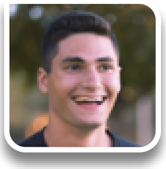
SYSTEMATIC NATIONAL EVIDENCE OF STEERING BY REAL ESTATE AGENTS

BY JORDAN M. BARRY, WILL FRIED & JOHN WILLIAM HATFIELD[1]

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Policymakers have long worried that real estate agents steer their buyer clients away from properties that pay buyer agents low commissions. They consider commission-based steering a key reason why U.S. real estate commissions have remained high despite low barriers to entry. We used a new dataset to provide the first systematic, nationwide evidence that buyer agents do in fact steer clients away from properties that offer low buyer agent commissions. All else being equal, we found that low-commission listings receive less attention, as measured by page views on Redfin. Homes with lower buyer agent commissions take longer to sell and are less likely to sell at all. These effects are most pronounced for listings with the lowest commissions, which take 33 percent longer to sell and face a 75 percent greater risk of not selling at all in a typical geographic market. Our findings have significant implications for both the $52 trillion U.S. housing market and for other industries in which firms are interdependent.

I. INTRODUCTION

In the United States, home sellers set the commission that the homebuyer's agent (the "buyer agent") will receive. Buyer agents have a duty to act in their clients' interests, but buyer agents also have a direct financial incentive to steer their clients away from listings that offer low buyer agent commissions. This dynamic motivates home sellers to offer going-rate commissions, even if the going rate is high, lest their homes languish unseen and unsold.

Indeed, residential real estate commissions are generally higher in the United States than in other developed countries.[2] And for almost fifty years, federal regulators have worried that commission-based steering is to blame.[3] These concerns have only seemed more well-founded over time. As the Internet has made it easier than ever for buyers and sellers to find each other, commissions for intermediaries such as stockbrokers and travel agents have plunged, but real estate agent commissions remain as high as they were 20 years ago.[4]

The National Association of Realtors ("NAR") strenuously denies that agents engage in commission-based steering. They contend that agents' fiduciary duties to their clients prohibit agents from steering, that it is not in agents' interest to steer clients, and that, in a world of Zillow and Redfin, agents simply lack the capacity to steer.[5]

Unfortunately, researchers have lacked the data to investigate steering systematically. The vast majority of homes sold in the United States are listed on a centralized database known as a Multiple Listing Service ("MLS"). A home's MLS listing contains large amounts of information about that home, including the commission offered to the buyer agent. However, MLSs have not released buyer agent commission information to the public. Without this data, researchers have been unable to study commission-based steering.[6]

A recent settlement between the Department of Justice ("DOJ") and NAR made buyer agent commissions publicly available for the first time.[7] We used this newly available data to analyze approximately 265,000 listings from more than 30 of the largest geographic markets around

2 Natalya Delcoure & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the U.S. Brokerage Industry*, 5 Int'l Real Estate Rev. 12, 12 (2002); *Sellers Beware*, The Economist, Aug. 29, 2019, available at https://www.economist.com/united-states/2019/08/29/why-americas-real-estate-brokers-are-such-a-rip-off.

3 *See* Federal Trade Commission Staff Reports, The Residential Real Estate Brokerage Industry (1983), available at https://www.scribd.com/document/589936946/The-Residential-Real-Estate-Brokerage-Industry-1983-The-Butters-Report [hereinafter FTC Report]; United States Government Accountability Office, Real Estate Brokerage: Factors That May Affect Price Competition, Report to the Committee on Financial Services, House of Representatives, August 2005, GAO-05-947, *available* at https://www.gao.gov/assets/gao-05-947.pdf; United States Dep't of Justice & Federal Trade Comm'n, Competition in the Real Estate Brokerage Industry 66-70 (2007) [hereinafter Joint Report]; Matthew Magura, Antitrust Division Economic Analysis Group, Dep't of Justice, How Rebate Bans, Discriminatory MLS Listing Policies, and Minimum Service Requirements Can Reduce Price Competition for Real Estate Brokerage Services and Why It Matters, EAG 07-8 at 3-17 (May 2007), available at https://www.justice.gov/sites/default/files/atr/legacy/2007/09/28/225695.pdf [hereinafter 2007 DOJ Paper].

4 Tracey Velt, *Average Real Estate Commission Rate at Highest Level Since 2013*, RealTrends, Apr. 26, 2023, https://www.realtrends.com/articles/average-real-estate-commission-rate-at-highest-level-since-2013.

