

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 637 w/CS Real Estate

**SPONSOR(S):** Bilirakis

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1266

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Trades, Professions, &amp; Reg. Business (Sub)</u>	<u>7 Y, 0 N</u>	<u>Livingston</u>	<u>Liepshutz</u>
2) <u>Business Regulation</u>	<u>32 Y, 0 N w/CS</u>	<u>Livingston</u>	<u>Liepshutz</u>
3) <u>Finance &amp; Tax</u>	<u>22 Y, 0 N w/CS</u>	<u>Levin</u>	<u>Diez-Arguelles</u>
4) <u>Commerce &amp; Local Affairs Apps (Sub)</u>	<u></u>	<u></u>	<u></u>
5) <u>Appropriations</u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

The Florida Real Estate Commission (commission) under the Division of Real Estate within the Department of Business and Professional Regulation (DBPR) administers regulation of real estate brokers and salespersons. The bill addresses several provisions of the real estate statutes, chapter 475, F.S. The major issues include the following:

The bill amends the definition section of chapter 475, F.S., and various other chapters of the statutes to eliminate reference to the terms "salesperson" and "broker salesperson" and replace them with the terms "sales associate" and "broker associate."

The bill clarifies that employees who only receive a salary as compensation for services are exempt from licensure as a real estate broker associate if the services are provided at apartments, condominiums, and cooperatives provided the salaried person works without receiving compensation based on the lease transaction. 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 authorizes the commission to adopt rules to specify circumstances when a licensee may disburse moneys from the licensee's escrow account without notifying the commission and without utilizing one of the escape provisions. The bill adds language allowing brokers to maintain personal funds in certain escrows. The bill gives the broker a reasonable amount of time to correct escrow account errors. It allows investment of escrow funds in certain instruments.

The bill creates a temporary license classification designed to allow an out of state licensee to operate temporarily in Florida in relation to commercial real estate transactions.

The bill addresses agency relationship disclosure provisions to make Florida a "presumption of transaction brokerage" state. Currently there is no presumption in favor of an authorized brokerage relationship. The bill deletes certain transaction brokerage disclosure requirements effective July 1, 2008.

The DBPR estimates a negative fiscal impact relating to increased administrative expenses associated with the requirements of the bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0637d.ft.doc

**DATE:** April 15, 2003

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |   |                             |   |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government?                | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | 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. EFFECT OF PROPOSED CHANGES:

##### **Current Law:**

##### 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 commission under the Division of Real Estate of the 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.

##### Definitions

Currently, several real estate terms are used 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 which acts as a broker.

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 and is specifically prohibited in Florida, s. 475.278, F.S.

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.

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.

"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.

##### **Effect of Proposed Changes:**

##### Definitions

The bill amends the definition section of chapter 475, F.S., and various other chapters of the statutes to eliminate reference to the terms "salesperson" and "broker salesperson" and replace them with the terms

“sales associate” and “broker associate.” Broker associate is defined similar to the current definition of broker salesperson and sales associate is defined the same as the current salesperson.

The bill amends the definition of “transaction broker” to specify under the definition that this form of limited representation is designed to facilitate a real estate transaction by providing assistance to both the buyer and the seller and the transaction broker does not owe the right of undivided loyalty to either buyer or seller.

### Exemptions

Several exemptions from licensure exist in s. 475.011, F.S., such as for attorneys under certain circumstances, public utility or transportation activities, certain employees of residential complexes, among others.

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 receiving compensation based on the lease transaction. 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.

### Membership

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.

The bill specifies that a broker associate or sale associate may be licensed as an individual, a professional corporation, or a limited liability company. The bill qualifies that this provision does not authorize the associate to be a member, officer, director of a brokerage corporation, or general partner of a brokerage partnership

### 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.

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 specifies that when a broker or real estate school notifies the commission of a business change of address and a list of sales associates or instructors who are no longer employed, the notification fulfills the change of address notification requirements for brokers and broker associates employed by the brokerage and instructors employed by the real estate school.

### 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 s. 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.

#### **Effect of Proposed Changes:**

The bill authorizes the commission to adopt rules to specify circumstances when a licensee may disburse moneys from the licensee’s escrow account without notifying the commission and without utilizing one of the escape provisions.

