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DATE: February 22, 2002

**HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS**

BILL #: CS/HB 593
RELATING TO: Real Estate Brokers and Salespersons
SPONSOR(S): Council for Smarter Government and Rep. Bilirakis
TIED BILL(S):

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

- (1) BUSINESS REGULATION YEAS 10 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 13 NAYS 0
 - (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 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 to keep up to \$5000 of their own funds in the escrow account and it allows a broker a reasonable amount of time to correct escrow fund errors before the commission may take action against the broker. It allows investment of escrow funds in certain instruments that are authorized investments that may be used by the State of Florida.

The DBPR estimates a negative fiscal impact relating to increased administrative expenses associated with the requirements of the committee substitute. Though a final impact has not been projected at this time, the impact could be anticipated to be less than the initial negative (\$500,000) associated with the provisions of the original bill.

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, F.S., 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 dispute resolution 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.

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), F.S., and qualified public depositories are unwilling to accept such money and pay the established rates, then such monies must be invested in various types of instruments

C. EFFECT OF PROPOSED CHANGES:

The bill amends the definition of "salesperson" to provide that a salesperson may perform services under the employment of another person rather than under the direction, control, or management of another person. It specifies 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 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 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.

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 exempt 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.

Section 6. 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. See Fiscal Comments section below.

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 negative impact by way of increased costs of administration, investigation, audits, and prosecution due to increased complaints. Increased costs to investigate and prosecute pursuant to the wrongful disbursement and investment of escrowed property will probably account for the most significant impact.

Changes in the committee substitute address several requirements of the original bill. The DBPR continues to anticipate a fiscal impact though a final impact has not been completed at this time. It may be anticipated that the impact could be less than initially projected.

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 (which could also apply to the CS). Their observations are noted below.

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

DBPR notes: This change 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 CS 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 change 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, F.S., 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 CS 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.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 19, 2002, the Smarter Government Council adopted a Council Substitute. The CS differs from the bill in the following areas:

It amends the definition of salesperson to specify that they may conduct affairs under the employment of another rather than under the "direction, control, or management" of the other person.

The CS revises the escrow language of the bill to limit administrative sanctions if the licensee does not notify the commission of the disbursement of the funds or institute one of the specified escape procedures relating to the disbursement of funds. The CS deletes language of the bill requiring out-of-state real estate licensees when conducting business in this state to enter into a written agreement with a Florida real estate licensee, requiring increased oversight by the Florida licensee of transactions conducted by the out-of-state licensee, and requiring compliance by the out-of-state agent with Florida's laws. Current law would prevail.

The CS provides legislative intent that litigation relating to escrowed funds should not delay release of a broker's personal funds that may be in the escrow account. The CS deletes language in the bill creating requirements for the processing of escrow deposit checks through financial institutions.

Finally, the CS deletes language of the bill removing rental deposits from the restrictions of the real estate chapter and applying the landlord and tenant statutes to these deposits. Current provisions of chapter 475, F.S., would continue to apply under the CS.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION:

Prepared by:

Alan W. Livingston

Staff Director:

Paul Liepshutz

STORAGE NAME: h0593s1.sgc.doc

DATE: February 22, 2002

PAGE: 8

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

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