

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/CS/SB 1682

INTRODUCER: Rules Committee; Regulated Industries Committee and Senators Garcia and Rodriguez

SUBJECT: Condominiums

DATE: April 26, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<b>Fav/CS</b>
3.	<u>Cibula</u>	<u>Phelps</u>	<u>RC</u>	<b>Fav/CS</b>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1682 makes three main categories of changes relating to the regulation and operation of condominium associations. The changes:

- Define and prohibit or restrict activities constituting a conflict of interest which may be detrimental to the unit owners of a condominium.
- Increase access to records by unit owners.

These changes are substantially based on a final report by a Miami-Dade County grand jury, titled, *Addressing Condo Owners' Pleas for Help: Recommendations for Legislative Action*. The grand jury found that the existing statutes do not sufficiently restrict self-dealing by members of the boards of condominiums or sufficiently deter other forms of misconduct such as election fraud. Additionally, the grand jury found that the existing statutory mechanisms are insufficient to force condominium associations to make their official records available to unit owners in a timely manner.

**II. Present Situation:**

A condominium is a form of ownership of real property which is comprised entirely of units which are accompanied by an undivided share in common elements, such as hallways, staircases, parking lots, and recreational facilities.<sup>1</sup> An association, which is a nonprofit corporation

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<sup>1</sup> Section 718.103(11), F.S.

comprised of the unit owners of the condominium, is responsible for operating the condominium.<sup>2</sup> The board of the condominium is a representative body that is responsible for managing the association.<sup>3</sup>

Condominium associations are self-governing but are regulated to some degree by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation (DBPR). Larger condominium associations may operate with the assistance of a community association management firm or community association manager. Community association management firms and community association managers are also licensed and regulated by the department.<sup>4</sup>

### **Condominium Powers and Duties**

The powers and duties of the association, operated by the board, include the power or duty to:

- Manage the condominium's property.
- Contract, sue, and be sued.
- Make and collect assessments and maintain the common elements of the association.
- Purchase adequate property insurance.
- Obtain liability insurance for its directors and officers.
- Maintain insurance or a fidelity bond for those persons who control or disburse the association's funds.
- Maintain the official records of the association, which include:
  - Minutes of the meetings of the board of administration.
  - The association's insurance policies.
  - Accounting records for the association.
  - Ballots, sign-in sheets, and other papers relating to voting by unit owners.
- Make the official records of the association available to a unit owner within five working days after the receipt of a written request.
- Preparing financial reports and providing them to unit owners.<sup>5</sup>

### **Restrictions on Conflicts of Interest**

Chapter 718, F.S., imposes a number of general restrictions on conflicts of interest by members of the board of a condominium association. The members of the board of the association have a fiduciary relationship to the unit owners.<sup>6</sup> Consistent with this responsibility, officers and directors may not solicit or accept anything of value from a person providing or proposing to provide goods or services to the association. An officer or director who violates the prohibition is subject to a civil penalty.<sup>7</sup>

Additionally, officers and directors are required to exercise their duties "in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances,

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<sup>2</sup> Section 718.111(1)(a), F.S.

<sup>3</sup> Section 718.103(4), F.S.

<sup>4</sup> See part VIII of ch. 468, F.S.

<sup>5</sup> Section 718.111, F.S.

<sup>6</sup> Section 718.111(1)(a), F.S.

<sup>7</sup> *Id.*

and in a manner he or she reasonably believes to be in the interests of the association.”<sup>8</sup> An officer or director of an association is liable for monetary damages if he or she breaches or fails to perform his or her duties and the breach or failure related to certain violations of criminal law, an improper personal benefit, or certain reckless acts.<sup>9</sup>

The restrictions on conflicts of interest by board members do not prohibit a board member from having a financial interest in a party providing maintenance or management services to the association.<sup>10</sup> In those cases, contracts between the party providing maintenance or services are permissible if the board member’s interest in the party is disclosed in the contract.

Officers and directors of a condominium association are required to comply with s. 617.0832, F.S., dealing with the general standards for directors in not-for-profit corporations. Officers and directors must disclose and seek approval of conflicts of interest related to contracts between the board of a not-for-profit corporation and a member or members of the board. Such a contract is not void or voidable, if:

- The relationship is disclosed to the board or committee that approves or ratifies the contract or transaction by a vote or consent that does not count the interested director or directors;
- The fact of such relationship or interest is disclosed or known to the members of the board or committee entitled to vote on such contract or transaction, if any, and they authorize, approve, or ratify it by vote or written consent; or
- The contract or transaction is fair and reasonable as to the corporation at the time it is authorized by the board, a committee, or the members.

