

# SENATE STAFF ANALYSIS AND ECONOMIC 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: Commerce and Consumer Services Committee

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BILL: SPB 7020

SPONSOR: For consideration by Commerce and Consumer Services Committee

SUBJECT: Certified Capital Company Act/OGSR

DATE: January 26, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kruse</u>	<u>Cooper</u>	_____	<b>Pre-meeting</b>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

SPB 7020 reenacts the public records exemption for information related to an investigation or Office of Financial Regulation (OFR) review of a certified capital company (CAPCO). This bill repeals the exemption for: personal information of OFR employees who may be involved in an investigation or review of such nature as to endanger their lives or physical safety or that of their families; all information obtained by the office from any person which is only made available on a confidential or similarly restricted basis; the social security number of any customer of a CAPCO, complainant, or person associated with a CAPCO or qualified business. The bill also removes the requirement for a future Open Government Sunset Review and also removes the repeal date.

This bill substantially amends section 288.99, Florida Statutes.

## II. Present Situation:

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>1</sup>

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<sup>1</sup> Section 119.15(3)(b), F.S.

Under s. 119.15(2), F.S., an exemption may be maintained only if: “(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals; (b) The exemption is necessary for the effective and efficient administration of a governmental program; or (c) The exemption affects confidential information concerning an entity.”

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

An exemption may be maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.”
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”<sup>2</sup>

### **Certified Capital Company Act**

In 1998, the Legislature enacted ch. 98-257, L.O.F., titled the Certified Capital Company Act, which was codified in s. 288.99, F.S. The primary purpose of the act is to “stimulate a substantial increase in venture capital investments in this state by providing an incentive for insurance companies to invest in certified capital companies in this state which, in turn, will make investments in new businesses or in expanding businesses.” The act is designed to contribute to employment growth in the state through the investments in the new or expanding businesses, create jobs with wages that are greater than the county average wage where the jobs are created, and expand or diversify the economic base of the state.<sup>3</sup> The incentives to insurance companies

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<sup>2</sup> Section 119.15(4)(b), F.S.

<sup>3</sup> Section 288.99(2), F.S.

for investing are in the form of insurance premium tax credits in amounts equal to the investments in the certified capital companies, known as CAPCOs.

The Office of Financial Regulation (OFR), the Governor's Office of Tourism, Trade, and Economic Development (OTTED), and the Department of Revenue (DOR) have roles in administering the CAPCO Program. OTTED allocates tax credits to CAPCOs and provides an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives; DOR accounts for tax credits claimed by insurance companies through the program; and OFR certifies capital companies and performs an annual review of each CAPCO.

Under Program One of the act, the insurance industry was authorized to invest up to a maximum of \$150 million in CAPCOs and claim insurance premium tax credits totaling \$15 million per year for 10 years. Under Program Two, which has not been executed, an additional \$150 million in insurance premium tax credits may be allocated by OTTED once certain insurance premium tax collection criteria are met as determined by the Revenue Estimating Conference.<sup>4</sup>

Under Program One, there are three certified companies eligible to receive investment funds from insurance companies and to invest these funds as venture capital. Insurance companies invested a total of \$150 million in these three CAPCOs. Examples of industries in which the three CAPCOs in turn made investments include electronic imaging, medical technology, boat manufacturing, credit card payment processing, vehicle fleet managements systems, and an Internet portal for fisherman.

The statute requires OFR, as part of its annual review, to determine if each CAPCO is abiding by the requirements of certification, to advise the CAPCO as to the eligibility status of its investments, and to ensure that no investment has been made in violation of the statute governing CAPCOs.<sup>5</sup> During the course of the review, OFR may examine CAPCOs due diligence files on companies under consideration for investment. These files may include business plans, product descriptions, processes, formulas, internal product cost information, and competitive strategies of companies under consideration for investment. A typical office review begins with OFR contacting a CAPCO and establishing an appointment date for a site visit to the CAPCO; visiting the CAPCO and making copies of various documents that will help OFR determine if the CAPCO is in compliance with the CAPCO statute; and releasing a letter to the CAPCO following the review stating whether the CAPCO has met all the requirements of the CAPCO statute.

## **Public Records Exemptions**

### *Investigation or Review Information*

In 2000, the Legislature enacted a public records exemption for the Certified Capital Company Act which provides confidentiality to, and exempts from the open government provisions, any information relating to an investigation or Office of Financial Regulation (OFR) review of a certified capital company (CAPCO), including a consumer complaint, until the investigation or

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<sup>4</sup> Section 288.99(17), F.S.

