

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.)

Date: March 20, 1998 Revised: \_\_\_\_\_

Subject: Timeshare Plans

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Rodriguez</u>	<u>Guthrie</u>	<u>RI</u>	<u>Favorable/CS</u>
2.	<u>Wiehle</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

The bill revises chapter 721, Florida Statutes, relating to timeshare plans. The bill creates the Timeshare Lien Foreclosure Act, which provides for consolidation of timeshare foreclosure proceedings under certain conditions, for service of process by service on a registered agent or by mail, and for appointment of a registered agent to accept such service. The bill also creates statutes on commissioners of deeds to allow execution of timeshare instruments outside the United States. The bill also:

- Authorizes rulemaking authority to create exemptions to ch. 721, F.S.;
- Increases the number of days that the Division of Florida Land Sales, Condominiums, and Mobile Homes has to respond to a proposed amendment to an approved multi-site timeshare plan that adds a new component site;
- Eliminates the requirement that a developer file an irrevocable letter of credit, surety bond, or other assurance to guarantee the delivery of incidental benefits to the purchaser, and authorizes disclosure of such benefits;
- Revises language regarding reservation agreements;
- Defines the term “regulated short-term product”;
- Provides for disclosure and cancellation provisions;
- Authorizes the advertisement of such agreements subject to the division’s approval;
- Allows developers greater flexibility in the allocation of common expenses;
- Amends the provisions regarding the audit of financial statements, and
- Requires that the certified public accountants preparing these audits be licensed in the State of Florida.

The bill substantially amends the following sections of the Florida Statutes: 721.03, 721.05, 721.06, 721.07, 721.075, 721.09, 721.11, 721.13, 721.15, 721.18, 721.26, and 721.265. The bill

creates the following sections of the Florida Statutes: 721.80, 721.81, 721.82, 721.83, 721.84, 721.85, 721.86, 721.96, 721.97, and 721.98.

## II. Present Situation:

Chapter 721, F.S., provides statutory recognition to real property timesharing and personal property timesharing in the state. Currently, the chapter contains procedures for the creation, sale, exchange, promotion, and operation of timeshare plans. It also provides for full and fair disclosure of timeshare plans to purchasers and prospective purchasers.

Section 721.03, F.S., provides that ch. 721, F.S., applies to all timeshare plans consisting of more than 7 timeshare periods over a period of at least 3 years in which the accommodations or facilities are located within this state, unless otherwise exempted. Subsection (1) of s. 721.03, F.S., provides that timeshare plans that contain accommodations in the state, but are offered for sale outside the United States, are exempt from this chapter so long as the seller files the plans with the Division of Florida Land Sales, Condominiums, and Mobile Homes (the division) and complies with specific disclosure requirements.

Section 721.05, F.S., defines terms used in ch. 721, F.S.

Section 721.06, F.S., requires that a conspicuous disclosure, stating that the purchaser has 10 days to cancel the purchase contract without penalty or obligation, be placed in the timeshare purchase contract in the area directly above the purchaser's signature.

Section 721.07(3), F.S., provides that public offering statements must be filed with the division for approval and, pending such approval, any contract regarding the sale of the timeshare plan is voidable by the purchaser. This section also provides that the division has 20 days after receipt of a proposed amendment to an offering statement to approve or cite deficiencies in the proposed amendment. If the division fails to act within 20 days, the amendment is deemed approved.

Section 721.075, F.S., sets forth requirements for the offering of incidental benefits. An incidental benefit is defined in s. 721.05(17), F.S., to mean an accommodation, product, service, discount, or other benefit that is offered to the purchaser or prospective purchaser of a timeshare plan prior to the expiration of the initial 10-day voidableness period pursuant to s. 721.10, F.S. The term does not include certain offers or programs used to promote the sales of timeshare plans. This section requires that prior to offering incidental benefits, the developer must file an irrevocable letter of credit, surety bond, or other assurance acceptable to the division director if the aggregate represented value of the incidental benefits to a purchaser exceeds 5 percent of the purchase price.