The bill adds language allowing brokers to maintain up to \$5,000 of personal or brokerage business funds in the broker’s property management escrow account and \$1,000 of personal or brokerage funds in the broker’s sales escrow account. The bill 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.

#### **Investment of Escrow Funds**

Currently, investment of escrow funds require 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 require the broker 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 allows the funds to be kept and with the written consent of the parties to a transaction, to be invested by the broker in six different general categories of investment options.

#### **Nonresident Licensees**

Notwithstanding the licensure requirements of s. 475.17(2),(6) and 475.175, F.S., 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.

#### **Effect of Proposed Changes:**

The bill creates a temporary license classification designed to allow an out of state licensee to operate temporarily in Florida in relation to commercial real estate transactions only. The licensee must register with the commission, pay a fee, show proof of licensure in the other state, and agree in writing to cooperate in commission investigations. The bill requires the licensee and the Florida 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 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.

The Florida real estate broker must accompany the out-of-state licensee and the client during the initial property showing. Subsequent property showings and negotiations regarding the real estate transaction must be conducted under the supervision, control, and express permission of the Florida real estate broker.

#### **Current Law: Real Estate Licensees, Disclosure of Agency Relationship**

The term "agency" describes the legal relationship between two persons when one person, known as the agent, acts on behalf of, or represents, the other person. The term "real estate agency law" (or "agency law") refers to laws regulating the legal relationship between real estate licensees and buyers and sellers of real estate.

At common law, a real estate licensee owes a duty of loyalty solely to the party paying the commission. Because a real estate commission is, in practice, nearly always paid solely by the seller; a buyer under the common law rule would rarely be represented in the real estate transaction. Traditionally, persons owning property often employ an agent to sell their property. That agent represents the seller in the marketing of the property and in the negotiation of the sale. In recent years, however, an increased number of buyers are hiring agents to represent them.

Agency law and the required notices related to agency law have been changed five times in the recent past. Despite legislative efforts at clarification, real estate licensees report that considerable confusion continues to exist among both real estate licensees and the general public regarding agency law and the notice requirements.

#### **Effect of Proposed Changes:**

The bill addresses agency relationship disclosure provisions to make Florida a "presumption of transaction brokerage" state. Currently there is no presumption in favor of an authorized brokerage relationship. The bill deletes certain transaction brokerage disclosure requirements effective July 1, 2008.

#### Other

The bill amends s.689.25, F.S., relating to an exemption from disclosure for an occupant of real property who is or has been infected with HIV or AIDS. The bill further addresses these provisions relating to stigmatized or psychologically impacted property to expand the exemption to include homicide, suicide, or death that would not be considered a material fact which requires disclosure.

#### **Present Situation**

The bill addresses numerous other provisions relating to real estate transactions.

#### **Effect of Proposed Changes:**

- s. 475.17, F.S., to broaden the post-licensure education course topics for sales associates.
- s. 475.175, F.S., to allow applicants to submit electronically authenticated applications regarding the state examination and requires submission of fingerprints in electronic form effective July 1, 2006.
- s. 475.25, F.S., to create a statute of limitations of five years for violations of chapter 475, F.S. and provide notice requirements for certain disciplinary actions.

- s. 475.31, F.S., to specify that a sales associate or a broker associate license becomes involuntarily inactive, but not cancelled, when the associate's employing broker's license is revoked or suspended.
- s. 475.42, F.S., to specify that it is a third degree felony for operating without a license.
- s. 475.482 , F.S., to raise the revenue ceiling of the Real Estate Recovery Fund from \$750,000 to \$1m.
- s. 475.483 , F.S., to specify the payment of court costs and attorney fees resulting from a claim for an escrow disbursement from the Fund.
- s. 475.484 , F.S., to double the payments that can be recovered from the Fund to \$50,000 per event, \$50,000 per transaction, and \$150,000 in the aggregate against one broker or broker associate.
- s. 475.175 , F.S., to repeal the requirement that two photographs be submitted to DBPR prior to taking the state examination.
- s. 475.422, F.S., to repeal provisions requiring the disclosure of termite and roof inspection reports.
- s. 475.4511 , F.S., to repeal language that prohibits real estate schools from advertising pass/fail rates and examination employment guarantees.