To ratify or approve a conflict of interest, an affirmative vote is required by a majority of the directors on the board who have no relationship or interest in the transaction or contract. The conflict of interest may not be approved or ratified by a single director.<sup>11</sup> However, the presence or vote of such a director, whose conflict of interest has been ratified or approved by the board, may be counted for purposes of determining whether the transaction is approved.<sup>12</sup>

### **Homeowners’ Association Comparison – Conflicts of Interest**

In contrast, contracts between mandatory homeowners’ associations under ch. 720, F.S., and directors or entities in which a director has a financial interest, must comply with conflict of interest procedures outlined in s. 617.0832, F.S., comply with disclosure requirements outlined in s. 617.0832, F.S., be approved by a two-thirds vote of the directors present, and be disclosed at the next regular or special meeting of the members.<sup>13</sup> If any member of a homeowners’ association makes a motion at the next regular or special meeting of the members, the contract may be canceled by a majority vote of the members present. If the contract is canceled, the association is only liable for the reasonable value of goods and service previously provided and is not liable for any fee or damages connected to the cancellation.<sup>14</sup>

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<sup>8</sup> Section 718.111(1)(d), F.S.

<sup>9</sup> *Id.*; s. 617.0834, F.S.

<sup>10</sup> Section 718.3025, F.S.

<sup>11</sup> Section 617.0832, F.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 720.3033(2), F.S.

<sup>14</sup> *Id.*

Officers, directors and managers in a homeowners' association may not solicit or accept anything of value from any person providing or offering to provide goods or services to the association. Upon a finding by the board that an officer or director has violated this prohibition, the board must immediately remove the officer or director from office. However, board members may accept food to be consumed at a business meeting with a value of less than \$25 per individual or services or items in connection to trade fairs or education programs.

### **Elections**

Members of the board of an association are generally selected through elections.<sup>15</sup> Candidates for election to the board, however, may not include a member who is delinquent in the payment of any monetary obligation due to the association. Similarly, the association may suspend the voting rights of members who are delinquent in paying any monetary obligation to the association by more than 90 days.<sup>16</sup> Notices of elections must be delivered to each unit owner entitled to vote at least 60 days before the election.<sup>17</sup> The elections must be conducted using secret ballots.<sup>18</sup>

Members of the board may be recalled by an agreement among a majority of the unit owners who are entitled to vote in condominium matters, or a by a vote of the unit owners at a special meeting.<sup>19</sup> A recalled member must turn over association records and other property of the association within 5 days after he or she is recalled. If the board does not certify the recall of a board member, the board must file a petition for arbitration with the division.<sup>20</sup>

### **Arbitration**

The division is authorized to employ attorneys and certify attorneys who may act as arbitrators to resolve condominium disputes.<sup>21</sup> An attorney who is certified by the division as an arbitrator must be in good standing with The Florida Bar. The disputes that are subject to arbitration may relate to the authority of the board to require or prohibit a unit owner from taking actions relating to his or her unit.<sup>22</sup> Other disputes eligible for arbitration may relate to the failure of the board to properly conduct an election, give adequate notice of meetings and other actions, or allow inspection of the association's books and records. A dispute relating to election irregularities in an election for a member of the board must be handled on an expedited basis.<sup>23</sup>

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<sup>15</sup> See s. 718.112(2), F.S.

<sup>16</sup> Section 718.303(5), F.S.

<sup>17</sup> Section 718.112(2)(d)4.a., F.S.

<sup>18</sup> *Id.*

<sup>19</sup> Section 718.112(2)(j), F.S.

<sup>20</sup> Section 718.112(2)(j)3., F.S.

<sup>21</sup> Section 718.1255(4), F.S.

<sup>22</sup> Section 718.1255(1), F.S.

<sup>23</sup> Section 718.1255(5), F.S.

## **Regulation by the Department of Business and Professional Regulation**

The division has authority to ensure that condominium associations and boards comply with the statutes and rules governing condominiums. This includes the authority to investigate complaints relating to financial issues, elections, and access to records by unit owners.<sup>24</sup>

If the division has reasonable cause to believe that a condominium association, its board, or officer of the board has violated the statutes or rules governing condominiums, the division may initiate enforcement proceedings.<sup>25</sup> These enforcement proceedings may result in letters of censure or warning, cease and desist orders, restitution, declaratory relief, injunctive relief, and civil penalties.

