A NEW PARADIGM: HOW BROKER COMMISSION REFORMS ARE RESHAPING REAL ESTATE TRANSACTIONS

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I. INTRODUCTION

In March 2024, the National Association of Realtors (the "NAR") entered into a settlement agreement (the "Agreement") to resolve a series of pending lawsuits challenging its policies governing broker compensation in residential real estate transactions.[1] The central issue in these lawsuits was the NAR's requirement that listing brokers make a blanket offer of buyer-broker compensation when listing a property on a Multiple Listing Service. This practice effectively tied the buyer-broker's commission to the listing, making seller-paid buyer-broker commissions the prevailing model in residential transactions.[2] This practice affected almost 90% of all residential real estate sales in the United States.[3] Under the Agreement, the NAR eliminated the requirement that a seller-broker set the buyer-broker commission; instead, each broker must now negotiate compensation separately, and sellers are no longer, as a matter of the NAR's requirements, the customary source of buyer-broker compensation.[4]

This change was received with divided reactions. Proponents of the Agreement argue that the new commission structure will increase competition among real estate brokers by promoting competitive commission rates in place of the effectively standardized rates that prevailed under the prior structure, thereby making residential real estate more affordable.[5] On the other hand, critics primarily contend that the new structure will make it more challenging for the average buyer to purchase residential real estate, disproportionately impacting minorities and low-income Americans who face financial constraints.[6]

This Note examines the socioeconomic impact of the Agreement on residential real estate transactions, combining legal analysis of the Agreement's terms with an assessment of its practical effects on buyers, particularly those from underrepresented communities. The Note also

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1. Ben Harris & Liam Marshall, *How Will the National Association of Realtors Settlement Affect the Cost of Selling or Buying a Home?*, BROOKINGS (Mar. 29, 2024), https://www.brookings.edu/articles/how-will-the-national-association-of-realtors-settlement-affect-the-cost-of-selling-or-buying-a-home; Alana Semuels, *Here's What's About to Change for People Buying and Selling Homes*, TIME (Aug. 5, 2024), https://time.com/7006951/nar-settlement-whats-changing/.

2. Harris & Marshall, *supra* note 1; Elisabeth Buchwald, *Should You Sell Your Home Now or Wait for the Realtor Settlement This Summer?*, CNN BUS. (Mar. 24, 2024), https://www.cnn.com/2024/03/24/investing/when-to-list-your-home-nar-settlement/index.html.

3. Harris & Marshall, *supra* note 1.

4. *Id.*

5. Buchwald, *supra* note 2.

6. Ann B. Schnare, Amy C. Cutts & Vanessa G. Perry, *Be Careful What You Ask For: The Economic Impact of Changing the Structure of Real Estate Agent Fees,* SSRN (May 13, 2022), https://ssrn.com/abstract=4106600.

addresses the Agreement's impact on commercial and hybrid real estate transactions. It begins with a discussion of the events leading up to the Agreement, followed by an overview of key court cases that shaped its terms. Drawing on a variety of research studies, this Note argues that the new commission structure under the Agreement likely poses home affordability challenges for underrepresented and minority home buyers compared to the previous structure.

II. BACKGROUND

A. Parties to the Agreement

The NAR and the home seller class action plaintiffs executed the Agreement on March 15, 2024.[7] The Agreement consolidated two major class action suits: *Moehrl v. National Association of Realtors* on behalf of themselves and those similarly situated from the United States District Court of the Northern District of Illinois, Eastern Division, and *Burnett v. National Association of Realtors* on behalf of themselves and those similarly situated from the United States District Court of the Western District of Missouri, Western Division.[8] Both *Moehrl* and *Burnett* were consolidated from the merger of numerous smaller class action lawsuits filed nationwide.[9]

B. The Class Action Lawsuits Leading to the Agreement

Both *Moehrl* and *Burnett* alleged a series of similar causes of action against the NAR.[10] These class action lawsuits (the "Action") alleged that the NAR and the four largest national real estate broker franchisors — Anywhere Real Estate Inc. (formerly Realogy Holdings Corp.); HomeServices of America, Inc.; RE/MAX Holdings, Inc.; and Keller Williams Realty, Inc., (collectively, the "Franchisors") — were involved in the practice of tying.[11] The Action alleged that together, the Franchisors conspired to require home sellers to pay the broker representing the buyers of their homes, thus violating federal antitrust laws.[12] The cornerstone of the alleged Franchisors' conspiracy was the

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7. Corrected Settlement Agreement at 1, *Burnett v. Nat'l Ass'n of Realtors*, No. 4:19-cv-00332-SRB (W.D. Mo. Apr. 19, 2024), https://www.nar.realtor/sites/default/files/documents/nar-settlement-agreement-download-2024-04-19.pdf; *see* NAT'L ASS'N OF REALTORS, *National Association of Realtors Reaches Agreement to Resolve Nationwide Claims Brought by Home Sellers* (Mar. 15, 2024), https://www.nar.realtor/newsroom/nar-reaches-agreement-to-resolve-nationwide-claims-brought-by-home-sellers.

8. Corrected Settlement Agreement, *supra* note 7, at 8.

9. *Id.* at 9.

10. *Id.*

11. *See* Class Action Complaint ¶ 1, *Moehrl v. Nat'l Ass'n of Realtors*, No. 1:19-cv-01610, Doc. 84 (N.D. Ill. June 14, 2019), https://jnswire.s3.amazonaws.com/jns-media/9b/ed/1657686/Moerhl_v_National_Association_Realtors_complaint.pdf.

12. *Id*.

