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BILL ANALYSIS

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Senate Bill 603 (as passed by the Senate)
Senate Bill 604 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Ron Jelinek
Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 2-15-06

RATIONALE

In recent years, an increasing number of sellers seeking a competitive price for goods and property have been turning to auctioneers. Reportedly, there are more than 700 auctioneers operating in Michigan, yet, with the exception of those selling livestock, motor vehicles, or boats, auctioneers are not required to be registered or licensed by the State. (According to the Department of Labor and Economic Growth, a person planning to hold an auction in a township must obtain a license from the township clerk, pay a \$25 license fee, and post a bond, as well as submit a report to the Department of Treasury; cities and villages have the authority to regulate auction sales under the provisions of home rule laws.) Since most states require auctioneers to be licensed, according to the Michigan State Auctioneers Association, many operating in Michigan are concerned that this State is becoming a haven for unethical auctioneers. Some people believe that auctioneers operating in Michigan should be allowed to register with the State so that buyers and sellers working with a registered auctioneer would know that he or she had achieved a basic level of competency and was subject to sanctions for operating in an improper manner.

CONTENT

Senate Bill 603 would add Article 28 to the Occupational Code to do the following:

- Establish registration requirements for auctioneers and related responsibilities of the Department of Labor and Economic Growth (DLEG).**

- Create a Board of Auctioneers and require the Board and DLEG to develop an examination for registration applicants.**
- Require written contracts between registered auctioneers and their clients.**
- Require a registered auctioneer to deposit all funds related to the conduct of an auction in a custodial account separate from the registrant's own funds.**
- Specify that registrants who committed certain acts would be subject to penalties and sanctions under the Code.**
- Require registered auctioneers to maintain written records of auction sales and on employees for at least three years.**

Senate Bill 604 (S-1) would amend the State License Fee Act to establish application, examination, and registration fees for registered auctioneers.

The two bills are tie-barred together.

Senate Bill 603

Registration Requirement

The bill would prohibit a person from using the title "registered auctioneer" unless registered under Article 28. ("Auctioneer" would mean an individual who, for compensation, is engaged in the business of the conduct of, or offers to engage in the conduct of, an auction. "Auction" would mean the sale or offer for sale by bidding of

real or personal property at a public or private location.)

The bill also would prohibit a person from advertising or using the term "registered auctioneer" or any other similar term that connoted that the person was registered under Article 28 unless he or she obtained a registration.

A corporation, partnership, limited liability company, association, or other legal entity could apply for registration if at least one of its officers, partners, members, or managing agents were designated as a qualifying member. The Department could issue a registration to the qualifying member if he or she fulfilled the requirements specified in the bill. The qualifying member would be responsible for supervising and controlling the activities regulated by Article 28 to assure full compliance with it and any rules promulgated under the article.

The Department would have to suspend, revoke, or deny a company's registration when the qualifying member's registration was suspended, revoked, or denied. If the qualifying member of an entity were no longer a qualifying member, the entity's registration would be automatically suspended. Upon request, DLEG could permit the registration to remain in force for a reasonable period of time to allow the qualifying of a new qualifying member.

Exemptions

The following people would be exempt from Article 28, provided they did not use the term "registered auctioneer" unless registered under the article:

- A dealer or broker licensed under Public Act 284 of 1937 selling livestock by auction.
- A dealer licensed under the Michigan Vehicle Code selling motor vehicles by auction.
- A dealer or manufacturer selling by auction boats or watercraft required to have a certificate of title under Part 801 (Marine Safety) of the Natural Resources and Environmental Protection Act.

Registration Criteria

Except as otherwise provided, the bill would require DLEG to issue a registration to an

individual or the qualifying officer of a legal entity who met all of the following requirements:

- Had either two years of apprentice experience with a registered auctioneer or proof of graduation from an accredited auction school acceptable to the Board of Auctioneers and one year of apprentice experience with a registered auctioneer.
- Had actively participated in the conduct of at least 10 auctions, verified by an affidavit of a registered auctioneer providing the names and addresses of the parties on whose behalf the auction was held and the dates of the auction.
- Had completed an examination as described below.
- Was of good moral character.

A registered auctioneer would have to maintain a regular place of business in this State. If the auctioneer maintained more than one place of business, DLEG would have to issue a duplicate registration at no additional cost. A regular place of business would not include a location used only as a warehouse.

