

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1009 CS Real Estate Profession Regulation
SPONSOR(S): Cretul; Goodlette
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1816

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation Committee</u>	<u>17 Y, 0 N</u>	<u>Livingston</u>	<u>Liepshutz</u>
2) <u>Civil Justice Committee</u>	<u>6 Y, 0 N</u>	<u>Shaddock</u>	<u>Bond</u>
3) <u>State Administration Appropriations Committee</u>	<u>7 Y, 0 N</u>	<u>Rayman</u>	<u>Belcher</u>
4) <u>Commerce Council</u>	<u>13 Y, 0 N, w/CS</u>	<u>Livingston</u>	<u>Randle</u>
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill makes a number of changes to the statutes addressing real estate brokers, sales associates and schools. Some of the significant changes are below.

- The bill provides licensure of a real estate broker or sale associate as a professional limited liability company.
- The bill increases the time limit for certification of an applicant from one to two years.
- The bill creates grounds for broker discipline while limiting the time period for the filing of an administrative complaint against a sales associate.
- The bill requires the Department of Business and Professional Regulation (DBPR) to notify a licensee's broker or employer in writing when a formal complaint has been filed.
- The bill removes the "Important Notice" header and warning language about disclosure of confidential information in the required agency disclosure forms.
- The bill repeals the prohibition against charging advance fees for listing real property, except for timeshares, and removes criminal penalties for failure to follow advance fee procedures.

The bill modifies commercial real estate sales and leasing commission liens. The significant changes include:

- defining "Owner's Net Proceeds;"
- providing that generally a commission notice expires one year after recording; and
- providing that leases mentioned in a notice of commercial lien are not a recorded conveyance under the relevant provisions of the marketable record title act.

The DBPR states that 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.

The bill provides an effective date of July 1, 2006.

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

STORAGE NAME: h1009g.CC.doc
DATE: 4/18/2006

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- The bill eliminates the restrictions on advance fees or commissions, and eliminates the corresponding misdemeanor offense. 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 \$1,000 to \$5,000.

Safeguard individual liberty -- This bill eliminates restrictions on advance fees.

B. EFFECT OF PROPOSED CHANGES:

Real Estate Brokers, Sales Associates, and Schools

The general regulation of real estate brokers and salespersons is established under part I of ch. 475, F.S. The Florida Real Estate Commission¹ ("commission") under the Division of Real Estate of the Florida 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 financial harm.

Section 1

Current Law

Several real estate terms are used in chapter 475, F.S., including the following:

- "Broker" is 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, 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.

¹ "The Florida Real Estate Commission (FREC) consists of seven members and meets monthly in Orlando. The commission meeting is usually the third Wednesday of the month. The FREC administers and enforces the real estate license law, Chapter 475, Part I, Florida Statutes. The Commission is also empowered to pass rules that enable it to implement its statutorily authorized duties and responsibilities." Florida Real Estate Commission (last visited Mar. 20, 2006) <http://www.myflorida.com/dbpr/re/frec_welcome.shtml>.

Effect of Bill

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

Section 2

Current Law

Applicants for licensure must meet character and educational requirements, submit to a background check, and pass an examination. The commission is authorized to require satisfactory completion of one or more approved educational courses before a person may 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 the exam is not taken within that 1 year the licensure expires and a new application process must be completed and approved by the commission.

Effect of Bill

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

Current Law

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.

Effect of Bill

The bill authorizes a licensee to reactivate a license that has been involuntarily inactive for 12 months or less by completing at least 14 hours of continuing education. A licensee may reactivate a license that has been involuntarily inactive for more than 12 months but fewer than 24 months by completing 28 hours of education courses.

Section 4

Current Law

Section 475.25, F.S., prescribes disciplinary guidelines for violations of the provisions of part I of chapter 475, F.S.

Effect of Bill

The bill increases the administrative fine that may be imposed on practitioners from \$1,000 to \$5,000. The bill creates additional violations if a broker fails to reasonably manage or supervise any broker or sales associate whose license is affiliated with that broker or if a broker has failed to review the brokerage's trust accounting practices. When a formal complaint is filed against a licensee, the bill requires the DBPR or the commission to notify a licensee's broker or employer.

Section 5

Current Law

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 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; s. 475.278(1)(b), F.S., specifies "[i]t 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."

Effect of Bill

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

Section 6

Amends s. 475.42, F.S., to correct a cross-reference to conform to changes made by the bill.

Section 7

Current Law

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.

Effect of Bill

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 after the course was completed.

Section 8

Current Law

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 must conform to guidelines so material information is effectively disclosed to a prospective tenant.

Effect of Bill

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

Commercial Real Estate Sales Commission Lien Act

Part III of ch. 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

Current Law

Section 475.701, F.S., 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.

Effect of Bill

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

Current Law

Section 475.707, F.S., 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.

Effect of Bill

The bill specifies that a commission notice will 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.

Section 11

Current Law

Current law provides conditions that must be met by the closing agent prior to the release of reserved funds to the broker.

Effect of Bill

The bill amends s. 475.709, F.S., to provide 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.

