

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1072

SPONSOR: Committee on Regulated Industries and Senator Sullivan

SUBJECT: Brokerage Relationship Disclosure

DATE: March 30, 1999 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Martin</u>	<u>Guthrie</u>	<u>RI</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

This bill will revise portions of the statutes related to real estate brokers and salespersons. Specifically, it:

- reduces multiple disclosure forms by repealing the Notice of Nonrepresentation and inserting all of the required disclosure language 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. However, disclosures must be made before, or at the time of, entering into a listing agreement or any agreement for representation or before showing of property, whichever comes first.
- exempts certain registered brokers and financial institutions from the registration requirements for real estate brokers if their services are in connection to negotiating the purchase, sale or rental of a business enterprise to or by a person who is an accredited investor and the sale, purchase or rental 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.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 475.01, 475.011, 475.181, 475.25, 475.272, 475.274, 475.2755, 475.276, 475.278, 475.2801, and 475.5015.

## II. Present Situation:

Regulation of real estate brokers, salespersons, and schools teaching real estate is established under part I of Chapter 475, Florida Statutes. 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:

- 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.
- 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. *See*, 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 that broker’s 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. *See*, s. 475.278, F.S. (1998 Supp.). Similarly, a single agent must disclose that agent’s 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.** The Brokerage Relationship Disclosure Act, ss. 475.2701-475.2801, F.S., was first enacted in 1997 through the passage of Ch. 97-42, Laws of Florida, and amended in Ch. 98-250, Laws of Florida. It currently requires that a broker provide a notice of nonrepresentation at first contact with any potential seller or buyer involving a residential sale. 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.).

The statute prescribes the content and form of the notice, as well as how it is to be served on the party. The statutory notice explains to a potential seller or buyer that the broker does not represent them and advises that no one represents them unless they agree to engage someone in an authorized brokerage relationship. It further advises the party not to disclose any information that the party wants to be held in confidence until the party makes a decision on representation. Failure to provide this notice can subject the licensee to discipline. *See*, s. 475.25(1)(q), F.S. 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. s. 475.276, F.S. (1998 Supp.). The law 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 stated purpose of these requirements is to eliminate confusion and to provide for a better understanding on the part of customers in real estate transactions. *See*, s. 475.272, F.S.

**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 Commission directed 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 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.

**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 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.** 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 securities brokers and financial institutions negotiate for sophisticated investors 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 securities broker or financial institution.

### III. Effect of Proposed Changes:

**Section 1** deletes the phrase “first contact” from the definitions section of the practice act and renumbers the remaining subsections accordingly.

**Section 2** creates an exemption in s. 475.011, F.S., to exempt from real estate licensure requirements any dealer registered under the Securities and Exchange Act of 1934, as amended, or any federally insured depository corporation that is negotiating the sale, exchange, purchase or rental of business enterprises for accredited investors.

**Section 3** clarifies that the Commission may not certify individuals who have not met the statutory requirements for licensure.

**Section 4** allows the Florida Real Estate Commission to discipline a licensee who fails to comply with the requirements of the “designated salesperson” provisions and deletes a reference to s. 475.276, F.S.

**Section 5** amends s. 475.272, F.S. by deleting from the intent of the Brokerage Relationship Disclosure Act the purpose of requiring real estate licensees to disclose to customers upon first contact that they are not and will not be represented by a licensee, unless they engage a licensee in an authorized form of representation.

**Sections 6, 7, 10 and 13** amend ss. 475.274, 475.2755, 475.2801 and 475.5015, F.S., to correct cross-references to the repealed statute, s. 475.276, F.S.

**Section 8** repeals s. 475.276, F.S., the provision requiring the notice of nonrepresentation be provided at first contact, in its entirety.

**Section 9** reduces 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. However, disclosures must be made before, or at the time of, entering into a listing agreement or any agreement for representation or before showing of property, whichever comes first. This portion of the bill 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.

**Sections 11 and 12** provide that a person may not recover from the Florida Real Estate Recovery 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 if the judgment was against a limited liability company or limited liability partnership.

**Section 14** provides for an effective date of October 1, 1999.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill would reduce the paperwork required of real estate licensees after making first contact with potential sellers or buyers of residential property. It would also remove the possibility of disciplinary proceedings against licensees for failure to serve notices of nonrepresentation on sellers or buyers after first contact. The bill further affects 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.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

PCS/SB 1072 is a companion to CS/HB 417.

**VIII. Amendments:**

None.