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 Committee on Regulated Industries

BILL:	SB 1490
INTRODUCER:	Senator Pizzo
SUBJECT:	Investments by Condominium Associations
DATE:	March 15, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	**Pre-meeting**
2.			CA	
3.			RC	

I. Summary:

SB 1490 authorizes condominium associations, including multicondominium associations, to invest association funds. It requires associations to annually develop and adopt a written investment policy statement and to select a registered investment adviser if the association opts to invest funds in an investment product other than a depository account.

The investment adviser may not be related by affinity or consanguinity to any board member or unit owner. The investment adviser must comply with the prudent investor rule in s. 518.11, F.S., act as a fiduciary to the association, annually provide the association with a written certification of compliance with the requirements in the bill, and submit monthly, quarterly, and annual reports to the association prepared in accordance with investment industry standards. Additionally, any funds invested must be held in third-party custodial accounts and insured by the Securities Investor Protection Corporation in an amount equal to or greater than the assets held.

Investment portfolios managed by the investment adviser may contain any type of investment necessary to meet the objectives in the investment policy statement, but may not contain stocks, securities, or other obligations that the State Board of Administration or state agencies are prohibited from investing in.

The association must have at least 36 months of projected reserves in cash or cash equivalents available at all times. Additionally, any principal, earnings, or interest in the investment portfolio must be available at no cost or charge to the association within 15 business days after delivery of the association's written or electronic request.

At least once each calendar year, the association must select a certified public accountant to provide the association with a statement verifying the invested fund transactions and a report of cash receipts and disbursements for the invested funds.

Under the bill, an association's investment policy statement is an official record of the association that must be available to unit owners for inspection and copying.

The bill takes effect July 1, 2021.

II. Present Situation:

Condominium

A condominium is a "form of ownership of real property created under ch. 718, F.S."[1] Condominium unit owners are in a unique legal position because they are exclusive owners of property within a community, joint owners of community common elements and members of the condominium association.[2] For unit owners, membership in the association is an unalienable right and required condition of unit ownership.[3] A condominium is created by recording a declaration of the condominium in the public records of the county where the condominium is located.[4] A declaration is similar to a constitution in that it:

> [S]trictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[5]

Condominium associations are creatures of statute and private contracts. Under the Florida Condominium Act, associations must be incorporated as a Florida for-profit corporation or a Florida not-for-profit corporation.[6] Although unit owners are considered shareholders of this corporate entity, like other corporations, a unit owner's role as a shareholder does not implicitly provide them any authority to act on behalf of the association.

A condominium association is administered by a board of directors referred to as a "board of administration."[7] The board of administrators is comprised of individual unit owners elected by the members of a community to manage community affairs and represent the interests of the association. Association board members must enforce a community's governing documents and are responsible for maintaining a condominium's common elements which are owned in undivided shares by unit owners.[8] In litigation, an association's board of directors is in charge of directing attorney actions.[9]

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[1] Section 718.103(11), F.S.
[2] *See* s. 718.103, F.S.
[3] *Id.*
[4] Section 718.104(2), F.S.
[5] *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).
[6] Section 718.303(3), F.S.
[7] Section 718.103(4), F.S.
[8] Section 718.103(2), F.S.
[9] Section 718.103(30), F.S.

The Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business the Professional Regulation has limited regulatory authority over condominiums.[10]

Reserve Accounts

Condominium associations are required to prepare an annual budget detailing the annual operating revenues and expenses for the fiscal year.[11] The association must provide members with a copy of the proposed annual budget and the adopted annual budget.[12]

In addition to annual operating expenses, the budget must include reserve accounts for capital expenditures and deferred maintenance.[13] Reserve funds and any accrued interest must remain in the reserve account or accounts, and may be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a duly called meeting of the association.[14]

All funds collected by an association must be maintained separately in the association's name. Reserve funds may be commingled with operating funds of the association for investment purposes only. Commingled operating and reserve funds must be accounted for separately, and a commingled account may not, at any time, be less than the amount identified as reserve funds.[15] Although current law permits reserve and operating funds to be comingled for investment purposes, current law does not provide a process or requirements for the investment of association funds.