NAR's adoption and implementation of a rule requiring all real estate brokers[13] to make a blanket, non-negotiable offer of buyer-broker commission (the "Commission Rule") when listing a property on a Multiple Listing Service (an "MLS").[14] An MLS is a database of properties listed for sale in a particular geographic region.[15] A vast majority of residential real estate in the United States is listed on an MLS marketplace to be sold.[16] Brokers, if they are members of a specific MLS, are required to list all their properties on that MLS only.[17] One example is the Houston Association of Realtors (commonly known as HAR.com).[18]

C. What Was the Commission Rule?

The Action alleged that the local NAR associations controlled the MLSs involved in the practice of coupling MLS access with mandatory compliance with the Commission Rule, requiring member brokers to follow all rules set forth in the NAR's Handbook on Multiple Listing Policy (the "Handbook").[19] Multiple sections of the Handbook required all listing brokers to display the seller-broker's offer of compensation for each active listing on their consumer-facing websites.[20] The Action further alleged that the Franchisors collectively possessed market power in local markets for broker services through their unilateral control of the local MLSs.[21] This level of total control coerced home sellers to pay a 3% buyer-broker commission that, plaintiffs alleged, would have been paid by the buyer in a competitive market absent the Franchisors' anticompetitive restraint.[22] As a consequence of the Commission Rule, most buyer-brokers would not show homes to their clients where the seller would be offering a low buyer-broker commission, or they would give priority to showing homes with higher buyer-broker commission offers first.[23] As a result, seller-brokers were

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13. Real estate agents are also referred to as agents and realtors throughout this Note.

14. Class Action Complaint, *supra* note 11, ¶ 2.

15. *Id.* ¶ 3.

16. *Id.*; NAT'L ASS'N OF REALTORS, *Commercial Information Exchange Comparison*, https://www.nar.realtor/commercial/commercial-information-exchange-comparison (last visited Aug. 22, 2025).

17. *Id.*; Class Action Complaint, *supra* note 11, ¶ 3.

18. HOUSTON ASS'N OF REALTORS, *MLS Services*, https://cms.har.com/mls_services (last visited Aug. 21, 2025).

19. NAT'L ASS'N OF REALTORS, *Summary of 2024 MLS Changes* (Dec. 24, 2024), https://www.nar.realtor/sites/default/files/2024-12/2024-Summary-of-MLS-Changes-2024-12-24.pdf; Class Action Complaint, *supra* note 11, ¶ 3.

20. NAT'L ASS'N OF REALTORS, *supra* note 19, at 10; Class Action Complaint, *supra* note 11, ¶ 49.

21. *Id.* ¶ 5.

22. *Id.*

23. *Id.* ¶ 7; *see also* Aly J. Yale, *How Do Real Estate Commissions Work?,* U.S. NEWS & WORLD REP. (Feb. 6, 2025), https://realestate.usnews.com/real-estate/articles/how-do-real-estate-commissions-work.

incentivized to offer higher buyer-broker commissions to gain buyer-broker cooperation as part of complying with NAR's Commission Rule.[24]

The Action maintained that in the absence of the NAR's Commission Rule, home buyers would have been responsible for paying buyer-broker commissions directly.[25] The Action further contended that the Commission Rule curtailed price competition among buyer-brokers because the individuals who engage a buyer-broker—the home buyers—are neither involved in negotiating nor responsible for bearing the cost of their commission. [26] In a typical residential MLS resale transaction, one broker represents the seller while another represents the buyer, with both brokers receiving a percentage of the property's sale price.[27] Prior to the Agreement, total broker compensation in the United States generally ranged from 5–6% of the home sale price, with approximately half of this amount allocated to buyer-broker.[28]

D. A Comparison of Commission Structure in the Foreign Markets

In several foreign real estate markets, buyers who choose to engage a broker pay their broker directly, and the commission rates are generally less than half those paid to buyer-brokers in the United States.[29] These foreign markets include the United Kingdom, Germany, Israel, Australia, and New Zealand.[30] The typical real estate commission is 4.5% in Germany, 2.5% in Australia, and 1.3% in Britain.[31] Trends in the real estate industry highlighted that total commissions in the United States are higher (5–6% commission) compared to the average international markets (1–2% commission).[32]

In summary, the NAR controlled the local MLSs, and the Franchisors leveraged their agreements with those MLSs to require brokers in their residential real estate markets to comply with the NAR's Handbook rules. Among these was the Commission Rule, which required seller-brokers to make a blanket offer of commission to buyer-

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24. *Id.*; Class Action Complaint, *supra* note 11, ¶ 7; *see* Nicole Friedman & Laura Kusisto, *So Much About Real-Estate Commissions Just Changed. Here's What to Know.*, WALL ST. J. (Aug. 14, 2024), https://www.wsj.com/real-estate/real-estate-commission-changes-homebuying-cf5d2448.

25. *Id.*; Class Action Complaint, *supra* note 11, ¶ 8.

26. *Id.*

27. *Id.* ¶ 10; *Commercial Real Estate Commission: A Complete Guide*, CRE KNOWLEDGE BASE, https://crekb.com/commercial-real-estate-commission/ (last visited Aug. 22, 2025).

28. *Id.*; Class Action Complaint, *supra* note 11, ¶ 10.

29. *Id.* ¶ 11.

30. *Id.*

31. David Leonhardt, *The Realtors' Big Defeat*, N.Y. TIMES (Mar. 18, 2024), https://www.nytimes.com/2024/03/18/briefing/real-estate-agent-commissions-free-market.html.

32. Class Action Complaint, *supra* note 11, ¶ 11; *see also* Veronica Dagher, *Almost No One Pays a 6% Real-Estate Commission—Except Americans*, WALL ST. J. (Nov. 16, 2023), https://www.wsj.com/personal-finance/real-estate-buying-home-charts-6dc40caa.

brokers and display the offered commission on their client-facing websites.[33]

III. KEY CASES LEADING TO THE AGREEMENT

Because of many smaller-scale class actions and individual lawsuits, the NAR faced numerous legal challenges. Among those, *Moehrl*, *Sitzer*, and *Leeder* are most instructive in highlighting the legal claims raised against the Franchisors and the NAR.