<sup>5</sup> Section 288.99(10)(a), F.S.

review is complete or ceases to be active.<sup>6</sup> Even if the investigation or review ceases to be active or is complete, the information remains confidential and exempt if the information is submitted to any law enforcement or administrative agency for further investigation, until that agency's investigation is complete or ceases to be active. The statute specifies that:

an investigation or review shall be considered “active” so long as the office, a law enforcement agency, or an administrative agency is proceeding with reasonable dispatch and has a reasonable good faith belief that the investigation may lead to the filing of an administrative, civil, or criminal proceeding.<sup>7</sup>

This exemption provides that information relating to an investigation or office review may remain confidential and exempt after an investigation or review is complete if disclosure would: 1) reveal a trade secret; 2) jeopardize the integrity of another active investigation or review; or 3) disclose the identity of a confidential source or investigative techniques or procedures.<sup>8</sup>

When it enacted the exemptions, the Legislature stated that “it is a public necessity to exempt from public records requirements certain information obtained during an investigation or annual review of a certified capital company” in order to “protect the integrity of contract negotiations inherent to this industry, which include complex financial transactions and negotiations” between CAPCOs and insurance companies that invest in CAPCOs.<sup>9</sup> The Legislature further stated that if information collected during an investigation or review is not protected, “critical proprietary information regarding investment contracts and the structuring of investments in certified capital companies will be revealed.”<sup>10</sup> The Legislature also stated that:

Disclosure of this information would place those certified capital companies at a competitive disadvantage in all states in which the companies currently operate or intend to operate. Consequently, companies whose records are not otherwise open to public inspection may refrain from seeking certification as certified capital companies in Florida, or expanding their current presence in Florida. As a result, Florida would lose a significant source of venture capital for small early-stage businesses, economic growth resulting from the establishment of new businesses funded by certified capital, tax revenue generated by new jobs and businesses, and employment opportunities for the citizens of this state.<sup>11</sup>

Additionally, according to OFR, without the exemption, a CAPCO would not be able to guarantee that the sensitive business information provided by the early-stage companies, such as business plans, formulas, and processes, would not become public and available to competitors.

### *Personal Information of OFR Employees*

The statute also specifies that if OFR employees are or have been involved in an investigation or review that would endanger their lives or the lives of their families, the following information is

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<sup>6</sup> Section 1, ch. 2000-311, L.O.F.; s. 288.99(15)(a), F.S.

<sup>7</sup> Section 1, ch. 2000-311, L.O.F.; s. 288.99(15)(a), F.S.

<sup>8</sup> Section 288.99(15)(b), F.S.

<sup>9</sup> Section 2, ch. 2000-311, L.O.F.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

confidential and exempt from the open government provisions: 1) the home addresses, telephone numbers, places of employment, and photographs of such personnel; 2) the home addresses, telephone numbers, photographs, and places of employment of spouses and children of such personnel; and 3) the names and locations of schools and day care facilities attended by the children of such personnel.<sup>12</sup>

The stated public purpose for the exemption regarding the protection of personal information of OFR employees who may be involved in an investigation or OFR review is to prevent the release of information which could:

jeopardize the safety and welfare of departmental<sup>13</sup> investigatory personnel and their families. The release of this personal information would not benefit the public or aid it in monitoring the effective and efficient operation of government. The exemption of this personal information would minimize the possibility that those persons under investigation might use the information to threaten, intimidate, harass, or cause physical harm or other injury to these persons or members of their family.<sup>14</sup>

However, in practice, this exemption has never been utilized. The likelihood of OFR employees being placed in danger because of a CAPCO investigation or review has been reported to be remote.

#### *Documents Provided on a Confidential Basis*

The statute also provides confidentiality and an exemption from the open government provisions for “[a]ll information obtained by the office from any person which is only made available to the office on a confidential or similarly restricted basis.”<sup>15</sup>

This exemption appears to be the broadest exemption in the CAPCO statute. Potentially, any person or business, including a CAPCO, may offer OFR information and request that the information be kept confidential. OFR staff reported that this provision has only been invoked once – by a CAPCO during the initial application process. This exemption is qualified in that it “shall not be construed to prohibit disclosure of information which is specifically required by law to be filed with the office or which is otherwise subject to” the open government provisions.<sup>16</sup> The First Amendment Foundation suggested that this provision either be rewritten or allowed to expire because it may be unconstitutional in that it is overly broad and permits a provider of information, which may be a CAPCO, to unilaterally determine what is confidential without any legislative guidelines.

