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DATE: February 11, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
BUSINESS REGULATION
ANALYSIS**

BILL #: HB 593
RELATING TO: Real Estate Brokers and Salespersons
SPONSOR(S): Representative(s) Bilirakis

TIED BILL(S):

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

- (1) BUSINESS REGULATION
 - (2) SMARTER GOVERNMENT COUNCIL
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

The Florida Real Estate Commission under the Division of Real Estate within the Department of Business and Professional Regulation administers regulation of real estate brokers and salespersons. The bill addresses several provisions of the real estate statutes. It specifies that the definition of salesperson does not prevent a salesperson from being an officer or partner of a brokerage firm or from forming a firm with a broker or other salesperson. The bill deletes the restriction that requires general partners of a brokerage limited partnership must be licensed brokers.

The bill clarifies that employees who only receive a salary as compensation for services are exempt from licensure as a real estate salesperson if the services are provided at apartments, condominiums, and cooperatives. The bill deletes the authority of the commission to adopt rules to establish standards for the size and form of signs located at a brokers' office. The bill requires that the name of the broker and a designation that the person is licensed must be located on signage at the office.

The bill addresses escrowed funds to allow disbursement at the discretion of the broker without a disbursement order from the commission. It allows a broker a reasonable amount of time to correct escrow fund errors before the commission may take action against the broker and allows investment of escrow funds in certain instruments that are authorized investments that may be used by the state of Florida. Rental security deposits are removed from the restrictions of the real estate chapter and are moved to the landlord and tenant statutes.

The bill requires written agreements between Florida licensees and out-of-state real estate licensees when conducting business in this state. It increases oversight responsibilities of transactions by the Florida licensee and requires compliance by the out-of state agent with Florida's laws.

The DBPR estimates a negative fiscal impact of (\$571,123) for FY 02-03 to cover increased administrative expenses.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Chapter 475, F.S., Florida Real Estate Brokers and Salespersons

Regulation of real estate brokers and salespersons is established under part I of chapter 475, F.S. The Florida Real Estate Commission (commission) under the Division of Real Estate of the Department of Business and Professional Regulation (DBPR) administers this program. Regulation is designed to assure the minimal competency of real estate practitioners in order to protect the public from potential financial harm. Applicants for licensure must meet character and educational requirements, submit to a background check, and pass an examination.

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

The term "broker" is statutorily defined as a person who for compensation buys, sells or leases real property or negotiates the transaction for others. The definition includes a general partner, officer, or director of a partnership or corporation that acts as a broker.

"Salesperson" is defined in s. 475.01, F.S., as a person who performs the duties of a broker, but performs them under the supervision of another person.

Salespersons

Partnerships, limited liability partnerships, limited liability companies, and corporations that act as a broker must register with the commission. Pursuant to s. 475.15, the commission requires every partnership to be registered and at least one of its partners to be licensed or registered as an active broker. No salesperson or broker-salesperson may be registered as an officer, director of a brokerage corporation, or general partner of a brokerage partnership. A broker-salesperson qualifies for a license as a broker but operates as a salesperson in the employment of another person.

Signage

An operating broker must maintain an office consisting of at least one enclosed room in a building of stationary construction pursuant to s. 475.22, F.S. A sign that is easily observable and readable

by any person about to enter such office must be maintained on or about the entrance of the principal office and each branch office.

Escrow Funds

In a typical contract for purchase and sale of real estate, the seller expects the buyer to place property in escrow as a condition of the contract. Although any form of property may be placed in escrow, in practice, the property is nearly always cash. The property placed in escrow is commonly referred to as a "good faith deposit" or a "good faith binder."

Section 475.25(1)(d)1., F.S., authorizes discipline of a licensee for failure to account for or deliver a deposit to the party entitled to it "at the time which has been agreed upon or is required by law..." Section 475.25(1)(k), F.S., requires a licensee to hold monies in trust "until disbursement thereof is properly authorized..."

Typically, when a buyer chooses to withdraw from or cancel the transaction, the buyer also makes a simultaneous demand for the return of any property the buyer may have placed in escrow with a real estate licensee. The real estate licensee must then inform the seller of the buyer's election to rescind the contract, and will then typically ask the seller to sign a form releasing the deposit to the buyer. If the seller refuses to sign the release of deposit form, the claim is considered in dispute and the real estate licensee must follow specific procedures set forth in s. 475.25(1)(d)1., F.S. The real estate licensee must first promptly notify the commission of the conflicting demands and then must promptly institute one of the procedures listed in ss. 475.25(1)(d)1.a.-d., F.S.:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. Seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation. The mediation process must be successfully completed within 90 days following the last demand or the licensee must promptly employ one of the other escape procedures contained in this section.