A. Moehrl v. National Association of Realtors

Filed in the Northern District of Illinois, *Moehrl* involved home sellers who sold their homes through MLSs and were required to offer set commissions to buyer-brokers.[34] As a condition of listing their home on an MLS, each home seller had to include in their listing a single set offer of compensation to any broker who found a buyer for their home.[35] Home sellers then paid that offer amount in connection with the sale of their homes.[36] According to the home sellers, the requirement that they make a set commission offer to the buyer-broker for their property to be listed on an MLS was anticompetitive and caused them to pay artificially inflated, supracompetitive commission rates.[37] For that reason, they brought the antitrust action alleging that the NAR and the Franchisors engaged in a conspiracy in restraint of trade in violation of Section One of the Sherman Act.[38]

The court concluded that the complaint sufficiently alleged that the NAR's conduct deprived the real estate market of "independent centers of decision-making."[39] Instead, power was effectively concentrated in the hands of the NAR, allowing it to influence and set the rules for buyer-broker commission.[40] The court further added that the NAR played a key role in maintaining that system by requiring its realtors to abide by the Commission Rule.[41] The NAR's representatives implemented and enforced those rules through their leadership roles with the local realtor associations.[42] These allegations together were sufficient to plead the NAR's participation in an antitrust conspiracy.[43] The court also found that the home sellers had sufficiently pleaded that they suffered an

33. Leonhardt, *supra* note 31, at 8.
34. *Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768, 773 (N.D. Ill. 2020).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* (citing 15 U.S.C. § 1).
39. *Id.*
40. *Id*. at 779.
41. *Id.*
42. *Id.*
43. *Id.*

antitrust injury.[44] Each Plaintiff was a home seller required to pay a commission to the buyer-broker.[45] Therefore, denying the NAR's motion to dismiss, the court allowed the action to move forward.[46]

B. Sitzer v. National Association of Realtors

Home sellers in Missouri brought a lawsuit against the NAR, alleging anticompetitive practices related to real estate commissions.[47] The key issue centered on the NAR's Commission Rule.[48] Home sellers argued that this rule required all seller-brokers, when listing a property on an MLS, to make blanket, unilateral, and effectively non-negotiable offers of buyer-broker compensation.[49] The home sellers contended that this practice reduced competition and led to inflated residential real estate commissions throughout Missouri, thus violating Section One of the Sherman Act.[50] The home sellers further asserted that the rule and its enforcement by the NAR effectively forced home sellers to pay elevated buyer-broker commissions, which limited the ability of buyer-brokers to negotiate lower commission rates.[51]

Like the court in *Moehrl*, the court here also concluded that the home sellers satisfied the pleading requirements necessary to survive a motion to dismiss.[52] Thus, like *Moehrl*, the court allowed the action to move forward.[53]

C. Leeder v. National Association of Realtors

Unlike *Moehrl* and *Sitzer*, this action was brought by home buyers instead of home sellers against the NAR.[54] Home buyers argued that the Commission Rule violated Section One of the Sherman Act by unreasonably restraining price competition among real estate brokers, which resulted in supracompetitive buyer-broker commission rates that artificially inflated the purchase prices of residential real estate.[55] The home buyers contended that as a result of the NAR's alleged conspiracy to agree to, comply with, and implement these rules, the home buyers had suffered "significant financial harm."[56] The home buyers also argued that the NAR had unjustly enriched itself at the

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44. *Id.* at 787.
45. *Id.*
46. *Id.*
47. *Sitzer v.* Nat'l Ass'n *of Realtors*, 420 F. Supp. 3d 903, 910–11 (W.D. Mo. 2019).
48. *Id.* at 911.
49. *Id.*
50. *Id*. at 914–15.
51. *Id.*
52. *Id.* at 912.
53. *Id.* at 916.
54. *Leeder v. Nat'l Ass'n of Realtors*, 601 F. Supp. 3d 301, 305 (N.D. Ill. 2022).
55. *Id.*
56. *Id.* at 307.

expense of home buyers, necessitating a return of the proceeds from their allegedly unlawful conduct.[57]

However, the court was not persuaded by their arguments.[58] The court explained that a downstream plaintiff could not sue an alleged monopolist on a theory that a middleman passed an anticompetitive overcharge to him.[59] In other words, "a plaintiff who asserts that he indirectly bore the brunt of overcharge passed on by the direct purchaser has no claim."[60] The court classified home buyers as indirect purchasers because "it's the home sellers who agree in their listing agreement to pay a single, total commission, and the buyer-brokers compensation comes from that fund."[61] The court further clarified that the home buyer's contract with their broker usually made it clear that the buyer-broker compensation came from the total commission paid by the seller.[62] The court held that the home buyers were indirect purchasers of their buyer-broker services because such services were purchased for them by home sellers.[63] Therefore, the home buyers were barred from recovering damages from the NAR, and the court dismissed the plaintiffs' claim for damages for the defendants' purported Sherman Act violations.[64]

IV. TERMS OF THE AGREEMENT

Among other things, the NAR agreed to establish a special interest-bearing escrow account as a qualified settlement fund.[65] The NAR would deposit $5 million into this account within thirty days of the preliminary approval of the settlement.[66] Following the court's final approval, the NAR would deposit $197 million within ninety days, and additional installments of $72 million would be deposited one and two years after the initial payment.[67] The final installment, including accrued interest, would be made three years after the initial payment.[68] All accrued interest would benefit the settlement class unless the settlement is not approved, and then the interest would revert to the NAR.[69]

Under the Agreement, the obligation for these payments would be documented in a promissory note, which the plaintiffs can assign with

57. *Id.*
58. *Id.* at 311.
59. *Id*. at 308.
60. *Id.* at 309.
61. *Id.*
62. *Id.*
63. *Id.* at 311.
64. *Id.*
65. Corrected Settlement Agreement, *supra* note 7, ¶ 37.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

advance notice to the NAR.[70] The court would retain jurisdiction to enforce the settlement terms.[71] The NAR's existing funded debt obligations would not exceed $35 million, and the promissory note would be secured by liens on the NAR's assets, subordinated to existing security interests held by a trust under a prior loan agreement.[72] The parties agreed to negotiate the terms of the promissory note and related security agreements in good faith, with disputes to be resolved by a mediator if necessary.[73]

Additionally, as soon as practicable, the NAR would implement several practice changes.[74] These would include eliminating any and all requirements for listing brokers or sellers to make offers of compensation to buyer brokers and prohibiting such offers from being blanket, unconditional, or unilateral.[75] The NAR would also prohibit the disclosure of broker compensation on MLS listings and remove all broker compensation fields from the MLS.[76] Moreover, membership in an NAR MLS would no longer be conditioned on offering or accepting compensation offers to buyer brokers.[77] The NAR would refrain from supporting any mechanisms for listing brokers to make compensation offers to buyer-brokers outside the MLS.[78]

Moreover, the NAR would require that all MLS broker participants working with buyers enter into written agreements before any home tours, specifying the compensation they will receive.[79] The NAR's members must disclose and obtain seller approval for any payments made to other brokers or agents.[80] Furthermore, the NAR agreed to ensure broker commissions are disclosed as negotiable in all relevant agreements and documents.[81] Under the new commission structure, the NAR's members can no longer filter MLS listings based on the offered commission percentage.[82]

V. EFFECTS ON COMMERCIAL REAL ESTATE

Commercial real estate involves properties used for business, including office buildings, warehouses, shopping centers, and hotels.[83]

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70. *Id.* ¶ 39.
71. *Id.* ¶ 32.
72. *Id.* ¶ 39.
73. *Id.*
74. *Id.* ¶ 58.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *See also Conner v. Commissioner*, 115 T.C.M. (CCH) 1013, at *3 (T.C. 2018).

