

# SENATE BILL REPORT

## SB 5189

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As of January 23, 2019

**Title:** An act relating to prohibiting dual agency in certain real estate transactions.

**Brief Description:** Prohibiting dual agency in certain real estate transactions.

**Sponsors:** Senators Hasegawa and Saldaña.

**Brief History:**

**Committee Activity:** Financial Institutions, Economic Development & Trade: 1/22/19.

**Brief Summary of Bill**

- Clarifies the definition of conflicts of interest to a broker acting in a dual agent capacity in a commercial real estate transaction.
- Requires the parties to sign a conflict of interest waiver in a dual agent commercial real estate transaction.

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**SENATE COMMITTEE ON FINANCIAL INSTITUTIONS, ECONOMIC DEVELOPMENT & TRADE**

**Staff:** Clint McCarthy (786-7319)

**Background:** Within real estate transactions, a dual agent is defined in statute as a broker who has entered into an agency relationship with both the buyer and seller in the same transaction. An agent may act as a dual agent with written consent by both the buyer and seller of the property. Unless additional duties are agreed to in writing signed by a dual agent, the duties of a dual agent are limited to the duties of a broker as defined in statute. Under statute, a dual agent must:

- take no action that is adverse or detrimental to either party's interest in a transaction;
- timely disclose to both parties any conflict of interest;
- advise both parties to seek expert advice on matters relating to transactions that are beyond the dual agent's expertise; and
- not disclose any confidential information from or about either party, except under subpoena or court order, even after termination of the agency relationship.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Summary of Bill:** Prohibits a broker from representing a party to a commercial real estate transaction if the representation involves a conflict of interest. A conflict of interest is defined as:

- the representation of one party will be directly or indirectly adverse to another party in a commercial real estate transaction;
- there is significant risk that the representation of one or more parties involved will be limited by the broker's statutory duties; and
- the brokerage firm, or any of its affiliates has a direct or indirect ownership interest in any party that may be a viable alternative for the buyer, the lessee, or both.

If a broker is prohibited from representing a party based on one of these conflicts of interest, 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. If a broker has terminated an association with a firm, the firm is no longer prohibited from representing a party in the transaction. This prohibition does not apply if the transaction occurs in a county with a population less than 100,000. Disciplinary statutes for unprofessional conduct with respect to brokers is amended to include a broker's conflict of interest in commercial real estate transactions.

A broker may act as a dual agent only with a written conflict of interest waiver form that has been signed by both parties, as well as their legal counsel. A conflict of interest waiver must show that each party is waiving their right to legal remedies against the dual agent broker, managing broker, and brokerage firm. Dual agents are also directed to disclose additional conflicts of interest that may arise during the transaction, including the broker of one party acting in the capacity of an undisclosed principal in the same transaction.

Commercial real estate transactions involving multiple-unit housing are excluded from these dual agent conflict of interest provisions.

**Appropriation:** None.

**Fiscal Note:** None.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: This bill seems like a no brainer. There has to be a conflict of interest whenever a broker represents two sides of a transaction, and this bill provides a degree of transparency and protection for lessees and buyers. A landlord wants the highest rent possible and the renter wants the lowest rent possible, which makes it very difficult for a dual agent to support both the buyer or renter and the seller. This whole system is designed to benefit landlords. This bill provides more transparency on real estate transactions where brokers act as dual agencies. This bill helps tenants understand what they are getting into. These transactions have a tendency to be are very opaque, and a lot of startup businesses do not know that brokers have a dual conflict. Many of these new individuals starting a business are unaware of how the role of a broker works, and this lack of knowledge

can put their business at a disadvantage that can bankrupt and disenfranchise small business owners. It is important to have informed tenants.

CON: There is an issue in real estate. There is a shortage of housing and other infrastructure that drives the cost of real estate and rents. Real estate brokers are not lawyers, and what they do should not be elevated to what lawyers do—broker a transaction. Many commercial tenants seek legal counsel to represent their interests. There is an informed consent provision that exists under current statute. Eliminating dual agency will take away legal remedies that benefit consumers under statute. If dual agents are an issue in real estate transactions, it does not make sense to limit the scope to commercial real estate and not residential real estate. There is no explanation for why multifamily housing units are excluded under this bill. The number of claims against commercial brokers by consumers has dropped precipitously over time. This bill would seriously restrict or effectively eliminate dual agency representation that benefits the economy of the state of Washington. Consumers should be allowed the choice to use a full service firm. It is anti-consumer legislation. This will be a boon for lawyers, but it will hurt mom-and-pop small businesses. This will increase the cost of using a full service firm and make the process of procuring commercial real estate as difficult and cumbersome. There are very few brokers capable of carrying out these complex actions. Market trends show that consumers prefer full service firms. Full service firms carry out 95 percent of these transactions in the state's three largest markets.

**Persons Testifying:** PRO: Senator Bob Hasegawa, Prime Sponsor; Jason Hughes, Hughes Seattle; Rafael Zimberoff, ShipRush; Joe Sky-Tucker, citizen.

CON: Annette Fitzsimmons, Chair, Real Prop., Probate, Trust Section of the Washington Bar Association and Legal Counsel, Washington REALTORS; John Miller, CBRE, INC; Chris Osborn, Legal Counsel, NWMLS and Commercial Brokers Association; Jason Green, Managing Director, CBRE, Inc; Jane Blair, CBRE, Inc.; Brian Finnegan, WestCom Properties, Inc.

**Persons Signed In To Testify But Not Testifying:** No one.