Section 721.09, F.S., requires that prior to filing the public offering statement, a seller may not offer a timeshare plan for sale, but may accept reservation deposits if a fully executed escrow agreement and reservation agreement is approved by the division. Currently, this section does not address whether such a reservation agreement may be advertised.

Section 721.11, F.S., requires any advertising material including prize and gift promotional offers to be filed with the division 10 days prior to use. This section specifies what materials are included and excluded in the term “advertising material.”

Section 721.13, F.S., relates to the duties of a managing entity of a timeshare plan. A copy of the final budget, with estimated revenues and expenses, must be provided by the managing entity to all purchasers and to the division. A managing entity is required to arrange for an annual independent audit of all books and financial records of the timeshare plan and to file a copy of the audit with the division. A copy of the audit must also be sent to the officers of an owners’ association, or, if no association exists, each owner of a timeshare period must be notified that the audit is available upon request. The managing entity must also file a statement of receipts and disbursements regarding the ad valorem tax escrow account as required by s. 192.037(6)(e), F.S.

Subsection (4) of s. 721.13, F.S., provides a mechanism for purchasers of a condominium or cooperative timeshare plan to request the managing entity to initiate a mail-out to the owners of the timeshare plan, if the purpose of the mail-out is to advance legitimate association business. The ability to request a mail-out applies only to condominium or cooperative timeshare purchasers and not to a purchaser of other timeshare plans.

Section 721.15(1), F.S., requires a developer to allocate common expenses of a timeshare plan among purchasers on the basis of either square footage or unit type, and allows for the allocation of common expenses to timeshare periods owned or not yet sold by the developer. Condominium and cooperative timeshare plans are required to allocate common expenses in accordance with the requirements stated in chs. 718 and 719, F.S., respectively.

Section 721.18, F.S., requires exchange programs to file certain information at least 20 days prior to July 1 of each year. The timeshare audit is also required to be filed during the similar time frame, but currently there is no requirement to file both simultaneously.

Section 721.26, F.S., provides for joint and severable liability for any person who materially participates in any offer or disposition of any interest in a timeshare plan in a fraudulent manner. It does not address the fraudulent management or operation of a timeshare plan. Also, the division may only enforce penalties for statutory violations, and may not seek penalties for rule violations.

Section 721.265, F.S., provides service of process procedures.

On July 19, 1996, the Secretary of the Department of Business and Professional Regulation appointed a task force to gather information and make recommendations to address the number of timeshare resorts in the state suffering from serious financial distress, and to address failure to comply with chs. 718 and 721, F.S. The task force included department experts, timeshare industry representatives, and public accountants. The task force determined that the number and nature of financial problems facing the timeshare plans demand immediate attention in order to protect timeshare purchasers and the industry. The recommendation of the task force was for a nonjudicial foreclosure proceeding.

In 1996, a Secretary of State's report to the Joint Legislative Information Technology Resource Committee identified the existence of "Commissioners of Deeds," authorized under ch. 118, F.S., and noted that "the existence of this chapter has been used to facilitate fraudulent acts on some occasions and the Governor's office prefers that this chapter be repealed." Section 10, ch. 97-241, Laws of Florida, and s. 59, ch. 97-278, Laws of Florida, repealed the provisions creating commissioners of deeds. Some of the duties assigned to commissioners of deeds were assumed by a new concept, the "Florida International Notary," created in ch. 97-278, Laws of Florida. The commissioners of deeds provisions in prior ch. 118, F.S., appear to be similar to those proposed in the bill. There is, however, one significant difference. The prior commissioners of deeds had authority "to take the acknowledgment and proof of the execution of any deed, mortgage, or other conveyance of *any lands, tenements, or hereditaments* lying or being in this state." (emphasis added.) In contrast, the bill authorizes commissioners of deeds "to take acknowledgments, proofs of execution, and oaths in connection with the execution of any deed, mortgage, deed of trust, contract, power of attorney, or any other writing to be used or recorded in connection with a *timeshare estate, timeshare license, any property subject to a timeshare plan, or the operation of a timeshare plan located within this state.*" (emphasis added.) See section III. B. below discussing Commissioners of Deeds.

