

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 1408

INTRODUCER: Regulated Industries Committee and Senator Gardiner

SUBJECT: Timeshares

DATE: January 26, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.			BC	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill requires the full and fair disclosure of terms, conditions, and services offered by timeshare resale service providers, which includes brokers and advertisers who offer unsolicited telemarketing, direct mail, or e-mail in connection with the offering of resale brokerage services or resale advertising services to consumer owners of timeshare who wish to sell their interest in a timeshare. It provides exceptions for sales by consumers and licensed real estate brokers.

The bill specifies the information that resale service providers must provide to the consumer timeshare resellers before engaging in resale brokerage services or resale advertising services, including a description of any fees or costs; a description of when such fees or costs are due; and the ratio or percentage of the number of timeshare resale interests sold or rented versus the number of timeshare resale interests listed for sale or rent by the timeshare resale broker for each of the previous two calendar years. Resale service providers may not engage in those activities of a real estate broker unless they are a licensed real estate broker.

The bill prohibits timeshare resale service providers from:

- Misrepresenting that they will provide any type of direct sales or resale brokerage services;
- Misrepresenting that another person has a preexisting interest in the timeshare without providing identifying information for that person;
- Representing that sales or rentals have been achieved or generated, unless the resale provider substantiates the statement at the representation is made;
- Representing that a specific number of sales or rentals have been sold or rented without providing the consumer with the ratio or percentage timeshare interests advertised that have actually resulted in a sale or rental for each of the previous two calendar years.
- Representing that a timeshare interest has a specific resale value.
- Collecting any payment without a written contract signed by the consumer.

The bill specifies the information that must be included in a written contract for resale advertising services, which includes a conspicuous statement that the consumer has the right to cancel the contract for advertising services within 10 days after the date the contract is signed. The bill also requires that resale advertisers provide a full refund within 20 days of the consumer's cancellation of the agreement, or five days after the consumer's check has cleared, whichever is later.

If the contract for resale advertising services fails to comply with the provisions in the bill, the contract would be voidable at the option of the consumer for one year after the date it is executed by the consumer. If a violation of the provisions in the bill occurs during an offering of resale services, both the resale service provider and the person who actually commits the violation would be deemed to have violated this section.

The bill provides that persons who provide resale advertising services for timeshare interest have submitted to the jurisdiction of the state courts. The bill provides a civil penalty of \$15,000 per violation in addition to the penalties and remedies provided in the Unfair and Deceptive Trade Practices Act in part II of ch. 501, F.S.

The bill provides an effective date of July 1, 2012.

This bill substantially amends sections 721.02, 721.05, and 721.20, Florida Statutes. The bill creates section 721.205, Florida Statutes.

II. Present Situation:

Timeshares

A timeshare interest is a form of ownership of real property. According to a report prepared by the American Resort Development Association (ARDA), Florida had 23 percent of the estimated 1,548 timeshare resorts in the United States in 2010.¹

¹ ARDA International Foundation, *State of the Vacation Timeshare Industry: United States Study*, 2011 Edition, a copy of the report is available at: http://www.arda.org/uploadedFiles/ARDA/News_and_Information/Industry_Information/Industry_Media_Fact_Sheets/2011%20state%20of%20industry%20fact%20sheet.pdf (Last visited January 19, 2012).

In a timeshare, the real property is typically a condominium unit or a cooperative unit. A timeshare property is typically a resort in which multiple parties hold the right to use the property. Each owner of a timeshare interest is allotted a period of time (typically one week) in which they may use the property.

The Florida Vacation Plan and Timesharing Act, ch. 721, F.S., establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.² Chapter 721, F.S., applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the accommodations and facilities are located within this state or offered within this state.³ A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods or a condominium unit in which timeshare estates have been created.⁴ A timeshare plan is any arrangement, plan, scheme, or similar device whereby a purchaser gives consideration for ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years.⁵

Section 721.05(34), F.S., defines a “timeshare estate” as “a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof.” The term also includes an interest in a condominium unit, a cooperative unit, or a trust.