The division is also required to maintain a toll-free number for condominium unit owners.<sup>26</sup> When the division receives a complaint, it generally must conduct its investigation and take action on the complaint within 90 days.<sup>27</sup> If the division believes that a person has altered, concealed, or destroyed a document that must be maintained by an association for the purpose of impairing its accuracy or availability in an investigation, the division must refer the matter to a local law enforcement agency.<sup>28</sup>

The division also houses a condominium ombudsman whose duties include:

- Acting as a liaison between the division, unit owners, boards of directors, and board members.
- Developing policies and procedures to assist unit owners, boards of directors, board members and community association managers to understand their rights and responsibilities.
- Monitoring and reviewing procedures and disputes concerning condominium election and meetings.
- Appointing an election monitor to attend the annual meeting of unit owners and conduct the election of directors upon a petition by at least 15 percent of the voting interests in the association or six unit owners, whichever is greater.<sup>29</sup>

## **Grand Jury Report—Addressing Condo Owners’ Pleas for Help: Recommendations for Legislative Action**

The increasing numbers of condominiums in this state, the increasing numbers of problems for people living in them, and the increasing numbers of complaints against the DBPR motivated a Miami-Dade County grand jury to conduct an investigation of complaints by condominium

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<sup>24</sup> Section 718.501(1), F.S.

<sup>25</sup> Section 718.501(1)(d), F.S.

<sup>26</sup> Section 718.501(1)(k), F.S.

<sup>27</sup> Section 718.501(1)(m), F.S.

<sup>28</sup> Section 718.501(1)(n), F.S.

<sup>29</sup> Section 718.5012, F.S.

residents and the DBPR's responses to their complaints.<sup>30,31</sup> The grand jury's report contains several findings and recommendations, including:

- The statutes governing unit owner access to records are ineffective because the financial penalties for the denial of access to records may be paid from assessments levied against the unit owners, not by the person who wrongfully withheld access to records.<sup>32</sup>
- The statutes should not allow a member of a board of a condominium to vote for or against awarding a contract that involves the board member, a relative of the board member, or any person or entity who has a relationship with that board member or the board member's relative.<sup>33</sup>
- Investigators with the department have little experience or training and seem more intent of closing complaints than resolving them.<sup>34</sup>
- Some associations delay notifying unit owners of delinquent assessments that disqualify them from voting in elections in order to impede those unit owners from becoming current in their financial obligations before the election.<sup>35</sup>
- There are many complaints about fraud in condominium elections, and the statutes should be revised to provide criminal punishments for those who engage in fraudulent activities in condominium elections.<sup>36</sup>
- Election monitors should have the authority to collect evidence and void a condominium election when they reasonably believe that fraudulent election activities have occurred.<sup>37</sup>
- The broad scope of the department's responsibilities may be the cause of its ineffective regulation of condominiums, and if placed elsewhere, the department's investigative arm should employ trained and experienced investigators who have the authority to conduct criminal investigations and to initiate investigations based on their own observations.<sup>38</sup>

### III. Effect of Proposed Changes:

This bill makes two main categories of changes relating to the regulation and operation of condominium associations. The changes:

- Define and prohibit or restrict activities constituting a conflict of interest.
- Increase access to records by unit owners.

The bill also addresses a number of other issues pertaining to condominiums.

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<sup>30</sup> FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, ADDRESSING CONDO OWNERS' PLEAS FOR HELP: RECOMMENDATIONS FOR LEGISLATIVE ACTION (Feb. 6, 2017), <http://www.miamisao.com/wp-content/uploads/2017/02/Grand-Jury-Report-Final.pdf>.

<sup>31</sup> In addition to issuing criminal indictments, grand juries "consider the actions of public bodies and officials in the use of public funds and report or present findings and recommendations as to practices, procedures, incompetency, inefficiency, mistakes and misconduct involving public offices and public monies." *Miami Herald Pub. Co. v. Marko*, 352 So. 2d 518, 522 (Fla. 1977).

<sup>32</sup> FINAL REPORT OF THE MIAMI-DADE COUNTY GRAND JURY, *supra* note 24 at 8-9.

<sup>33</sup> *Id.* at 9-10.

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> *Id.* at 20-22.

<sup>37</sup> *Id.* 24-26.

<sup>38</sup> *Id.* at 27.

**Conflicts of Interest (Sections 1, 3, 5, & 6)**

The bill prohibits conflicts of interest among those who are responsible for operating a condominium as follows:

- Attorneys are prohibited from representing both the board of a condominium association and the management company of the association.
- Members of the board or the management company for a condominium association that is not a timeshare condominium are prohibited from purchasing a unit at a foreclosure sale resulting from the association's foreclosure of its lien for unpaid assessments or from taking title to the unit by deed in lieu of foreclosure.
- Condominium associations that are not timeshare condominiums are prohibited from contracting with a service provider that is owned or operated by a board member or a person who has a financial relationship with a board member, or a close relative of a board member or officer.

