

**STORAGE NAME:** h0417.rpp

**DATE:** March 15, 1999

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
REAL PROPERTY AND PROBATE  
ANALYSIS**

**BILL #:** HB 417

**RELATING TO:** Brokerage Relationship Disclosure Act

**SPONSOR(S):** Representative J. Miller

**COMPANION BILL(S):** SB 1072 (I)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 10 NAYS 0
  - (2) REAL PROPERTY AND PROBATE
  - (3)
  - (4)
  - (5)
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**I. SUMMARY:**

The bill removes the requirement that the "notice of nonrepresentation" be provided by a real estate agent or broker to a potential buyer or seller in a residential real estate transaction upon the first contact between the parties. The bill, by eliminating this disclosure requirement, would not directly impact the ability of an individual to conduct their business affairs. The bill would lessen a burden of doing business by removing one of the paperwork requirements associated with attempting to communicate with potential customers.

The bill transfers provisions from the section being repealed, which limit the application of these requirements to residential sales, to the section which requires disclosure of authorized real estate brokerage relationships.

This bill does not appear to have a fiscal impact on state or local governments.

There is a strike-everything amendment traveling with the bill.

**The Committee on Real Property and Probate offers additional analysis of the amendment in the "Comments" section.**

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Regulation of real estate brokers, salespersons, and schools teaching real estate is established under part I of chapter 475, F.S. Regulation is administered by the Florida Real Estate Commission under the Department of Business and Professional Regulation.

Currently, several real estate oriented terms are used in chapter 475, F.S., including the following:

A fiduciary is a broker in a relationship of trust and confidence between that broker, as agent, and the seller or buyer, as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence.

A single agent is a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction.

A dual agent is a broker who works as an agent for both the buyer and seller.

A transaction broker is a broker who facilitates a brokerage transaction between a buyer and a seller. The transaction broker does not affirmatively represent either the buyer or seller as an agent, and no fiduciary duties exist, except for the duty of accounting and the duty to use skill, care, and diligence. However, the transaction broker must treat the buyer and seller with honesty and fairness and must disclose all known facts materially affecting the value of the property in residential transactions to both the buyer and seller. The broker's role as a transaction broker must be fully disclosed in writing to the buyer and seller.

First contact means the commencement of the initial meeting of, or communication between a licensee and a seller or buyer. However, the term does not include: a bona fide open house or model home showing; unanticipated casual encounters between a licensee and a seller or buyer; and situations in which a licensee's communications with a customer are limited to providing general factual information.

In 1994, the Legislature amended chapter 475, F.S., to authorize the transaction broker and disclosed dual agent forms of representation for real estate professionals, in addition to the traditional single agent relationship. Despite disclosure requirements, considerable confusion existed on the part of licensees and consumers as to the scope and nature of the various types of representation.

During the 1996 interim, representatives of the Florida Association of Realtors, Florida Real Estate Commission, and the Department of Business & Professional Regulation met in the form of the Real Estate Agency Work Group to attempt to develop a solution to the problem of the appropriate relationships between real estate professionals and their customers. Revisions to several statutory provisions resulted as a part of CS/CS/HB 339, which became chapter 97-42, Laws of Florida.

This legislation created the "Brokerage Relationship Disclosure Act" in the stated attempt to eliminate confusion and provide for a better understanding on the part of customers in real estate transactions. The act expressly revoked disclosed dual agency in Florida; required certain disclosures including "Notice of Nonrepresentation" upon "first contact", as newly defined; and allowed single agency transactional brokerage, as defined in the act.

B. EFFECT OF PROPOSED CHANGES:

The bill amends the "Brokerage Relationship Disclosure Act" by repealing the various provisions and references which require real estate licensees to provide a "notice of nonrepresentation" to a potential seller or buyer. Real estate licensees would no longer be required to provide notice upon "first contact" that the licensee's brokerage firm or the licensee do not represent the potential client unless they had agreed to appropriate representation in an authorized capacity, either as a single agent or as a transaction broker. They also would no longer be required to caution the

seller or buyer against expressing confidential information until a decision on representation was finalized.

The bill further amends the Act to republish provisions which are repealed as a part of the "notice of nonrepresentation" provisions. These provisions would then continue to apply to authorized brokerage relationships. The saved provisions restrict the disclosure requirements to residential sales, as defined, and specifically cite certain activities, such as auctions or appraisals, to which the disclosures do not apply.

The bill repeals the definition of "first contact" as the term applies to real estate licensees and their initial contact with a potential buyer or seller for purposes of providing the "notice of nonrepresentation".

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?  
No.
- c. Does the bill reduce total taxes, both rates and revenues?  
No.
- d. Does the bill reduce total fees, both rates and revenues?  
No.
- e. Does the bill authorize any fee or tax increase by any local government?  
No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?  
No.
- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?  
No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?  
  
This bill would repeal the disclosure requirements for "notice of nonrepresentation", as currently required of real estate agents and brokers, thus allowing the opportunity to conduct their business affairs without this paperwork requirement.
- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?  
  
No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:
  - (1) Who evaluates the family's needs?  
N/A
  - (2) Who makes the decisions?  
N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

**D. STATUTE(S) AFFECTED:**

Sections 475.01; 475.25; 475.272; 475.274; 475.2755; 475.276; 475.278; 475.2801; 475.5015, Florida Statutes.

**E. SECTION-BY-SECTION ANALYSIS:**

Section 1. Amends s. 475.272, F.S., by deleting provisions which state the purpose for disclosure of nonrepresentation upon first contact in residential real estate transactions.

Section 2. Repeals s. 475.276, F.S., relating to the requirement for providing a "notice of nonrepresentation" and establishing the format for the notice.

