

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Regulated Industries Committee

BILL: CS/SB 1816

SPONSOR: Regulated Industries Committee and Senator Posey

SUBJECT: Real Estate Profession Regulation

DATE: March 30, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill permits the Florida Real Estate Commission (commission) to issue a license to a broker associate or sales associate as a limited liability company or professional limited liability company.

The bill increases from one year to two years the time for certification of an applicant after an application for licensure is received by the commission. It provides that the application expires if the applicant does not pass the examination during the new two year period. It also provides that the applicant's successful course completion is invalid for licensure if the applicant does not pass the licensing examination within two years after the successful course completion date. The bill provides additional education requirements for a licensee to reactivate his or her license when the license has become involuntarily inactive.

The bill increases the administrative fine that may be imposed by the commission from \$1,000 to \$5,000. It creates additional violations for brokers that fail to reasonably manage or supervise any broker or sales associate whose license is affiliated with that broker, and for the broker that fails to review the brokerage's trust accounting practices in order to ensure compliance with ch. 475, F.S.

The bill limits the time period for the filing of an administrative complaint against a sales associate to five years, and requires that the department or the commission promptly notify a licensee's broker or employer when a formal complaint is filed against a licensee by the department.

The bill deletes the “Important Notice” header and warning to the buyer or seller that they should not assume that a licensee represents them, and to not disclose confidential information unless the brokerage relationship is clear.

The bill repeals s. 475.452, F.S., which provides procedures for brokers that contract for, or collect, an advance fee for the listing of real property and which provides criminal penalties for failure to follow the advance fee procedures.

The bill provides record keeping and reporting requirements for education providers.

The bill amends the Commercial Real Estate Sales Commission Lien Act in part III of ch. 475, F.S., to revise provisions relating to calculating disputed commission amounts owed to brokers, and to provide the conditions that the closing agent must consider to resolve a dispute. It also provides for the payment of costs equally by the parties when neither the owner nor broker is the prevailing party in an action regarding a disputed commission.

The bill also amends the Commercial Real Estate Leasing Commission Lien Act in part IV of ch. 475, F.S., to provide conditions related to extending recorded liens.

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

This bill substantially amends the following sections of the Florida Statutes: 475.161, 475.181, 475.183, 475.25, 475.278, 475.42, 475.451, 475.453, 475.701, 475.707, 475.709, 475.711, 475.713, 475.715, 475.719, 475.807, and 721.20. The bill repeals section 475.452, Florida Statutes.

II. Present Situation:

The regulation of real estate brokers and salespersons is established under part I of ch. 475, F.S. The Florida Real Estate Commission (commission) within the Department of Business and Professional Regulation (department) is the agency responsible for implementing and enforcing the provisions of ch. 475, F.S. The Division of Real Estate (division) within the department provides administrative support to the commission. The division is responsible for providing the recordkeeping, examination, legal, and investigative services for the commission.

Definitions

Section 475.01, F.S., defines several real estate terms used in ch. 475, F.S., including the following:

A “broker” is a person who for another and for compensation buys, sells, or leases real property or negotiates the transaction. The definition includes a general partner, officer, or director of a partnership or corporation which acts as a broker. The term also includes any person or entity that undertakes to list or sell one or more timeshare periods or plans per year on behalf of another person.¹

¹ Section 475.01(1)(a), F.S.

A “broker associate” is a person qualified to be issued a license as a broker but who operates as a salesperson in the employ of another.²

A “sales associate” is a person who performs any act specified in the duties of a broker, but performs the act under the direct supervision, control or management of another person.³

A “single agent” is a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction.⁴ Section 475.278(1)(a), F.S., prohibits a broker from acting as a disclosed or undisclosed “dual agent,” that works as an agent for both the buyer and seller.

A “transaction broker” is a broker who provides limited representation to a buyer, a seller, or both in the same transaction. The transaction broker does not represent either the buyer or seller as an agent.⁵

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. The broker also has the duty to use skill, care, and diligence.⁶

Brokerage Relationship Disclosure Act

The term "agency" describes the legal relationship between two persons in which one person, known as the agent, acts on behalf of, or represents, the other person, known as the principal. The term “agency law” in the context of real estate transactions refers to laws regulating the legal relationship between real estate licensees and the buyers and sellers of real estate. Persons owning property often employ an agent to sell, market, and negotiate the sale of their property.