5 See e.g. *Moehrl v. Nat'l Assoc. of Realtors*, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, Case No. 1:19-cv-01610, at 45-46 (N. Dist. Ill.); *Sitzer v. Nat'l Assoc. of Realtors*, Suggestions in Support of the Corporate Defendants' Motion to Dismiss, Case No. 4:19-cv-00332-SRB, at 14 (W. Dist. Mo. Aug. 15, 2019); Andrea V. Brambila, *More Than 700 Agent Steering Calls Suggest Price-Fixing, Lawyers Charge*, Inman, July 8, 2022, https://www.inman.com/2022/07/08/more-than-700-agent-steering-calls-suggest-price-fixing-lawyers-charge/ (quoting Mantill Williams, Vice President of Public Relations and Communications Strategy for NAR, as saying "Brokers who were only to show homes that offer high commissions wouldn't be in business very long, as buyers would demand to see other options or go to someone else who will."); Anthony Phillips, *The Case for Realtors: The National Association of Realtors vs Missouri,* The Real Daily, July 6, 2023, https://theamericangenius.com/housing/board-associations/the-case-for-realtors-nar-vs-missouri/.

6 The one exception is Panle Jia Barwick, Parag A. Pathak & Maisy Wong, *Conflicts of Interest and Steering in Residential Brokerage*, 9 Am. Econ. J.: Applied Econ. 191 (2017). The authors of that paper were able to get access to data from the Boston metropolitan area, ending in 2011. Their findings are consistent with our own.

7 [Proposed] Final Judgment, *United States v. Nat'l Ass'n of Realtors*, Case No. 1:20-cv-03356, at 4 (D.D.C. Nov. 19, 2020), *available at* https://www.justice.gov/media/1106421/dl. The DOJ backed out of the proposed settlement in July 2021 because it determined that the terms of the settlement we inadequate to prevent future malfeasance. We believe this to be the first time that the DOJ's Antitrust Division has withdrawn from a proposed settlement that a defendant had not violated. NAR is attempting to enforce the proposed settlement; the matter is currently before the Court of Appeals for the D.C. Circuit. *Nat'l Ass'n of Realtors v. United States*, Notice of Appeal, Case No. 1:21-cv-02406-TJK (D.D.C. Mar. 27, 2023).

the country.[8] We found that buyer agents nationwide steer their clients away from low-commission listings.[9] Low-commission listings receive less attention from buyers, take longer to sell, and are more likely to remain unsold. All of these effects are strongest for the homes with the lowest commissions, which take 33 percent more time to sell and are 75 percent more likely to remain unsold in a typical geographic market.

This is a particularly timely moment to consider steering in real estate. More than a dozen class action lawsuits are currently pending against NAR and real estate brokerages, alleging that they illegally conspired to inflate agents' commission rates.[10] The first of these cases, *Burnett v. NAR*, went to trial in fall of 2023 and produced a $1.8 billion verdict for plaintiffs — a figure that may yet be tripled.[11] The other cases remain pending, including several that cite our research, and could produce even larger verdicts.[12]

The economic significance of our findings extends beyond current events. Millions of U.S. homes sell each year. If real estate agent commissions are inflated, the annual cost to U.S. homeowners would measure in the tens of billions of dollars.[13] The housing market also has important implications for the labor market. The more expensive it is to move, the harder it is to pursue attractive job opportunities in different geographic locations. Higher real estate agent commissions increase moving-related frictions, to the detriment of the U.S. economy overall.

Our findings also offer new insights into the power of industry norms. In some industries ("Collaborative Industries"), firms must cooperate with their rivals to succeed.[14] The need to cooperate makes firms in Collaborative Industries more interdependent than firms in conventional industries. Real estate brokerage is a classic example; agents must work with rival agents to consummate transactions. A real estate agent will therefore care about what other agents think of them, which provides an incentive to conform to industry norms.

Collaborative Industries can use rivals' interdependence to enforce anticompetitive norms. For example, existing firms might join together to resist new entrants, especially if they do not conform to existing pricing conventions or other industry norms. Having fewer entrants can dampen price competition, at consumers' expense. Moreover, entrants are often the vehicle by which innovative ideas and technologies enter an industry. Reducing entrants can thus reduce innovation in an industry.

Our findings provide insight into the ways in which firms can use norms to resist disruptive innovation, especially in Collaborative Industries. For example, consider instant buyers (more commonly known as "iBuyers"). iBuyers make immediate cash offers to home sellers, then resell the properties they purchase soon afterward to conventional buyers — essentially, they operate like stockbrokers or car dealers, except they are dealers of real estate instead of stocks or cars. iBuyers were new, potentially disruptive entrants into the residential real estate brokerage industry. If real estate agents can steer clients based on the commissions they offer, they can steer clients away from iBuyers' listings, too.[15]

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8 We present our analysis and findings in our forthcoming law review article, Jordan M. Barry, Will Fried & John William Hatfield, Et Tu, Agent? Commission-Based Steering in Residential Real Estate, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4596391 [hereinafter Commission-Based Steering]; see also Jordan M. Barry, Will Fried & John William Hatfield, Online Appendix to Et Tu, Agent? Commission-Based Steering in Residential Real Estate, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714313. All of our data and code are also available online. William Fried, Redfin Views Analysis, https://github.com/williamfried/redfin_views_analysis.