In general, the buyer forfeits the escrowed property if the purchase is not completed unless the seller breaches the contract or the contract requires refund of the escrow deposit to the buyer. Current statutes allow a real estate licensee to return escrowed property to the buyer of a residential condominium unit who validly rescinds the purchase contract without the licensee obtaining a signed release from the seller and without following the statutory dispute resolution procedures. There is also similar statutory allowance for the cancellation of a contract and the return of an escrowed deposit for the failure of the buyer to obtain financing for the purchase of the property.

NonResident Licensees

Notwithstanding the licensure requirements of ss. 475.17(2) and (6) and 475.175, the commission has discretion to enter into written agreements with licensing authorities of other states or foreign national jurisdictions to provide Florida licensees nonresident licensure opportunities comparable to those afforded to nonresidents by Florida law, s. 475.180, F.S. Whenever the Commission determines that another jurisdiction does not offer nonresident licensure to Florida licensees substantially comparable to those afforded to licensees of that jurisdiction by this section, those licensees who apply for nonresident licensure in Florida must meet additional requirements for education courses and examination.

State Treasurer Investments

The Treasurer keeps state funds and securities and disburses these funds upon the order of the Comptroller. In the event money is available for interest-bearing time deposits or savings accounts as provided by s. 18.10(2), and qualified public depositories are unwilling to accept such money and pay the established rates, then such monies must be invested in any of 22 various types of instruments

Financial Institutions Deposits

The Federal Expedited Funds Availability Act, 12 U.S.C. ss. 4001 through 4010, requires all banks, savings and loan associations, savings banks, and credit unions to make deposited funds available according to specified time schedules and to disclose their funds availability policies to their customers. The law does not require an institution to delay the customer's use of deposited funds, but instead limits how long any delay may last.

Florida Residential Landlord and Tenant Act

Residential landlord-tenant relationships are regulated under Part II of Chapter 83, F.S. Current law does not require a security deposit, but in most residential leases the landlord requires a tenant to post a security deposit as a condition of the lease. When the tenant vacates the rental unit, the landlord has 15 days to return the security deposit together with interest if otherwise required, or to give the tenant written notice by certified mail of the landlord's intention to impose a claim on the deposit and the reason for imposing the claim. If the landlord fails to give the required notice within the 15-day period, the landlord forfeits the right to impose a claim upon the security deposit, but the landlord may still sue to collect damages in civil court.

If the landlord makes a claim against the deposit, the tenant then has 15 days within which to object to the landlord's claim. If the tenant does not object, the landlord may subtract the amount of the claim from the deposit account, returning the remainder, if any. If the tenant does timely object, then the funds must remain in the deposit account until the matter is resolved either by agreement or by a court. The prevailing party in any lawsuit is entitled to attorney's fees and costs.

Licensed real estate brokers may disburse security deposits and deposit money without having to comply with the notice and settlement procedures contained in s. 475.25(1)(d) where this section is preempted by chapter 83, F.S.

C. EFFECT OF PROPOSED CHANGES:

The bill amends the definition of "salesperson" to specify that the language of the definition may not be construed to limit a salesperson from registering as an officer or director of a brokerage corporation or general partner of a brokerage partnership. The bill further allows a salesperson to form a partnership, limited liability company, limited liability partnership, or corporation with brokers and other salespersons.

The bill exempts from licensure salaried employees of an owner or of a registered broker for an owner of an apartment complex if the employee works in an onsite rental office of the apartment

community in a leasing capacity and if the salaried employee works without any other compensation being paid in addition to the salary. This section also clarifies language that exempts from licensure a person employed for a salary as a manager of a condominium or cooperative apartment complex as a result of any activities or duties which the person may have to perform in relation to the renting of individual units if rentals are for periods no greater than 1 year and provided the salaried person works without any other compensation in addition to the salary.

The bill removes the authority of the commission to adopt rules to establish standards for the size and form of signs located at a brokers' office. The bill requires that the name of the broker and a designation that the person is licensed must be located on signage at the brokerage office.

