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OHIO LEGISLATIVE SERVICE COMMISSION

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Office of Research
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Office

S.B. 155*
136th General Assembly

Occupational Regulation Report

[Click here for S.B. 155's Bill Analysis / Fiscal Note](#)

Primary Sponsors: Senators Brenner and Ingram

Impacted Professions: Real estate wholesalers

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LSC is required by law to issue a report for each introduced bill that substantially changes or enacts an occupational regulation. The report must: (1) explain the bill's regulatory framework in the context of Ohio's statutory policy of using the least restrictive regulation necessary to protect consumers, (2) compare the regulatory schemes governing the same occupation in other states, and (3) examine the bill's potential impact on employment, consumer choice, market competition, and cost to government.¹

LEAST RESTRICTIVE REGULATION COMPARISON

Ohio's general regulatory policy

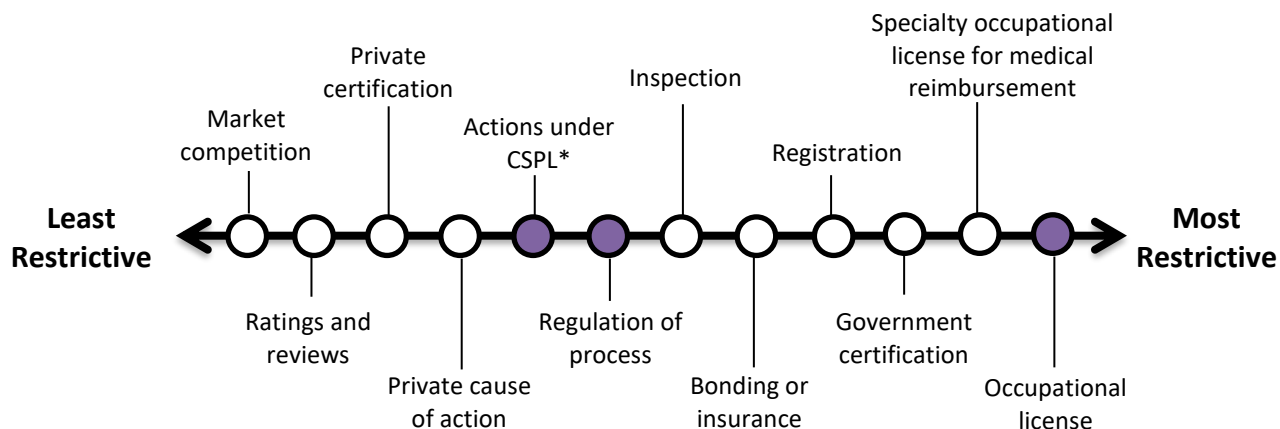
The general policy of the state is reliance on market competition and private remedies to protect the interests of consumers in commercial transactions involving the sale of goods or services. For circumstances in which the General Assembly determines that additional safeguards are necessary to protect consumers from "present, significant, and substantiated harms that threaten health, safety, or welfare," the state's expressed intent is to enact the "least restrictive regulation that will adequately protect consumers from such harms."²

The degree of "restrictiveness" of an occupational regulation is prescribed by statute. The following graphic identifies each type of occupational regulation expressly mentioned in the state's policy by least to most restrictive:

* This report addresses the "As Introduced" version of S.B. 155. It does not account for changes that may have been adopted after the bill's introduction.

¹ R.C. 103.26, not in the bill.

² R.C. 4798.01 and 4798.02, neither in the bill.



*CSPL – The Consumer Sales Practices Law

S.B. 155 regulates dealing in residential real estate contracts, a practice commonly called “wholesaling.” Specifically, the bill requires wholesalers (as defined in the bill) acting as the grantee of residential real property containing one to four dwelling units, before entering into a contract transferring an interest in the property, to give the property’s owner a written disclosure statement that meets certain specifications.³ For a wholesaler who violates this requirement, the bill establishes all of the following potential consequences:

- Being the subject of a lawsuit brought under the Consumer Sales Practices Law, which could result in liability for damages and attorney fees;⁴
- If the wholesaler holds a real estate broker or salesperson license, disciplinary sanctions (including license suspension or revocation) by the Ohio Real Estate Commission;⁵ and
- Cancellation of the contract and loss of earnest money.⁶