9 Several other bodies of evidence also indicate that buyer agents steer their clients away from low-commission listings. Real estate agent training materials, a consumer watchdog investigation, and recorded phone calls in which agents refuse to show their clients low-commission properties paint a picture of buyer-agent steering as a widespread phenomenon. Commission-Based Steering, *supra* note 8, Part IV.4.

10 See e.g. *Moehrl v. Nat'l Ass'n of Realtors*, Complaint, Case No. 1:19-cv-01610 (N.D. Ill., June 7, 2022); *Sitzer v. Nat'l Ass'n of Realtors*, Class Action Complaint, Case No. 4:19-cv-00332-SRB (W. Dist. Mo., Apr. 29, 2019); see also *United States v. Nat'l Ass'n of Realtors*, Complaint, Case No. 1:20-cv-03356 (Dist. D.C., Nov. 19, 2020).

11 See e.g. Dave Gallagher & Austin Alonzo, *Jury Sides with Home Sellers in Commissions Trial*, Real Estate News, Nov. 17, 2023, https://www.realestatenews.com/2023/10/31/jury-sides-with-home-sellers-in-commissions-trial.

12 The *Sitzer* case, which yielded a $1.8 billion verdict, was limited to sales of homes through Missouri MLSs, which captures only a small fraction of national home sales. Another pending case, *Moehrl*, may result in more than $40 billion of damages. *See* James Rodriguez, *The Multibillion-Dollar Lawsuits That Could Radically Reshape How We Buy and Sell Homes Forever*, Business Insider, June 26, 2023, https://www.businessinsider.com/real-estate-agents-lawsuits-buy-sell-homes-forever-housing-market-2023-6.

13 See e.g. Noah Buhayar, *Real Estate Agents Target Record $100 Billion as Home Sales Boom*, Bloomberg, July 9, 2021, https://www.bloomberg.com/news/articles/2021-07-09/real-estate-agents-eye-record-100-billion-as-home-sales-boom; *Residential Real Estate Market Size And Trends*, Leanprop.com, 2021, https://www.leanprop.com/posts/residential-real-estate-market-size-and-trends; *Real Estate Sales & Brokerage in the US - Market Size 2005–2029*, IBIS World, Feb. 1, 2023, https://www.ibisworld.com/industry-statistics/market-size/real-estate-sales-brokerage-united-states/.

14 Jordan M. Barry, John William Hatfield, Scott Duke Kominers & Richard Lowery, *Not from Concentrate: Collusion in Collaborative Industries*, 108 Iowa L. Rev. 1089 (2023) [hereinafter *Collaborative Industries*]; see also John William Hatfield, Scott Duke Kominers, Richard Lowery & Jordan M. Barry, *Collusion in Markets with Syndication*, 128 J. Pol. Econ. 3779 (2020); John William Hatfield, Scott Duke Kominers & Richard Lowery, *Collusion in Brokered Markets*, 79 J. Fin. (forthcoming 2024).

15 For more on this topic, *see* Commission-Based Steering, *supra* note 8, Part IV.B.3.

Similarly, our findings also provide insights into when government intervention may be the best way to resolve problematic industry practices. NASDAQ market-makers provide an encouraging data point in this regard. They successfully enforced anticompetitive pricing practices via peer pressure and retaliation for many years.[16] Once these practices were brought to light, the DOJ launched an investigation. The practice promptly disappeared, firms committed to long-term behavioral changes designed to prevent the problematic practices from recurring, and firms paid over $1 billion in damages.[17]

II. OUR DATA

Our primary data consists of all active listings on Redfin within specified ZIP codes between June 12, 2021, and February 3, 2022. This amounts to hundreds of thousands of listings from 34 of the country's largest real estate markets. For each listing, our data includes a wealth of information, including:

1) *listing information*, such as the asking price;
2) *property information*, such as Redfin's price estimate, the year the property was built, its latitude and longitude, the number of bedrooms, the number of bathrooms, the square footage, and the property type (for example, single-family residence, townhouse, condominium, etc.);
3) *Redfin site information*, such as the number of page views it had received ("page views");
4) *the buyer agent commission* offered; and
5) *sale information* (if applicable), including the date the property went under contract, the date the sale closed, and the sale price.

Before proceeding to our analysis, it is worth discussing how we treat buyer agent commission rates. The going-rate commission varies across U.S. real estate markets; what constitutes a low-commission listing in one geographic market might be commonplace in another. For example, in the Washington, DC metro area, over 80 percent of listings offer the buyer agent a 2.5 percent commission. Thus, a seller offering 2.5 percent has little cause to be concerned about steering. In Houston, on the other hand, the vast majority of sellers offer 3 percent commissions. A seller offering only 2.5 percent in Houston might well encounter steering.

