



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

House Bill 4849 (Substitute H-1 as reported without amendment)
House Bill 4850 (Substitute H-1 as reported without amendment)
Sponsors: Representative Tonya Schuitmaker (H.B. 4849)
Representative Kevin Green (H.B. 4859)
House Committee: Regulatory Reform
Senate Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 8-30-06

RATIONALE

Traditionally, a Michigan resident buying or selling residential property works with a real estate agent who performs such services as marketing the property, negotiating the sale or purchase price, and closing the transaction. The typical commission is 6% of a home's selling price, which is split between the buyer's and seller's agents. In recent years, however, Michigan has seen a growing number of people who either are buying or selling their home without the assistance of an agent, or are using a limited-service broker who only provides specific services, such as posting a home on a multiple listing service or placing ads in the local media. These so-called "fee-for-service" brokers charge a flat fee that is usually significantly lower than the commission that a homeowner would pay a traditional broker.

Under the Occupational Code, a licensed real estate broker or salesperson is required to disclose the nature of the agency relationship to a potential buyer or seller through a disclosure form. The disclosure form indicates the licensee's duties relating to being a buyer's agent, seller's agent, or dual agent (a realtor who represents both the buyer and the seller in a transaction). Apparently, there is a concern that some home buyers and sellers who contract with fee-for-service brokers do not realize their broker or salesperson is under no obligation to provide services other than those required by their contract. Allegedly, for example, there have been cases in which a fee-for-service agent refused to accept an offer on behalf of a client because the agent

was not required to do so under the terms of the contract, although the client believed the agent was obligated to accept an offer. Some people have suggested that the Occupational Code should provide that, when a buyer or seller contracts with a real estate agent, the agent has an obligation to perform a minimum level of services for the client.

CONTENT

House Bill 4849 (H-1) would amend the Occupational Code to specify the minimum services that a real estate broker acting under a service provision agreement creating an exclusive agency relationship would have to provide to his or her client; and include a failure to provide the minimum services as a violation of the Code.

House Bill 4850 (H-1) would amend the Code to require the disclosure regarding real estate agency relationships to include a description of the duties an agent providing services under an exclusive service provision agreement would owe to a client.

The two bills are tie-barred to each other.

House Bill 4849 (H-1)

Under the bill, a real estate broker acting pursuant to a service provision agreement creating an exclusive agency relationship would be required, at minimum, to provide the following services to his or her client:

- When the real estate broker was representing a seller or lessor, the marketing of the client's property in the manner agreed upon in the service provision agreement.
- Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease the client's property or the property the client sought to purchase or lease.
- Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related documents or notices until a purchase or lease agreement was executed by all parties and all contingencies were satisfied or waived.
- After execution of a purchase agreement by all parties, assistance as necessary to complete the transaction under the terms specified in the purchase agreement.
- Furnishing, or causing to be furnished, a complete and detailed closing statement, as required by R 339.22311 of the Michigan Administrative Code.

(Rule 339.22311 requires a broker or associate broker who is involved at the closing of a real estate or business opportunity transaction to furnish, or cause to be furnished, to the buyer and seller a complete and detailed closing statement signed by the broker or associate broker showing each party all receipts and disbursements affecting that party.)

Under the Code, a licensed real estate broker or salesperson who commits certain violations is subject to the penalties set forth in Article 6 of the Code (e.g., license suspension or revocation, a maximum civil fine of \$10,000, censure, probation, or a requirement to make restitution). Under the bill, failure to provide the required minimum services when providing services pursuant to an exclusive service provision agreement also would be subject to the penalties. A licensee providing real estate services pursuant to an agreement allowed under law that was not a service provision agreement creating an exclusive agency relationship would not be considered in violation of this provision.

As used in the bill, "service provision agreement" would mean an agreement between the broker and client that establishes an agency relationship through a

listing agreement or a buyer agency agreement.

House Bill 4850 (H-1)

Under the Occupational Code, a licensed real estate broker or salesperson must disclose to a potential buyer or seller in a real estate transaction all types of agency relationships available and the licensee's duties that each agency relationship creates before the potential buyer or seller discloses to the licensee any confidential information specific to that potential buyer or seller.

The disclosure of the type of agency must be in writing and must conform substantially to the disclosure form included in the Code. The form defines a real estate transaction and lists the responsibilities of seller's agents, buyer's agents, and dual agents to their clients.

The bill would add to the disclosure form that an agent providing services under an exclusive service provision agreement owed the following duties to the client:

- When representing a seller or lessor, the marketing of the client's property in the agreed-upon manner.
- Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease the client's property.
- Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related notices or documents until a purchase or lease agreement was executed by all parties and all contingencies were satisfied or waived.
- After execution of a purchase agreement, assistance as necessary to complete the transaction under the terms specified in the purchase agreement.
- Furnishing, or causing to be furnished, a complete and detailed closing statement.

MCL 339.2512 (H.B. 4849)
339.2517 (H.B. 4850)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Currently, if a homeowner or prospective buyer uses a fee-for-service broker, the agent has no obligations to the client outside of those for which he or she has contracted. This has led to difficulties because, while clients who work with fee-for-service agents usually know they are contracting for fewer services than they would receive using a traditional broker, the buyers and sellers often expect fee-for-service agents to perform some of the basic duties required of a traditional agent, regardless of whether they were included in the contract. Reportedly, the most common situation in which a buyer or seller expects a fee-for-service agent to act on his or her behalf, despite not having contracted for the service, occurs when a potential buyer contacts the fee-for-service agent directly and the agent does not relay the offer to the client. The bills would require an agent who signed a service provision agreement with a client to provide a minimum level of service to the client, such as accepting the delivery of and presenting offers and notifying the client of that obligation.

Additionally, many fee-for-service agents are not obligated to assist their clients in executing a purchase agreement and completing the sale. If one party has an agent who is involved in executing a purchase agreement and completing the sale but the other party does not, there is the possibility that the agent will be found to have represented both parties. Reportedly, in such situations, the party without an agent often relies on the representations made by the agent who is present because that party has no other source of information. The agent therefore could be found to be representing both parties in a transaction as an undisclosed dual agent, which is considered to be a breach of an agent's duty of loyalty to his or her principal. The bills would solve this problem by requiring an agent, after the parties executed a purchase agreement, to provide such assistance as necessary to complete the transaction. Thus, one party would not have to rely solely on the representations made by the agent of another.

Opposing Argument

The bills would reduce consumer choice in Michigan. If a person who is buying or selling a home would like to save money by contracting with a fee-for-service broker,

then he or she should be free to do so. The bills would require fee-for-service brokers to provide services that their clients may not want. The market for fee-for-service brokers is driven by home sellers and buyers who do not want all of the services provided by a traditional broker and do not want to pay for services they do not intend to use. Additionally, to provide the additional services that would be required under the bills, a fee-for-service broker would have to increase his or her fees.

According to the Federal Trade Commission and the U.S. Department of Justice, this legislation "...would make it more difficult for real estate professionals to provide Michigan consumers with customized real estate brokerage services, and likely would decrease competition among real estate professionals...[W]ith less competition, Michigan consumers will have fewer options for real estate services, likely causing some home sellers and home buyers to pay thousands of dollars more in commissions to real estate brokers."

Response: The bills would apply only if a broker and a client entered into a service provision agreement that established an agency relationship through a listing agreement or a buyer agency agreement.

Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bills would have no fiscal impact on State or local government.

Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.