

# HOUSE BILL REPORT

## SB 6381

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### As Passed House - Amended:

March 4, 2008

**Title:** An act relating to fiduciary duties of mortgage brokers.

**Brief Description:** Establishing fiduciary duties for mortgage brokers.

**Sponsors:** By Senators Weinstein, Kauffman, Tom, Fairley, McAuliffe, Kohl-Welles, Kline and Murray.

### Brief History:

#### Committee Activity:

Insurance, Financial Services & Consumer Protection: 2/21/08, 2/28/08 [DPA].

#### Floor Activity:

Passed House - Amended: 3/4/08, 93-0.

### Brief Summary of Bill (As Amended by House)

- Establishes a fiduciary duty that is owed by a mortgage broker to a borrower.

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## HOUSE COMMITTEE ON INSURANCE, FINANCIAL SERVICES & CONSUMER PROTECTION

**Majority Report:** Do pass as amended. Signed by 9 members: Representatives Kirby, Chair; Kelley, Vice Chair; Roach, Ranking Minority Member; Hurst, Loomis, Rodne, Santos, Simpson and Smith.

**Staff:** Jon Hedegard (786-7127).

### Background:

The Department of Financial Institutions (DFI) licenses mortgage brokers and loan originators under the Mortgage Broker Practices Act (MBPA). The MBPA has provisions regarding licensing, continuing education, prohibited practices, examinations, investigations, and criminal, civil, and administrative penalties.

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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.*

The MBPA has specific provisions regarding money received from a borrower. All money received by a mortgage broker from a borrower for payment of third-party provider services must be held in trust by the mortgage broker. Funds maintained in a trust account are exempt from execution, attachment, or garnishment. A mortgage broker must not encumber the trust account or commingle any other operating funds with trust account funds. Withdrawals from a trust account must be only for the payment of bona fide services rendered by a third-party provider or for refunds to borrowers. Interest earned on the trust account must be refunded or credited to the borrowers at closing. A person violating these provisions is guilty of a class C felony.

"Third-party provider" is defined as any person other than a mortgage broker or lender who provides goods or services to the mortgage broker in connection with the preparation of the borrower's loan. "Third-party provider" includes credit reporting agencies, title companies, appraisers, structural and pest inspectors, and escrow companies.

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**Summary of Amended Bill:**

A mortgage broker has a fiduciary relationship with the borrower. A mortgage broker's fiduciary duties are the following:

- a mortgage broker must act in the borrower's best interest and in the utmost good faith toward the borrower;
- a mortgage broker must disclose any and all interests to the borrower;
- a mortgage broker must not receive any undisclosed compensation on an expenditure made for the borrower;
- a mortgage broker must not accept, provide, or charge any undisclosed compensation or realize any undisclosed benefits;
- a mortgage broker must carry out all lawful instructions provided by the borrower;
- a mortgage broker must disclose to the borrower all known material facts that might reasonably affect the borrower's rights, interests, or ability to receive the borrower's intended benefit from the residential mortgage loan;
- a mortgage broker must use reasonable care in performing duties; and
- a mortgage broker must provide the borrower with an accounting of all money and property received from the borrower.

A mortgage broker may receive a fee for the provision of services if the fee is disclosed to the borrower before those services are provided.

The Director of the DFI must adopt rules to implement the act.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Staff Summary of Public Testimony:**

(In support) The Task Force did not reach a consensus on this issue. Nine of the 17 members indicated that they wanted to go further than the Task Force bill on this issue. Mortgage brokers advertise that they work for borrowers. This is not always true. A fiduciary duty will lead to common-law penalties for a violation. A borrower can enforce the requirements in court. Other professions have a fiduciary duty, including attorneys. This does not mean that they can't contract with multiple parties. It means that they must put the interest of the client first. The documents for a loan are 20 times the size that they were just 25 years ago. The act of buying a home is more complex today. People go to mortgage brokers because they need professional advice. Mortgage brokers don't have a fiduciary duty to borrowers in this state but they do have that duty in other states. The Task Force recommended prohibiting steering and providing additional disclosure. This bill is the most important bill addressing mortgage brokers this session. It makes the law consistent with a borrower's expectation. It is important that the word "fiduciary" is used. It is important that the duties that the word represents are imposed on mortgage brokers. There are five key requirements: act in the borrower's best interest; carry out the lawful instructions of a borrower; disclose all material facts; exercise reasonable care; and account for the borrower's money. Under state law, unlike in California or Minnesota, a broker and borrower have a contractual relationship. In that contract, it says that the broker is not the agent of the borrower. That is not what a borrower expects or believes. People have been hit hard by the foreclosure crisis. In a single month last year, 28 people living in my zip code lost their homes. Action and reform are needed. This bill provides basic consumer protections that every home buyer should have and expects to have from their mortgage broker. Ending deceptive and abusive practices in mortgage lending is important. Unfair practices impact borrowers and their communities. It has been reported that over half of all borrowers in subprime loans actually would have qualified for a prime loan. Borrowers were steered to loans with less favorable terms because brokers received greater commissions for those subprime loans. Yield spread premium (YSP) puts the interest of a broker into direct conflict with the interest of a borrower. This bill would require brokers have the duty to a borrower that a borrower believes is in existence today. The complexity of transactions means that borrowers need the services of a professional. Mortgage brokers hold themselves out as professionals and should have a fiduciary duty.

(In support with concerns) There are concerns about this bill. The Task Force was unanimously supportive on the Governor's request bill. This bill goes beyond the Task Force recommendations. If that is necessary, it should only be considered after the Governor's request bill is effective.

(Opposed) This bill will lead to litigation. No mortgage broker can always provide the cheapest loan at the lowest cost. If someone is falsely advertising, current laws that should be enforced. The average mortgage broker is a six person shop. They don't spend a lot on advertising. Seventy percent of loans are originated by mortgage brokers. That business comes from referrals. We are like real estate agents or insurance agents. Realtors have an

agency relationship or dual agency relationship. Mortgage brokers have a dual agency relationship with lenders and borrowers. It isn't clear if any type of yield spread premium (YSP) would violate a fiduciary duty. The YSP is not the key. The key is overall price. The MBPA imposes a duty of honesty and fair dealing. The Task Force opposed steering but did not discuss YSP in detail or vote on YSP recommendations. There have been suits where people have alleged that YSP violates a duty to the borrower regardless of disclosure. This bill would lead to more suits like those. There may be some workable solution but this is not it. The bill ignores a mortgage brokers duty to a lender. Federal Trade Commission studies have indicated that more disclosure of YSP actually leads to worse consumer decisions.

**Persons Testifying:** (In support) Senator Weinstein, prime sponsor; Fred Corbit, Northwest Justice Project; John Jones, Association of Community Organizations for Reform Now; Damiana Merryweather, United Food and Commercial Workers State Council; and Brad Allen.

(In support with concerns) Denny Eliason, Washington Bankers Association and the United Financial Lobby.

(Opposed) Adam Stein, Steve Buckner, and David Erickson, Washington Association of Mortgage Brokers.

**Persons Signed In To Testify But Not Testifying:** None.