Commercial real estate is characterized by its involvement in real property trades or businesses such as development, leasing, or brokerage activities.[84] Even properties that might traditionally be considered residential, like leased residential properties, can be classified as commercial if they are used by the owner to generate income, i.e., through renting.[85] The distinction often depends on the use of the property rather than its physical characteristics.[86] For instance, a property intended for use and generating income through business activities, even if it includes residential units, may be considered commercial.[87] Conversely, properties primarily intended for personal living spaces are classified as residential, even if they involve some level of income generation.[88]

The Agreement should not apply to transactions involving commercial real estate because commercial properties remain distinguishable from residential real estate as they are listed on a Commercial Information Exchange (a "CIE").[89] Commercial real estate professionals use a CIE as a specialized online platform or database to share information about available properties, market data, and industry news.[90] It serves as a central hub where brokers, agents, property managers, investors, and other stakeholders can list, search, and exchange information related to commercial properties, such as office buildings, retail spaces, industrial facilities, and land parcels.[91] A CIE typically offers features like property listings, search functionality, market analytics, networking tools, and transaction management capabilities.[92] *A CIE is not an MLS*.[93] No offers of cooperation and compensation are communicated by filing information on a property with a CIE.[94] Any compensation agreement related to property included in the exchange compilation must be made on an individual basis outside the CIE between the participants involved.[95]

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84. *Id.*

85. *Id.*

86. Jeff Hamann, *Commercial vs. Residential Real Estate: A Comprehensive Guide*, JANOVER (Feb. 19, 2023), https://www.commercialrealestate.loans/blog/commercial-vs-residential-real-estate-guide/; GNP REALTY PARTNERS, *17 Key Differences Between Commercial & Residential Properties* (Feb. 10, 2023), https://www.gnprealty.com/news/differences-between-commercial-residential-properties/.

87. *Id.*; Hamann, *supra* note 86.

88. *Id.*

89. NAT'L ASS'N OF REALTORS, *supra* note 16.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* This Note does not contend that the Agreement cannot influence commercial practice indirectly; rather, it aims for readers to appreciate that the Agreement's operative changes target only residential MLS transactions.

94. *Id.*

95. *Id.*

Additionally, in commercial real estate transactions, compensation for brokers remains varied and negotiable, reflecting the terms negotiated between brokers and the clients they serve across all real estate transactions.[96] Therefore, unlike the NAR's Commission Rule, where the seller-brokers were required to list the percentage of commission to be paid to buyer-brokers, the same effect is not required in a commercial real estate transaction. Furthermore, no limitation on broker commission negotiation exists in the commercial real estate space.[97]

In fact, price negotiation is the cornerstone of every commercial real estate transaction, and parties do not move forward with the transaction until there is an agreeable price on the table.[98] However, even if a commercial property is listed on an MLS, consumers still have the option to negotiate offers of compensation off MLS with brokers, as is common practice in many commercial transactions.[99] Moreover, sellers are also permitted to offer buyer concessions on MLS listings, such as closing cost assistance or tenant improvement allowances, provided these concessions are not contingent on using or paying a buyer-broker.[100]

Given that commercial real estate properties are listed on a CIE without any requirement to pay a set commission to the buyer-broker (unlike the Commission Rule), and that parties are free to negotiate in commercial transactions, this Note suggests that the Agreement should not apply to purely commercial real estate transactions.

VI. EFFECTS ON HYBRID REAL ESTATE

Nevertheless, the Agreement may affect commercial properties encompassing residential units, such as condominiums. Condominiums can be residential or commercial.[101] A commercial condominium building may contain offices, retail shops, storage facilities, and other similar non-residential spaces.[102] On the other hand, a residential condominium building contains individually owned units managed by a

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96. *Id.*

97. THE CCIM INST., *National Association of Realtors Settlement – Will It Impact Commercial Real Estate Transactions?*, https://www.ccim.com/insights/commercial-connections/summer-2024/national-association-realtorsr-settlement-will-it-impact-commercial-real-estate-transactions/ (last visited Aug. 22, 2025); *see also* SEGAL COM. LLC, *Commercial Real Estate Agent Commissions Are Negotiable* (Sept. 25, 2019), https://www.segalcommercial.com/blog/commercial-real-estate-commissions-are-negotiable/.

98. *Id.*; The CCIM Inst., *supra* note 97.

99. REALTORS, *Does the Settlement Affect Commercial Transactions?* (Apr. 9, 2024), https://rworld.com/blog/settlement-commercial.

100. *Id.*

101. FED. EMERGENCY MGMT. AGENCY, *Non-Residential (Commercial) Condominium Buildings*, https://emilms.fema.gov/is_1110a/groups/26.html (last visited Aug. 22, 2025).

102. *Id.*

condominium association consisting of the unit owners.[103] This Note proposes that the test to determine whether the Agreement applies to hybrid real estate, such as condominiums, will likely involve a two-pronged approach: (i) whether the property is being purchased for investment purposes or as a residence, and (ii) if it is for investment, whether it is listed on an MLS or a CIE.