Necessity of regulations

Senator Catherine Ingram, one of the bill’s primary sponsors, asserted that the bill would protect Ohioans from real estate wholesaling, a practice that she described as being predatory by preying on vulnerable homeowners to rob them of equity in their homes. She explained that real estate wholesaling involves a wholesaler who enters into a contract with a property owner and then assigns the wholesaler’s interest in that contract to a third-party investor for an assignment fee. She said that, unlike an investor who flips a home after purchasing it, a wholesaler has no intention of actually purchasing the property and never takes title.

³ R.C. 5301.95(A) and (B).

⁴ R.C. 5301.95(C) and R.C. 1345.02 and 1345.09, neither in the bill.

⁵ R.C. 4735.18(A) and (B) and R.C. 4735.051(I), not in the bill.

⁶ R.C. 5301.95(C).

Senator Ingram stated that problems arise when wholesalers engage in aggressive tactics to persuade homeowners to enter into such a contract. She said that wholesalers mislead homeowners into believing that the wholesaler is the one purchasing the property when, in reality, the wholesaler intends to sell the contract for a profit. If the wholesaler cannot find an investor to sell the contract to, Senator Ingram explained that the wholesaler will back out of the contract without closing, with few consequences.

If the closing proceeds, she testified that the homeowner then discovers that the actual purchaser is a third-party investor with whom the homeowner has never interacted. She also asserted that the homeowner finds that the sale price is well below fair market value, benefitting the wholesaler who makes a profit while depriving the homeowner of equity in the home.

Furthermore, Senator Ingram said that wholesalers publicly market the property as if they actually own it, which is often indistinguishable from the activities a licensed real estate professional engages in when representing a seller. However, she stated that wholesalers are unlike licensed real estate professionals, who receive training and who are subject to Ohio law and have a fiduciary obligation to protect and promote the client's interests. Instead, she asserted that wholesalers operate in the shadows, and state regulators have no authority to take action against them in cases of abuse.

Senator Andrew Brenner, the bill's other primary sponsor, testified the bill increases transparency by requiring wholesalers to disclose their true intentions to the homeowner and end buyer. The disclosure informs the homeowner that the wholesaler:

- Is not representing the homeowner;
- Intends to assign the wholesaler's rights to the contract for a profit; and
- May be offering below fair market value for the home.

Consequently, Senator Brenner asserted that the bill will ensure that homeowners make informed decisions when entering into a contract to sell their property.⁷

Restrictiveness of regulations

Licensure

Licensure is the most restrictive of all regulatory options identified within the state's continuum of regulations. Accordingly, the state's policy prescribes a narrow range of situations in which required licensure is appropriate, specifically, when all of the following circumstances are present:

- The occupation involves providing a service regulated by both state and federal law;

⁷ See [Sponsor testimony of Senator Andrew Brenner and Senator Catherine Ingram \(PDF\)](#) which is available on the General Assembly's website, legislature.ohio.gov, by searching for "SB 155" and looking under the "Committee Activity" tab.

- The licensing framework allows individuals licensed in other states and territories to practice in Ohio; and
- The licensing requirement is based on uniform national laws, practices, and examinations that have been adopted by at least 50 U.S. states and territories.⁸

Continuing law satisfies the state policy's first criterion regarding concurrent state and federal law. For example, real estate transactions are subject to the federal Fair Housing Act, which prohibits discrimination based on specified factors.⁹ In addition, state governments issue licenses to sell real estate.¹⁰

The state policy's second criterion regarding licensure of out-of-state individuals also is satisfied by continuing law. Specifically, the state's Out-of-State Applicant Licensure Law generally requires the Ohio Real Estate Commission to issue licenses to applicants who hold analogous out-of-state occupational licenses.¹¹

As for the state policy's third criterion, neither continuing law nor the bill satisfies it because laws governing the transfer of real estate, including licensure laws, generally are not consistent across the nation.¹²

