

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1009

Real Estate Profession Regulation

**SPONSOR(S):** Cretul

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 1816

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee	_____	Livingston	Liepshutz
2) Civil Justice Committee	_____	_____	_____
3) State Administration Appropriations Committee	_____	_____	_____
4) Commerce Council	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

#### **Part I, chapter 475, F.S., Real Estate Brokers, Sales Associates, and Schools**

The bill:

- permits the licensing of a limited liability company or professional limited liability company;
- increases the time limit for certification of an applicant from one year to two years, and would clarify how long an education class required to sit for the examination remains valid;
- requires additional education for a licensee to reactivate his or her license under situations where the license has become involuntarily inactive;
- creates additional grounds for discipline for brokers and limits the time period for the filing of an administrative complaint against a sales associate; creates an additional offense of failing to adequately manage or supervise a sales associate or broker associate; creates an additional disciplinary offense of failing to systematically review the brokers accounting practices;
- requires the DBPR to notify a licensee's broker or employer in writing upon the filing of a formal complaint;
- removes the "Important Notice" header and warning language about disclosure of confidential information to an agent by the buyer when the agency relationship is uncertain;
- requires education providers to maintain certain records and provide the DBPR with a copy of a course roster within 30 days of the completion of the course examination;

#### **Part III, chapter 475, F.S., Commercial Real Estate Sales Commission Lien Act**

The bill:

- amends and clarifies existing law by defining "Owner's Net Proceeds" to mean the gross sales proceeds that the owner is entitled to receive from a sale, discounted by amount of money actually secured by any lien or encumbrance that has priority over the recorded commission notice and any costs associated with the transaction
- provides that a commission notice expires one year after recording, unless the owner remains obligated to pay a commission to the broker;
- clarifies the duties of a closing agent regarding a commission claimed under a commission notice;
- clarifies the actions of a closing agent when computing an owner's net proceeds.

#### **Part IV, chapter 475, F.S., Commercial Real Estate Leasing Commission Lien Act**

The bill:

- clarifies that the leases mentioned in a notice of commercial lien are not a recorded conveyance under the relevant provisions of the marketable record title act;
- repeals the relevant portions of the prohibition of charging advance fees for listing real property, except for timeshares.

**Fiscal** - The DBPR projects, "It is not possible to estimate the increase in workload but the presumption is that any increase in workload will be minimal and can be handled within existing resources."

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

**STORAGE NAME:** h1009.BR.doc

**DATE:** 3/12/2006

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - the DBPR points out the bill does "not [create] more, but different regulation."

Ensure lower taxes - the bill increases the administrative fine that may be imposed on practitioners from \$5,000 to \$10,000.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present situation

##### **Part I, chapter 475, F.S., Real Estate Brokers, Sales Associates, and Schools**

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.

**Section 1** amends s. 475.161, F.S.

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.

"Broker associate" means "a person who is qualified to be issued a license as a broker but who operates as a sales associate in the employ of another."

"Sales associate" means "a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person."

A broker associate or sales associate may be organized and licensed to operate as a "professional corporation" or a "limited liability company."

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.

##### The bill

authorizes a professional limited liability company to be licensed as a broker associate or sales associate.

**Section 2** amends s. 475.181, F.S.

Currently, applicants for licensure must meet character and educational requirements, submit to a background check, and pass an examination. The commission is authorized to, in addition to other

prescribed qualifications, require satisfactorily complete one or more approved educational courses "as a condition precedent for any person to become licensed."

When the commission certifies that a person qualifies to take the licensure examination, the applicant has 1 year to take the examination. If it is not taken the application for licensure expires and a new application process must be completed by the applicant and approved by the commission.

#### The bill

specifies that the application for licensure expires in "2 years" if the applicant "does not pass" the examination. It also specifies that if the applicant does not pass the examination "the applicant's successful course completion is invalid for licensure."

