report warns "commissions spiral downward" as a very high risk, citing the International Real Estate Review as a source indicating that typical rates are 1-2 percent in the UK, 2-3 percent in Australia, 1.5-2 percent in the Netherlands, 3 percent in Belgium, and 3-6 percent in Germany.

[53] See sources listed in note 13 of the amicus brief submitted by CFA and the Oregon State Public Interest Group to the U.S. District Court for Oregon's Portland Division in March 2021, in the case of REX v. Kate Brown, et al.

[54] John D. McKinnon, "Real-Estate Agents Gear Up for Fight to Save Their Commissions," The Wall Street Journal (September 20, 2021).

[55] Roger P. Alford and Benjamin H. Harris, "Anticompetition in Buying and Selling Homes," Regulation (Summer 2021). Barwick and Wong, Competition in the real estate brokerage industry, loc. cit. (note 41). See also: Nadel, "Obstacles to Price Competition," loc. cit. (note 21).

[56] Sitzer v. NAR (2019); Moehrl v. NAR (2020); Bauman v. MLS Property Information Network, Inc. (2020).

[57] White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021). The order asks regulatory agencies to address "unfair tying practices or exclusionary practices in the brokerage or listing of real estate."

[58] See two recent opinion pieces in Inman: Teresa Boardman, "Are Real Estate Commissions Going Down? Not So Much" (August 12, 2021). Johnny Hanna, "Agent Commissions are Heading for a Reckoning: 3 Things to Consider" (October 4, 2021).

[59] In the early 1990s, most of the hundreds of real estate agencies we called were willing to provide some information on commissions, if only to say, "most of our realtors charge six or seven percent." Today it is apparent

A few researchers have gained access to data about buyer agent commissions from one of the 580 MLSs, but never from many MLSs except in one industry-commissioned study. And several decades ago, the industry decided not to record information on listing agent commissions, making it impossible to accurately estimate average total commissions and their variance even locally, let alone nationally.

Faced with increasing external pressure for rate transparency, the industry has shown some willingness to provide information about buyer agent commissions. Several years ago, the Pacific Northwest MLS (serving most of Washington State) allowed participating members to include these commissions on their public property listings.[60] Late last year, the industry agreed to provide more information about buyer agent commissions in their settlement of a DOJ antitrust lawsuit, however, the specific form of these disclosures had not been publicly disclosed, or possibly agreed to, by the time DOJ decided to withdraw from the agreement.

In November of this year, NAR approved guidance that allows agents and brokers belonging to MLSs to share information about buyer agent commissions with non-members, including consumers. This disclosure is not required by realtors, but if portals such as Zillow and Realtor.com, which apparently will have access to the data, include it in their property listings, this information will become broadly available to all consumers. Effective disclosure of these buy-side commissions would inhibit buyer brokers from steering clients to high-commission properties, but it would not increase price competition because buyers still could not effectively use this rate information to negotiate lower commissions.[61]

It is essential that agent and client discuss and agree on agent compensation – rates and other fees – before any contract for services is signed. But it is also important for firms and offices to provide more information about typical rates and fees. When asked, agencies could provide some information, such as: "The typical listing [or buyer] agent commission at this agency is x percent." Or, "most buyer [or seller] commissions range between y and z percent. Also, there is an additional fee of $495." Car dealerships post prices on vehicles then are willing to negotiate these prices, and most consumers are aware that negotiation is possible. Agent compensation could be treated by real estate firms in the same way. Eventually many firms

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from numerous calls that office personnel are instructed not to say anything about rates. If you ask to speak to someone else, they transfer you to the voice mail of an agent.

[60] Patrick Kearns, "Brokerages Vow to Display Buyer's Broker Commissions as New Rule Goes Into Effect in Washington," Inman (October 1, 2019). A recent survey of homes listed by Zillow in "primary areas" served by the Northwest MLS found that all listings included a buyer broker rate.

[61] See analysis in the CFA release, "DOJ settlement with NAR will discourage steering and discrimination against discount brokers, but will not significantly advance price competition in the real estate brokerage marketplace," Consumer Federation of America (November 20, 2020).

would maintain a price list for services offered to home sellers and buyers that could allow for some negotiation of these services and their prices.[62]

**An Evolving Industry:** Today the residential real estate brokerage industry shares the following characteristics:

- About 90 percent of home buyers and sellers work with an agent.[63]
- A large majority of home sales with agents involve two agents, in most areas, between 85 and 95 percent.[64]
- A significant minority of sellers and buyers work with dual agents, transaction brokers (facilitators), or fiduciaries to the other party in the sale. In Florida, for example, according to our data, a large majority of agents work as transaction brokers.
- Despite wide variation in agent costs and quality of service provided, commission rates are very uniform in most urban markets.