If a condominium is purchased for residential use, the Agreement likely applies because the Agreement encompasses all residential real estate transactions involving MLSs. However, if a condominium is being purchased for investment, the applicability depends on where it is listed. Suppose the property is listed on a CIE. In that case, the Agreement likely does not apply, as buyers and sellers on CIEs have the freedom to negotiate broker commissions, and sellers are not required to set a commission for the buyer-broker. In contrast, if the property is listed on an MLS, where sellers are required to set and disclose a blanket commission offer for the buyer-broker, the Agreement is likely applicable. Ultimately, the Agreement affects only those properties where sellers, through their brokers, are required to pay a commission to the buyer's broker.

VII. EFFECTS ON RESIDENTIAL REAL ESTATE

Before the Agreement, residential properties listed on an MLS required the inclusion of buyer-broker compensation.[104] Home sellers generally paid around 6% of the home's sale price, with approximately 3% allocated to their agent and the other 3% to the buyer's agent, though the exact amounts often varied.[105] After the Agreement took effect in August 2024, MLSs were no longer allowed to advertise compensation offers.[106] Sellers can still offer to cover the buyer-broker's fee, but this must now be negotiated separately.[107] In some cases, sellers may no longer contribute to the buyer-broker's fee, leaving buyers to cover the cost themselves.[108] Thus, if a seller refuses to pay buyer-broker fees, the buyer could either negotiate and pay the broker out of pocket or handle the transaction independently without a broker.[109]

The new commission structure, under which buyers may pay their agents directly, may appear to reduce costs, but this structural change

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103. *Id.*

104. NAT'L ASS'N OF REALTORS, *Summary of MLS Policy Changes* (May 3, 2024), https://www.nar.realtor/sites/default/files/documents/mls-policy-changes-summary-2024-05-03.pdf.

105. Aly J. Yale et al., *How the NAR Settlement Is Changing Homebuying and Selling*, U.S. NEWS & WORLD REP. (Aug. 15, 2024), https://realestate.usnews.com/real-estate/articles/what-the-2-billion-realtor-lawsuit-means-for-home buyers-and-sellers.

106. *Id.*; *see also* NAT'L ASS'N OF REALTORS, *supra* note 104.

107. *Id.*; *see also* Yale et al., *supra* note 105.

108. *Id.*

109. *Id.*

likely does not meaningfully reduce homebuying costs for potential buyers.[110] Instead, it may have the opposite effect by making home buyers provide more upfront cash to buy residential real estate than was necessary under the previous commission structure.[111] Critics of the new commission structure point out that the Agreement might have overlooked a significant advantage of the previous commission structure––it reduced the amount of upfront cash needed to purchase residential real estate for home buyers.[112] It is worthwhile to note here that home buying is becoming increasingly inaccessible for first-time buyers, resulting in many young home purchasers relying on older mortgage co-signers for assistance, such as their parents.[113] Notably, the share of home buyers in their twenties and thirties receiving financial help for a down payment is also on the rise.[114] Recently, home buyers have financed their home purchase with a typical down payment for first-time buyers at around 8%, while the typical down payment for repeat buyers can be at or around 19%.[115] Combined with the cash constraints facing home buyers generally, constraints that are particularly acute among first-time buyers, these factors must be carefully weighed in evaluating the effects of the new commission structure.

The new commission structure is likely to affect historically disadvantaged minority home buyers.[116] In 2024, housing affordability remained the biggest challenge for underrepresented home buyers.[117] Housing unaffordability disproportionately affects various racial and ethnic groups due to historical, economic, and systemic factors. For example, racial and ethnic minorities often have lower average incomes compared to those of White households, making it harder for these groups to afford homes and save for down payments.[118] To illustrate, in 2020, the median household income for Black households was approximately $47,800, while White households had a median income

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110. Schnare et al., *supra* note 6, at 4.

111. *Id.* at 5.

112. *Id.*

113. *Id.*; Abha Bhattarai & Federica Cocco, *What does it take to buy a house? Increasingly, Mom and Dad.*, WASH. POST (May 27, 2024), https://www.washingtonpost.com/business/2024/05/19/home buyers-parents-help-housing-affordability/ ("[I]n 1994, 1.6% of first-time home buyers under 35 had a co-borrower of age 55 or older. By 2022, after a pandemic-era spike, that figure had more than doubled to 3.7%, matching a high set in 2015").

114. *Id.*

115. NAT'L ASS'N OF REALTORS, *2023 Texas Profile of Home Buyers and Sellers* (2023), https://www.texasrealestate.com/wp-content/uploads/2023TexasHomebuyerHomesellerReport.pdf.

116. Schnare et al., *supra* note 6, at 5; NAT'L ASS'N OF REALTORS RSCH. GRP., *Snapshot of Race and Home Buying in America* 15 (2024), https://www.nar.realtor/sites/default/files/documents/2024-snapshot-of-race-and-home-buying-in-america-02-20-2024.pdf.

117. *Id.*

118. *Id.*; *see* Schnare et al., *supra* note 6, at 5.

of $75,700.[119] Over the past decade, the income gap between Black and White households has widened.[120] In 2012, the difference was $21,540, growing to $27,840 by 2022.[121] However, Hispanic households have made notable strides in income growth, with their income gap with White households narrowing to about $13,000 as of 2022.[122] Considering these statistics, it is reasonable to conclude that efforts to change the way in which the buyer-broker is compensated will likely have a negative impact on the families of underrepresented minorities who are likely to be most cash-constrained.[123]

A. Analysis of Cash Required at Closing with New Commission Structure

This section of the Note provides examples of how the minimum down payment requirements can impose significant constraints on cash-constrained buyers' ability to purchase residential real estate by adopting the analysis of Ann Schnare, Amy Crews Cutts, and Vanessa Gail Perry.[124] Specifically, the Note considers the financial limitations faced by many home buyers, particularly first-time buyers and those with low-to-moderate incomes to illustrate the potential challenges of shifting real estate agent fees directly to buyers.

1. Old Commission Structure: Seller Pays the Buyer-Broker

If a buyer is using a Federal Housing Administration (an "FHA") mortgage,[125] the amount of up-front cash required at closing is affected

119. NAT'L ASS'N OF REALTORS RSCH. GRP., *supra* note 116.

120. *Id.*

121. *Id.*

122. *Id.*

123. Schnare et al., *supra* note 6, at 5.

124. *Id*. This Note adopts Schnare, Cutts, and Perry's framework for assessing the economic effects of shifting real-estate agent compensation in residential transactions. This Section draws on their analysis and simplifies their comparison of the cash required to purchase a home under the prior and new commission structures. Readers seeking the authors' complete framework, supporting assumptions, and underlying data should consult the original.