The bill provides that nothing in s. 475.25(1)(h), as amended by the bill, or in s. 475.41 relating to invalidating contracts for unlicensed persons, is intended to prevent a Florida real estate broker from sharing a commission in a cooperative real estate transaction with a person who holds an active real estate license in another state or country. The bill requires that sharing of a commission in a cooperative real estate transaction requires the licensee and the cooperating real estate broker to enter into a written agreement that states the terms of cooperation and compensation; that services if conducted in Florida, will be under the supervision and control of the cooperating broker in this state; that the out-of-state licensee will comply with all applicable laws of this state; and that civil actions may be commenced against the licensee in any court of competent jurisdiction in any county of this state in which a claim may arise. The Florida cooperating real estate broker or real estate broker engaged by the cooperating broker must accompany the out-of-state licensee and the client during the initial property showing. Subsequent property showings and negotiations regarding the cooperative real estate transaction must be conducted under the supervision, control, and express permission of the Florida cooperating real estate broker or a real estate broker engaged by the cooperating broker.

The bill provides an alternative to the escape procedures used in resolving an escrow dispute by allowing a licensee to promptly disburse moneys from the licensee's escrow account without notifying the commission, notwithstanding any civil liability. The bill also deletes the provision relating to the release of escrowed property involving buyers of residential condominium units and for the cancellation of a contract for failure to obtain financing by the buyer.

The bill addresses investment of escrow funds and deletes the requirement that a broker place escrowed property with a title company, banking institution, credit union, or savings and loan association located and doing business in Florida, or to deposit the funds in a trust or escrow account maintained by the broker with a bank, credit union, or savings and loan association located and doing business in Florida. The bill subjects a broker to discipline if the broker fails to immediately place, upon receipt, any money, fund, deposit, check, or draft in an escrow account. The funds must be kept and with the written consent of the parties to a transaction, invested in a manner not inconsistent with s. 18.10(2), F.S., relating to investments by the state Treasurer.

The bill deletes language authorizing the commission to establish rules regarding the manner in which deposits in escrow accounts are to be made. This bill adds language allowing brokers to maintain up to \$5,000 of personal or brokerage business funds in the broker's escrow account and gives the broker a reasonable amount of time to correct escrow account errors if there is no shortage of funds and any errors pose no significant threat of economic harm to the public.

The bill specifies that local checks that are written and deposited into a broker's escrow account be made available for withdrawal on the second business day following the banking day on which the funds are deposited. For nonlocal checks, the funds must be available on the fifth business day following the banking day on which funds are deposited. A local check is defined in the bill as any check drawn on a bank within the same Federal Reserve check-processing region as the bank or

branch that accepts the check for deposit. A nonlocal check is specified to be any check that is drawn on a bank outside the Federal Reserve check-processing region as the bank or branch that accepts the check for deposit.

The bill creates s. 475.252, F.S., to specify that money provided or advanced to a licensee by a tenant on a rental agreement as rent, advance rent, or security for performance of the rental agreement be held pursuant to s. 83.49(1), F.S., relating to the landlord/tenant act.

See Comments section of this analysis in V. C. below.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 475.01, F.S., to specify that the definition of salesperson does not prevent a salesperson from being an officer or partner of a brokerage firm or from forming a firm with a broker or other salesperson.

Section 2. Amends s. 475.011, F.S., to clarify that employees who only receive a salary as compensation for services are exemption from licensure as a real estate salesperson if the services are provided at apartments, condominiums, and cooperatives.

Section 3. Amends s. 475.15, F.S., to delete the requirement that general partners of a brokerage limited partnership be licensed brokers.

Section 4. Amends s. 475.22, F.S., to delete the authority of the commission to adopt rules to establish standards for the size and form of signs located at a brokers' office; requires the name of the broker and a designation that the person is licensed be located on signage at the brokerage office.

Section 5. Amends s. 475.25, F.S., to allow disbursement of escrow funds at the discretion of the broker without a disbursement order from the commission; allows a broker a reasonable amount of time to correct escrow fund errors before the commission may take action against the broker; allows investment of escrow funds in certain instruments that are authorized investments that may be used by the state of Florida; requires out-of state real estate licensees when conducting business in this state to enter into a written agreement with a Florida real estate licensee; requires increased oversight by the Florida licensee of transactions conducted by the out-of state licensee; and requires compliance by the out-of state agent with Florida's laws.

Section 6. Creates s. 475.252, F.S., to remove rental deposits from the restrictions of the real estate chapter and applies the landlord and tenant statutes to these deposits.

Section 7. Effective date – upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None anticipated.

