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**SENATE BILL 5189**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Senators Hasegawa and Saldaña

AN ACT Relating to prohibiting dual agency in certain real estate transactions; amending RCW 18.85.361 and 18.86.060; adding a new section to chapter 18.86 RCW; creating a new section; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature finds that Washington state's commercial real estate brokerage market has dramatically transformed over the last decade and includes some of the most competitive leasing markets in the country. This often negatively impacts businesses, especially immigrant-owned and traditionally underserved businesses in their capacities as buyers of commercial property, as buyer is defined in RCW 18.86.010.

NEW SECTION. **Sec.**  A new section is added to chapter 18.86 RCW to read as follows:

(1) A broker may not represent a party to a commercial real estate transaction if the representation involves a conflict of interest. A concurrent conflict of interest exists if:

(a) The representation of one party to the commercial real estate transaction will be directly or indirectly adverse to another party to the commercial real estate transaction, including but not limited to the simultaneous representation of the landlord/lessor and prospective tenant in a commercial leasing transaction, or the representation of the property owner/seller and prospective purchaser in a for-sale transaction, each of which is deemed inherently adversarial under this section;

(b) There is significant risk that the representation of one or more parties involved in the commercial real estate transaction will be limited by the broker's fiduciary statutory duties under chapter 18.86 RCW to another party to the transaction, a third party, or a personal interest of the broker; or

(c) The brokerage firm, or any of its affiliates, partnerships, subsidiaries or other related entities, has a direct or indirect ownership interest in any property that may be a viable potential alternative for the buyer, the lessee, or both.

(2)(a) If a broker is prohibited from representing a party to a transaction under subsection (1) of this section, no broker in the same firm may represent that party, unless the prohibition is based on the personal interest of the broker and there is not a significant risk of limiting the representation of the party.

(b) When a broker has terminated an association with a firm, the firm is no longer prohibited from representing a party that the formerly associated broker was prohibited from representing, unless the transaction is the same or substantially similar.

(3) A violation of this section constitutes a violation under RCW 18.85.361.

(4) For the purposes of this section, "commercial real estate" has the same meaning as in RCW 18.85.011.

(5) This section does not apply to commercial real estate transactions that take place in counties with a population of less than one hundred thousand.

(6) For purposes of this section "broker" means a licensed commercial real estate broker, managing broker, or brokerage firm and any commercial real estate agent working under the managing broker or brokerage firm.

**Sec.**  RCW 18.85.361 and 2008 c 23 s 32 are each amended to read as follows:

In addition to the unprofessional conduct described in RCW 18.235.130, the director may take disciplinary action against any person engaged in the business or acting in the capacity of a real estate broker, managing broker, designated broker, or real estate firm, regardless of whether the transaction was for the person's own account or in a capacity as broker, managing broker, designated broker, or real estate firm, and may impose any of the sanctions and fines specified in RCW 18.235.110 for any holder or applicant who is guilty of:

(1) Violating any of the provisions of this chapter or any lawful rules made by the director pursuant thereto or violating a provision of chapter 64.36, 19.105, or 18.235 RCW ((~~or~~)), RCW 18.86.030 or section 2 of this act, or the rules adopted under those chapters or sections;

(2) Making, printing, publishing, distributing, or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonably induce any person to act thereon, if the statements, descriptions, or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew or, by the exercise of reasonable care and inquiry, could have known, of the falsity of the statements, descriptions or promises;

(3) Knowingly committing, or being a party to, any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme, or device whereby any other person lawfully relies upon the word, representation or conduct of the licensee;

(4) Accepting the services of, or continuing in a representative capacity, any broker or managing broker who has not been granted a license, or after his or her license has been revoked or during a suspension thereof;

(5) Conversion of any money, contract, deed, note, mortgage, or abstract or other evidence of title, to the person's own use or to the use of that person's principal or of any other person, when delivered in trust or on condition, in violation of the trust or before the happening of the condition; and failure to return any money or contract, deed, note, mortgage, abstract, or other evidence of title within thirty days after the owner thereof is entitled thereto, and makes demand therefor, is prima facie evidence of such conversion;

(6) Failing, upon demand, to disclose any information within the person's knowledge, or to produce any document, book, or record in the person's possession for inspection by the director or the director's authorized representatives acting by authority of law;

(7) Continuing to sell any real estate, or operating according to a plan of selling, whereby the interests of the public are endangered, after the director has, by order in writing, stated objections thereto;

(8) Advertising in any manner without including the real estate firm's name or assumed name as licensed in a clear and conspicuous manner in the advertisement; except, that real estate brokers, managing brokers, or firms advertising their personally owned real property must only disclose that they hold a real estate license;

(9) Accepting other than cash or its equivalent as earnest money unless that fact is communicated to the owner before the owner's acceptance of the offer to purchase, and such fact is shown in the purchase and sale agreement;

(10) Charging or accepting compensation from more than one party in any one transaction without first making full disclosure in writing of all the facts to all the parties interested in the transaction;

(11) Accepting, taking, or charging any undisclosed commission, rebate, or direct profit on expenditures made for the principal;

(12) Accepting employment or compensation for appraisal of real property contingent upon reporting a predetermined value;