125. Schnare et al., *supra* note 6, at 8; U.S. DEP'T OF HOUS. & URB. DEV., *History of FHA Federal Housing Administration*, https://www.hud.gov/program_offices/housing/fhahistory; Jamie Young & Chris Jennings, *FHA Loans: Exploring Basics, Requirements and More*, FORBES ADVISOR (September 28, 2023). An FHA mortgage is a home loan insured by the Federal Housing Administration, a government agency under the U.S. Department of Housing and Urban Development. These loans are designed to help low- to moderate-income borrowers and first-time home buyers by offering lower down payment requirements, typically as low as 3.5%, and more flexible credit score criteria than conventional mortgages. Borrowers with credit scores of at least 580 can qualify for the 3.5% down payment, while those with scores between 500 and 579 may still be eligible for a 10% down payment. However, FHA loans require mortgage insurance premiums, including an upfront payment and annual premiums for the life of the loan. The FHA sets loan limits that vary by region based on housing costs, with limits ranging from $472,030 in low-cost areas to $1,089,300 in high-cost areas in 2023. FHA loans also allow higher debt-to-income ratios, making it easier for borrowers with existing debt to qualify. These features make FHA loans particularly appealing to first-time buyers and those with limited savings or credit history.

by the fees the buyer must negotiate with a real estate agent. To illustrate this, first consider the traditional commission structure where the seller pays all of the commission.[126] In this scenario, a buyer purchasing a residential property priced at $250,000 does not directly pay buyer-broker commission, which is typically 3% of the sales price; this fee is usually covered by the seller as part of the transaction costs.[127] Assume the buyer qualifies for a 3.5% FHA loan, and considering closing costs generally range between 2–5%, assume an average of 3% for closing costs.[128] In this scenario, the total down payment and closing costs add up to 6.5% of the sales price (3.5% down payment plus 3% closing costs).[129] This equates to $16,250, calculated as 6.5% of $250,000.[130] Because the seller is paying the buyer-broker commission, the buyer does not need to come up with any additional cash to purchase a home. Consequently, the total cash required from the buyer at closing is at least $16,250.[131]

It is important to note that the Agreement eliminates the requirement that the seller pay the buyer-broker commission; however, it does not prohibit a seller from voluntarily agreeing to do so. Whether a seller agrees to pay the buyer-broker's commission will likely be determined by, among other factors, market forces—in a buyer's market, sellers may be more inclined to cover this cost to attract offers, whereas in a seller's market, buyers may bear the full burden. The following illustrations apply only where the seller refuses to pay the buyer-broker commission. If the seller agrees to pay the buyer-broker commission, the analysis set forth in the preceding section remains applicable.

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126. Schnare et al., *supra* note 6, at 9. This Note adopts from Schnare, Cutts, and Perry's detailed framework for assessing the economic effects of shifting real estate agent compensation in residential transactions to develop the calculations presented here. However, unlike the authors' "hold harmless" approach, which derives the adjusted sales price needed to yield $235,000 net to the seller after commissions, this Note reduces the assumed sales price by 3% (e.g., from $250,000) to reflect the typical buyer-broker commission that would no longer be embedded in the seller's transaction costs and would instead be borne by the buyer.

127. *Id.* at 8. The simplified calculations herein assume: (1) a minimum FHA down payment of 3.5% and (2) estimated closing costs of 3% for ease of comparison. Actual cash-to-close may be higher or lower depending on transaction-specific factors, including lender fees, prepaid items (taxes and insurance), discount points, appraisal and inspection costs, title and escrow charges, seller concessions, and local market practices.

128. *Id.*; *see also* Victor Flynn, *Typical Closing Costs in Texas for Buyers and Sellers*, JVM LENDING BLOG (Feb. 8, 2024), https://www.jvmlending.com/blog/typical-closing-costs-in-texas-for-buyers-and-sellers/.

129. Schnare et al., *supra* note 6, at 8.

130. *Id.* at 9.

131. *Id.*

2. New Commission Structure: Buyer Pays the Buyer-Broker

However, when buyers pay all of the buyer-broker commission, the required cash at closing increases significantly.[132] Under the new rule, assume the buyer and seller split the broker's 6% commission, paying 3% each. Assume that the seller reduces the price of the house by 3% because they are no longer paying the buyer's broker fee, reducing the price to $242,500 (a 3% reduction from $250,000).[133] The FHA down payment and closing costs remain at 6.5%, now calculated on the reduced price, totaling $15,762.50 (6.5% of $242,500).[134] However, now, the buyer pays their 3% share of the broker's fee, amounting to $7,275 (3% of $242,500).[135] When the FHA down payment and closing costs are combined with the broker's fee, the total out-of-pocket expense for the first-time home buyer comes to $23,037.50 ($15,762.50 + $7,275).[136]

Compared to the previous structure, where the out-of-pocket cash needed was $16,250, the upfront cash required to buy a home increased by approximately 30% at closing. This simplified framework illustrates how shifting the broker's commission to the buyer significantly increases the amount of cash needed at closing, even when the sales price is for the amount the seller would have paid the broker.