### **III. Effect of Proposed Changes:**

#### **A. Creation of the Timeshare Lien Foreclosure Act**

The bill creates Part III of ch. 721, F.S., the "Timeshare Lien Foreclosure Act" (the act). Section 721.81, F.S., provides that the purpose of this act is to recognize the need to assist vacation ownership resort owners' associations and mortgagees, and reduce court congestion and the cost to taxpayers by simplifying and expediting the process of foreclosure of assessment liens and mortgage liens against timeshare estates. The bill also finds that such procedures will benefit the timeshare industry and vacation ownership resort owners' associations.

To accomplish this simplifying and expediting of foreclosure procedures, the act makes 3 substantive changes to the timeshare foreclosure process. First, it provides for consolidation of foreclosure proceedings under the following conditions:

- The foreclosure proceeding involves a single timeshare property and is filed by a single plaintiff;
- The default and remedy provisions in the written instrument on which the proceeding is based are substantially the same for each defendant; and
- The nature of the defaults is the same for each defendant.

The court is to sever for separate trial any count of the foreclosure complaint for which a defendant timely raises a defense or counterclaim.

The second substantive change to the foreclosure process relates to service of process for a timeshare estate foreclosure proceeding. Such service of process can be made in 3 ways. First, service can be made by any means recognized by law. Second, substitute service can be made by service on a registered agent if a party has appointed such an agent pursuant to the act. Finally,

where no money judgment is sought, service may be made on any person located inside or outside this state by certified or registered mail, either addressed to the person to be served at the notice address or addressed to the registered agent, if one has been appointed, at the registered office. (The definition of “notice address” is discussed below.) Service is obtained upon the signing of the return receipt by any person at the notice address or by the registered agent. The current owner and the mortgagor of the timeshare estate must promptly notify the association of the timeshare plan and the mortgagee of any change in address.

The timeshare lien foreclosure act defines the term “notice address” to mean:

- As to an assessment lien, the address of the current owner of a timeshare estate as reflected by the books and records of the timeshare plan.
- As to a mortgage lien:
  1. The address of the mortgagor as set forth in the mortgage, the promissory note or a separate document executed by the mortgagor at the time the mortgage lien was created, or the most current address of the mortgagor according to the records of the mortgagee; and
  2. If the current owner of the timeshare estate is different from the mortgagor, the address of the current owner of the timeshare estate as reflected by the books and records of the mortgagee.
- As to a junior interestholder, the address as set forth in the recorded instrument creating the junior interest or lien, or any recorded supplement thereto changing the address, or written notification by the junior interestholder to the foreclosing lienholder of such change in address.

The third substantive change in the timeshare foreclosure process concerns the appointment by an obligor of a registered agent for service of notices and process. (The bill defines “obligor” to include a mortgagor, a person subject to an assessment lien, or the record owner of a timeshare estate.) The statement of appointment must be in writing and must be signed by the obligor. The statement also must: include the registered agent’s name and street address, identify the obligor and provide the obligor’s mailing address, indicate the purpose of the appointment, specify the instruments out of which a lien arises, and contain a statement confirming the registered agent’s acceptance of the appointment. An obligor may change an appointment by selecting a new registered agent, but cannot revoke the appointment. A registered agent or successor agent must promptly provide the lienholder with a copy of the obligor’s statement of appointment. A registered agent who receives any notice or other document from the lienholder, addressed to the obligor in care of the agent, must mail the document to the obligor within 5 days of receipt. The documents must be mailed either by first class mail, for United States addresses, or international air mail, for addresses outside the United States.

The foreclosure act defines the following terms: “assessment lien,” “junior interestholder,” “lienholder,” “mortgage,” “mortgage lien,” “mortgagee,” “mortgagor,” “notice address,” “obligor,” “registered agent,” and “registered office.”

The act provides that it applies to all assessment liens and mortgage liens arising after the effective date of the bill, which is upon becoming a law, and to all assessment liens and mortgage liens existing prior to the effective date of the act for which a foreclosure procedure has not commenced. The act also provides for severability of the provisions in Part III of ch. 721, F.S. Finally, it provides that the division has no authority to regulate, enforce, or ensure compliance with provisions of this part.