Reserve funds and any interest accruing on those funds may be used only for authorized reserve expenditures, unless the use for other purposes has been approved in advance by a majority vote at a duly called meeting of the condominium association.[16]

In Fiscal Year 2019-2020, there were 2,011 complaints received by the Division of Florida Condominiums, Timeshares, and Mobile Homes. Of those complaints 459 (22.82 percent) were related to budgets, financial reports, and assessments. [17]

Fiduciary Duty and Prohibited Acts

Officers and directors of a condominium association have a fiduciary relationship to the unit owners, and may be sanctioned for breach of their fiduciary duty.[18] An officer, director, or

[10] *See* s. 718.501, F.S. *See infra*, the *Present Situation* for the proposed revisions to the division's authority set forth in s. 718.501, F.S.
[11] Section 718.112(2)(f)1., F.S.,
[12] Section 718. 112(2)(e), F.S.
[13] Section 718. 112(2)(f)2., F.S.
[14] Section 718. 112(2)(f)3., F.S.
[15] Section 718.111(14), F.S.
[16] Section 718.112(2)(f)3., F.S.
[17] Division of Florida Condominiums, Timeshares, and Mobile Homes, *Annual Report, Fiscal Year 2019-2020*, at page 2, *available* at SPTLLSC0420082413380 (myfloridalicense.com) (last visited March 13, 2021). The largest number of complaints were regarding access to official records (508 – 25.26 percent).
[18] Section 718.111(1)(a), F.S.

manager may not solicit, offer to accept, or accept anything or service of value or kickback for which consideration has not been provided for the benefit of such person (or immediate family members) from any person providing or proposing to provide goods or services to the association.[19]

Section 718.111(1)(a), F.S., provides that any officer, director, or manager who knowingly solicits, offers to accept, or accepts anything or service of value or kickback is subject to a civil penalty pursuant to s. 718.501(1)(d), F.S.,[20] and, if applicable, a criminal penalty as provided in s. 718.111(1)(d), F.S.[21] An officer, director, or agent must discharge his or her duties in good faith, with the care an ordinarily prudent person in a similar position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the interests of the association.[22] An officer, director, or agent is liable for monetary damages as provided in s. 617.0834, F.S., if such officer, director, or agent breaches or fails to perform his or her duties and the breach of, or failure to perform, such duties constitutes:

- A violation of criminal law as provided in s. 617.0834, F.S.;
- A transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or
- Recklessness or an act or omission that was in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[23]

Investment Advisers

Investment advisors are defined as "any person who receives compensation, directly or indirectly, and engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services."[24] The term does not include:

- Any licensed practicing attorney whose performance of such services is solely incidental to the practice of her or his profession;
- Any licensed certified public accountant whose performance of such services is solely incidental to the practice of her or his profession;
- Any bank authorized to do business in this state;
- Any bank holding company as defined in the Bank Holding Company Act of 1956, as amended, authorized to do business in this state;

[19] Section 718.111(1)(a), F.S., does not prohibit an officer, director, or manager from accepting services or items received in connection with trade fairs or education programs.
[20] Section 718.501(1)(d), F.S., authorizes the division to impose a civil penalty of not more than $5,000.
[21] The only crimes specifically referenced in s. 718.111(1)(d), F.S., are offenses relating to forgery of a ballot envelope or voting certificate, theft or embezzlement of association funds, and destruction of or refusal to allow inspection or copying of association records. Additionally, s. 718.111(1)(d), F.S., states that an officer, director, or agent shall be liable for monetary damages as provided in s. 617.0834, F.S., if such officer, director, or agent breached or failed to perform his or her duties and the breach of, or failure to perform, his or her duties constitutes a violation of criminal law as provided in s. 617.0834, F.S. However, s. 617.0834, F.S., does not provide a criminal prohibition.
[22] Section 718.111(1)(d), F.S.
[23] *Id.*
[24] Section 517.021(14)(a), F.S.

- Any trust company having trust powers which it is authorized to exercise in the state, which trust company renders or performs services in a fiduciary capacity incidental to the exercise of its trust powers;
- Any person who renders investment advice exclusively to insurance or investment companies;
- Any person who does not hold herself or himself out to the general public as an investment adviser and has no more than 15 clients within 12 consecutive months in this state;
- Any person whose transactions in this state are limited to those transactions described in s. 222(d) of the Investment Advisers Act of 1940. Those clients listed in subparagraph 6. may not be included when determining the number of clients of an investment adviser for purposes of s. 222(d) of the Investment Advisers Act of 1940; or
- A federal covered adviser.[25]

An investment advisor must be registered with the Office of Financial Regulation within the Financial Services Commission[26] to "sell or offer for sale any securities in or from offices in this state, or sell securities to persons in this state from offices outside this state, by mail or otherwise, unless the person has been registered with the office pursuant to the provisions of this section. The office shall not register any person as an associated person of a dealer unless the dealer with which the applicant seeks registration is lawfully registered with the office pursuant to [ch. 517, F.S.]"[27]

III. Effect of Proposed Changes:

The bill creates s. 718.111(16), F.S., to authorize condominium associations, including multicondominium associations, to invest association funds in one or in any combination of investment products.