Section 12

Current Law

The law provides that a closing agent may initiate legal action to determine the rights of the parties to disputed funds if the owner disputes the release of the reserved proceeds, if the owner and broker have not agreed in writing within 5 days, and if neither the owner nor the broker has initiated a civil action.

Effect of Bill

The bill amends s. 475.711, F.S., to provide that all of the conditions specified must be met before an action seeking adjudication of the rights of the parties to the disputed funds may be filed.

Section 13

Current Law

In civil actions involving commissions, the non-prevailing party is required to pay the costs and reasonable attorney's fees incurred in the action by the prevailing party.² However, if a court determines that neither the owner nor the broker is the prevailing party, the costs and attorney's fees of the prevailing party and the closing agent will be divided equally between and paid by the owner and broker.³

Effect of Bill

The bill amends s.475.713, F.S., to revise the award of costs and attorney's fees in civil actions over a commission. Specifically, the bill provides that if a court determines that neither the owner nor the broker is the prevailing party, the costs and attorney's fees of the closing agent and the amount of any costs, recording charges, and service charges of the court of court that were deducted from the disputed reserve proceeds will be divided equally between and paid by the owner and broker.

² Section 475.713(5)(a), F.S.

³ Section 475.713(5)(b), F.S.

Section 14

Effect of Bill

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.*

Commercial Real Estate Leasing Commission Lien Act

Part IV of ch. 475, F.S. 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. The Act 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

Effect of Bill

The bill amends s.475.719, F.S., to delete a duplicative reference.

Section 16

Current Law

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.

Effect of Bill

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. Moreover, the bill specifies that neither the recording of a broker's lien notice or an extension nor the recording of any lis pendens⁴ to foreclose a broker's lien constitutes notice to a creditor or subsequent purchaser of the existence of the lease.

Section 17

Effect of Bill

The bill amends s. 721.20, F.S., to correct a reference.

Advance Fees

Section 18

Current Law

⁴ Lis pendens is defined as "[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." Black's Law Dictionary 943 (7th ed. 1999).

Section 475.452, F.S., provides the procedures for advance fees collected by a broker in all situations. The commission is authorized to adopt rules to regulate the method of accounting to be used by brokers. The requirements of the section do not apply to real estate brokers who have entered into a written agreement providing how anticipated expenses are to be incurred and paid. The section also provides that anyone who violates the provisions is guilty of a misdemeanor of the first degree.

Effect of Bill

The bill repeals s. 475.452, F.S., relating to the advance fees, the deposit of those fees, and accounting procedures for the fees.

Section 19

Provides an effective date of July 1, 2006.

C. SECTION DIRECTORY:

Section 1. Amends s. 475.161, F.S., to require a professional limited liability company to be licensed as a broker or sales associate.

Section 2. Amends s. 475.181, F.S., dealing with expired licenses.

Section 3. Amends s. 475.183, F.S., regarding reactivation of involuntary inactive licenses.

Section 4. Amends s. 475.25, F.S., by increasing an administrative fine.

Section 5. Amends s. 475.278, F.S., by deleting language in a broker disclosure agreement.

Section 6. Amends s. 475.42, F.S., to correct a cross-reference.

Section 7. Amends s. 475.451, F.S., relating to the retention of broker education records.

Section 8. Amends s. 475.453, F.S., by limiting the disclosure documents only to brokers or sales associates who provide a rental information "list" to a prospective tenant.

Section 9. Amends s. 475.701, F.S., relating to the calculation of an owner's net proceeds.

Section 10. Amends s. 475.707, F.S., relating to the expiration of a commission notice.

Section 11. Amends s. 475.709, F.S., regarding what conditions must be met before a closing agent may release reserved funds.

Section 12. Amends s. 475.711, F.S., to provide that all of the conditions specified must be met in before an action seeking adjudication of the rights of the parties to the disputed funds may be filed.

Section 13. Amends s.475.713, F.S., to correct references.

Section 14. Amends s.475.715, F.S., relating to a closing agent's calculation of an owner's net proceeds.

Section 15. Amends s.475.719, F.S., to delete a duplicative reference.

Section 16. Amends s. 475.807, F.S., regarding an owner's obligation to pay a commission.

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. Provides an effective date of July 1, 2006, for the bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill 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 bill would also enable licensee to take advantage of certain professional protections against liability.

D. FISCAL COMMENTS:

The Florida Department of Business and Professional Regulation projects, “[i]t 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.” The bill would increase the amount of work for the FREC and department operations to perform to relative to continuing education and make it more likely that license holders request formal hearings before an administrative law judge rather than submitting to the enforcement of discipline at informal hearings before the FREC. The broadening of the scope of persons notified of the filing of administrative complaints will increase workload for staff supporting the actions of the FREC.

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, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Business and Professional Regulation notes, the bill “may require rule making by the FREC to carry out the additional duties prescribed.”

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 17, 2006, the Commerce Council adopted one amendment which modified the bill in the following manner and reported the bill favorably with committee substitute.

The amendment further clarifies that brokers must direct, control or manage their associates. It specifies that a rebuttable presumption of employment exists when DBPR records indicate registration with the broker by the associate. It also conforms broker notification, when a complaint is filed against a licensee, to confidentiality requirements within chapter 455, F.S., the general powers authority of the DBPR.