To account for these differences, we classify each listing's commission based on how it compares to the going rate in that geographic market. The highest commission category ("c_1") includes commissions that are at or above the going rate in that geographic market. The lowest category ("c_4") consists of commissions below 2 percent. Category c_4 commissions are fairly rare in all of the markets we examine; 99 percent of listings offer higher commission rates nationwide. We have two intermediate categories between these poles ("c_2" and "c_3"), representing commissions that are below the going rate but that are still 2 percent or above.[18]

The basic idea behind our classification system is that c_1 commissions are going-rate commissions ("Going-Rate Commissions"). As one progresses through the other three categories (collectively, "Low Commissions"), commissions drop further and further below the going rate. This classification gives us an intuitive measure that is interpretable across markets.

III. OUR STATISTICAL FINDINGS

We now turn to the results of our statistical analyses. We begin by considering the effects of buyer agent commission rates on page views. We then consider whether homes offering lower commission rates take longer to sell or face greater risk of not selling at all. Finally, we consider alternative possible explanations for the results we observe.

16 William G. Christie & Paul H. Schultz, *Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?*, 49 J. Fin. 1813, 1838–39 (1994); *Collaborative Industries*, *supra* note 14, at 1127-28.

17 William G. Christie, Jeffrey H. Harris & Paul H. Schultz, *Why Did NASDAQ Market Makers Stop Avoiding Odd-Eighth Quotes?*, 49 J. Fin. 1841, 1841–43 (1994); Competitive Impact Statement at 24–26, *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532 (S.D.N.Y. 1996) (No. 96-5313), https://www.justice.gov/atr/case-document/file/484141/download; Arthur M. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the* NASDAQ *Litigation*, 52 Case W. L. Rev. 111 (2001).

18 Category c_3 generally includes commissions that are (1) smaller than the going-rate commission; (2) at least 2 percent; and (3) less than 2.5 percent. Category c_2 captures commissions that are larger than those in c_3 but smaller than those in c_1. Of the 34 geographic markets in our data, 14 have all four commission categories, 29 have all categories but c_2, and five have only c_1 and c_4 commissions. For more detail, see Commission-Based Steering, *supra* note 8, Part III.B.

A. Page Views

Real estate agents frequently send their clients listings that may be of interest. We hypothesize that, all else being equal, buyer agents are less likely to send their clients listings that offer low commissions for buyer agents. If so, then fewer potential buyers will become aware of low-commission listings, which would translate into fewer views of those listings' Redfin pages. So long as some buyer agents behave this way, and some buyers look at listings on Redfin, low-commission properties should tend to receive fewer page views on Redfin than comparable properties that offer going-rate commissions.

To investigate this hypothesis, we estimate the effect of offering a low buyer agent commission on Redfin page views. In doing so, we compare the average page views for homes that offer Going-Rate Commissions against the average page views for homes that offer Low Commissions. We find that across almost all markets, listings with Low Commissions garner fewer page views, and the effects are more pronounced for listings with the lowest commissions (c_4). All of these effects are both statistically and economically significant.

More specifically, all else being equal, a listing with a c_2 or c_3 commission receives approximately 4 percent fewer page views. The effect is twice as large for the lowest commissions; homes offering a c_4 commission receive more than 8 percent fewer page views. All of our results are statistically significant at the 0.001 level.

When interpreting these results, it is important to remember that people view real estate listings for a variety of reasons: Some are actively looking to buy, but others are merely learning about the local market or are hobbyists who simply enjoy looking at real estate listings, possibly in locations they never plan to live in. Thus, buyer agents can only channel a fraction of Redfin traffic, which means that buyer agent steering should only reduce a listing's total page views by a modest amount — which is what we find.

From a seller's perspective, some page views are more valuable than others. Sellers need active buyers to see their listings; idle hobbyists hundreds of miles away are of little concern. Buyer agent steering impacts the viewing habits of a group that sellers care about—potential buyers who are represented by agents and who are actively looking at homes in the area—and should be expected to have larger effects than raw page view differences alone would indicate.

A few points merit special mention. First, c_2 commissions — which are only slightly below the going rate — still appear to trigger a substantial amount of steering. This result can potentially explain why real estate agents' commissions have held remarkably steady, even as commissions in other intermediation businesses have plunged: If small drops in the commission rate went unpunished, those drops could accumulate over time, gradually eroding the going rate. But if buyer agents steer clients away from any listing that offers a Low Commission, that could discourage sellers from cutting rates at all, avoiding the price-erosion process.