A timeshare plan developer must file a public offering statement and the required exhibits with the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation, prior to offering the timeshare plan to the public.⁶

For each timeshare plan, the developer must provide for a managing entity, which must be the developer, a separate manager or management firm, or an owners’ association.⁷

Timeshare Resale Agreements

Section 721.06-721.12, F.S., provide the duties and rights of timeshare sales agreements. Section 721.10, F.S., provides purchasers of timeshare interests the right to cancel the purchase agreement within 10 days of it being signed by the consumer.

Section 721.065(2), F.S., specifies the disclosures that must be made in a resale purchase agreement. These disclosures are required to be made by the owner of a timeshare who acquires a timeshare interest for her or his own use and occupancy and later offers it for resale, or any agent of such person.⁸

² Section 721.02(2) and (3), F.S.

³ Section 721.03, F.S.

⁴ See ss. 721.05(41) and 718.103(26), F.S.

⁵ Section 721.05(39), F.S.

⁶ Section 721.07, F.S.

⁷ Section 721.13(1)(a), F.S. The duties of a managing entity are detailed in s. 721.13(3), F.S.,

⁸ Section 721.065(1), F.S.

The disclosures in s. 721.065(2), F.S., may be made by the following persons or entities in lieu of the disclosures specified in ss. 721.06-721.12 and 721.20, F.S.:

- A managing entity, not otherwise a developer, that sells, or engages a third party to sell on its behalf, 50 or fewer timeshare interests in the timeshare plan which it manages in a given calendar year to persons who are not existing purchasers of that timeshare plan; and
- A managing entity, not otherwise a developer, that sells, or engages a third party to sell on its behalf, timeshare interests in the timeshare plan which it manages to persons who are existing purchasers of that timeshare plan.

There is a rebuttable presumption that an owner who has acquired more than seven timeshare interests did not acquire them for her or his own use and occupancy.⁹

The disclosures specified in s. 721.065(2), F.S., include identifying information of the timeshare plan and the managing entity of the timeshare plan, a conspicuous statement regarding the current year's assessments for common expenses, and a statement that provides that the contract may be cancelled without penalty within 10 days after it is signed.

The disclosures in s. 721.065(2), F.S., do not apply to an agreement for the advertisement of timeshare interest for resale or other timeshare resale services.

Timeshare Resale Service Provider

Most timeshare resale companies charge consumers approximately \$300 to \$500 to list or advertise a timeshare.¹⁰

Section 721.05(44), F.S., defines the term "resale service provider" to mean:

any person who uses unsolicited telemarketing, direct mail, or e-mail in connection with the offering of resale brokerage or resale advertising services to owners of timeshare interests. The term does not include developers, managing entities, or exchange companies to the extent they offer resale brokerage or resale advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

Section 721.20(9), F.S., resale service providers are required to disclose the description of any fees or costs relating to advertising, listing or sale of the timeshare interest that must be paid to the resale service provider or third party, when the fee is due and the ratio or percentage of the number of listings of timeshare interests for sale versus the number of timeshare interests sold by the resale service provider for each of the previous two calendar years.

Failure to disclose this information in writing constitutes an unfair and deceptive trade practice pursuant to ch. 501, F.S.¹¹ Any contract that is entered into in violation of s. 721.20(9), F.S., is

⁹ *Id.*

¹⁰ See Office of Attorney General Bill McCollum, How to Protect Yourself: Timeshare Sales & Resales, August 8, 2004. A copy of this news release is available at: <http://www.myfloridalegal.com/NewsBrie.nsf/OnlineAlerts/982958C2786805568525703C006A0739> (Last visited January 21, 2012). This estimate of cost was confirmed by a representative for the American Resort Development Association.

void and the purchaser is entitled to a full refund of any money paid to the resale service provider.

Section 721.11, F.S., provides for the approval of the advertising materials used by developers. Section 721.20(9), F.S., which provides for the advertisement of a timeshare resale does not reference the advertising provisions in s. 721.11, F.S.

