

Legislative Analysis



REAL ESTATE BROKER RESPONSIBILITIES

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House Bill 4416 (Substitute H-2)

House Bill 4417 (Substitute H-1)

Sponsor: Rep. Tonya Schuitmaker

Committee: Regulatory Reform

First Analysis (12-4-07)

BRIEF SUMMARY: The bills would require brokers and real estate salespersons to undertake certain minimum duties and services, and require disclosure of those responsibilities. The bills would also allow clients to waive certain services under a limited service agreement.

FISCAL IMPACT: There would be no fiscal impact on the state or local governmental units.

THE APPARENT PROBLEM:

Traditionally, a person 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. Real estate licensees with an agency relationship to their client (either the seller or the buyer in a real estate transaction) have a fiduciary responsibility to that client. While this fiduciary responsibility is not explicitly defined in statute, it is generally understood under the common law of agency to mean a duty to act in the client's best interest at all times even if doing so conflicts with the agent's own interest, and includes the duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting.

The responsibilities of the client and the agent are generally specified in a service provision agreement (an agreement between the broker and client that establishes an agency relationship through a listing agreement when selling real estate or a buyer agency agreement when buying real estate). 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).

In recent years, however, a growing number of people in the state are either buying or selling their homes without the assistance of an agent, or are using a limited-services broker who only provides specific services, such as posting a home on a multiple listing service or placing ads in the local media. Known as "fee-for-service" brokers, these brokers charge a flat fee that is usually significantly lower than the commission a homeowner would pay a traditional broker (typically, six percent of the home's selling price, split between the buyer's and the seller's agents).

A concern has been voiced that some home buyers and sellers who contract with fee-for-service brokers do not realize that their broker or salesperson is under no obligation to provide services other than those required by their contract. For example, stories circulate of cases in which a fee-for service agent has refused to accept an offer on behalf a client, or even communicate the offer to the 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 do so. According to the Michigan Association of Realtors, an apparent loophole exists in the law that allows licensees to avoid performing specific fiduciary duties to their clients by simply not accepting offers and evading all responsibilities to that client by contracting those duties away. The Association feels that legislation to establish minimum services when a buyer or seller enters into an agency relationship is necessary to ensure the protection of the consumer and professionalism in the real estate industry

THE CONTENT OF THE BILLS:

The bills would amend Article 25 of the Occupational Code [MCL 339.2501 et al. (HB 4416) and 339.2517 (HB 4417)] to require brokers and real estate salespersons to undertake certain minimum duties and services, and require disclosure of those responsibilities. The bills would take effect July 1, 2008 and are tie-barred to each other, meaning neither could take effect unless both are enacted.

House Bill 4416 would require a real estate broker or real estate salesperson to perform certain duties and services under a service provision agreement. "Service provision agreement" would mean an agreement between a broker and client that established an agency relationship through a listing agreement or a buyer agency agreement. (This is the same definition as provided in the Michigan Administrative Code.) A broker could authorize a designated agent to represent the client, as long as the authorization was in writing. At a minimum, the following duties would be owed to the client:

- The exercise of reasonable care and skill in representing the client and carrying out the responsibilities of the agency relationship.
- The performance of the terms of the service provision agreement.
- Loyalty to the interest of the client.
- Compliance with the laws, rules, and regulations of state and applicable federal statutes or regulations.
- The recommendation to the client to obtain expert advice related to material matters when necessary or appropriate.
- An accounting in a timely manner of all money and property received by the agent in which the client has or may have an interest.

- Confidentiality of all information, unless disclosed with the client's permission or as provided by law, including the duty not to disclose confidential information to any licensee who is not an agent of the client.

The bill would also specify that, unless expressly waived by the client under a limited service agreement, a licensed real estate broker or real estate salesperson who failed to provide certain minimum services under a service provision agreement would be subject to the code's penalties. A "limited service agreement" would mean a service provision agreement where the real estate broker and client established an agency relationship in which certain enumerated services, as prescribed by law, were waived by the client as provided for in the bill. At a minimum, the following services would be required to be provided to the client:

- Marketing of the client's property in the manner agreed upon in the service provision agreement, when representing a seller or lessor.
- Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease the client's property or the property the client seeks to purchase or lease (this service could be waived under a limited service agreement).
- Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related notices or documents until a purchase or lease agreement is executed by all parties and all contingencies are satisfied or waived (this service could be waived under a limited service agreement).
- After execution of a purchase agreement, assistance as necessary to complete the transaction under the terms specified in the purchase agreement (this service could be waived under a limited service agreement).
- Furnishing, or causing to be furnished, a complete and detailed closing statement.