If commission rates were uncoupled and the industry provided consumers (and third parties) with more information about rates and fees, the brokerage industry would likely begin to change to become more like other service industries, particularly the legal profession where, like real estate agents, attorneys often help one individual reach an agreement with another individual:

- A very large majority of home sellers and buyers would continue to work with agents. For these consumers, too much is at stake and the purchase process is too complicated for them to engage in a home sale without this assistance.
- Consumers would increasingly understand the services that they are receiving, for example, the negotiability of rates and fees, or the difference between a fiduciary and non-fiduciary relationship with an agent.
- Agents would vary rates to a much greater extent based on their costs, their services, and more knowledgeable consumer demand. The marketplace would likely evolve so that consumers had a real choice of options ranging, for example for a buyer, to limited non-fiduciary help looking at and purchasing one property to an extensive home search, with many visits, by a fiduciary. Increasingly, both buyers and sellers would have the opportunity to work with one transaction broker who would facilitate the sale for a greatly reduced commission rate or dollar price.

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[62] These prices could, to an extent, reflect the amount of work required of agents. For example, a firm or agent could add a surcharge if more than x number of homes were shown. We have spoken to agents who are considering this type of pricing scheme.

[63] A finding of industry and independent surveys that is not questioned.

[64] Brobeck, Double-Dipping, loc. cit. This report did not include anomalies like Brooklyn, where the percentage of double-ended sales with one agent is much higher.

- A more competitive and wide-open brokerage marketplace would not only provide home sellers and buyers more opportunities to reduce their costs but also possibly expose them to greater risks of overpaying for poor service. The role of regulators would become more important in providing consumers with information, complaint resolution, and especially, the monitoring and disciplining of agents and firms that engaged in unfair practices.[65]
- To the extent that agents offered more non-fiduciary services, the role of attorneys in the purchase process would increase.

## Appendix: Distribution of Buyer Agent Commission Rates (%s)

| City | N | $s | 0 | 0.1-1.9 | 2 | 2.1-2.4 | 2.5 | 2.6-2.9 | 3 | >3.0 | Median |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Atlanta, GA | 500 | 0 | 1 | 0 | 7 | 13 | 41 | 3 | 434 | 1 | 3 |
| Baltimore, MD | 500 | 6 | 2 | 24 | 21 | 4 | 412 | 0 | 19 | 8 | 2.5 |
| Birmingham, AL | 500 | 20 | 0 | 5 | 14 | 4 | 276 | 3 | 173 | 5 | 2.5 |
| Brooklyn, NY | 500 | 0 | 157 | 286 | 34 | 1 | 18 | 0 | 4 | 0 | 1.25 |
| Buffalo, NY | 500 | 23 | 0 | 1 | 3 | 1 | 128 | 4 | 340 | 0 | 3 |
| Charlotte, NC | 500 | 10 | 0 | 4 | 49 | 5 | 218 | 8 | 206 | 10 | 2.5 |
| Chicago, IL | 500 | 7 | 0 | 2 | 59 | 53 | 370 | 0 | 9 | 0 | 2.5 |
| Columbus, OH | 500 | 1 | 3 | 2 | 13 | 0 | 33 | 5 | 441 | 2 | 3 |
| Grand Rapids, MI | 500 | 0 | 5 | 0 | 1 | 0 | 16 | 3 | 474 | 1 | 3 |
| Harrisburg, PA | 550 | 60 | 0 | 1 | 5 | 1 | 165 | 5 | 304 | 9 | 3 |
| Hartford, CT | 500 | 6 | 0 | 0 | 18 | 30 | 415 | 1 | 29 | 0 | 2.5 |
| Indianapolis, IN | 500 | 7 | 0 | 2 | 59 | 54 | 369 | 0 | 9 | 0 | 2.5 |
| Jacksonville, FL | 500 | 1 | 2 | 4 | 39 | 9 | 214 | 35 | 195 | 0 | 2.5 |
| Memphis, TN | 500 | 7 | 4 | 1 | 11 | 0 | 21 | 0 | 455 | 1 | 3 |
| Miami, FL | 500 | 1 | 1 | 7 | 46 | 3 | 126 | 1 | 311 | 4 | 3 |
| Minneapolis, MN | 590 | 0 | 1 | 4 | 3 | 51 | 0 | 520 | 8 | 0 | 2.7 |
| New Orleans, LA | 500 | 37 | 0 | 1 | 54 | 72 | 177 | 13 | 145 | 1 | 2.5 |
| Portland, ME | 500 | 1 | 0 | 2 | 36 | 59 | 370 | 4 | 27 | 1 | 2.5 |
| Roanoke, VA | 500 | 2 | 1 | 0 | 2 | 0 | 21 | 1 | 473 | 0 | 3 |
| St. Louis, MO | 500 | 14 | 6 | 1 | 5 | 21 | 126 | 313 | 8 | 6 | 2.7 |
| Trenton, NJ | 500 | 31 | 5 | 2 | 24 | 4 | 250 | 5 | 177 | 2 | 2.5 |

[65] Some of these anti-consumer practices are explained on the page, "Top Ten Worst Practices," in the website of the Consumer Advocates in American Real Estate (C.A.A.R.E.), led by Douglas Miller.