### **B. Creation of Commissioner of Deeds Statutes**

The bill creates Part IV of ch. 721.96, F.S., to provide for commissioners of deeds. The provisions are similar to prior ch. 188, F.S., which was repealed in 1997. However, under that chapter, commissioners of deeds had authority to acknowledge instruments relating to any lands in Florida, while the bill limits the acknowledgment authority to instruments to be used or recorded in connection with a timeshare estate, timeshare license, any property subject to a timeshare plan, or the operation of a timeshare plan located within this state.

Under the bill, commissioners of deeds are to be appointed by the Governor to terms of 4 years. Commissioners of deeds are authorized to take acknowledgments, proofs of execution, and oaths in connection with the execution of any deed, mortgage, deed of trust, contract, power of attorney, or any other writing to be used or recorded in connection with a timeshare estate, timeshare license, any property subject to a timeshare plan, or the operation of a timeshare plan located within this state. The instruments must be executed outside the United States in a manner directed by the laws of Florida and must be certified by a commissioner of deeds. The certification must be endorsed on or annexed to the instrument, and has the same effect as if made or taken by a notary public licensed in this state.

The bill provides that any official acts performed by previously appointed commissioners of deeds, between May 30, 1997 and the effective date of this act, are valid as though the acts were performed in accordance with and under the authority of the provisions of the bill.

The division has no duties or authority under this part.

### **C. Amendment of General Timeshare Statutes**

Current s. 721.03(1)(b), F.S., provides an exemption from ch. 721, F.S., for offers to sell timeshare plans with accommodations or facilities located in Florida when the offers are made outside of the state. The bill amends this paragraph to clarify that the exemption is effective if the seller files the required public offering statement information and the filing is approved within 6 months. The bill amends s. 721.03(1)(c), F.S., to grant the division rulemaking authority to designate which provisions of the public offering statement statutes need not be addressed in the filing. The bill provides that the current fees set forth in s. 721.07(4), F.S., apply to all filings made under this section. The bill requires an additional disclosure in the purchase contract to inform purchasers of any other party's actual interest in the accommodations or facilities offered for sale, including the developer's.

The bill defines the term “regulated short-term product.” Regulated short-term products are offered as samples of a timeshare product at a lower price and for a shorter duration. “Regulated short-term product” is defined to mean a contractual right offered by the seller to use accommodations of a timeshare plan, provided that the contract to purchase the right meets two requirements which are specified in the definition. First, the contract must be executed in Florida on the same day that the prospective purchaser attends a timeshare sales presentation. Second, the contract must either provide that all or a portion of the consideration paid for the regulated short-term product will be credited toward a timeshare purchase or establish a fixed cost of a future purchase of a timeshare interest.

The bill amends s. 721.06(1)(f), F.S., to clarify that the 10-day period during which a contract for purchase of timeshare periods may be canceled without penalty or obligation is the later of 10 *calendar* days after the date the contract is signed or within 10 *calendar* days after receiving the approved public offering statement.

The bill amends s. 721.07(3)(a), F.S., to increase from 20 days to 45 days the time period for the division to approve a proposed public offering statement amendment that adds a new component site to an approved multi-site timeshare plan.

The bill deletes subsection (4) of s. 721.075, F.S., which requires an irrevocable letter of credit, surety bond, or other assurance if the incidental benefits exceed 5 percent of the purchase price. Eliminating this provision will permit the division to focus on other significant enforcement needs. In the case of nonperformance by a developer, the civil remedies contained in s. 721.21, F.S., which include attorney’s fees, are available to a purchaser.

The bill also amends this section to allow a developer to renew or extend the availability of an incidental benefit and to delete a prohibition against the developer representing such benefits to the purchaser. The disclosure statement must indicate that it is the developer’s option whether or not to renew or extend the incidental benefit, and that the purchase in a timeshare interest should not be based on the availability of such a benefit.