Deceptive and Unfair Trade Practices Act

Part II of ch. 501, F.S., provides the Deceptive and Unfair Trade Practices Act (DUTPA or act). This act addresses issues of consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices.¹² Violations of the act are enforced by the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction. The Department of Legal Affairs is the enforcement authority if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.¹³

The enforcing authority may seek a declaratory judgment to determine whether an act or practice violate the act, file an action to enjoin any person who has violated, is violating, or is otherwise likely to violate the act, or take legal action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of the act.¹⁴

The act provides for a civil penalty of no more than \$10,000 for willful violations. The enforcing authority is also entitled to reasonable attorney's fees and costs if civil penalties are assessed in any litigation.¹⁵

Real Estate Broker

A person may not provide the services of a real estate broker without a valid and current license issued by the Florida Real Estate Commission within the Department of Business and Professional Regulation. Operating as a broker without a license is a felony of the third degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., or, if a corporation, as provided in s. 775.083., F.S.¹⁶

Section 475.01(1)(a), F.S., defines the term "broker" to mean:

a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises

¹¹ Part II of ch. 501, F.S., may be cited as the "Florida Deceptive and Unfair Trade Practices Act."

¹² See s. 501.202, F.S.

¹³ Section 501.202(2), F.S.

¹⁴ Section 501.207(1), F.S.

¹⁵ Section 501.2075, F.S.

¹⁶ Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not exceeding five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not exceeding \$5,000.

or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). Where the term “appraise” or “appraising” appears in the definition of the term “broker,” it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term “broker” also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term “broker” also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

Consumer Complaints Regarding Timeshare Resale Advertisers

The Office of the Attorney General Pam Bondi (AG) received 8,700 consumer complaints in 2011 related to timeshare resale. According to the AG, the number of consumer complaints the office has received has significantly increased in recent years. The most common complaints relate to false claims that a specific buyer is ready to buy or rent the property once the consumer signs a contract, deceptive claims that the property will sell/rent within a certain time, failure to honor stated cancellation policies, including refunds of fees, and misrepresentations of the actual services provided to consumers.

In 2009, the Attorney General’s Economic Crimes Division began a state-wide initiative to investigate timeshare resellers. More than 60 companies were investigated, and as of July 2010, the Economic Crimes Division had 48 active investigations. On July 20, 2010, Attorney General Bill McCollum filed three lawsuits against timeshare resale companies alleging deceptive and unfair trade practices, seeking restitution for affected consumers, and to prohibit the companies from engaging in further violations.¹⁷ In 2009, the AG entered into an agreement with two timeshare resale companies to pay \$190,483 in consumer restitution and the AG’s fees and investigative costs.¹⁸

¹⁷ See Office of Attorney General Bill McCollum, *Attorney General Announces Additional Consumer Protection Efforts Against Timeshare Resale Scams*, July 20, 2010. A copy of this news release is available at: http://myfloridalegal.com/_852562220065EE67.nsf/0/EF554E6AF98D6BA8852577660051766F?Open&Highlight=0,timeshares (Last visited January 21, 2012).

¹⁸ See Office of Attorney General Bill McCollum, *South Florida Timeshare Companies to Pay Over \$190,000 in Consumer Restitution*, April 17, 2009. A copy of this news release is available at:

III. Effect of Proposed Changes:

Section 1. The bill amends section s. 721.02, F.S., to provide that a purpose of ch. 721, F.S., is to require the full and fair disclosure of terms, conditions, and services offered by resale services providers.

Section 2. The bill amends the definition of the term “resale service provider” in s. 721.05(44), F.S., to include resale brokers, resale advertisers, or other person or entity, including any agent or employee of such person, within the meaning of the term.

The conduct of a resale service provider is redefined to include offering or using telemarketing, or other means of communication. The bill deletes the provision that defines the communication as unsolicited. The bill replaces the term “owners of timeshare interests” with the term “consumer timeshare resellers.”

