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DATE: March 24, 1999

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

BILL #: CS/HB 417

RELATING TO: Brokerage Relationship Disclosure Act

SPONSOR(S): Committee on Real Property and Probate and Representative J. Miller

COMPANION BILL(S): SB 1072 (s)

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

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 10 NAYS 0
 - (2) REAL PROPERTY AND PROBATE YEAS 7 NAYS 0
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

CS/HB 417 provides for revisions of the statutes related to real estate brokers and salespersons. Specifically, the committee substitute:

- * collapses required real estate disclosure forms into one form for each type of transaction by transferring disclosure language from the repealed Notice of Nonrepresentation and inserting it into the Transaction Broker Notice and Single Agent Notice; accordingly, real estate licensees are no longer required to provide a Notice of Nonrepresentation upon "first contact" with a potential buyer or seller;
- * exempts certain financial institutions from the registration requirements for real estate brokers if the financial institution negotiates the purchase or sale of a business enterprise for a third party and the sale or purchase involves land, buildings, fixtures, or other improvements to the land;
- * clarifies that the Real Estate Commission may certify a person for licensure only if the person satisfies statutory requirements for licensure;
- * subjects "designated salespersons" to disciplinary action for violations of the law; and
- * provides limitations on entities and persons eligible for recovery from the Real Estate Recovery Fund as well as parties from whom money may be recovered.

The committee substitute does not appear to have a fiscal impact on state or local governments.

The committee substitute is effective on October 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

General Information

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.

The Florida Statutes authorize real estate licensees to enter into two types of relationships with potential buyers or sellers of real estate:

1. In a "single agent relationship," the broker represents, as a *fiduciary*, either the buyer or seller, but not both, in the same transaction. ss. 475.01(1)(l) and 475.278(3), F.S.
2. In a "transaction broker relationship," the broker provides a limited form of representation to a buyer, seller, or both, in a real estate transaction but does not represent either in a fiduciary capacity or as a single agent. However, the transaction broker must: treat the buyer and seller with honesty and fairness; account for all funds; use skill, care, and diligence in the transaction; disclose all known facts that materially affect the value of the property that are not readily observable; present all offers or counteroffers in a timely manner; and, maintain a limited confidentiality. ss. 475.01(1)(m) and 475.278(2), F.S.

A real estate licensee may not operate as a "dual agent," which means a licensee cannot represent both the buyer and seller as a fiduciary in a real estate transaction. s. 475.278(1), F.S.

A customer is not required to enter into a brokerage relationship with any real estate licensee. s. 475.278(1), F.S. However, if the buyer or seller is not represented by a real estate licensee, a licensee must deal honestly and fairly with the customer, disclose all known facts that materially affect the value of the property that are not readily observable, and account for all funds entrusted to the licensee by the customer. s. 475.278(4), F.S.

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, as well as the duty to use skill, care, and diligence. s. 475.011(f), F.S.

A transaction broker must disclose his or her duties to a buyer or seller in a "Transaction Broker Notice" before or at the time of entering into a listing agreement or an agreement for representation. s. 475.278, F.S. (1998 Supp.). Similarly, a single agent must disclose his or her duties to a buyer or seller in a "Single Agent Notice" before or at the time of entering into a listing agreement or an agreement for representation. Id.

Notice of Nonrepresentation

In 1997, the Florida Statutes were revised to require real estate licensees to provide a Notice of Nonrepresentation ("Notice") upon "first contact" with a potential buyer or seller. s. 475.276, F.S. (1998 Supp.). The Notice must be printed on a separate and distinct form in the required format with no additional information other than the brokerage's name, address and telephone number. Id. Section 475.276, F.S. (1998 Supp.), requires the following statement to be included in the Notice:

You are hereby notified that _____ (insert name of brokerage firm) and I do not represent you in any capacity. You should not assume that any real estate broker or salesperson represents you unless you agree to engage a real estate licensee in an authorized brokerage relationship, either as a single agent or as a transaction broker. You are advised not to disclose any information you want to be held in confidence until you make a decision on representation. Your

signature below acknowledges receipt of this form and does not establish a brokerage relationship.