**Section 3** amends s. 475.183, F.S.

Currently, section 475.182, F.S., requires a licensee to biennially renew a license upon application and payment of the renewal fee by the practitioner. The renewal application must include proof satisfactory to the commission that the licensee has, since the issuance or renewal of her or his current license, satisfactorily completed at least 14 classroom hours of continuing education during each biennium of a license period. Failure to renew before the expiration of the term of the license causes the licensee to be in involuntary inactive status. Any license which has been involuntarily inactive for more than 2 years automatically expires and becomes null and void.

#### The bill

allows a licensee to reactivate a license that has been involuntarily inactive for 12 months or less by satisfactorily completing at least 14 hours of continuing education. It also allows a licensee to reactivate a license that has been involuntarily inactive for more than 12 months but fewer than 24 months by satisfactorily completing 28 hours of education courses.

**Section 4** amends s. 475.25, F.S.

Currently, this section prescribes disciplinary guidelines for violations of the provisions of part I of this chapter.

#### The bill

increases the administrative fine that may be imposed on practitioners from \$5,000 to \$10,000 and creates additional violations if a broker has failed to reasonably manage or supervise any broker associate or sales associate whose license is affiliated with such broker or if a broker has failed to review the brokerage's trust accounting practices.

#### The bill

requires the DBPR or the commission to notify a licensee's broker or employer any time a formal complaint is filed against a licensee.

**Section 5** amends s. 475.278, F.S.

Currently, 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.

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. A "single agent" is a broker who represents either the buyer or seller but not both in the same transaction.

A real estate licensee in this state may enter into a brokerage relationship as either a transaction broker or as a single agent with potential buyers and sellers. Florida is a "presumption of transaction brokerage" state. Section 475.278(1)(b) specifies "It shall be presumed that all licensees are operating as transaction brokers unless a single agent or no brokerage relationship is established, in writing, with a customer."

#### The bill

deletes language in the disclosure requirements for a transaction broker, single agent, and where there is no brokerage relationship. The disclosure that the buyer or seller should not assume that a licensee represents them unless representation is specifically agreed to is removed.

**Section 6** amends s. 475.42, F.S., to correct a reference.

**Section 7** amends s. 475.451, F.S.

Currently, each person, school, or institution, except approved and accredited colleges, universities, community colleges, and career centers in this state, conducting or teaching any course of study in real estate practice prescribed by the commission for licensure as a broker or sales associate, or teaches any course designed or represented to enable or assist applicants for licensure to pass examinations for such licensure is required to obtain a permit from the DBPR. The exemption for colleges, universities, community colleges, and career centers is limited to transferable college credit courses offered by such institutions.

An applicant for a permit to operate a proprietary real estate school, to be a chief administrator of a proprietary real estate school or a state institution, or to be an instructor for a proprietary real estate school or a state institution must meet statutory qualifications for practice set forth in s. 475.17(1) and the following minimal requirements:

"School permitholder" means the individual who is responsible for directing the overall operation of a proprietary real estate school. A school permitholder must be the holder of a license as a broker, either active or voluntarily inactive, or must have passed an instructor's examination approved by the commission. A school permitholder must also meet the requirements of a school instructor if actively engaged in teaching. "Chief administrative person" means the individual who is responsible for the administration of the overall policies and practices of the institution or proprietary real estate school. "School instructor" means an individual who instructs persons in the classroom in noncredit college courses in a college, university, or community college or courses in a career center or proprietary real estate school.

#### The bill

requires each person, school, or institution to keep registration records, course rosters, attendance records, a file copy of each examination and progress test, and all student answer sheets for a period of at least 3 years. A copy of the classroom course roster of courses that require satisfactory completion of an examination is required to be delivered to the DBPR within 30 days.

**Section 8** amends s. 475.453, F.S.

Currently, each broker or sales associate who attempts to negotiate a rental, or who furnishes rental information to a prospective tenant for a fee must provide the prospective tenant with a contract or

receipt. The contract or receipt shall also conform to guidelines adopted by the commission in order to effect disclosure of material information regarding the service to be provided to the prospective tenant.

#### The bill

limits the disclosure documents only to brokers or sales associates who provide rental information "lists" to a prospective tenant.