At common law, a real estate agent owes a duty of loyalty solely to the party paying the commission. A real estate commission is usually, but not always, paid exclusively by the seller. Therefore, a buyer under the common law rule would rarely be represented in the real estate transaction. However, it has become common practice for buyers to hire agents to represent them. This has caused a level of confusion among consumers as to the nature of their relationship with real estate licensees.

Sections 475.2701-475.2801, F.S., constitute the “Brokerage Relationship Disclosure Act” (the act).⁷ The act’s purpose is to eliminate the confusion and to provide for better understanding on the part of consumers in real estate transactions.

Section 475.255, F.S., provides that the mere payment or promise to pay compensation to a licensee does not, without consideration of the facts and circumstances, mean that an agency or

² Section 475.01(1)(b), F.S.

³ Section 475.01(1)(j), F.S.

⁴ Section 475.01(1)(k), F.S.

⁵ Section 475.01(1)(l), F.S.

⁶ Section 475.01(1)(f), F.S.

⁷ Section 475.272, F.S.

transactional brokerage relationship exists. The act provides the following provisions relating to the brokerage relationship:

- Expressly revokes disclosed dual agency representation.
- Establishes disclosure requirements for brokerage representation.
- Provides that single agents may represent either a buyer or a seller, but not both, in a real estate transaction.
- Provides that transaction brokers provide a limited form of non-fiduciary representation to a buyer, seller, or both in a real estate transaction.

Section 475.2755, F.S., authorizes a broker to designate salespersons to act as single agents for different customers in the same transaction, provided that the seller and buyer have assets of \$1 million or more and the buyers request the representation. This provision does not apply to residential real estate transactions.

Brokerage Relationships

Section 475.278, F.S., establishes three real estate licensee relationships with real estate buyers and sellers, i.e., brokerage relationships. The three relationships are: the transaction brokerage relationship, the single agent relationship, and the no brokerage relationship.

Section 475.278(1), F.S., authorizes a real estate licensee to enter into a brokerage relationship as either a single agent or as a transaction broker with potential buyers and sellers. A licensee cannot operate as a dual agent, which represents both the buyer and the seller in the same real estate transaction, whether the dual agency is disclosed or not. A brokerage relationship once established may be changed by written disclosure and consent by the buyer or seller.

Section 475.278(1)(b), F.S., creates the presumption that all licensees are operating as transaction brokers unless a single agent or a no brokerage relationship is established, in writing, with a customer.

Transaction Broker Relationship

Section 475.278(2), F.S., establishes the duties of a transaction broker. A transaction broker does not represent the buyer or seller in a fiduciary capacity or as a single agent. This is a limited form of representation.

The act requires that the duties of a transaction broker must be disclosed in writing to the buyer or seller at the time of, or before entering into, a listing agreement or an agreement for representation before showing the property. The act sets forth the form and content of the disclosure. The duties of a transaction broker are to:

1. Deal honestly and fairly.
2. Account for all funds.
3. Use skill, care, and diligence in the transaction.
4. Disclose all known facts that materially affect the value of residential real property and are not readily observable to the buyer.

5. Present all offers and counteroffers in a timely or agreed manner.
6. Limited confidentiality, unless waived in writing by a party. The transaction broker cannot disclose that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, the motivation of any party for selling or buying property, that a seller or buyer will agree to financing terms other than those offered, or of any other information requested by a party to remain confidential.
7. Perform any additional duties that are mutually agreed to with a party.

Single Agent Relationship

Section 475.278(3), F.S., established the duties of a single agent. The single agent is in a fiduciary relationship with the buyer or seller who engages his or her services. A single agent owes the following duties to the buyer or seller:

1. Dealing honestly and fairly;
2. Loyalty;
3. Confidentiality;
4. Obedience;
5. Full disclosure;
6. Accounting for all funds;
7. Skill, care, and diligence in the transaction;
8. Presenting all offers and counteroffers in a timely manner, unless a party has previously directed the licensee otherwise in writing; and
9. Disclosing all known facts that materially affect the value of residential real property and are not readily observable.