Section 3. Amends s. 475.278, F.S., to specify that the provisions relating to authorized brokerage relationships apply to residential sales only.

Section 4. Amends s. 475.01, F.S., by deleting the definition of "first contact" and renumbering subsequent definitions.

Section 5. Amends s. 475.25, F.S., to correct a cross-reference.

Section 6. Amends s. 475. 274, F.S., to correct cross-references.

Section 7. Amends s. 475.2755, F.S., to correct a cross-reference.

Section 8. Amends s. 475.2801, F.S., to delete a cross-reference.

Section 9. Amends s. 475.5015, F.S., to delete a cross-reference.

Section 10. Provides that the act shall take effect October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

Though not anticipated to be significant, the bill would reduce the paperwork required when providing written disclosures after making first contact with potential sellers or buyers by real estate licensees.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

V. COMMENTS:

Comments by the Real Property and Probate Committee on the Amendment adopted by the Business Regulation and Consumer Affairs Committee:

The amendment provides that the Department of Business Regulation ("DBPR") must license any applicant who satisfies the statutory requirements for licensure as determined by the Florida Real Estate Commission. (Section 2 of the Amendment). In 1998, the Florida Real Estate Commission directed the DBPR to award a real estate broker's license to individuals that did not appear to be statutorily qualified for licensure.<sup>1</sup> In December 1998, Representative Mark Ogles, Chairman of the House Committee on Business Regulation and Consumer Affairs, asked the Attorney General of Florida whether the Florida Real Estate Commission has the authority and discretion to direct the DBPR to award either a salesperson's or broker's license to a person who is otherwise statutorily unqualified for licensure. The Attorney General opined that the commission does not appear to have authority to certify such individuals, however, the Attorney General recommended that it would be advisable for the legislature to clarify its intent on this matter. Id.

Additionally, the amendment allows the Florida Real Estate Commission to discipline a licensee who fails to comply with the requirements of the "designated salesperson" provisions for a non-residential transaction involving a buyer and a seller who has more than \$1 million in assets. (Section 3 of the Amendment).

The Amendment also collapses two required disclosure forms into one form for each type of transaction by lifting certain disclosure language from the repealed Notice of Nonrepresentation and inserting it into the Transaction Broker Notice and the Single Agent Notice. (Section 8 of the Amendment).<sup>2</sup>

A proponent of the Amendment states that the 1997 legislation requiring a "Notice of Nonrepresentation" was intended to clarify that the licensee did not represent the consumer before the consumer relayed confidential information to the licensee. The "Notice of Nonrepresentation" was meant to prevent any conflicts should the consumer and licensee fail to establish a representation agreement. However, since enactment, it has become clear that the Notice of Nonrepresentation confuses consumers and makes agency law more complicated than it was

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<sup>1</sup> Letter from The Honorable Robert A. Butterworth, Attorney General of Florida, to The Honorable Mark R. Ogles, Representative, District 67 (December 8, 1998).

<sup>2</sup> Although the Amendment reduces the number of documents that must be provided to a buyer or seller, the remaining notice may be difficult for a layperson to comprehend because technical terms of art are used without explanation.

prior to 1997. In addition, there is no provision in the law for consumers who frequently avail themselves of a licensee's services. A more reasonable approach is for the licensee to inform the consumer at first contact of the types of representations that are available. The conversation should then proceed to assure the consumer they are free to enter into any type of representation that is available prior to divulging any confidential information. This method provides the consumer with needed information so that he or she can make informed choices concerning representation and the purchase of a home.<sup>3</sup>

Finally, the Amendment includes several provisions to correct an oversight from the 1998 legislative session regarding who may recover from the Real Estate Recovery Fund ("Fund") as well as from whom money may be recovered. Specifically, the Amendment provides that a person may not recover from the Fund if the broker or salesperson is a member of a limited liability company, or a partner of a limited liability partnership which was the seller, buyer, landlord, or tenant in the transaction. In addition, the Amendment states that a person is eligible to recover from the Fund if the person executes an affidavit showing the final judgment is not on appeal or that appellate proceedings are concluded. Lastly, the Amendment provides that a person may not recover from the Fund if that person is a licensed broker or salesperson who acted as a transaction broker or nonrepresentative in the transaction, or the judgment was against a limited liability company or limited liability partnership.

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

On March 11, 1999, the Committee on Business Regulation and Consumer Affairs adopted a strike-everything amendment which is traveling with the bill.

The amendment retains the provisions of the bill which, primarily, relate to the repeal of the requirement for providing a "Notice of Nonrepresentation" by real estate licensees. However, it transfers a portion of the repealed notice language to the current disclosure notice which is required for brokers and agents.

The amendment addresses several additional provisions:

It clarifies that the Real Estate Commission may certify a person to be qualified to practice as a broker or salesperson if they meet the appropriate statutory licensure and examination requirements. This language effectively prohibits the commission's practice of issuing licenses to members of the commission or employees of the commission who have not met the statutory requirements for licensure.

It makes a reference to the provisions enacted last session creating a "designated salesperson" classification for purposes of bringing disciplinary actions against this class of licensee.

The amendment references transaction brokers and non-representatives which were inadvertently omitted in last year's legislation, for purposes of clarifying that these entities would not be eligible to recover from the Real Estate Recovery Fund.

**VII. SIGNATURES:**

**COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:**

Prepared by:

Staff Director:

Alan W. Livingston

Rebecca R. Everhart

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<sup>3</sup> Telephone conference with Gene Adams, Vice President, Florida Association of Realtors (March 15, 1999).



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**PAGE 9**

AS REVISED BY THE COMMITTEE ON REAL PROPERTY AND PROBATE:  
Prepared by: Staff Director:

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Karen M. Camechis, J.D.

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J. Marleen Ahearn, Ph.D., J.D.