Discipline involving real estate broker and salesperson licenses

Under the bill, a licensed real estate broker or salesperson who, while acting as a wholesaler, fails to give a residential property owner a disclosure statement as the bill requires is subject to potential disciplinary sanctions by the Ohio Real Estate Commission. (For more details, see **"Required wholesaler disclosures"** under the **"Process regulation"** heading, below.) By thus expanding the grounds for disciplinary sanctions, the bill appears to increase restrictiveness. These sanctions may include suspension or revocation of the individual's real estate broker or salesperson license, a fine of up to \$2,500 per violation, a public reprimand, or completion of additional continuing education course work.¹³

Process regulation

The state's policy does not provide specific guidance as to when a regulation of process is the best means of protecting the health, safety, and welfare of consumers. However, the policy as a whole suggests that regulations of process are the most preferred method of regulation when market competition, ratings and reviews, private certifications, private causes of action,

⁸ R.C. 4798.02, not in the bill.

⁹ 42 United States Code 3601 *et seq.*

¹⁰ See [Licensing for Real Estate Professionals](#), which may be accessed by conducting a "licensing for real estate professionals" keyword search on the National Association of Realtors website: nar.realtor.

¹¹ R.C. 4735.07, 4735.09, and 4796.03, not in the bill.

¹² See [Licensing for Real Estate Professionals](#).

¹³ R.C. 4735.051(l), not in the bill, and 4735.18.

and actions under the state's Consumer Sales Practices Law do not provide sufficient protection.¹⁴

Whether these mechanisms are a sufficient means of protecting consumers is a policy decision. However, continuing Ohio law establishes several process regulations that govern the real estate industry. For example, a licensee who is a buyer's agent or a seller's subagent working with a buyer must provide the buyer with an agency disclosure statement containing specified information.¹⁵ In addition, a real estate broker or salesperson who provides the name of a home inspector to a buyer or seller must provide names of at least three such inspectors.¹⁶ Also, agency agreements must contain specified provisions.¹⁷

Required wholesaler disclosure statement

The bill appears to increase restrictiveness by establishing disclosure requirements for wholesalers. Under the bill, a wholesaler is defined as a person or entity that, for the receipt (or with the intention, expectation, or promise of receiving) a fee, commission, or other valuable consideration, enters into a purchase contract for residential real property as either of the following:

- The grantee, and assigns or novates that contract to another person or entity; or
- The grantor, and, without holding legal title to that real property, assigns or novates that contract to another person or entity.

The bill defines "residential real property" as real property that is improved by a structure containing one to four dwelling units.

Under the bill, before entering into a binding contract that transfers an interest in residential real property, a wholesaler (or the wholesaler's representative) acting as the grantee must provide to the property's owner a conspicuous written disclosure statement, separate from the purchase agreement, printed in specified bold type. The bill prohibits the wholesaler from entering into such a contract before both parties sign and date the statement.

The bill prescribes the form and wording with which the statement must substantially conform. The statement must include disclosures such as the following:

- That the person presenting the document is a wholesaler and that the property owner is advised to seek legal advice before entering into an agreement;
- That the wholesaler is acting on the wholesaler's own behalf, does not represent the property owner, and seeks to make a profit;

¹⁴ R.C. 4798.01, not in the bill.

¹⁵ R.C. 4735.57 and 4735.58, neither in the bill.

¹⁶ R.C. 4735.22, not in the bill.

¹⁷ R.C. 4735.55, not in the bill.

- That the wholesaler may assign the wholesaler's interest in the property to a third party and may collect a fee from the ultimate property buyer, separate from any fee included in the contract between the wholesaler and the property owner;
- That the purchase price may be less than the actual market value of the property;
- That the property owner may pursue specified remedies against a wholesaler who fails to present or complete the statement as required (see "**Remedies**," below).¹⁸

Actions under the Consumer Sales Practices Law

The Consumer Sales Practices Law (CSPL)¹⁹ aims to protect consumers by authorizing lawsuits for unfair, deceptive, or unconscionable acts or practices in connection with the transfer of goods or services intended for the home or for personal use.