3. New Commission Structure: Buyer Pays the Buyer-Broker at a Reduced Rate

Even if the buyer negotiates a lower commission with their broker, there is a significant financial restraint on the buyer.[137] Reducing the buyer's broker commission from 3% to 2% does lower the total out-of-pocket cost, but it is still higher than what the buyer would have paid under the old commission structure, where the seller covered the broker fee.[138] In this scenario, the seller reduces the home price by 3%, lowering it from $250,000 to $242,500 (based on the assumption that the seller anticipates paying the full 3% commission).[139] The buyer's FHA down payment and closing costs, calculated at 6.5% of the reduced price, come to $15,762.50.[140] Additionally, with a 2% buyer-broker fee,

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 7, 9.
136. *Id.* at 9. The example assumes that the seller reduces the purchase price by the full amount of the buyer-broker commission savings; however, any reduction in sale price in real world depends on market conditions, bargaining power, and seller incentives, and may not occur in full or at all.
137. *Id.* at 8-9.
138. *Id.* at 9.
139. *Id.* at 7.
140. *Id.* at 9.

the buyer now pays $4,850 in commission (2% of $242,500).[141] Altogether, the total cash required at closing for the buyer is $20,612.50.[142] Compared to the previous commission structure, where the buyer would have only needed $16,250, this represents an additional $4,362.50 out-of-pocket payment.[143]

4. New Commission Structure: Buyer Uses No Broker

In a scenario where buyers choose not to use a broker, handle the negotiation and close the house independently, they may pay slightly less than what they would have under the old commission structure, where they would have the expertise of a broker on their side.[144] Assuming the seller still reduces the price by 3%, the house price would be $242,500 (based on the commission the seller would have paid under the old rule).[145] The buyer's only out-of-pocket expenses would be the FHA down payment and closing costs, which remain at $15,762.50.[146] However, historically, approximately 90% of home buyers use real estate brokers, and only 10% do not.[147] Therefore, only 10% of home buyers would potentially benefit from this scenario, but the savings would be minimal. Under the old rule, the buyer would have paid just $487.50 more ($16,250 - $15,762.50) while having the support and expertise of a broker.[148]

It is also important to recognize that, to circumvent the limitations of the new commission structure, some home buyers may cover their additional closing costs by receiving a credit from the seller as part of their contingency offer.[149] For example, the seller could achieve their asking price of $242,500 by selling the property for that amount and then contributing $7,500 (the 3% buyer's agent commission) to cover the buyer's closing costs.[150] However, this practice poses the additional problem of artificially inflating home prices, as the recorded sales price would likely exceed the market value of comparable properties.[151] If this practice were to become a norm, the housing market could face the risk of widespread, artificially-inflated home prices and asking rates.[152]

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 8-9.
145. *Id.* at 7.
146. *Id.* at 9.
147. NAT'L ASS'N OF REALTORS, *supra* note 116.
148. Schnare et al., *supra* note 6, at 10.
149. *Id.* at 11.
150. *Id.*
151. *Id.*
152. *Id.*

B. Effects of the New Commission Structure on Homeownership Rates

At a minimum, given the prior illustrations, researchers suggest that if a significant number of potential home buyers are cash-constrained, the new buyer-broker compensation structure could lead to reduced demand for residential real estate among cash-constrained buyers. This shift may also likely leave many sellers and potential homeowners worse off than they were under the previous structure because cash-constrained buyers may be deterred from entering the market.[153] With a change in the broker compensation structure, the same buyer likely would not transact with the same seller because the buyer's ability to afford the property under the new commission arrangement may restrict them from purchasing a home they previously could have afforded.[154] This is particularly true if the buyer intends to use a broker or agent in the transaction who is compensated at a market rate of approximately 3% of the sales price.[155]

Researchers also believe that many potential buyers with limited cash savings would face significant difficulty in purchasing residential real estate under the new commission structure, leading to a decline in homeownership rates, particularly among low and moderate-income households.[156] As discussed previously, some first-time home buyers rely on gifts from their parents to meet part or all of their down payment requirements.[157] Alathough seller's concessions may allow transactions to proceed without requiring additional cash from the buyer, researchers are worried that the practice can distort pricing signals where the contract price is increased to finance the concession.[158] If this structure becomes widespread, recorded sales prices may become less reflective of true market value, raising concerns about price distortion and artificially elevated asking prices.[159]

C. Arguments for and Against the New Structure

Proponents of the new commission structure are confident in its ability to increase competition among real estate professionals.[160] They contend that the new structure is likely to increase brokerage price

153. *Id.*
154. *Id.* at 11-12.
155. *Id.* at 11.
156. *Id.* at 12.
157. Bhattarai & Cocco, *supra* note 113.
158. Schnare et al., *supra* note 6, at 12.
159. *Id.*
160. Stephen Brobeck, *The Relationship of Residential Real Estate Commission Rates to Industry Structure and Culture*, CONSUMER FED'N OF AM. 22 (Nov. 30, 2021), https://consumerfed.org/reports/the-relationship-of-residential-real-estate-commission-rates-to-industry-structure-and-culture/.

competition in the residential real estate market.[161] First, proponents of the new structure argue that eliminating the display of buyer-broker commissions on an MLS discourages buyers' agents from steering buyers away from low-commission properties and toward high-commission properties.[162] Thus, under the new commission structure, where buyer-broker commission will be negotiated independently, brokers will no longer have an incentive to steer customers away from low-commission listings.

Critics contend, however, that this argument fails to account for the practical reality that brokers' incentives to maximize compensation remain unchanged. Such incentives may simply migrate behind the scenes through private communications, selective showing practices, or subtle discouragement. [163] In fact, by requiring buyers to negotiate and potentially pay their own agents directly, the new structure may reduce buyer representation among cash-constrained purchasers, thereby decreasing competition and transparency for the buyers most in need of professional guidance.[164]

Extending this argument further, proponents of the new commission structure assert that it would significantly increase competition and, on average, lower the commissions paid to brokers in residential real estate transactions.[165] One example of this is the potential rise in the use of discount brokers.[166] Discount brokers offer services similar to traditional real estate brokers but at a lower commission rate or a flat fee.[167] Under the new commission structure, discount brokers would no longer be constrained by the necessity of offering buyer-brokers the typical rate previously paid in the MLS (3% under the old structure).[168] Instead, discount brokers would be free to offer lower commission rates to both buyers and sellers, likely increasing the prevalence of such lower rates.[169]

Critics believe that the proponents of this argument have failed to consider that discount brokers may not be available or practical in all

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161. *Id.* at 21.

162. *Id.* at 23.

163. Alex Veiga & Heather Hollingsworth, *6% Commission Fees for Real Estate Agents Are Going Away. What to Know About the New Rule*, NBC NEWS N.Y. (Mar. 19, 2024), https://www.nbcnewyork.com/news/national-international/6-commission-fees-for-real-estate-agents-are-going-away-what-to-know-about-the-new-rule/5238942/.

164. Schnare et al., *supra* note 6, at 13.

165. Brobeck, supra note 160, at 21–23.

166. *Id.* at 21.