Date

(Signature Optional)

(Signature Optional)

The statute defines "first contact" to mean the commencement of the initial meeting of, or communication between, a licensee and a seller or buyer, and provides for several exceptions to the definition, including open houses, casual encounters, responses to general factual questions, and situations where the licensee provides only general information regarding the licensee or the licensee's brokerage firm. s. 475.011(1)(g), F.S. (1998 Supp.).

Florida Real Estate Commission Licensing Authority

The Department of Business and Professional Regulation ("DBPR") must license any applicant certified by the Florida Real Estate Commission ("Commission") as qualified to practice as a broker or salesperson. s. 475.181(1), F.S. (1998 Supp.). The Commission must certify any applicant who meets the statutory requirements for licensure. s. 475.181(2), F.S. (1998 Supp.).

In 1998, the Florida Real Estate Commission directed the DBPR to license individuals who did not appear to be statutorily qualified for licensure. 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 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. In response, the Attorney General stated 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.¹

Designated Salesperson Disciplinary Provisions

In 1998, the legislature authorized "designated salespersons" to act in certain real estate transactions. Chapter 98-250, Laws of Florida. At the request of a customer in a nonresidential real estate transaction, where the buyer and seller have assets of at least \$1 million, the broker may designate salespersons to act as a single agent for different customers in the same transaction. s. 475.2755(1), F.S. (1998. Supp.). Although a designated salesperson has the duties of a single agent and must comply with certain disclosure requirements, a designated salesperson is not specifically subject to disciplinary action if the salesperson fails to comply with statutory requirements.

The Florida Real Estate Recovery Fund

The Florida Real Estate Commission may order disbursement from the Real Estate Recovery Fund for any person adjudged by a Florida civil court to have suffered monetary damages by reason of any act committed by certain brokers or salespersons as part of a real estate transaction. s. 475.482(1), F.S. (1998 Supp.). For example, the broker or salesperson must not be an officer or director of a corporation or a member of a partnership that was the seller, buyer, landlord, or tenant in the transaction. Although limited liability companies and partnerships are eligible for licensure, these business entities are not excluded in a manner consistent with corporations and partnerships.

Financial Institution Exemption from Real Estate Licensure

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

A person may not act as a real estate "broker" or "salesperson" without being licensed. s. 475.42, F.S. (1997). The term "broker" is defined as anyone who for compensation negotiates "the sale, exchange, purchase, or rental of business enterprises or business opportunities." s. 475.01(1)(a), F.S. (1998 Supp.). Currently, many financial institutions negotiate for third parties the sale or purchase of business enterprises, some of which involve the sale of real property. If a sale or purchase of a business enterprise also involves real property to any extent, a licensed real estate broker must manage the transaction on behalf of the financial institution.

B. EFFECT OF PROPOSED CHANGES:

Notice of Nonrepresentation

The committee substitute collapses the required disclosure forms for each type of transaction into one form for each transaction by transferring disclosure language from the repealed Notice of Nonrepresentation and inserting the language into the "Transaction Broker Notice" and the "Single Agent Notice." Real estate licensees are no longer required to provide a Notice of Nonrepresentation upon "first contact" with a potential buyer or seller. The committee substitute also restricts disclosure requirements to residential sales, as defined, and specifically cites certain activities to which the disclosures do not apply, such as auctions or appraisals.

Florida Real Estate Commission Licensing Authority

The committee substitute clarifies that the Department of Business Regulation must license any applicant who satisfies the statutory requirements for licensure as certified by the Florida Real Estate Commission. This proposed change clarifies that the Commission may not certify individuals who have not met the statutory requirements for licensure.

Designated Salesperson Disciplinary Provisions

The committee substitute allows the Florida Real Estate Commission to discipline a licensee who fails to comply with the requirements of the "designated salesperson" provisions.

The Florida Real Estate Recovery Fund

The committee substitute 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, 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. Also, 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.

Financial Institution Exemption from Real Estate Licensure

The committee substitute exempts certain financial institutions from the registration requirements for real estate brokers if the financial institution negotiates the purchase or sale of a business enterprise for a third party and the purchase or sale involves land, buildings, fixtures, or other improvements to the land. The exemption does not apply to a purchase or sale of land, buildings, fixtures, or other improvements to the land which are not in connection with the sale or purchase of a business enterprise.