The bill also prohibits a party that contracts to provide maintenance or management services or a board member of the party from owning more than 50 percent of the units of the condominium or from purchasing a property that is subject to a lien by the association. This prohibition does not apply to a condominium association that is a timeshare condominium and to associations in which the non-developer unit owners are not entitled to elect a majority of the board.

Additionally, officers and directors of a condominium board are required to disclose activities that may reasonably be construed to be a conflict of interest. The existence of the conflict of interest must be documented on contracts and meeting agendas. In some cases, the officer or director engaged in a conflict of interest must choose to no longer pursue the activity creating the conflict or withdraw from office. Otherwise, the board must remove the officer or director from office.

In other cases, where the potential for a conflict of interest exists, the person responsible for creating the potential conflict may not be present during the board's deliberations or vote on the matter. Additionally, a contract between a director, officer, or relative of either and the association which is not properly noticed to the unit owners is void.

**Criminal Penalties (Section 1)**

The bill does not directly impose criminal penalties for misconduct relating to condominiums, but the bill expressly declares that certain types of misconduct are subject to punishment under existing criminal laws as follows:

- The forgery of a ballot envelope used in a condominium election or the forgery of a voting certificate constitutes the crime of forgery under existing s. 831.01, F.S.
- The theft or embezzlement of the funds of a condominium association is theft under existing s. 831.014, F.S.
- The destruction of an official record of a condominium association in furtherance of a crime constitutes tampering with evidence under existing s. 918.13, F.S., or obstruction of justice under existing s. 843.02, F.S.

- The use of a debit card issued in the name of a condominium association or billed to an association for expenses that are not lawful obligations of the association constitutes credit card fraud under existing s. 817.61, F.S.

### **Access to Association Records (Sections 1 & 9)**

The bill requires condominium associations to keep additional records and generally to take actions to make those records available to unit owners as follows:

- A condominium association must maintain bids for materials, equipment, and services as part of its official records.
- A condominium association must permit renters to inspect and copy the association's bylaws and rules.
- A condominium association must provide an annual report to the Department of Business and Professional Regulation listing the financial institutions at which it maintains accounts, and unit owners may obtain the report from the department.
- A unit owner may give notice to the Division of Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation that an association has failed to mail or hand deliver to the unit owner a copy of the most recent financial statement after a request. The division must then give the association notice that it must comply with the request. If the association fails to comply with that request within 5 business days, the association may not prepare less complex financial statements than the statutory default requirements for 3 years.
- An officer or director of a condominium who is charged with certain crimes relating to the condominium generally may not access association records without a court order while the charges are pending.

Additionally, by July 1, 2018, condominium associations having 150 or more units must post copies of certain types of its official records on its website. However, the records must be inaccessible to the general public. The records that must be posted on the website include:

- The declaration of condominium and related amendments.
- The bylaws.
- Articles of incorporation of the association and related amendments filed with the Department of State.
- The rules of the association.
- Management agreements, leases, and other contracts to which the association is a party.
- The annual budget for the association.
- Documents to considered and voted on during a meeting and any documents listed on a meeting agenda.
- The annual financial report for the association.
- Certifications by directors relating to conflicts of interest.
- Contracts and transactions between the association and other entities in which a director has a financial interest.
- Notices of board meetings and agendas for those meetings.

The bill also requires the department to notify condominium associations in the next condominium annual fee statement of the obligation to maintain records on a website.



### **Miscellaneous Changes (Sections 1, 3, 4, 7 & 8)**

Finally, the bill includes a number of changes to the laws governing condominiums that:

- Prohibit an association from using a debit card to pay association obligations.
- Require an association to timely provide copies of financial reports to unit owners or lose the authority to waive heightened financial reporting requirements.
- Prohibit member of a condominium board from serving more than four consecutive 2-year terms unless approved by a two-thirds vote of the total voting interests of the association.
- Eliminate the authority of a condominium board to certify the recall of a board member.
- Extend the time period for a recalled board member to turn over records and other association property to 10 days from 5 days after the recall.
- Specify minimum qualifications for arbitrators who are certified by the Division of Florida Condominiums, Timeshares and Mobile Homes to arbitrate a condominium dispute.
- Require arbitrators to conduct a hearing within 30 days after being assigned or entering a contract for the arbitration unless the arbitration petition is withdrawn or a continuance is granted for good cause.
- Require arbitrators who arbitrate condominium disputes to render decisions within 30 days after a hearing.
- Provide that failing to render a written decision within 30 days after a hearing may result in the cancellation of the arbitrator's certification.<sup>39</sup>
- Prohibit a condominium from suspending the voting rights of a unit owner unless the unit owner owes more than \$1,000 to the association.
- Require that proof of nonpayment of a monetary obligation must be provided to the unit owner 30 days before the unit's owners membership rights are suspended because of the nonpayment.<sup>40</sup>
- Prohibit a receiver from exercising the voting rights of a unit that is in receivership for the benefit of the association.
- Authorize the ombudsman to review secret ballots cast in the vote of an association where there is reasonable cause to believe that election misconduct has occurred.
- Suspend an officer or director of a condominium while certain criminal charges are pending against him or her for criminal conduct relating to the condominium.
- Repeal a provision of existing law which provides that a condominium association having fewer than 50 units must prepare an annual report of cash receipts and expenditures instead of a potentially more extensive financial report based on the association's revenues.

### **Effective Date**

The bill takes effect July 1, 2017.

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<sup>39</sup> Section 44.106, F.S., provides that the Florida Supreme Court establishes the minimum standards and procedures for qualifications, certification, professional conduct, and discipline of arbitrators.

<sup>40</sup> Section 718.303(6), F.S., requires that the unit owner's suspension must be approved at a properly noticed meeting of the board. A nonemergency meeting of the board requires a 14-day notice pursuant to s. 718.112(2)(c), F.S.

**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:

The provisions of the bill that define and restrict conflicts of interests may result in lower costs for contracted services to condominiums.

Condominiums may incur increased costs to maintain and make their records available to unit owners.

## C. Government Sector Impact:

The minimum qualifications for arbitrators who may arbitrate condominium disputes as set forth in the bill may reduce the pool of qualified arbitrators. This may result in greater costs to the Department of Business and Professional Regulation to employ these arbitrators.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 718.111, 718.112, 718.1255, 718.3025, 718.303, 718.5012, and 718.71.

This bill creates section 718.3207, Florida Statutes.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Rules on April 25, 2017:**

The committee substitute differs from the underlying committee substitute in that it:

- Prohibits an officer, director, or manager of a condominium association from accepting a “kickback” from a person providing or proposing to provide goods or services to the condominium.
- Provides for the suspension of officers and directors of a condominium who are charged with certain crimes relating to the condominium.
- Provides that certain types of misconduct relating to condominiums are crimes under existing laws.
- No longer includes provisions which would have created new criminal offenses relating to fraudulent election activity in condominium elections, the theft or embezzlement of condominium funds, the destruction of condominium records, and the repeated failure to provide access to condominium records.
- Delays the implementation of requirements for certain condominium associations to their post records on a website and makes the requirements applicable to associations having at least 150 units instead of 500 units.
- Prohibits condominiums from using debit cards to pay condominium expenses.
- Prohibits a condominium from contracting with or employing a relative within the third degree of consanguinity by blood or marriage to a board member or officer.
- Ties the complexity of the financial reporting requirements for condominiums having fewer than 50 units to the same revenue thresholds that apply to other condominiums.

**CS by Regulated Industries on April 4, 2017:**

The committee substitute:

- Permits a renter to inspect and copy only the association’s bylaws and rules.
- Removes the provision that requires a condominium association to make its records available to renters and authorized representatives of unit owners and renters.
- Extends until October 1, 2017, the requirement in the bill that an association with 500 or more units must maintain a website to provide members access to the information specified in the bill.
- Provides that the copy of the Articles of incorporation of the association posted on the website of an association 500 or more units must be the copy filed with the Department of State.
- Removes the requirement that an association with 500 or more units must provide a copy of its proposed annual budget and proposed financial report on its website.
- Requires associations with 500 or more units to post on their website documents to be voted on at a board meeting and a notice of any board meeting.
- Exempts timeshare condominiums from the prohibitions in the bill against:
  - A board member, manager, or management company purchasing a unit in a foreclosure sale resulting from unpaid assessments;

- Employing or contracting with a service provider owned or operated by a board member or any person who has a financial relationship with a board member; and
- A person contracting to provide management services purchasing a unit in a foreclosure sale resulting from unpaid assessments.
- Limits to non-developer controlled residential condominium associations the prohibition against a person contracted to provide management services purchasing a unit in a foreclosure sale or owning more than 50 percent of the units of the condominium.

B. Amendments:

None.