The state's policy does not provide specific guidance as to when actions under the CSPL are the best means of protecting the health, safety, and welfare of consumers. However, the policy as a whole suggests that those actions are the most preferred method of regulation when market competition, ratings and reviews, private certifications, and specific private causes of action do not provide sufficient protection.²⁰ Whether these mechanisms are a sufficient means of protecting consumers is a policy decision.

Thus, it is somewhat unclear whether the state's CSPL-related policy is satisfied by the bill, which allows a lawsuit to be brought under the CSPL against a wholesaler who violates the bill's disclosure requirements. However, given that selling or buying a home often is one of the most significant financial transactions in an individual's life, it may be argued that this application of the CSPL is an appropriate means of protecting home sellers and buyers who have been misled by a wholesaler who failed to make the required disclosures.

Remedies

The bill increases restrictiveness by specifying that a wholesaler's violation of its disclosure statement requirement constitutes an unfair or deceptive act or practice under the CSPL and that the same relief available to consumers under the CSPL applies.²¹ Thus, a party injured by the violation may bring a lawsuit under the CSPL against such a wholesaler. Accordingly, the injured party is entitled to pursue a variety of remedies, including recovery of actual economic damages and up to \$5,000 in noneconomic damages and, if the violation was committed knowingly, reasonable attorney's fees.²² In addition, if specified criteria are met, the Ohio Attorney General may bring certain actions for such a violation.²³

¹⁸ R.C. 5301.95(B).

¹⁹ R.C. Chapter 1345.

²⁰ R.C. 4798.01, not in the bill.

²¹ R.C. 5301.95(C), by reference to R.C. 1345.09, not in the bill.

²² R.C. 1345.09, not in the bill.

²³ R.C. 5301.95(C) and 1345.07, not in the bill.

IMPACT STATEMENT

Opportunities for employment

Disclosure requirements that the bill would impose on wholesalers of one to four dwelling units may inhibit the ability of these persons or entities to operate as they have in the past or to generate prior levels of profitability. Notably, a bill requirement that record owners acknowledge that the purchase price from the wholesalers for their properties may be less than market value may curtail these wholesalers' effectiveness in conducting business. By creating a less favorable environment for these residential real estate wholesalers, the bill may reduce opportunities for success in this line of employment.

Consumer choice

As a result of the bill's disclosure provisions, consumers will be better informed to make choices about buying or selling residential real estate.

Market competition

Tighter regulation of market participants operating as real estate wholesalers may tend to reduce demand for one to four family homes that the wholesalers would direct to their buyers. Final demand would be unchanged, though, since the wholesalers perform an intermediary function. Information flows in this market should tend to be improved by the bill's disclosure requirements.

Cost to government

The Ohio Department of Commerce's Division of Real Estate and Professional Licensing would incur costs for a disclosure form that would be required of real estate wholesalers with each transaction. The bill also creates a new category of broker. Costs to the state could be offset by associated fees. At the local level, whether the bill would result in additional civil proceedings is unclear. Any such increase in caseloads of county common pleas courts is not expected to be large. For further details, please refer to the [LBO fiscal note \(PDF\)](#).

SUMMARY OF PROPOSED REGULATIONS

The bill makes other changes in addition to those described under "**Restrictiveness of regulations**," above. If a wholesaler acting as a grantee fails to provide the disclosures required under the bill, the record property owner may cancel the contract before the close of the escrow without penalty. In that case, the escrow or closing agent must disburse to the owner, within 30 days after the cancellation, any earnest money the wholesaler paid.²⁴

The bill prohibits its disclosure requirements from being modified or waived by any oral or written agreement. It specifies that any such modifications or waivers are void.²⁵

²⁴ R.C. 4735.24 and 5301.95(C).

²⁵ R.C. 5301.95(C).

For a detailed description of the bill, please see the [LSC bill analysis \(PDF\)](#).