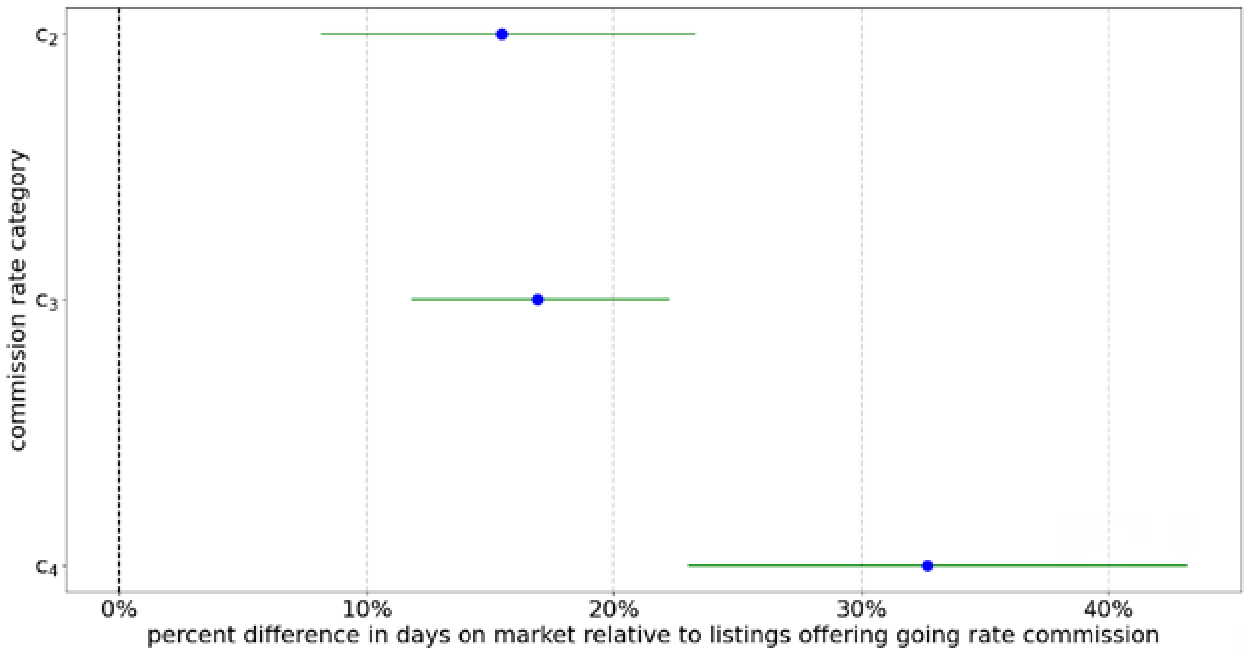
B. Time to Sell

If buyer agents steer clients away from Low-Commission properties, sellers who offer Low Commissions would have more trouble selling their homes. We therefore investigate whether Low Commission homes take longer to sell. This analysis mirrors the page view analysis. The two important differences are that (1) we limit our data to homes that went under contract within 180 days of being listed and (2) our outcome variable for each particular home is now the number of days that home remained on the market, rather than page views on Redfin.[19]

We find that listings offering commissions in categories , and , respectively, take an average of 15.5 percent, 16.9 percent, and 32.7 percent longer to sell than listings offering Going-Rate Commissions. These results track those of our page view analysis, and are statistically significant at the 0.001 level. Selling delays of these magnitudes would impose significant costs on home sellers. Figure 1, below, illustrates these findings graphically. The blue dots represent the best-guess estimates for each commission category relative to listings offering Going-Rate Commissions. The green error bars denote the 90 percent credible intervals for those estimates.

19 We use the logarithm of the number of days on market as our measure. This is common in statistical modeling. See e.g. Kenneth Benoit, Methodology Inst., London Sch of Econ., Linear Regression Models with Logarithmic Transformations at 2, Mar. 17, 2011, https://kenbenoit.net/assets/courses/me104/logmodels2.pdf.

Figure 1: Relationship Between Commission Category and Days on Market, on the National Level[20]



C. Probability of Sale

We also investigate the relationship between commission category and the chances that a home sells at all. This analysis closely tracks our time-to-sell analysis.[21] We find that listings offering Low Commissions have lower odds of selling within 120 days than listings that offer Going-Rate Commissions, and these results are statistically significant at the 0.001 level. The chances of selling decline as the commission rate offered decreases.

The most intuitive way to understand these results is to compare (1) the probability that a typical listing in a given market will not sell, assuming that it offers a Going-Rate Commission and (2) the probability that same listing will not sell, assuming that it offers a Low Commission. For example, in Atlanta, there is an 11.6 percent probability that a typical listing will not sell, assuming it offers a Going-Rate Commission. If that same listing were to offer a c_2 commission, the estimated probability of not selling would be 16.8 percent. Thus, shifting from a Going-Rate Commission to a slightly lower commission increases the estimated probability of not selling by 45 percent.[22]

Low-Commission listings are significantly less likely to sell than listings that offer Going-Rate Commissions, and the effect is biggest with respect to the lowest commissions (c_4). In almost every market, the best estimate is that listings offering c_4 commissions are at least 50 percent more likely to not sell than listings offering Going-Rate Commissions. In several markets, listings offering c_4 commissions are more than twice as likely to remain unsold. Again, these results are economically meaningful for sellers. Facing such potential consequences, a rational seller might well decide to pay a Going-Rate Commission.