A registrant would have to post conspicuously a copy of the registration issued under the bill at the regular place of business.

The term of a registration issued under the bill would commence on January 1.

Written Contract; Records

A registered auctioneer could not conduct an auction unless he or she executed a written contract with the person desiring auction services. A registrant would have to keep a written copy of the contract as part of his or her records and, upon request, make them available to DLEG for inspection during normal business hours.

A registrant would have to maintain written records of each auction sale for a period of at least three years from the date of the sale. The records would have to include consignment receipts, bidder registrations, and documents relating to final settlements with consignors.

A registrant also would have to maintain employee records, including the employee's name, address, Social Security number, and

date of birth, on all current employees and on past employees for at least three years after an employee left the registrant's employment.

Custodial Account

Money paid by a person to a registrant under Article 28 in connection with an auction would be considered to be held in trust for the benefit of the person making the payment. The registrant would be considered the trustee for the money.

A registrant would have to establish a custodial account and deposit into it all payments by a buyer for an item sold by auction. The registrant would have to make disbursements through that custodial account in the time period and manner specified in the bill.

A registrant could not permit an advance payment of money by a customer to be deposited in the registrant's business or personal account or to be commingled in any way with the registrant's own funds, except as otherwise provided. The registrant would have to deposit customer money into a separate custodial account within two days after the auction transaction but not more than five days after its receipt, until the transaction involved was consummated or terminated.

The separate custodial account would have to meet the following requirements:

- Be an interest-bearing account maintained in a depository recognized by DLEG.
- Designate the registrant as the custodian or trustee.
- Provide for withdrawal of money without previous notice and not be encumbered in any manner.
- Not contain any of the registrant's money except for an amount sufficient to pay service charges on the account or to maintain the account when customer money was not on deposit.

("Depository" would mean a State- or nationally-chartered bank, savings and loan association, savings bank, or credit union whose deposits are insured by an agency of the United States government.)

Disbursements from the custodial account could be made only for the following purposes:

- Payment as a result of the sale of an item by the registrant pursuant to the contract.
- Refund of an amount to the customer upon termination of the transaction.
- Payment to the registrant of a commission and documented and approved expenses following the consummation of a transaction.

The registrant would have to keep records of money deposited in the separate custodial account. The records would have to show all of the following:

- The date of the receipt of money from a customer and the name of the customer on whose behalf the money was paid.
- The purpose for which the money was paid.
- The date the money was deposited in the custodial account.
- The date of withdrawal of the money, the purpose of the withdrawal, and the name of the person to whom the money was paid upon withdrawal.
- Any other pertinent information regarding the transaction.

Upon giving notice to a registrant, DLEG and the Board of Auctioneers could inspect the records specified above.

Auctioneer Examination

The bill would require DLEG and the Board of Auctioneers to develop an examination for registration applicants in the manner specified in Section 316 of the Code. (That section requires a board and DLEG to develop an examination or test required by an article. The board and Department must give special emphasis to an alternative form of testing that permits a person to demonstrate qualifications that may not be evident under a written examination. The board and Department may adopt an examination or test prepared by another agency if it serves as a basis for determining whether a person has the knowledge and skills to perform an occupation with competence.)

The examination would have to include at least the following subject matter:

- The provisions of Article 28.
- Ethics and ethical practices as they relate to the business of conducting auctions.
- Elementary mathematics.
- Elementary principles of real estate and personal property economics.
- Elementary principles of the law regarding bulk sales, deeds, mortgages, contracts of sale, agency, leases, auctions, and brokerage.

The Department would have to administer the examinations at least quarterly, and could administer them more frequently if the Board determined that more frequent administration of the examination was warranted.

The Department would have to issue a registration without examination to a nonresident individual who, at the time of application, was licensed, registered, certified, or otherwise regulated by another state, if the Board determined that the requirements of that state were substantially the equivalent of the requirements of Article 28 and if that state offered similar registration on a reciprocal basis to registrants under Article 28.

A nonresident would have to file an irrevocable consent to service of process, signed by the registrant. A process or pleading served upon DLEG would be sufficient service upon the registrant. The process or pleading would have to be in duplicate, and the Department immediately would have to serve by first-class mail a copy to the registrant's last known address.