(13) Issuing a report on any real property in which the broker, managing broker, or real estate firm has an interest unless that interest is clearly stated in the report;

(14) Misrepresentation of membership in any state or national real estate association;

(15) Discrimination against any person in hiring or in real estate brokerage service activity, on the basis of any of the provisions of any local, county, state, or federal antidiscrimination law;

(16) Failing to keep an escrow or trustee account of funds deposited relating to a real estate transaction, for a period of three years, showing to whom paid, and other pertinent information as the director may require, such records to be available to the director, or the director's representatives, on demand, or upon written notice given to the bank;

(17) In the case of a firm and its designated broker, failing to preserve records relating to any real estate transaction for three years following the submission of the records to the firm;

(18) Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories thereof within a reasonable time following execution;

(19) In the case of a broker or managing broker, acceptance of a commission or any valuable consideration for the performance of any acts specified in this chapter, from any person, except the licensed real estate firm with whom the broker or managing broker is licensed;

(20) To direct any transaction involving his or her principal, to any lending institution for financing or to any escrow company, in expectation of receiving a kickback or rebate therefrom, without first disclosing the expectation to his or her principal;

(21) Buying, selling, or leasing directly, or through a third party, any interest in real property without disclosing in writing that the person is a real estate licensee;

(22) In the case of real estate firms, and managing and designated brokers, failing to exercise adequate supervision over the activities of their brokers and managing brokers within the scope of this chapter;

(23) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetence;

(24) Acting as a vehicle dealer, as defined in RCW 46.70.011, without having a license to do so; or

(25) Failing to ensure that the title is transferred under chapter 46.12 RCW when engaging in a transaction involving a mobile or manufactured home as a broker, managing or designated broker, or firm.

**Sec.**  RCW 18.86.060 and 2013 c 58 s 7 are each amended to read as follows:

(1) Notwithstanding any other provision of this chapter, a broker may act as a dual agent only with the written ((~~consent of~~)) conflict of interest waiver from both parties ((~~to the transaction after the dual agent has complied with RCW 18.86.030(1)(f), which consent must include a statement of the terms of compensation~~)), as well as their respective legal counsel. The waiver shall clearly define that each party is waiving their right to legal remedies against the dual agent broker, managing broker and brokerage firm. The waiver must state the following in bold 16-point font: "Buyer/lessee and seller/lessor hereby waive any and all legal remedies against the dual agent broker, managing broker and brokerage company. Each party understands that it is impossible for a dual agent to represent, as a fiduciary, two opposing parties. The state of Washington highly recommends an independent fiduciary advisor for both parties."

(2) Provided subsection (1) of this section, unless additional duties are agreed to in writing signed by a dual agent, the duties of a dual agent are limited to those set forth in RCW 18.86.030 and the following, which may not be waived except as expressly set forth in (e) and (f) of this subsection:

(a) To take no action that is adverse or detrimental to either party's interest in a transaction;

(b) To timely disclose to both parties any additional conflicts of interest that may arise during the transaction, including but not limited to the broker of one party acting in the capacity of an undisclosed principal in the same transaction;

(c) To advise both parties to seek expert advice on matters relating to the transaction that are beyond the dual agent's expertise;

(d) Not to disclose any confidential information from or about either party, except under subpoena or court order, even after termination of the agency relationship;

(e) Unless otherwise agreed to in writing after the dual agent has complied with RCW 18.86.030(1)((~~(f)~~)), to make a good faith and continuous effort to find a buyer for the property; except that a dual agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale; and

(f) Unless otherwise agreed to in writing after the dual agent has complied with RCW 18.86.030(1)((~~(f)~~)), to make a good faith and continuous effort to find a property for the buyer; except that a dual agent is not obligated to: (i) Seek additional properties to purchase while the buyer is a party to an existing contract to purchase; or (ii) show properties as to which there is no written agreement to pay compensation to the dual agent.

(3)(a) The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a dual agent does not in and of itself constitute action that is adverse or detrimental to the seller or create a conflict of interest.

(b) The representation of more than one seller by different brokers licensed to the same firm in competing transactions involving the same buyer does not in and of itself constitute action that is adverse or detrimental to the sellers or create a conflict of interest.

(4)(a) The showing of property in which a buyer is interested to other prospective buyers or the presentation of additional offers to purchase property while the property is subject to a transaction by a dual agent does not in and of itself constitute action that is adverse or detrimental to the buyer or create a conflict of interest.

(b) The representation of more than one buyer by different brokers licensed to the same firm in competing transactions involving the same property does not in and of itself constitute action that is adverse or detrimental to the buyers or create a conflict of interest.

(5)(a) This section does not apply to:

(i) Commercial real estate transactions in counties with a population of one hundred thousand or less; or

(ii) Commercial real estate transactions involving multiple-unit housing. For the purposes of this subsection (a)(ii), "multiple-unit housing" means a building having four or more dwelling units not designed or used as transient accommodations and not including hotels and motels. Multifamily units may result from new construction or rehabilitated or conversion of vacant, underutilized, or substandard buildings to multifamily housing as defined in RCW 84.14.010.

(b) For the purposes of this subsection, "commercial real estate" has the same meaning as in RCW 18.85.011.

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