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?

Yes, the committee substitute increases the authority of the Florida Real Estate Commission by providing that a person is subject to disciplinary action by the Commission if the person violates the "designated salespersons" provisions in chapter 475, F.S.

(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:

An agency or program is not 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?
No.
- 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:
The committee substitute does not purport 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:

The committee substitute does not create or change a program providing services to families or children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

§§ 475.01; 475.011; 475.181; 475.25; 475.272; 475.274; 475.2755; 475.276; 475.278; 475.2801; 475.5015, FS. (1998 Supp.).

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 475.01, F.S., to delete the definition of "first contact."

Section 2. Amends s. 475.011, F.S., to create a limited exemption for financial institutions from real estate licensure requirements.

Section 3. Amends s. 475.181, F.S., to clarify that applicants for real estate licensure must comply with statutory requirements.

Section 4. Amends s. 475.25, F.S., by providing that "designated salespersons" are subject to disciplinary action if the person violates the statute.

Section 5. Amends s. 475.272, F.S., to delete the intent language requiring real estate licensees to provide disclosure of nonrepresentation upon first contact with a customer.

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

Section 9. Amends s. 475.278, F.S., to specify that the provisions relating to authorized brokerage relationships apply to residential sales only.

Section 10. Amends s. 475.2801, F.S., to delete a cross-reference.

Section 11. Amends s. 475.482, F.S., to clarify who may recover from the Real Estate Recovery Fund.

Section 12. Amends s. 475.483, F.S., to clarify eligibility for recovery from the Real Estate Recovery Fund.

Section 13. Amends s. 475.5015, F.S., to delete a cross-reference.

Section 14. Provides an effective date of 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:

A proponent of the committee substitute asserts that the Notice of Nonrepresentation has confused consumers and made agency law more complicated.² Therefore, elimination of the Notice of Nonrepresentation may result in less consumer confusion regarding representation by real estate professionals.

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

The committee substitute effects private enterprise by eliminating the real estate licensure requirement for a financial institution that negotiates the purchase or sale of business enterprises if the purchase or sale involves real property. In addition, the committee substitute reduces the administrative burden on real estate licensees by reducing the number of disclosure forms licensees must provide to potential buyers or sellers of real estate.

² Florida Association of Realtors, Position Paper (undated).

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:

A proponent of the committee substitute states that the intent behind requiring a "Notice of Nonrepresentation" at "first contact" with a consumer was to clarify, before the consumer conveys confidential information, that the licensee does not represent the consumer. The Notice of Nonrepresentation was intended 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 prior to 1997. 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.³

Proponents of the limited exemption from real estate licensure requirements for financial institutions assert that requiring real estate licensure adds another layer of regulation without a corresponding public benefit. In addition, the requirement utilizes resources of the Department of Professional Regulation and the Florida Real Estate Commission. The proponents also assert that the public is not endangered by financial institutions engaging in negotiations which are normal and ordinary elements of the business of commercial banking for the following reasons:

- * financial institutions are highly regulated and subject to examination by state and federal banking regulators; and,
- * the businesses and individuals with whom banks deal in business acquisitions are typically highly sophisticated and typically supported by legal and accounting professionals throughout the transaction.⁴

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

⁴ Thomas J. Cardwell, General Counsel, Florida Bankers Association, Position Paper (undated).

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.

On March 17, 1999, the Committee on Real Property and Probate adopted an amendment to the bill which creates an exemption from the registration requirements for real estate brokers for certain financial institutions if the financial institution negotiates the purchase or sale of a business enterprise for a third party and the purchase or sale involves land, buildings, fixtures, or other improvements to the land. The exemption does not apply to the purchase or sale of land, buildings, fixtures, or other improvements to the land which is not in connection with the sale or purchase of a business enterprise. The Committee reported the bill favorably as a committee substitute.

Please see "Current Situation" and "Effect of Proposed Changes" for analysis of the committee substitute.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

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