A broker or real estate salesperson representing a seller under a service provision agreement (which, by definition, would include a limited service agreement) could not advertise the property to the public as "FOR SALE BY OWNER" or otherwise mislead the public to believe that the seller was not represented by a real estate broker.

Under House Bill 4417, the written agency disclosure statement required of a real estate broker and real estate salesperson providing services under a service provision agreement would have to include the duties and services listed in House Bill 4416.

The disclosure statement would also have to inform the client that certain individual services required to be provided by the real estate broker or salesperson could be waived by the seller or buyer if a separate waiver document was signed. The bill would also include the wording of the form that must be provided to a client who desired to waive any of the required services eligible to be waived under House Bill 4416.

BACKGROUND INFORMATION:

A similar set of bills, House Bills 4849 and 4850, were introduced in the 2005-2006 legislative session and were passed by the House. They would have required brokers in an exclusive agency relationship to undertake certain minimum services, and required disclosure of those responsibilities.

ARGUMENTS:

For:

Real estate transactions are complex and often represent the largest financial transaction that an individual will make in his or her lifetime. It is crucial that the laws are clear regarding the services and duties owed to a client by a licensed real estate broker or salespersons. Apparently, some unscrupulous licensees have avoided, by what some believe to be a loophole in current law, specific fiduciary responsibilities to their clients by not accepting offers or by contracting certain duties to others.

Other problems have surfaced as the services of fee-for-service brokers, where the agent has no obligations to the client outside of those specified in the contract between the agent and the client, have become more popular. Buyers and sellers often expect the same level of service from these fee-for-service agents as traditional agents, regardless of whether they were included in the contract. According to an argument developed by the Senate Fiscal Agency in an analysis of last session's legislation, 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 hired by the seller directly and the agent does not relay the offer to the seller.

The bills would address problems such as these by placing in statute a clear minimum standard of responsibilities, as well as clear disclosure of those responsibilities, that a real estate broker or salesperson must perform when he or she enters into a service provision agreement with a buyer or a seller. A licensee who failed to provide the specified services would be subject to penalties under the Occupational Code (e.g., license sanctions, restitution, or a civil fine). A buyer or seller who felt comfortable handling certain aspects of the negotiations without the services of a licensee could still do so under a limited service agreement. However, House Bill 4416 would limit the types of services that could be waived by a client. The legislation would therefore minimize the opportunity for unscrupulous licensees to charge for more services than contracted for, or for clients to expect delivery of services for which they are not paying.

Against:

Last year's legislation, which was similar to the bills under discussion, was perceived as an attempt to neutralize competition from discount or limited service brokers, and was criticized as an attempt to limit consumer choice and increase costs, as some buyers and sellers do not feel they need the full range of services required by the bills.

Response:

The current bill package differs from the previous proposed legislation in that the provisions would be triggered only when there was a listing contract that established an agency provision with a seller or buyer; for example, an exclusive listing agreement or a buyer's agency. The bills would not prevent a seller or buyer from "going it alone." In addition, the current bill package would allow a buyer or seller to waive certain services that would otherwise be required. Thus, he or she should be able to negotiate a lower fee by accepting only those services he or she feels necessary or needed.

Similarly, according to the Michigan Association of Realtors, the bills would not restrict a licensee from "unbundling" services such as advertising or marketing, handling open houses, negotiating offers to conclusion, serving as a transaction coordinator. However, the bill would hold licensees to certain services and duties if a service provision agreement were entered into. This would protect the consumer and also protect the professionalism of the industry.

POSITIONS:

The Department of Labor and Economic growth indicated support for the bills. (11-27-07)

The Michigan Association of Realtors supports the bills. (11-27-07)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.