167. Jennifer Dixson Hoff, *What Are Discount Real Estate Brokerages? Pros, Cons & Impact on Commission Structures,* COLIBRI REAL EST.: CAREER HUB BLOG (July 16, 2024), https://www.colibrirealestate.com/career-hub/blog/what-are-discount-brokerages/; *see also* Alex Mikoulianitch, *What is a Discount Real Estate Brokerage?*, PREVU BLOG (Oct. 14, 2024), https://www.prevu.com/blog/what-is-a-discount-real-estate-brokerage.

168. Brobeck, *supra* note 160, at 2–3, 19, 21; *see also* Schnare et al., *supra* note 6, at 6 (providing example of fee structure as it currently exists).

169. Brobeck, *supra* note 160, at 21.

regions or markets of the United States.[170] First, the availability of discount brokers may often be limited in smaller or rural markets due to factors like lower transaction volumes, concentration of traditional brokers, and operational costs.[171] Second, discount brokers generally rely on high transaction volumes to offset their lower commission rates, and smaller markets typically have fewer transactions, making it less attractive for them to operate there.[172] Third, smaller markets may be dominated by traditional brokers, and the lack of competition can perpetuate traditional commission structures.[173] Last, the overhead of running a brokerage may not be easily offset by lower commissions in less active markets, discouraging discount brokers from entering.[174]

Another factor that home buyers using discount brokers must consider is that the lower commission rates offered by discount brokers may lead to reduced service quality.[175] Discount brokers often provide fewer services than traditional brokers, which can be overwhelming for first-time home buyers or sellers.[176] Accordingly, clients may be required to handle important tasks in the home sale or purchase process themselves, such as marketing the property, hosting open houses, and managing complex transaction negotiations.[177] Additionally, some discount brokers may only create a basic MLS listing without actively marketing the property.[178] In contrast, traditional agents and brokers invest significant time and resources into marketing efforts, such as professional photography, online advertising, open houses, and networking, all of which can increase the chances of a successful and profitable sale.[179]

Proponents of the new commission structure also emphasize that owning a house comes with a host of financial responsibilities, and not all individuals are prepared to undertake such responsibilities.[180] Accordingly, prospective buyers should remain renters until they have accumulated adequate cash reserves to purchase a house.[181] Critics suggest that, in making this argument, proponents implicitly assume the

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170. *See* Schnare et al., *supra* note 6, at 21.

171. Hoff, *supra* note 167.

172. *Id.*

173. *Id.* (noting that discount brokerages depend on higher sales volumes, which may be less feasible in smaller or rural markets, allowing traditional brokers to maintain dominance).

174. *Id*.

175. *See* Schnare et al., supra note 6, at 21; Jennifer Dixson Hoff, *Traditional vs. Discount Real Estate Brokers: The Battle Rages On*, MCKISSOCK (Mar. 8, 2016), https://www.mckissock.com/blog/real-estate/real-estate-career/traditional-vs-discount-real-estate-brokers/.

176. *Id.*

177. Hoff, *supra* note 168.

178. *Id.*

179. *Id.*

180. *See* Schnare et al., *supra* note 6, at 12. (citing Panle Jia Barwick & Maisy Wong, *Competition in the Real Estate Brokerage Industry: A Critical Review*, BROOKINGS (Dec. 2019)).

181. *Id.*

costs of renting are lower than the costs of owning a home, despite evidence suggesting homeownership is less expensive than renting in approximately two-thirds of the United States, not to mention other economic benefits of owning a house, like building equity.[182]

Proponents of the new commission structure argue that mortgage lending practices would adapt to accommodate changes in the structure of residential real estate commissions.[183] Specifically, they claim that if the seller's agent were somehow prohibited by force of law from paying the buyer's agent commission, mortgage lenders would adjust how they calculate the maximum allowable mortgage amount.[184] Under this adjustment, lenders would include buyer-paid agent fees in their estimate of the property's market value, allowing borrowers who are cash-constrained to finance the commission paid to the buyer's agent.[185]

While it is true that current housing prices reflect real estate fees borne by the seller through the seller's agent's commission, critics are far less certain how the mortgage industry would respond to a new commission structure. A mortgage's loan-to-value ("LTV") ratio, based on the lower of the appraised value of the property or the sale price, is widely regarded as one of the most reliable predictors of the likelihood and severity of mortgage default.[186] Including extraneous factors, such as the buyer's agent fees, in the LTV calculation could reduce its predictive accuracy.[187] Because these fees are unrelated to the property's value, it is highly unlikely lenders would welcome this change.[188] Critics further claim that accepting buyer-agent fees as a component of property value would challenge established lending practices and is unlikely to be embraced by lenders as adding meaningful value to the property.[189]

VIII. CONCLUSION

The Agreement represents a significant turning point for the United States residential real estate market, possibly dismantling the long-standing practice where home-sellers were required per the NAR to compensate buyer-broker. While proponents of the new compensation structure argue it will foster competition among brokers, expand consumer choice, and reduce costs associated with real estate

182. Schnare et al., *supra* note 6, at 13; ATTOM DATA SOLUTIONS, *Buying a Home Is More Affordable Than Renting in 53 Percent of U.S. Housing Markets* (Jan. 7, 2020), https://www.attomdata.com/news/market-trends/attom-data-solutions-2020-rental-affordability-report/.

183. Schnare et al., *supra* note 6, at 13; Brobeck, *supra* note 160, at 22.

184. *Id.*

185. *Id.*

186. Schnare et al., *supra* note 6, at 13.

187. *Id.*

188. *Id.* at 13–14.

189. *Id.*

transactions, critics contend that the practical implications for home buyers, particularly those who are cash-constrained or belong to historically disadvantaged groups, may be substantial. By shifting buyer-broker commission payments directly onto buyers if the home seller refuses to compensate the buyer's broker, the new structure may increase the cash required at closing and, in turn, exacerbate financial barriers to homeownership.

As a result, buyer representation in residential real estate transactions may become more contingent and negotiable, and more closely tied to liquidity. Buyers with sufficient cash reserves may be better positioned to secure representation, while cash-constrained buyers may face increased pressure to proceed without professional assistance or not proceed at all.