The act requires that the duties of a single agent must be disclosed in writing to the buyer or seller at the time of or before entering into a listing agreement or an agreement for representation and before showing the property. The act also sets forth the form and content of the disclosure.

No Brokerage Relationship

A real estate licensee owes to the potential buyer or seller with whom the licensee has no brokerage relationship the following duties:

1. Dealing honestly and fairly;
2. Disclosing all known facts that materially affect the value of residential real property and are not readily observable to the buyer; and
3. Accounting for all funds entrusted to the licensee.

The act requires that the duties of a real estate licensee without a brokerage relationship must be disclosed in writing to the potential buyer or seller at the time of or before entering into a listing agreement or an agreement for representation and before showing the property. The act also sets forth the form and content of the disclosure.

Notice to Potential Buyers and Sellers

Section 475.278, F.S., requires a written disclosure from each real estate licensee to all real estate buyers and sellers that warns the buyer and seller that they should not assume that any real estate broker or sales associate represents the buyer or seller unless the buyer or seller agrees to engage a real estate licensee in an authorized brokerage relationship, either as a single agent or as a transaction broker. The disclosure also advises the buyer and seller not to disclose any information he or she wishes to be held in confidence until he or she make a decision on representation. The required notice includes a Header that reads: "Important Notice."

Advance Fee Requirements

Section 475.452, F.S., prohibits brokers to contract for or collect any advance fee for the listing of real property from any principal without complying with the provisions of this section. To contract for, or collect, an advance fee, the broker must comply with the following conditions:

- Deposit 75 percent of the fee amount, when collected, in a trust account with a bank or other recognized depository in this state.
- Hold the funds in trust and not commingled with the funds of the broker who has collected the fee.
- Furnish a statement to the principal itemizing how the advance fees are to be expended and the amounts to be expended before withdrawing any fees from the trust account.
- Funds may be withdrawn from the trust account only when actually expended for the benefit of the principal or 5 days after verified accounts have been mailed to the principal.
- Funds held in the trust account must be refunded to the principal along with a final accounting of all funds expended by the broker if the listed property is not sold within the period of time specified in the broker's contract or within 18 months after the contract date, whichever period is shorter.

A verified copy of the accountings required under this section must also be provided to each principal:

- At the end of each calendar quarter;
- When the contract has been completely performed by the broker; and
- At any other time deemed appropriate by the commission.

The broker must also provide a verified copy of any account or all accounts if demanded by the commission.

Brokers who violate the provisions of this section are guilty of a misdemeanor of the first degree. The principal, in an advance-fee transaction for the listing of real property that violates this section, may recover treble damages for any funds misapplied and are entitled to reasonable attorney's fees in any action to recover such funds.

The provisions of s. 475.452, F.S., do not apply to a real estate broker auctioning real property.

Commercial Real Estate Sales Commission Lien Act

In 2005, the Legislature enacted the Commercial Real Estate Sales Commission Lien Act in part III of ch. 475, F.S.⁸ The act regulates a broker's lien for a sales commission for the sale of real property and prescribes 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.

Commercial Real Estate Leasing Commission Lien Act

In 2005, the Legislature enacted the "Commercial Real Estate Leasing Commission Lien Act," in part IV of ch. 475, F.S.⁹ The act provides the broker in a commercial 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 disputes regarding the commission, and procedures for release of the liens. Section 475.807, F.S., provides that, if the broker claims an automatic renewal commission, the lien notice expires ten years after recording unless the broker commences a foreclosure action. The lien notice may be extended for successive 10-year periods. However, an owner may attempt to shorten the time by filing a notice of contest of the broker's lien.

III. Effect of Proposed Changes:

Real Estate Brokers, Sales Associates, and Schools

Section 1. The bill amends s. 475.161, F.S., to permit the commission to license a broker associate or sales associate as a limited liability company or professional limited liability company. Current law permits the commission to license a broker associate or sales associate as a professional corporation or a limited liability company. According to the department, this provision would enable certain licensees to take advantage of certain tax benefits available to these business entities.

Section 2. The bill amends s. 475.181(2), F.S., to increase from one year to two years the time for certification of an applicant after an application for licensure is received by the commission. Under current law, the application expires if the applicant does not take the appropriate examination during that period. The bill provides that the application expires if the applicant does not pass the examination during the new two year period. It deletes the reference to the applicant failing to take the appropriate examination during that period. The bill also provides that, if the applicant does not pass the licensing examination within two years after the successful course completion date, the applicant's successful course completion is invalid for licensure.