If an association invests funds in any type of investment product other than a depository account described in s. 215.47(1)(h), F.S.,[28] the board of the association must:

- Annually develop and adopt a written investment policy statement; and
- Select an investment adviser who is registered with the Office of Financial Regulation under s. 517.12, F.S.

The investment adviser may not be related by affinity or consanguinity to any board member or unit owner. The association may pay any investment fees and commissions from the invested reserve funds or operating funds.

The investment adviser selected by the board must:

[25] Section 517.021(14)(b), F.S.
[26] Section 517.021(8), F.S.
[27] Section 517.12(1), F.S.
[28] Section 215.47(1)(h), F.S., authorizes the State Board of Administration to invest in savings accounts in, or certificates of deposit of, any bank, savings bank, or savings and loan association. Such accounts must be insured by the Federal Government or an agency thereof and have a prime quality of the highest letter and numerical ratings as provided for by at least one nationally recognized statistical rating organization, provided such savings accounts and certificates of deposit are secured in the manner prescribed in ch. 280, F.S., the Florida Security for Public Deposits Act.

- Comply with the prudent investor rule in s. 518.11, F.S.,[29] if the funds are not deposited in a depository account;
- Act as a fiduciary to the association in compliance with the standards set forth in the Employee Retirement Income Security Act of 1974 (ERISA);[30]
- Annually provide the association with a written certification of compliance with s. 718.111(16), F.S.; and
- Submit monthly, quarterly, and annual reports to the association which are prepared in accordance with investment industry standards.

Under the bill, any funds invested must be held in third-party custodial accounts and insured by the Securities Investor Protection Corporation[31] in an amount equal to or greater than the assets held.

At least once each calendar year, the association must provide the investment adviser with:
- The association's investment policy statement;
- The most recent reserve study report or a good faith estimate disclosing the annual amount of reserve funds which would be necessary for the association to fully fund reserves for each reserve item; and
- The annual financial reports prepared pursuant to s. 718.111(13), F.S.

The investment adviser must annually review these documents and provide the association with a portfolio allocation model that is suitably structured to match projected reserve fund and liability liquidity requirements. Additionally, the association must have at least 36 months of projected reserves in cash or cash equivalents available at all times.

Investment portfolios managed by the investment adviser may contain any type of investment necessary to meet the objectives in the investment policy statement, but may not contain stocks, securities, or other obligations that the State Board of Administration or state agencies are

[29] Section 518.11, F.S., sets forth the prudent investor rule. Generally, a fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.

[30] The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. s. 1104(a)(1)(A)- (C), is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans. ERISA requires plans to provide participants with plan information; sets minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC). See U.S. Department of Labor, *Employee Retirement Income Security Act of 1974 (ERISA), available at*: https://www.dol.gov/general/topic/retirement/erisa (last visited Mar. 10, 2021.)

[31] The Securities Investor Protection Corporation (SIPC) was created under the Securities Investor Protection Act, 15 U.S.C. s. 78aaa, *et seq.*, as a non-profit membership corporation. The SIPC oversees the liquidation of member firms that close when the firm is bankrupt or in financial trouble, and customer assets are missing. In a liquidation under the act, the SIPC and the court-appointed trustee work to return customers' securities and cash as quickly as possible. Within limits, the SIPC expedites the return of missing customer property by protecting each customer up to $500,000 for securities and cash (including a $250,000 limit for cash only). Securities Investor Protection Corporation, *Mission, available at*: https://www.sipc.org/about-sipc/sipc-mission (last visited March 11, 2021).

prohibited from investing in under ss.215.471, 215.4725, 215.472, and 215.473, F.S., as determined by the investment adviser.[32]

The bill requires any principal, earnings, or interest in the investment portfolio must be available at no cost or charge to the association within 15 business days after delivery of the association's written or electronic request.

At least once each calendar year, the association must select a certified public accountant to provide the association with a statement verifying the invested fund transactions and a report of cash receipts and disbursements for the invested funds.

The bill also amends s. 718.112, F.S., to authorize the investing of reserve funds under s. 718.111(16), F.S.

Official Records

The bill amends s. 718.111(12), to provide that an association's investment policy statement is an official record of the association that must be available to unit owners for inspection and copying.

Effective Date

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

[32] These provisions deal with investments in stocks, securities, or other obligations of companies doing business with Cuba or Venezuela, that boycott Israel or engage in a boycott of Israel, or that conduct certain business operations with [North] Sudan and Iran.

E. Other Constitutional Issues:

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. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 718.111, 718.112, and 718.3026.

IX. Additional Information:

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

None.

B. Amendments:

None.