2. Expenditures:

Non-Recurring

FY02-03

	\$45,610	
Recurring	FY02-03	FY03-04
	\$525,513	\$541,278

The DBPR estimates their workload will increase requiring ten (10) additional FTEs: eight (8) investigators, one (1) attorney, and one (1) additional staff person to support the attorney.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

The DBPR states there could be a significant negative impact by way of increased costs of administration, investigation, audits, and prosecution due to increased complaints. Increased costs to investigate and prosecute real estate persons licensed in other states and complaints investigated pursuant to the wrongful disbursement and investment of escrowed property will probably account for the most significant impact, the DBPR projects.

Also see section V. C., "Other Comments" of this analysis.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None noted.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

The DBPR has expressed several concerns regarding the provisions of the bill as filed. Their observations are noted below.

The bill amends the definition of salesperson.

DBPR notes: This amendment directly conflicts with the remainder of the definition, which is left intact and states that a salesperson performs real estate services acts under the direction, control, or management of another person. Further, if the entity is a corporation, limited liability company, limited liability partnership, or partnership, at least one broker-member must maintain active licensure status. This provision also conflicts with rules promulgated by the commission, which forbid salespersons from registering as an officer, director of a brokerage corporation or general partner of a brokerage partnership. If a salesperson were the sole officer or director, then the broker registered with the entity would be performing under the direction of the salesperson, a practice barred by current law. ss. 475.42(1)(b) and (d).

The bill allows a licensee to disburse escrow funds without using statutory escape procedures.

DBPR notes: This amendment may cause an increase in complaints to the Division. In addition, if a civil court rules that a licensee erred, the prevailing party in that court proceeding may have recourse against the Real Estate Recovery Fund.

The bill deletes the requirement that a broker place escrowed property with a financial institution located and doing business in Florida, or to deposit the funds in a trust or escrow account maintained by the broker with an institution in Florida and it allows investment of escrow funds in instruments that are authorized investments that may be used by the state of Florida.

DBPR notes: This amendment replaces more controlled measures for monitoring licensee's management of entrusted funds with measures that are more difficult for owners of escrowed property and the Division to track and monitor. Further, s. 18.10 only allows the state Treasurer to invest only funds in excess of the state's disbursement needs. Chapter 18 further places other checks and balances upon the state Treasurer to further safeguard state funds.

The bill allows a broker a reasonable amount of time to correct escrow fund errors before the commission may take action against the broker.

DBPR notes: The fact that a more significant amount of the broker's or brokerage business' funds could be placed and maintained in the escrow account poses a threat of economic harm to the public should it be necessary for the broker or the brokerage to file for bankruptcy, be subject to state or federal tax liens or other seizure of the accounts. There is also a concern that this commingling of funds could delay the ultimate return of escrowed funds to their rightful owners, delay closing, or cause a breach of contract.

The bill addresses requirements for the processing of checks through financial institutions.

DBPR notes: This section of the bill could pose issues concerning the legislature's authority to set guidelines for banking institutions given the current state of federal law on this issue. Moreover, the provision fails to address situations in which a bank dishonors a check or address the availability of cash upon deposit to the escrow account. The bill's language raises a significant concern regarding the licensee's ability to provide one person's escrowed funds to another when there is no assurance that checks in process will clear. Also, the Division's ability to take administrative action in response to such practices is limited or eliminated.

The bill increases the oversight responsibilities of a Florida licensee of transactions conducted in a cooperative real estate transaction by an out-of state licensee.

DBPR notes: This amendment conforms with and is buttressed by the amendment made in Section 1 of the bill to s. 475.01(1)(j), F.S. The amendment could allow Florida brokers to establish a cottage industry qualifying foreign brokers. The Department believes this would result in a drastic increase in complaints with a corresponding rise in investigations and prosecution efforts concerning inadequate supervision.

The bill removes rental deposits from the restrictions of the real estate chapter and applies the landlord and tenant statutes to these deposits.

DBPR notes: This provision effectively removes from the commission oversight of funds that licensees obtain in the ordinary course of performing the services of real estate for another and is in direct conflict with s. 475.01(1)(a) which defines the activities to include renting and leasing of real property. A corresponding amendment to s. 475.01(1)(a) is necessary to remedy the conflict. Furthermore, Florida law prohibits non-lawyers, who are not a party to the transaction, from drafting leases, except for the two lease forms the Supreme Court has approved for that purpose. Real estate licensees usually draft a memorandum to enter into a lease while the landlord or an attorney drafts the lease. The bill refers to a "rental agreement," making it unclear whether the term means a memorandum to enter into a lease, the lease itself, or a rental agreement as defined in s. 83.42(7). Removing the commission's oversight significantly reduces the protections currently afforded the public.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION:

Prepared by:

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