### **Part III, chapter 475, F.S., Commercial Real Estate Sales Commission Lien Act**

Currently, part III of chapter 475, F.S., is the Commercial Real Estate Sales Commission Lien Act enacted in 2005. The act addresses various aspects of a broker's lien for a sales commission and describes a closing agent's obligations. The act provides a sales broker with the power to place a lien on an owner's proceeds from a commercial real estate transaction when there is a dispute over the broker's commission. The proceeds are placed in the registry of the court until the dispute is resolved, but the closing may proceed and the buyer may take clean title to the commercial property.

**Section 9** amends s. 475.701, F.S.

Currently, the statute specifies that the closing agent does not subtract the amount secured by a mortgage or lien that the buyer agrees to remain on the property. However, the buyer will receive credit against the purchase price for the amount of that lien thus reducing the amount to be paid to close. If the closing agent does not also subtract the continuing lien, then the closing agent may be reserving against net proceeds that are not a part of the transaction.

#### The bill

provides that, when calculating the owner's net proceeds that are subject to a lien, the closing agent must subtract the amount of all prior liens, not just the ones that are paid off at closing. Also see section 14 below.

**Section 10** amends s. 475.707, F.S.

Currently, the act provides that when there is a dispute over the broker's commission the proceeds are placed in the registry of the court until the dispute is resolved, but the closing may proceed and the buyer may take clean title to the commercial property. A commission notice recorded under this part expires 1 year after the date of recording, unless the brokerage agreement remains effective after the expiration date of the commission notice and the broker records an extension notice.

#### The bill

specifies that a commission notice would not expire in 1 year if the owner remains obligated to pay a commission to the broker and deletes reference to the term of the brokerage agreement.

**Sections 11 and 12** amend s. 475.709 and s. 475.711, F.S. to clarify that all of the conditions specified in each of the sections must be met by the closing agent to release the reserved funds to the broker and to seek adjudication of the rights of the parties to the disputed funds.

**Section 13** amends s.475.713, F.S., to correct references.

**Section 14** amends s.475.715, F.S., to provide, when calculating the owner's net proceeds that are subject to a lien, the closing agent must subtract the amount of all prior liens, not just the ones that are paid off at closing. Also see section 9, above.

## **Part IV, chapter 475, F.S., Commercial Real Estate Leasing Commission Lien Act**

Part IV is the "Commercial Real Estate Leasing Commission Lien Act," and provides a broker in a lease transaction with the power to place a lien on an owner's interest in commercial real estate for any commission earned by a broker under a brokerage agreement. The lien is on the commercial real estate itself. It provides legal procedures and requirements for filing a lawsuit to enforce a lien, resolve payment of commission owed, and release parties from liens. These provisions were enacted in 2005.

**Section 15** amends s.475.719, F.S., to delete duplicative reference.

**Section 16** amends s. 475.807, F.S.

A lien notice recorded under this part expires 10 years after the date of recording, unless the brokerage agreement remains effective after the expiration date of the commission notice and the broker records an extension notice.

### The bill

specifies that an owner remains obligated to pay a commission to the broker and deletes reference to the term of the brokerage agreement.

### The bill

specifies that neither the recording of a broker's lien notice or an extension nor the recording of any lis pendens to foreclose a broker's lien constitutes notice to a creditor or subsequent purchaser of the existence of the lease.

**Section 17** amends s. 721.20, F.S., to correct a reference.

**Section 18** repeals s, 475.452, F.S., relating to advance fee accounting procedures.

**Section 19.** Effective date - July 1, 2006.

## C. SECTION DIRECTORY:

See B., above.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It increases the administrative responsibilities for education providers and instructors related to the retention of education documentation. There may be a minimal effect on how certain licensees structure their business entities by allowing the licensure of a limited liability company or professional limited liability company. This would enable certain licensees to take advantage of certain tax benefits available to these business entities. The section would also enable licensee to take advantage of certain professional protections against liability.

D. FISCAL COMMENTS:

The DBPR projects, "It is not possible to estimate the increase in workload but the presumption is that any increase in workload will be minimal and can be handled within existing resources."

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The DBPR notes, the bill "may require rule making by the FREC to carry out the additional duties prescribed."

C. DRAFTING ISSUES OR OTHER COMMENTS:

NA

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**