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<sup>12</sup> Section 288.99(15)(d), F.S.

<sup>13</sup> The Department of Banking and Finance was reorganized, and the Office of Financial Regulation assumed CAPCO duties.

<sup>14</sup> Section 2, ch. 2000-311, L.O.F.

<sup>15</sup> Section 288.99(15)(e), F.S.

<sup>16</sup> *Id.*

### *Social Security Numbers*

Lastly, the CAPCO statute provides that the “social security number of any customer of a certified capital company, complainant, or person associated with a certified capital company or qualified business” is exempt from the open government provisions.<sup>17</sup>

This exemption is somewhat duplicative of s. 119.0721, F.S., which makes confidential and exempt from the open government provisions social security numbers held by an agency or its agents, employees, or contractors. However, s. 119.0721, F.S., does provide exceptions for the release of a social security number to another governmental agency, which must maintain the confidentiality of the social security number, and to a commercial entity that makes a written request for the number for certain approved legitimate business purposes.

These public records exemptions expire on October 2, 2005, unless they are reviewed and reenacted by the Legislature.

### **Senate Interim Project**

During the 2004-2005 interim, the Senate Committee on Commerce and Consumer Services conducted a review of the CAPCO exemptions and issued an interim project report. Evaluating the exemptions against the criteria prescribed in the Open Government Sunset Review Act, the report recommended that the Legislature reenact the public records exemption for information relating to an investigation or Office of Financial Regulation (OFR) review of a CAPCO. Without the exemption, an early-stage company that submits sensitive business information to a CAPCO risks having competitors access that information contained in an investigation or OFR review file. The report also recommended that the Legislature allow the exemption for personal identifying data of OFR examiners and their families to expire because CAPCO reviews do not appear to be inherently risky to investigators and the exemption has never been utilized. Further, the report recommended that the Legislature allow the remaining two exemptions to expire because:

- The catchall exemption for a person who wishes to provide information to OFR on a confidential basis appears to be overbroad; and
- The exemption for social security numbers is duplicative of an existing exemption.

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

SPB 7020 reenacts the exemption for information related to an investigation or Office of Financial Regulation (OFR) review of a certified capital company (CAPCO). In a future OFR investigation or review of a CAPCO, (as provided for in the existing exemption) if OFR personnel obtain information contained in the files of a CAPCO, that information will remain confidential and exempt during the investigation or review and will remain confidential and exempt after the investigation or review if disclosure would: 1) reveal a trade secret; 2) jeopardize the integrity of another investigation or review; or 3) disclose the identity of a confidential source or investigative technique or procedure.

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<sup>17</sup> Section 288.99(16), F.S.

The bill removes the phrase “consumer complaint” from two locations since that phrase is already included in the term “information.” This bill also removes the exemption for personal information of OFR personnel who may be involved in an investigation or review of such nature as to endanger their lives or physical safety or that of their families. Additionally, this bill removes the exemption for all information obtained by the office from any person which is only made available to the office on a confidential or similarly restricted basis. Further, this bill removes the exemption for a social security number of any customer of a CAPCO, complainant, or person associated with a CAPCO or qualified business. This bill also removes a provision that required a review of the CAPCO exemptions under the Open Government Sunset Review Act and also removes the repeal date.

This bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

This bill retains the exemption for investigation or Office of Financial Regulation (OFR) review information, and removes the following exemptions:

- Exemption for personal information of OFR employees who may be involved in an investigation or review of such nature that their lives or that of their families are placed in danger;
- Exemption for all information obtained by the office from any person which is only made available to the office on a confidential or similarly restricted basis; and
- Exemption for a social security number of any customer of a certified capital company, complainant, or person associated with a certified capital company or qualified business.

Additionally, this bill removes the requirement for an Open Government Sunset Review and removes the repeal date.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Information that is covered by the exemption for investigation or review information and obtained by certified capital companies (CAPCOs) from new or expanding businesses will continue to be confidential and exempt from open government provisions.

**C. Government Sector Impact:**

Although the circumstances that could bring about its use are unlikely to occur, an Office of Financial Regulation employee will not be able to utilize the exemption for personal information.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

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

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