IV. ALTERNATIVE EXPLANATIONS

It is important to consider alternative explanations that could account for our results — that lower commissions predict fewer page views, longer time to sell, and greater chance of a failed sale — other than buyer agent steering. Is there a factor that we do not account for that is associated with both those outcomes of interest and with lower buyer agent commissions?

One possible concern is that sellers who offer Low Commissions may tend to hire worse listing agents than sellers who offer Going-Rate Commissions. If this is the case, then poor listing agent quality could cause our results, rather than steering by buyer agents.

20 This figure is drawn from Commission-Based Steering, *supra* note 8, fig. 16.

21 Because we are now predicting a binary variable — a home either sold within the relevant time period (120 days) or it did not — we use a logistic regression model here. This is a common choice when the outcome of interest is a binary variable. See Susan M. Hailpern & Paul F. Visintainer, *Odds Ratios and Logistic Regression: Further Examples of Their Use and Interpretation,* 3 Stata J. 213 (2003).

22 Calculating the percent change compared to the initial probability of 11.6 percent yields: (16.8 percent - 11.6 percent) / 11.6 percent = 45 percent.

To address this concern, we repeat our analysis, but only include listings for which the listing agent has at least one Low-Commission listing in our dataset. If Low Commissions are associated with low-quality listing agents, then limiting the analysis to listings represented by these agents controls for listing agent quality. The results of this analysis mirror those derived from the entire dataset: Listings that offer Going-Rate Commissions receive significantly more page views than listings that offer Low Commissions, they sell faster, and they are more likely to sell at all. As before, these effects are most pronounced for the lowest-commission properties (c_4). These results indicate that differences in listing agent quality do not cause our results.

A second potential alternative explanation is that seller pricing behavior explains our results. All else being equal, one would expect underpriced homes to receive more page views, sell faster, and be more likely to sell, and the data bears this out. If sellers who offer Low Commissions also overprice their homes more than other sellers do, that could cause the results that we observe, rather than Low Commissions.

The data does not support that story. Our regression directly controls for the degree of over- and underpricing for each listing. Moreover, the distributions of over- and underpricing for listings in each commission category are quite similar. If anything, sellers offering Low Commissions are more likely to underprice their homes than other sellers. This runs directly contrary to the posited scenario, in which Low Commissions correlate with overpricing.

V. POTENTIAL POLICY RESPONSES TO COMMISSION-BASED STEERING

Commission-based steering can potentially cause multiple harms. It harms buyers, by preventing them from seeing homes that might be of interest. It harms sellers who offer Low Commissions, and whose homes then take longer to sell, if they sell at all. Finally, it harms sellers who offer Going-Rate Commissions, who pay higher commissions than they otherwise would in order to avoid steering.[23] Because most sellers offer Going-Rate Commissions, this last effect likely dominates the others, and regulators have generally centered their concerns around this point.[24] In short, when considering policy responses to commission-based steering, one should consider the policies' effects on overall commission levels.

There are four main policy proposals that have been put forth to combat commission-based steering. The smallest measure would be to allow sellers to list homes on MLSs without posting a buyer agent commission. Unfortunately, our data suggest that this approach is unlikely to be effective. Currently, sellers are permitted to post minimal commissions, such as $1, when listing their homes. However, more than 99.9 percent of sellers offer buyer agent commissions of at least 1 percent. It is not obvious why allowing sellers to offer marginally lower minimum commissions would make a difference when sellers virtually never offer minimum commissions today. Indeed, Seattle's MLS removed its requirement that sellers offer a buyer agent commission when listing a property for sale, and this change seems to have had little impact. Over 95 percent of the Seattle listings in our dataset offer Going-Rate Commissions, and our analyses do not indicate that steering is less prevalent in Seattle than in other markets.

Second, policymakers can attempt to make buyer agent commissions more salient to buyers and less visible to buyer agents. That would make it harder for agents to steer and more likely that clients will notice and object or counteract it. Ultimately, however, there are limits to what this strategy can accomplish given the current market structure. So long as buyer agents curate the listings that they forward to their clients, they will have the opportunity to weed out Low-Commission listings without buyers ever knowing. Buyers never see the commissions on listings that their agents choose not to send them.

A third possibility is to strengthen agents' loyalty requirements. Realtors are already required to serve their clients' interests rather than their own. But in practice, steering carries few consequences. A buyer who is steered is unlikely to know. A buyer who somehow becomes aware has little incentive to report an agent to a professional disciplinary body. Even if a buyer does make a report, serious discipline is unlikely; we are unaware of any instances in which regulators disciplined any real estate agent for commission-based steering.[25] Without a firm commitment from regulators — who have limited resources — to investigate and sanction commission-based steering, this approach is unlikely to succeed.