⁸ See section 1, ch. 2005-275, L.O.F.

⁹ See section 2, ch. 2005-275, L.O.F.

Section 3. The bill amends s. 475.183, F.S., to require additional education for a licensee to reactivate his or her license when the license has become involuntarily inactive.¹⁰ The bill requires that a licensee must reactivate a license that has been involuntarily inactive for 12 months or less by completing at least 14 hours of continuing education. If the license has been involuntarily inactive for more than 12 months but fewer than 24 months, the licensee must complete 28 hours of education courses. Current law provides that a license that has been inactive for more than two years shall automatically expire.¹¹

Section 4. The bill amends s. 475.25, F.S., to increase the administrative fine that may be imposed by the commission from \$1,000 to \$5,000.

The bill creates s. 475.25(1)(u), F.S., to provide a disciplinary provision for a broker who fails to direct, control, or manage a broker or sales associate employed by the broker. It creates a rebuttable presumption that a broker associate or sales associate is employed by a broker if the records of the department establish that the broker associate or sales associate is registered with the broker. It also provides that certified and authenticated licensure records are admissible as prima facie evidence of the registration.

The bill creates s. 475.25(1)(u), F.S., to also subject a broker to discipline if the broker has failed to review the brokerage's trust accounting practices in order to ensure compliance with ch. 475, F.S.

The bill includes sales associates under the requirement that an administrative complaint must be filed within five years after the act giving rise to the complaint or within five years of when the act is discovered or should have been discovered. Current law only references complaints against brokers or broker associates.

The bill requires that the department or the commission promptly notify a licensee's broker or employer when a formal complaint that alleges violations of ch. 475, F.S., or ch. 455, F.S., is filed. It provides that this notification may not be issued until 10 days after a finding probable cause has been found by the probable cause panel or the department, or the licensee has waived his or her privilege of confidentiality under s. 455.225, F.S.,¹² whichever occurs first.

Section 5. The bill amends s. 475.278, F.S., to delete the disclosure requirement for a transaction broker, single agent, and where there is no brokerage relationship regarding the disclosure that the buyer or seller should not assume that a licensee represents them. It also deletes the "Important Notice" header to the disclosure.

¹⁰ According to the division, a license may become involuntarily inactive if the licensee is under discipline, if the licensee has not completed his or her continuing education requirements, or if the licensee is a sales associate or broker associate whose license is working under the license of a broker with an inactive license.

¹¹ Section 475.183(2), F.S.

¹² Section 455.225(10), F.S., provides that the complaint and all information obtained pursuant to the investigation by the department are confidential and exempt from the public records requirement of s. 119.07(1), F.S., until 10 days after probable cause has been found to exist by the probable cause panel or by the department, or until the regulated professional or subject of the investigation waives his or her privilege of confidentiality, whichever occurs first. This exemption does not apply to actions against unlicensed persons pursuant to s. 455.228, F.S., or the applicable practice act.

According to the Florida Association of Realtors, this disclosure is inconsistent with the presumption in s. 457.278(1)(b), F.S., that the transaction brokerage relationship is presumed unless a single agent or a no brokerage relationship is established, in writing, with a customer because the notice incorrectly represents that the transaction broker may represent the buyer or seller.

Section 6. The bill amends s.475.42, F.S., to delete the requirement that a broker in a listing or agreement relating to a time share period must fully comply with the advance fee provisions of s. 475.452, F.S. The bill conforms this section to the repeal of s. 475.452, F.S., in section 18 of the bill.

Section 7. The bill amends s. 475.451, F.S., to require education providers 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 three years. The bill requires that education providers provide the department with a copy of the course roster within 30 days of the completion of the examination. The bill specifies the information that must be included in the course roster, including beginning and ending dates of the course and the students name and permit number. The roster must include the signature of the school permitholder, the chief administrative person, or the course sponsor.