Registrants with Prior Experience

Notwithstanding the registration requirements specified in the bill, DLEG would have to register as an auctioneer an individual who applied within two years of the bill's effective date and submitted an affidavit attesting to at least three years' experience in the conduct of auctions before the bill's effective date, if the individual had conducted at least 12 auctions. The Department would have to verify that experience.

Sanctions & Penalties

A registrant who committed any of the following acts would be subject to the sanctions and penalties specified in Article 6:

- Failed to enter into a written contract with a seller or consignor before placing or authorizing any advertising for an auction.
- Failed to reduce to writing or failed to issue any appropriate documentation relative to an auction-related transaction.
- Failed to use or issue payment appropriately from a custodial fund.
- Was involved in capping, shilling, or steering relative to an auction.
- Failed to disclose his or her registration number on all advertising.
- Knowingly misrepresented the nature or value of an item being auctioned.
- Violated the requirements of Article 28 or a rule promulgated under it.

(Sanctions under Article 6 include the suspension, denial, or revocation of a license or certificate of registration, the placement of limits on a license or certificate of registration, censure, probation, an administrative fine of up to \$10,000, and payment of restitution.)

Senate Bill 604 (S-1)

The bill would establish the following fees for an individual registered or seeking registration as an auctioneer under proposed Article 28 of the Occupational Code:

Application processing for registered auctioneer	\$50
Examination fee for registered auctioneer	\$50
Annual registration fee for auctioneer (individual)	\$200
Annual registration fee for auctioneer (firm)	\$200

MCL 339.303a et al. (S.B. 603)
Proposed MCL 338.2228 (S.B. 604)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Currently, 37 states--including those surrounding Michigan--require auctioneers to be licensed, according to the Michigan State Auctioneers Association. Michigan, however, does not require either licensure or registration of auctioneers conducting business in the State (except those

conducting livestock, motor vehicle, or watercraft auctions). In addition, according to DLEG, local requirements relating to auction sales are frequently ignored and seldom enforced. Reportedly, this lack of regulation has led to a situation in which out-of-State auctioneers will sometimes travel to Michigan to hold weekend auctions. Buyers and sellers who work with an out-of-State auctioneer have no way of knowing whether the auctioneer is reputable or is complying with the law while conducting the auction. Unethical or illegal behavior by auctioneers, whether they hail from Michigan or another state, blemishes the reputation of all auctioneers and makes sellers and bidders less likely to do business in Michigan. By giving Michigan auctioneers the opportunity to be registered, the bills should increase public confidence in auctions conducted by registered auctioneers. To be registered, an auctioneer would need to pass an exam and comply with specified requirements in conducting business, including requirements for contracts, record-keeping, and custodial accounts.

Additionally, the Michigan State Auctioneers Association reports that, if Michigan began to register its auctioneers, other states have agreed to provide reciprocity for them. If granted reciprocity, registered Michigan auctioneers would be allowed to conduct auctions in the granting state without seeking a separate license there. Without reciprocity, Michigan auctioneers are at a competitive disadvantage to their out-of-State counterparts, who may conduct auctions in Michigan almost without limitation.

Opposing Argument

While the bill could provide consumer protection for sellers and buyers who attended auctions conducted by registered auctioneers, it would do nothing to prevent out-of-State auctioneers from coming into Michigan for a weekend, conducting an auction, and then leaving the State without paying their taxes or fulfilling their obligations to buyers or sellers. The bill would provide penalties for registered auctioneers who committed violations of the rules and ethical standards laid out in the bill, but would not penalize unscrupulous auctioneers who were not registered.

Response: Registered auctioneers would be better educated in the State laws and regulations that govern auctions and

would be in a better position to report auctioneers who were conducting illegal or fraudulent auctions. Auctioneers have a vested interest in ensuring that Michigan residents continue to hold their auctions locally, which provides an incentive for them to report auctioneers who are acting unethically or illegally.

Legislative Analyst: J.P. Finet

FISCAL IMPACT

These bills would require the Department of Labor and Economic Growth to set up a registration program for auctioneers and auction companies, including administering examinations and enforcement for noncompliance. The bills would create a new Board of Auctioneers and set registration standards for the profession. Senate Bill 604 (S-1) also would create a fee structure to offset the costs to the Department for performing these new responsibilities. According to the Department, the cost of regulating the estimated 800 applicants/registrants in the first year would be approximately \$169,000, and the revenue that would be generated for the same number under the proposed fee schedule is approximately \$205,000 for that year.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.