The bill exempts resale brokers from the definition of “resale service provider” to the extent that they offer resale advertising services in connection with resale brokerage services and do not collect an advance fee for the advertising service. It exempts consumer timeshare resellers who acquire a timeshare interest or timeshare interests for his or her use and occupancy and who later offers the timeshare interest or interests for rent. It also exempts the resale of seven or fewer timeshare interests within a given calendar year when the interest was acquired for the use and occupancy of the consumer timeshare reseller.

The bill also amends s.721.05, F.S., to define several terms. It defines the terms “consumer resale timeshare interest,” “consumer timeshare reseller, ”real estate brokerage services,” and “resale advertising service.”

It defines the term “resale broker” to a person, or an agent or employee of such person, who is a licensed real estate broker under ch. 475, F.S., and offers or provides resale brokerage services to consumers for compensation or valuable consideration.

The bill defines the term “resale advertiser” to mean persons who offer, personally or through an agent, to resale advertising services to consumer timeshare resellers for compensation or valuable consideration. This applies to offers made in person, by mail, by telephone, through the internet, or other medium of communication. The bill exempts the following persons to the extent that they offer resale advertising services:

- Resale brokers if the advertising service is in connection with timeshare resale brokerage services and no advance fee is collected;
- Developers, managing entities, or exchange companies if the advertising service is limited to their own timeshare plans or members of their own exchange programs; or
- Newspaper, periodicals, or website owners, operators, or publishers, unless they derive more than 10 percent of its gross revenue from providing resale advertising services.

The percentage of gross revenue is based on the gross revenue derived from providing resale advertising services from any affiliate, parent, agent, and subsidiary of the newspaper, periodical, or website owner, operator, or publisher, so long as the resulting percentage of gross revenue is not decreased by the inclusion of such affiliate, parent, subsidiary, or agent in the calculation.

Section 3. The bill repeals s. 721.20(9), F.S., which provides the current disclosure requirements and penalties for resale service providers.

Section 4. The bill creates s. 721.205, F.S., to provide disclosure requirements for resale service providers.

Section 721.205(1), F.S., specifies the information that resale service providers must provide to the consumer timeshare resellers before engaging in resale brokerage services or resale advertising services. Resale service providers must provide:

- A description of any fees or costs; and
- A description of when such fees or costs are due.

Section 721.205(1)(b), F.S., provides that a resale service provider may not engage in those activities described in s. 475.01(1)(a), F.S., which define the activities that require a real estate broker's license under ch. 475, F.S., without being the holder of a valid and current active license in accordance with ch. 475, F.S.

Section 721.205(2), F.S., specifies the conduct that resale service providers are prohibited from engaging in during the course of offering resale advertising services. Resale advertiser may not:

- Represent that he or she will provide or assist in providing any type of direct sales or resale brokerage services other than the advertising of the consumer resale timeshare interest for sale or rent;
- Represent that another person has a preexisting interest in the timeshare without providing identifying information for that person;
- Represent that sales or rentals have been achieved or generated, unless the resale provider gives the consumer, at the time of making the representation, documentation to substantiate the statement;
- Represent that a specific number of sales or rentals have been sold or rented without providing the consumer with the ratio or percentage timeshare interests advertised that have actually resulted in a sale or rental for each of the previous two calendar years.
- Represent that a timeshare interest has a specific resale value.
- Collect any payment without first receiving a written contract that complies with the s. 721.205(2)(d), F.S.; and
- Engage in any resale advertising services for compensation or valuable consideration without first obtaining a written contract signed by the consumer timeshare reseller.