Section 8. The bill amends s. 475.453, F.S., delete the requirement that each broker or sales associate who attempts to negotiate a rental for a fee must provide the prospective tenant with a contract or receipt which contains a provision for the repayment of any amount over 25 percent of the fee to the prospective tenant if the prospective tenant does not obtain a rental. The bill would limit the requirements of this section to brokers and sales associates who furnish a rental information list to a prospective tenant.

Commercial Real Estate Sales Commission Lien Act

Section 9. The bill amends s. 475.701, F.S., to provide that, when calculating the owner's net proceeds that are subject to a lien, the closing agent must subtract the amount of money secured by any encumbrance, claim, or lien that has priority over the recorded commission. The bill deletes the requirement that the closing agent not subtract an encumbrance that the buyer authorizes to after the disposition. According to the department, this provision would help eliminate disputes between the buyer and the settlement agent over priority of liens.

Section 10. The bill amends s. 475.707, F.S., to provide that a commission notice will not expire in one year if the owner remains obligated to pay a commission to the broker. The bill changes the requirement in current law that the obligation to pay the commission remains if the brokerage agreement remains effective. The bill also provides that any extension notices must state that the owner remains obligated to pay a commission to the broker in place of the requirement in current law that the extension notice state that the brokerage agreement remains effective.

Section 11. The bill amends s. 475.709(6), F.S., which lists the duties of the closing agent, to provide that all of the listed conditions must be met to confirm a commission claimed in a commission notice.

Section 12. The bill amends s. 475.711, F.S., which lists conditions that must be met for a closing agent to seek judicial adjudication of the rights of the parties to disputed reserve, to require that all of the listed conditions must be met.

Section 13. Section 475.713(5)(b), F.S., requires that, when neither the owner or broker is the prevailing party in an action regarding a disputed commission, the parties must equally divide the costs and reasonable attorney's fees incurred by the prevailing party in the action and any costs incurred by the closing agent. The bill deletes the requirement that the parties divide the costs and reasonable attorney's fees of the prevailing party (because there is no prevailing party under the circumstance addressed in this section), and requires that they divide any costs, recording charges, and service charges of the clerk of court that were deducted from the disputed reserved proceeds.

Section 14. The bill amends s. 475.715, F.S., to provide, when calculating the owner's net proceeds that are subject to a lien, that the closing agent must subtract from the gross sales proceeds the amount of any prior liens and any money secured by a prior lien.

Section 15. The bill amends s. 475.719(3), F.S.,¹³ to delete the provision that the requirements of this section do not affect the rights and remedies otherwise available to the owner, the buyer, the buyer's broker under applicable law. It also provides that a broker's notice to a closing agent of his or her right to a fee or other compensation under a brokerage agreement shall not constitute a tortious interference with the sale or disposition or financing of the commercial real estate.

Commercial Real Estate Leasing Commission Lien Act

Section 16. The bill amends s. 475.807, F.S., to provide that a broker may extend a recorded lien notice that contains an automatic renewal provision if the owner remains obligated to pay a commission to the broker. The bill changes the requirement in current law that the lien notice may be extended if the brokerage agreement remains effective. The bill also provides that any extension notices must state that the owner remains obligated to pay a commission to the broker in place of the requirement in current law that the extension notice state that the brokerage agreement remains effective.

The bill provides that neither the recording of a broker's lien notice or an extension nor the recording of any *lis pendens*¹⁴ to foreclose a broker's lien constitute notice to a creditor or subsequent purchaser of the existence of the lease.

¹³ Section 475.719, F.S., provides that a written contract between a buyer and a buyer's broker for the payment by the buyer of any fee or other compensation to the buyer's broker for licensed services relating to the sale or disposition of commercial real estate is not a brokerage agreement. This section also permits a buyer's broker to give notice to the closing agent of the broker's right to receive a fee or other compensation from the buyer under the terms of the buyer's broker's written contract with the buyer, the owner, or any other party to the sale, if the notice does not violating any confidentiality provisions in the written contract.

¹⁴ "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 (7th ed. 1999).

Section 17. The bill amends s. 721.20, F.S., which requires that any seller of a timeshare plan must be a licensed real estate broker, broker associate, or sales associate, to delete a cross reference to s. 475.452, F.S.

Section 18. The bill repeals s. 475.452, F.S., relating to requirements for the collection of an advance fee by a broker to list real property.

Section 19. The bill provides an effective date of July 1, 2006.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
