

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 6, 1998 Revised: _____

Subject: Timeshare Plans/Timeshare Lien Foreclosure Act

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

I. Summary:

The bill revises chapter 721, Florida Statutes, relating to timeshare plans. The bill authorizes rulemaking authority to create exemptions to chapter 721, F.S.; increases the number of days that the Division of Florida Land Sales, Condominiums and Mobile Homes can 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" and provides for disclosure and cancellation provisions; authorizes the advertisement of such agreements subject to the division's approval; and allows developers greater flexibility in the allocation of common expenses. The bill 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 also provides for an expedited judicial foreclosure procedure for timeshare estates whereby a registered agent is duly appointed by the obligor for the purpose of accepting all notices and service of process. The newly created foreclosure proceedings may also consolidate defendant obligors and junior interestholders. The bill allows service of process to be made through certified or registered mail.

The bill provides for commissioners of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country.

The bill substantially amends, creates, or repeals 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, 721.265, 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, Florida Statutes, provides statutory recognition to real property timesharing and personal property timesharing in the state, establishes procedures for the creation, sale, exchange, promotion, and operation of timeshare plans, and provides for full and fair disclosure of timeshare plans to purchasers and prospective purchasers.

Section 721.03, F.S., provides that chapter 721 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 and complies with specific disclosure requirements.

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

Section 721.06, F.S., requires that a conspicuous disclosure, stating that the purchaser has ten 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 voidability 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 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 notice must be provided to the purchaser of each timeshare period that the audit is available. 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 chapters 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 chapters 718 and 721. 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 of chapter 97-241, Laws of Florida, and section 59 of chapter 97-278, L.O.F., 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 chapter 97-278, Laws of Florida.

III. Effect of Proposed Changes:

Section 1 amends s. 721.03(1)(b), F.S., to clarify that the exemption in this paragraph is effective if the filing contains the information required by s. 721.07 or 721.55, F.S. (both relating to public offering statements), and is approved within 6 months of filing. The bill clarifies that fees set forth in s. 721.07(4) apply to all filings made under this section. The bill provides an additional disclosure requiring the purchase contract to inform purchasers of any other party's actual interest, including the developer's, in the accommodations or facilities offered for sale. The bill amends s. 721.03(1)(c), F.S., to grant the division rulemaking authority to designate which provisions do not apply to filings submitted under paragraph (b).

Section 2 defines the term "regulated short-term product" to mean a contractual right offered by the seller to use accommodations of a timeshare plan. Regulated short-term products are offered as samples of a timeshare product at a lower price and for a shorter duration. The agreement must be executed in Florida after the prospective purchaser attends a sales presentation and the developer must agree to offer the purchaser a credit for all or a portion of the consideration paid or establish a fixed cost of a future purchase of a timeshare interest.

Section 3 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 latter of 10 *calendar* days after the date the contract is signed or within 10 *calendar* days after receiving the approved public offering statement.

Section 4 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 amendment that adds a new component site to an approved multi-site timeshare plan.

Section 5 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 non-performance by a developer, other civil remedies are available to a purchaser, including the award of attorneys fees.

This section is also amended to allow a developer to renew or extend the availability of an incidental benefit. The developer is not prohibited from 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 benefit.

Section 6 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 chapter 721. 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.

Section 7 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 statements describing refund procedures and that the specific value of the benefits is as agreed to by the purchaser and the seller. The agreement must also contain specific language regarding the purchaser's right to cancellation within 10 days of executing the agreement and provides an exception to some requirements if the cancellation period is longer.

Section 8 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 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.

Paragraph (i), of subsection (3), of s. 721.13, F.S., is amended 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.

Section 9 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. It grants the developer the flexibility to differentiate in the allocation between whole-unit condominium units and timeshare condominium units based on a combination of factors, or any reasonable basis.

Section 10 clarifies s. 721.18, F.S., requiring an exchange company to submit both the audit and the specified information as required in subsection (1) of s. 721.18, F.S., on or before June 1 of each year.

Section 11 amends s. 721.26, F.S., increasing the division's authority to seek personal liability against regulated parties and related parties who violate chapter 721 — except for the provisions in the newly created parts III and IV — or any administrative rules involving acts of fraudulence during the management and operation of the timeshare plan.

Section 12 amends s. 721.265, F.S., allowing the division in receivership proceedings to provide substituted service of process on registered agents in accordance with the new streamlined judicial procedures.

Section 13 creates part III of chapter 721, F.S., the “Timeshare Lien Foreclosure Act.” Section 721.81, F.S., provides that the purpose of this act is to recognize the necessity of streamlined procedures for the foreclosure of all assessment and mortgage liens against a timeshare estate and finds that such procedures will benefit the timeshare industry and vacation ownership resort owners' associations.

Section 721.82, F.S., defines the following terms: “assessment lien”; “junior interestholder”; “lienholder”; “mortgage”; “mortgage lien”; “mortgagee”; “mortgagor”; “notice address”; “obligor”; “registered agent” and “registered office.”

Section 721.83, F.S., provides for the consolidation of foreclosure actions if the following conditions are present: 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; and, the nature of the defaults are the same for each defendant. Any defendant who timely raises a defense or counterclaim will be severed from the proceedings and receive a separate trial.

Section 721.84, F.S., provides the duties and responsibilities of a registered agent. The signed agreement appointing the registered agent must include the registered agent's name and street address, the obligor's name and mailing address, the instruments out of which a lien arises and the purpose of the appointment, and a statement confirming the registered agent's acceptance of the duties contained in this section. The obligor must also acknowledge the responsibility of informing the registered agent if the obligor's mailing address has changed. This section provides procedures for changing (but not revoking) the obligor's registered agent, for modifying a registered agent's address, and for resignation of the registered agent and appointment of a successor agent. All

procedures require proper notification of the lienholders. The section also requires that the registered agent mail all notices and documents to the obligor either by first class mail (for U.S. addresses) or international air mail. The section provides that the registered agent will not be liable if the agent has complied with the provisions of this section in a timely manner.

Section 721.85, F.S., provides for service of process for a foreclosure proceeding. Service of process can be made on any person or registered agent, if one is appointed, by certified or registered mail, upon the signing of the return receipt.

Section 721.86, F.S., provides for severability of the provisions in part III. It provides that the division has no authority to regulate, enforce or ensure compliance with provisions of this part. It also provides that the provisions in part III shall apply to all assessment liens and mortgage liens existing prior to the effective date of this act, but will not apply to those for which a foreclosure procedure has commenced.

Section 14 creates part IV of chapter 721, F.S., regarding “Commissioner of Deeds.” Section 721.96, F.S., provides that the purpose of this part is to allow for the appointment of commissioners of deeds who may take acknowledgments, proofs of execution and oaths outside the United States in connection with any instrument related to timeshare estates or plans.

Section 721.97 authorizes the Governor to appoint commissioners of deeds for a period of 4 years 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, license or any other property subject to a timeshare plan. The execution must take place outside the United States in a manner directed by the laws of Florida and shall have the same effect as if the execution were made by a notary public licensed in this state. In order to be commissioned, a commissioner of deeds must file an oath with the Department of State. This section also recognizes any official acts performed by previously appointed commissioners of deeds between May 30, 1997 and the effective date of this act.

Section 721.98 provides that the division has no duties or authority under this part.

Section 15 provides an effective date upon becoming law, except as 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., will not apply to such filing until January 1, 1999, unless the developer otherwise voluntarily agrees to comply with the provisions.

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 undeterminable. 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.