Section 721.205(2)(d), F.S., specifies the information that must be included in a written contract for resale advertising services. The contract must be printed in at least 12-point type and must contain the following information:

- Identifying information to which a contract cancellation notice may be delivered by the consumer at his or her election.
- A complete description of all resale advertising services to be provided, the itemized cost to the consumer, and a statement of the total cost to the consumer;
- A statement printed in at least 12-point boldfaced type that advises the consumer of their right to cancel the contract for advertising services within ten days after the date the contract is signed;
- A statement that the consumer will receive a full refund within 20 days after the resale provider receives the notice of cancellation or five days after the consumer's check has cleared, whichever is later.
- A statement that any resale contract entered into must comply in all respects with s. 721.065, F.S., including the 10-day cancellation period for the prospective consumer resale purchaser.

Section 721.205(2)(g), F.S., requires that resale advertisers honor any cancellation notice that was received within 10 days after the date the contract for resale advertising services is signed.

Regarding the refund, s. 721.205(2)(h), F.S., requires that resale advertisers provide a full refund of all money paid by a consumer within 20 days after the resale provider receives the notice of cancellation of the contract or five days after the consumer's check has cleared, whichever is later.

Section 721.205(3), F.S., provides that a contract for resale advertising services that fails to comply with s. 721.205(2), F.S., shall be voidable at the option of the consumer for one year after the date it is executed by the consumer.

Section 721.205(4), F.S., imposes a duty on resale service providers to supervise, manage, and control all aspects of the offering of resale brokerage services or resale advertising services by any agent or employee of the resale service provider. If a violation of s. 721.205, F.S., occurs during an offering of resale services, both the resale service provider and the person who actually commit the violation would be deemed to have violated this section.

Section 721.205(5), F.S., provides that persons who provide resale advertising services with respect to the resale of a consumer resale timeshare interest in a property located in Florida, has submitted to the jurisdiction of the state courts for the purposes of s. 48.193(1), F.S., which enumerates the acts which submit persons to the jurisdiction of the courts of this state.

Section 721.205 (6), F.S., provides that the use of any unfair or deceptive act or practice by any person in connection with resale advertising services is a violation of s. 721.205, F.S.

Section 721.205(7), F.S., provides a civil penalty of not more than \$15,000 per violation of s. 721.205, F.S. Such civil penalty is in addition to the penalties and remedies provided in part II of ch. 501, F.S., for unfair and deceptive trade practice as prohibited by s. 501.204, F.S.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on January 26, 2012:

The committee substitute (CS) amends the definition of “resale service provider” in s. 721.05(44), F.S., resale brokers to the extent that they offer resale advertising services in connection with resale brokerage services and do not collect an advance fee for the advertising service.

The CS does not create s. 721.205(1), F.S., to require timeshare resale service providers to provide to consumers the ratio or percentage of the number of timeshare resale

interests sold or rented versus the number of timeshare resale interests listed for sale or rent by the timeshare resale broker for each of the previous two calendar years.

The CS does not create s. 721.205(2)(b), F.S., to require that, when a timeshare resale service provider represents that it has been successful in identifying buyers and renters, the resale service provider must document the responses to its advertisements and, before any payment is collected, provide the consumer with the ratio or percentage of the timeshare interests advertised for sale that have resulted in a sale, or rent if advertised for rent, for each of the previous two calendar years.

The CS creates s. 721.205(2)(c), F.S., to require that when a timeshare resale provider represents that sales or rentals have been achieved or generated, the resale provider must give the consumer, at the time of making the representation, documentation to substantiate the statement.

The CS creates s. 721.205(2)(c), F.S., to require that, when a timeshare resale service provider represents that he or she has sold or rented a specific number of timeshare interests, the resale provider must give the consumer the ratio or percentage timeshare interests advertised that have actually resulted in a sale or rental for each of the previous two years.

The CS creates s. 721.205(2)(d), F.S., to prohibit timeshare resale service providers from stating or implying that a timeshare interest has a specific resale value.

The CS revises the written notice provided in s. 721.205(2)(f), F.S., to reference a right to cancel an agreement for resale advertising services within 10 days after the consumer signs the of the agreement instead of within 7 days.

The CS revises the cancellation period in s. 721.205(2)(h), F.S., to extend the cancellation period from seven days to 10 days after the consumer signs the agreement for resale advertising services.

B. Amendments:

None.