

HOUSE BILL REPORT

HB 3012

As Reported by House Committee On:
Judiciary

Title: An act relating to estate distribution documents.

Brief Description: Regarding estate distribution documents.

Sponsors: Representatives Ross, Lantz, Rodne and Williams.

Brief History:

Committee Activity:

Judiciary: 1/29/08, 2/5/08 [DPS].

Brief Summary of Substitute Bill

- Exempts transfer on death accounts from the definition of "estate distribution document."
- Includes a securities broker-dealer licensed under state law in the definition of "financial institution."
- Defines "securities broker-dealer."
- Provides that this law does not apply to a financial institution or securities broker-dealer that is in compliance with a particular statute and court rules related to the practice of law.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Lara Zarowsky (786-7123).

Background:

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.

It is unlawful for anyone not authorized to practice law in this state to market estate distribution documents in or from the state.

An **estate distribution document** is a will, trust, living trust, or other agreement fixing the terms of the sale of a decedent's interest in any property at or following the decedent's death, except a *payable* on death account, that is prepared for a specific person or prepared as marketing materials. Marketing includes an offer or agreement to prepare or provide individualized advice about an estate distribution document.

The **practice of law** includes not only legal representation of a client in court, but also legal advice and counsel as well as the preparation of legal instruments and contracts by which legal rights are secured.

The State Bar Act makes the "unlawful practice of law" a gross misdemeanor punishable by up to one year in jail and a fine of up to \$5,000. "Nonlawyers," for purposes of this statute, include anyone not an active member in good standing of the State Bar Association. Court rules on the practice of law regulate admission to the bar and allow for discipline and disbarment of members, but do not directly regulate or discipline nonlawyers.

The unauthorized marketing of estate distribution documents is a violation of the state **Consumer Protection Act** (CPA). Under the CPA, certain activities have been designated by the Legislature as unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. Various remedies for violations of the CPA are provided, including authorization for the Attorney General to seek restraining orders. A person who is injured by a violation of the CPA may recover treble damages, costs, and reasonable attorneys' fees.

A person that is *not* authorized to practice law in this state may nonetheless gather information or assist in preparing estate distribution documents if (1) he or she is employed by someone who *is* authorized to practice law in this state, and (2) he or she does not provide legal advice.

Financial institutions are exempt from the prohibition against marketing estate distribution documents by those not authorized to practice law.

A financial institution is a:

- bank or bank holding company registered under federal law;
- trust company;
- savings or mutual savings bank;
- savings and loan association;
- credit union organized under state or federal law; or
- any affiliate, subsidiary, officer or employee of a financial institution.

A **securities broker-dealer** is any person engaged in the business of effecting transactions in securities for the account of others or for that person's own account. A security is a kind of contract that can be assigned a value and traded. Examples include notes, stocks, bonds, options, futures, warrants, and other financial assets.

A **transfer on death account** allows a holder to pass securities directly to another person or entity upon death without having to go through probate.

Summary of Substitute Bill:

A transfer on death account established under RCW 21.35 is specifically exempted in the definition of "estate distribution document."

A securities broker-dealer licensed under state law is added to the definition of "financial institution" and is therefore exempted from the prohibition against the marketing of estate distribution documents by anyone not authorized to practice law.

"Securities broker-dealer" is defined as a securities broker-dealer currently registered in the state pursuant to RCW 21.20.

The law does not apply to a securities broker-dealer or financial institution in compliance with General Rule 24, admission to practice rules, and RCW 2.48.

Substitute Bill Compared to Original Bill:

The substitute bill defines "securities broker-dealer" and provides that the law does not apply to any securities broker-dealer or financial institution that is in compliance with court rules and statutes related to the practice of law.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Last year, Attorney General request legislation HB 1114 made an effort to strengthen provisions to address unscrupulous activity with estate planning documents, particularly living wills. The law that passed provided exclusions in two areas: first a *payment* on death account is specifically excluded in the definition of an estate distribution document. However, a "transfer on death" account, common in the securities industry, was not excluded in the definition. Transfer on death is a common activity, and failing to exclude it from the prohibition against marketing of estate distribution documents results in an exposure that is unintended for a very basic activity.

Securities broker-dealers should be included in the definition of a financial institution so that they are exempted under the law. There is an inequity in the fact that banks and trust companies are excluded under the law, but securities broker-dealers are not. If a broker-dealer works for a financial institution, such as Wells Fargo, they are able to do securities

transactions while being exempted under this law. However, if the broker-dealer works for Merrill Lynch, they are not protected because Merrill Lynch is a securities company and does not fall under any of the categories considered a "financial institution" under the law. The inequity should be addressed. The rogues and non-licensed crowd are really the problem, and we should work to find a solution.

(In support with concerns) From a civil law enforcement standpoint, the bill passed last year is a good law. The purpose is to separate those engaged in the unauthorized practice of law from being able to engender trust through the sale of estate planning documents, particularly in the case of vulnerable consumers who can be misled into believing that dealing with an attorney is not in their best interest. The deception sets up fertile ground conflict of interest, incompetence, and sharp dealing. Allowing *transfer* on death accounts to be marketed is a good thing and this provision of the bill is strongly supported. Transfer on death accounts simply direct a financial institution on how to handle matters upon death. This doesn't involve the danger that we see in other transactions, such as we saw with living trusts. The question is whether *unlicensed* brokers should be exempted. The broker-dealer may be included as a party to trust activity as opposed to simply taking direction from the consumer, and may want to include its own language. This is the real issue.

(Opposed) None.

Persons Testifying: (In support) Representative Ross, prime sponsor; and Bill Stauffacher, Securities Industry and Financial Markets Association.

(In support with concerns) Doug Walsh, Office of the Attorney General.

Persons Signed In To Testify But Not Testifying: None.