### C. SECTION DIRECTORY:

Sections 1, 4, 5, 9, 11, 15, 18, 19, 21, 24, 25, 31, 34, 35, 36, 37, 38, 39, and 40, amend s. 475.001, 475.02, 475.04, 474.181, 475.215, 475.2755, 475.37, 475.41, 475.43, 475.453, 475.455, 475.612, 83.49, 440.02, 443.036, 501.604, 687.14, 721.20, 760.29, F.S., to refer to "sales associate" rather than "salesperson" and to refer to "broker associate rather than "broker salesperson" and to correct cross references.

Section 2. Amends s. 475.01, F.S., relating to real estate definitions.

Section 3. Amends s. 475.011, F.S., to address exemptions from chapter 475, F.S.

Section 6. Creates s. 475.161, F.S., to specify that a broker associate or sale associate may be licensed as an individual, a professional corporation, or a limited liability company.

Section 7. Amends s. 475.17, F.S., to expand post licensure education requirements.

Section 8. Amends s. 475.175, F.S., relating to examinations.

Section 10. Amends s. 475.182, F.S., relating to the renewal of licenses.

Section 12. Amends s. 475.22, F.S., to lessen signage requirements.

Section 13. Amends s. 475.23, F.S., to simplify change of address notification.

Section 14. Amends s. 475.25, F.S., to ease certain disciplinary causes.

Section 16. Amends s. 475.278, F.S., to substantially rewrite brokerage relationship provisions.

Section 17. Amends s. 475.31, F.S., to save a license from cancellation under a final order.

Section 20. Amends s. 475.42, F.S., relating to violations and penalties.

Section 22. Amends s. 475.451, F.S., to address real estate schools.

Section 23. Repeals s. 475.4511, (3), (4), and (5), F.S., to allow greater flexibility to advertise by real estate schools.

Section 26. Amends s. 475.482, F.S., to increase the amount of funds in the Real Estate Recovery Fund.

Section 27. Amends s. 475.483, F.S., to modify provisions relating to attorney's fees.

Section 28. Amends s. 475.484, F.S., to raise claim amounts from the recovery fund.

Section 29. Amends s. 475.5017, F.S., to raise the claim amounts for receivers.

Section 30. Creates 475.505, F.S., to establish a temporary license classification for certain out of state brokers who are temporarily operating in Florida.

Section 32. Amends s. 689.25, F.S., to remove certain disclosure requirements.

Section 33. Repeals s. 475.421, 475.422, and 475.452, F.S., relating to false advertising, disclosure of termite and roof inspections, and deposit of advance fees.

Section 41. Effective date – July 1, 2003.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The DBPR estimates a negative fiscal impact relating to increased administrative expenses associated with the requirements of the bill.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

NA

2. Expenditures:

NA

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Unknown. No registration or licensing fees are increased, although specialty courses for continuing education will now be approved or denied by the department.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None noted.

### B. RULE-MAKING AUTHORITY:

NA

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

The major difference between the original bill and the CS is as follows. The CS expands the definition section to include sales associate, as well as, broker associate; removed the four year license requirement; redrafted the escrow language to remove some of the broker authority to disburse funds; statutorily specifies investment options; removes the major rewrite of the agency law provisions and provides for repeal of certain disclosure requirements on July 1, 2008; and creates a temporary license classification designed to allow an out of state licensee to operate temporarily in Florida in relation to commercial real estate transactions.

On April 14, 2003 the Finance & Tax Committee adopted 3 amendments. Amendment 1 restores an exemption in current law which does not require persons employed for a salary as a manager of a condominium, cooperative apartment complex to comply with the provisions of Chapter 475, F.S. Amendment 2 clarifies that salespersons are not licensed as "managers" of brokerage firms registered as LLC's. Amendment 3 permits real estate schools to advertise their students' pass/ fail rates. These amendments are incorporated into this analysis and the CS.