23 This assumes that sellers ultimately bear the cost of agent commissions. Some or all of the true incidence of commissions may fall on buyers. If so, the analysis below generally holds, with appropriate adjustments.

24 See e.g. Joint Report, *supra* note 3, at 66-71; 2007 DOJ Paper, *supra* note 3, at 5-14.

25 We note that, on most of the state commissions that regulate real estate agents, a majority of the commissioners are themselves real estate agents. *See* Commission-Based Steering, *supra* note 8, Part II.A. This could potentially incline them to take a light approach to disciplinary matters.

The fourth — and most promising — option is to target the market structure directly. If buyer agents, as fiduciaries of the buyer, were forbidden from accepting compensation from sellers or sellers' agents, buyer agents would presumably seek compensation from their clients.[26] For example, buyer agents might enter contracts with their clients that require the client to pay the buyer agent a specified commission upon the closing of a home purchase.

If buyers paid their agents directly, sellers would not be choosing buyer agent commissions. Buyer agents would therefore have no incentive to engage in the kind of steering that we discuss in this Article. This change would place downward pressure on real estate agent commissions: Currently, the specter of steering buoys buyer agent commissions. That would end if sellers did not offer buyer agent commissions; those concerns would not apply to a buyer negotiating with her agent directly. Further, this change might also help reduce listing agents' commissions. High buyer agent commissions may serve as an anchor point that boosts listing agent commissions as well.

NAR and Schnare et al. have argued that, if buyers must pay their agents, buyers would need to bring more cash to the closing table than they do now.[27] Many home buyers are cash-constrained and already struggle to afford a down payment. Thus, they argue that the net effect would be to make it harder for people to buy homes.

However, this need not be the case. In today's system, the buyer agent commission can be financed because it is baked into the purchase price. That can also be accomplished in a world in which buyers set their own agents' compensation. Buyers can still layer the negotiated commission on top of the offer price, so that the total price of the home would still have the buyer agent commission baked in. REX has already used this approach with buyers across the country. According to its CEO, there were no issues.[28]

VI. CONCLUSION

We present compelling evidence that commission-based steering is a significant problem throughout the United States. Low-Commission listings receive less attention, take longer to sell, and face much greater risk of not selling at all. These results hold at the national level and within almost every geographic market we analyze.

Moreover, all of our data was collected during a historically strong seller's market. Demand outpaced supply, and buyers often had to submit offers on multiple homes before one was accepted. Buyer agents are only paid when deals close. Given the uncertainty of any particular buyer successfully landing any specific home they bid on, buyer agents had an incentive to show their buyers more homes than they normally would in order to maximize the chances of completing a sale. This suggests that buyer agent steering would often be even more prevalent than we observe in our data.

There is good reason to think, as regulators have for decades, that commission-based steering inflates real estate agents' commissions and costs U.S. homeowners tens of billions of dollars a year. But the dynamics we identify have also been a powerful stick for enforcing conformity — and for stunting experimentation and innovation — in the real estate brokerage industry. Back in 1979, the FTC surveyed "alternative" brokers. These were generally full-service brokers who offered consumers the same services as others in their area, but who charged significantly lower fees. The vast majority reported experiences in which other brokers had refused to show their listings, made disparaging statements about their businesses to clients and prospective clients, and even threats. These efforts were effective; homes listed with alternative brokers were more than three times as likely to remain unsold.[29]

26 Alternatively, one could bar sellers and seller agents from compensating buyer agents.

27 Home Services of America, the nation's largest residential real estate services company (as measured by transactions closed), funded Ann B. Schnare, Amy Crews Cutts & Vanessa G. Perry, Be Careful What You Ask For: The Economic Impact of Changing the Structure of Real Estate Agent Fees, May 2002, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106600; see also Charlie Oppler, *Oppler: Industry Expert Rebuts – Realtors Put Consumers First*, Boston Herald, Oct. 18, 2021, *available at* https://www.bostonherald.com/2021/10/18/oppler-industry-expert-rebuts-realtors-put-consumers-first/.

28 *Moehrl v. Nat'l Ass'n of Realtors*, Declaration of Jack Ryan, Case No. 1:19-cv-01610, Doc. 324-4 at 4 (N.D. Ill., June 7, 2022) ("In adjusting the home closing price to incorporate the fees the buyer and their agent agree upon, REX has not encountered any issues during the appraisal or financing process.").

29 FTC Report, *supra* note 3, at 150-57. In addition, only 29 percent of alternative brokers' sales were cooperative sales. For conventional brokers, that figure was 66 percent. *Ibid.* at 154.