COMPARISON TO OTHER STATES

As discussed above, the bill requires wholesalers acting as the grantee in certain residential real estate transactions to give the property owner a written disclosure statement before entering into a contract (see “**Required wholesaler disclosure statement**,” above).²⁶ Under the bill, failure to do so is grounds for all of the following consequences: (1) being the subject of a lawsuit brought under the Consumer Sales Practices Law, which could result in liability for damages and attorney fees,²⁷ (2) if the wholesaler holds a real estate broker or salesperson license, disciplinary sanctions such as license suspension or revocation,²⁸ and (3) cancelation of the contract and loss of earnest money.²⁹

Of the states surrounding Ohio, only Indiana, Kentucky, and Pennsylvania regulate real estate wholesaling. These regulations include the following disclosure requirements and related penalties for violations:

- **Indiana:** Requires an unlicensed real estate solicitor (the definition of which applies to a wholesaler), when soliciting the sale or purchase of a residential single-family home, to disclose that “This solicitation is not from a licensed real estate professional.” The disclosure must include the solicitor’s name and the expected home purchaser’s name if the expected purchaser is not the solicitor.³⁰ Failure to make the required disclosure is a deceptive act for which the Attorney General may take enjoinder action.³¹
- **Kentucky:** Requires wholesalers to be licensed³² as real estate brokers and to disclose in writing their status as a licensee to all parties in a real property transaction before entering into a contract. Failure to make the required disclosure is grounds for any or all of the following: (1) license probation, suspension, or revocation, (2) a fine of up to \$1,000, (3) required completion of additional real estate courses, or (4) a reprimand.³³
- **Pennsylvania:** Requires wholesalers to be licensed as real estate brokers³⁴ and requires a sales agreement for a wholesale transaction to prominently include the following

²⁶ R.C. 5301.95.

²⁷ R.C. 5301.95(C) and R.C. 1345.02 and 1345.09, neither in the bill.

²⁸ R.C. 4735.18(A) and (B) and R.C. 4735.051(I), not in the bill.

²⁹ R.C. 5301.95(C).

³⁰ Ind. Code 32-21-16.5-3 and 32-21-16.5-4.

³¹ Ind. Code 24-5-0.5-4(c) and 24-5-0.5-11.

³² Ky. Rev. Stat. 324.010(1) and 324.020(2).

³³ Ky. Rev. Stat. 324.160(1) and (4).

³⁴ 63 P.S. 455.201 and 63 P.S. 455.301.

statements: (1) that the wholesaler intends to sell the property interest without taking title to it, (2) that the consumer has the right to an appraisal and a consultation with another broker or an attorney, and (3) that the consumer has the right, within specified time periods, to cancel the agreement and receive a full refund from the wholesaler.³⁵ Failure to make the required disclosure is grounds for license suspension or revocation, a fine up to \$1,000, or both.³⁶

In addition, other states have enacted laws requiring real estate wholesalers to make specified disclosures. A brief sampling of two of these state laws is included below.

- **Arizona:** Requires a wholesaler, before entering into a contract for a real property transaction, to disclose both of the following in writing: (1) to the seller that the buyer is a wholesale buyer, and (2) to the buyer that the seller is a wholesale seller that holds an equitable interest in the real property and may be unable to convey title. Failure to comply with the disclosure requirements may result in the agreement's cancellation without penalty before the close of escrow and loss of earnest money.³⁷
- **Nebraska:** Requires a wholesaler to be licensed as a real estate broker³⁸ and, when marketing an equitable interest in real property but not representing the property's owner or buyer, to do both of the following: (1) disclose specified information, including the licensee's intent to make a profit, and (2) obtain signed acknowledgements of the disclosure's receipt. Failure to comply with the disclosure and signature requirements is grounds for a civil fine in an amount up to \$5,000 or the licensee's commission earned in the transaction, whichever is greater, alone or in combination with any of the following: (1) censure of the licensee, (2) license suspension or revocation, (3) issuance of consent orders.³⁹

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³⁵ 63 P.S. 455.610(e).

³⁶ 63 P.S. 455.604(a).

³⁷ Ariz. Rev. Stat. Ann. § 44-5101.

³⁸ Neb. Rev. Stat. 81-885.01(2), 81-885.02, and 81-885.03.

³⁹ Neb. Rev. Stat. 76-2421(1), 81-885.10, and 81-885.24; 299 Neb. Admin. Code ch. 5, § 003.