The bill amends s. 721.09(1), F.S., to clarify that a seller may advertise the reservation deposit program prior to filing the public offering statement with the division, so long as the fully executed escrow agreement and reservation agreement have been filed and the advertising material meets specified requirements. The advertising material must contain a general description of the proposed timeshare plan and must disclose that no interest in the timeshare can be sold until the public offering statement has been filed with the division in accordance with ch. 721, F.S. The developer has 90 days after the approval of the reservation agreement to file the public offering statement. Otherwise, the developer must cease collection of reservation deposits and advertisement of the reservation agreement and cancel and refund all outstanding reservation deposits.

The bill adds subsection (6) to s. 721.11, F.S., regarding advertising materials, to provide that a “regulated short-term product” must contain certain cancellation provisions and must be

submitted for the division's approval 10 days prior to its use. The agreement for a regulated short-term product must contain specific notice language regarding the purchaser's right to cancellation within 10 days of executing the agreement, and must contain a description of refund procedures.

The bill conforms s. 721.13, F.S., to the current administrative rule, which requires the annual audit of the timeshare plan financial records to be filed with the division within 5 months after the end of the timeshare plan's fiscal year. The bill deletes the requirement of an independent audit and requires that the certified public accountants performing the audits be licensed in Florida, that the financial statements be prepared on an accrual basis of accounting and presented in accordance with generally accepted accounting principles, and that timeshare condominiums be exempt from the annual financial reporting requirements provided for condominiums in s. 718.111(13) and (14), F.S. The bill also requires that a copy of the budget be submitted to the division, along with a statement indicating the number of 7-day periods that exist within the timeshare plan.

The bill amends s. 721.13(3)(i), F.S., to require the managing entity to include with its filing of the receipts and disbursements statement either a statement disclosing whether ad valorem property taxes have been paid for the timeshare development, or a statement disclosing the amount of any delinquent taxes, interest, and penalties due for each assessment year. This will enable the division to monitor the management of each timeshare plan and incorporate this information into on-going settlement negotiations or enforcement cases pending against financially troubled timeshare plans. Subsection (4) of s. 721.13, F.S., is amended to enable purchasers of licensed timeshare plans to request a mail-out for legitimate association business, as currently provided to the purchasers of condominium or cooperative timeshare plans.

The bill amends s. 721.15(1), F.S., to permit the developer of a condominium timeshare plan to allocate common expenses of the timeshare plan in a reasonable manner different from the requirements currently applicable to all condominiums.

The bill amends s. 721.18, F.S., to change the date by which timeshare exchange companies must submit specified information to the division from the current "at least 20 days prior to July 1 of each year" to "on or before June 1 of each year."

The bill amends s. 721.26, F.S., which provides for regulation of timeshares by the division, to exempt newly created Parts III and IV, relating to timeshare lien foreclosures and commissioners of deeds, from regulation by the division. This exemption is also provided in newly created ss. 721.86(3) and 721.98, F.S. The bill also provides for regulation of those persons who materially participate in the management or operation of a timeshare plan, and provides for imposition of penalties against a regulated party who violates any administrative rules adopted pursuant to ch. 721, F.S.



The bill amends s. 721.265, F.S., to allow the division to provide substituted service of process in receivership proceedings on registered agents in accordance with the new streamlined judicial procedures.

**D. Effective Date**

The bill takes effect upon becoming law, except that, with respect to any timeshare plan filing approved by the division prior to the date the act becomes law, the amendment to s. 721.06(1)(f), F.S., relating to the required notice in contracts for purchase of a timeshare unit, will not apply to such filing until January 1, 1999, unless the developer otherwise voluntarily agrees to comply with the provision.

**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:

The bill provides for a streamlined method of foreclosing on timeshare properties, which should ease the fiscal burdens of owners' associations and lending institutions in recovering mortgage and assessment liens, and have a positive fiscal impact on the timeshare industry. Elimination of the surety bond required of developers that offer incidental benefits could result in an increase in incidental benefits offered, and potentially an increase in total sales.

C. Government Sector Impact:

The fiscal impact is indeterminable. The division is afforded greater flexibility in imposing penalties for rule violations. The division expects that local governments could see an

increase in the number of timeshare plans that fully pay the annual ad valorem tax assessments as a result of the streamlined foreclosure procedures.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposed legislation.

**VIII. Amendments:**

None.

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

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