Redfin, the source of our data, began as a disruptive startup with plans to shake up the real estate industry. It was a brokerage that promised to rebate two-thirds of buyer agents' typical commissions to its clients.[30] Many incumbent agents worried that Redfin would transform the industry at their expense. Established agents discouraged their clients from engaging with Redfin clients; some refused to show homes to Redfin buyers; some refused to present Redfin buyers' offers to their sellers.[31] Redfin ultimately changed its business model and became more of a traditional brokerage. While it is a significant business, its market share is less than 1 percent and few predict that it will achieve the lofty transformative goals of its corporate youth.[32]

We see the same phenomena with respect to iBuyers. When iBuyers debuted, many industry observers predicted that they would capture a significant share of the market from traditional agents.[33] Yet that has not been the case. In 2022, the two largest iBuyers boasted a combined market share of less than 1 percent and over $2.4 billion in losses over the prior three years.[34]

Incumbents' resistance is not the only reason why iBuyers and other aspiring industry disruptors have not lived up to their hype. But in a Collaborative Industry like real estate brokerage, working with one's rivals is important. Hostility to "commission-thirsty outsiders" and "threats to the system" can make a difference.[35]

The real estate brokerage industry needs reform. Ending commission-based steering could save U.S. homeowners tens of billions of dollars annually, increase innovation and productivity in the residential real estate industry, and strengthen the labor market by increasing worker mobility. In our view, the most promising option is to prohibit buyer agents — who are fiduciaries of their clients — from accepting compensation from sellers or their agents. This reform would be a significant change to how the industry currently operates, but also holds tremendous upside. In our view, it is a bet well worth taking.

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30 Timothy B. Lee, *Redfin Set Out to Disrupt Real Estate—It Was Harder Than It Looked*, Ars Technica, July 28, 2017, https://arstechnica.com/tech-policy/2017/07/redfin-set-out-to-disrupt-real-estate-it-was-harder-than-it-looked/.

31 See e.g. Damon Darlin, *The Last Stand of the 6-Percenters?*, N.Y. Times, Sept. 3, 2006, *available at* https://www.nytimes.com/2006/09/03/business/yourmoney/03real.html; James R. Hagerty, *Real-Estate War Traps Consumers in the Middle: Full-Service Brokers' Tactics to Rebuff Discount Rivals Sometimes Hurt the Customer*, Wall St. J., June 17, 2006, at B1; *The Changing Real Estate Market: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.,* 109th Cong. 97–98 (2006) (statement of Glenn Kelman, President & CEO, Redfin Corp.), https://www.govinfo.gov/content/pkg/CHRG-109hhrg31541/pdf/CHRG-109hhrg31541.pdf.

32 Timothy B. Lee, *Redfin Set Out to Change Real Estate. Then Real Estate Changed Redfin.*, Vox, Aug. 10, 2015, https://www.vox.com/2015/8/10/9110233/redfin-glenn-kelman-profile; Lee, *supra* note 31; Tony Mariotti, *Redfin Company Stats: Revenue & Competitors (2023)*, RubyHome.com, Mar. 18, 2023, https://www.rubyhome.com/blog/redfin-stats/.

33 See e.g. B.L. Sheldon, *How Are iBuyers Changing Real Estate*, Real Estate Trend Shark, https://realestatetrendshark.com/how-are-ibuyers-changing-real-estate/ ("iBuyers are not a fad. They aren't going away . . . . And they are already growing and obtaining enormous amounts of venture capital funding."); Deloitte, uSell, iBuy (2019), *available at* https://www2.deloitte.com/us/en/pages/financial-services/articles/ibuyer-real-estate.html; *How to Stay Relevant in a Tech-Infused* World, Realtor Magazine, Aug. 22, 2019, https://www.nar.realtor/magazine/real-estate-news/technology/how-to-stay-relevant-in-a-tech-infused-world (quoting Brad Inman, founder of real estate publication Inman News, as predicting that iBuyers might soon command 50 percent of the national real estate market).

34 Tony Mariotti, *iBuyer Statistics*, RubyHome.com, Apr 2., 2023, https://www.rubyhome.com/blog/ibuyer-stats/; Opendoor Technologies, Inc., Annual Report (Form 10-K) at 46 (Feb. 23, 2023); OfferPad Solutions Inc., Annual Report (Form 10-K) at 49 (Feb. 28, 2023); OfferPad Solutions Inc., Annual Report (Form 10-K) at 48 (Mar. 7, 2022). Zillow ended its iBuyer program in 2021 after suffering large losses. Will Parker, *Zillow's Shuttered Home-Flipping Business Lost $881 Million in 2021*, Wall St. J., Feb. 10, 2022, *available at* https://www.wsj.com/articles/zillows-shuttered-home-flipping-business-lost-881-million-in-2021-11644529656.

35 *Burnett v. Nat'l Assoc. of Realtors*, Case No. 4:19-cv-00332-SRB, Order Denying Defendants' Request for Summary Judgment, Dec. 16, 2022 at 7 (quoting NAR's then-CEO Dale Stinton).

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