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.)

Prepared By: Banking and Insurance Committee

BILL: SPB 7058

SPONSOR: Banking and Insurance Committee

SUBJECT: Solvency of Insurers

DATE: February 21, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Senate Proposed Bill 7058 contains changes to insurance company solvency regulation in Florida in accordance with the recommendations of Senate Banking and Insurance Committee Interim Project report, *Insurance Company Solvency Regulation* (2005-106).

The proposed bill changes the maximum interval between financial examinations of insurers from 3 to 5 years if the Office of Insurance Regulation finds the insurer to be in sound financial condition and if the insurer's risk based capital level exceeds 250 percent.

The bill enacts a requirement that all property and casualty insurers transacting business in Florida maintain surplus and reinsurance adequate to pay obligations incurred as a result of a 100-year probable maximum loss event.

Authority is provided to require an independent actuarial certification of the insurer's annual statement of opinion on its loss and loss adjustment expense reserves to the Office of Insurance Regulation.

The Senate proposed bill requires the Financial Services Commission to adopt the Insurance Holding Company System Regulatory Act as promulgated by the National Association of Insurance Commissioners (NAIC). The following provisions are contained within the NAIC act:

- Places limits on the amount of certain kinds of investments (common stock, preferred stock, debt obligations and other securities) that a domestic insurer may make, though the insurer may invest a greater amount in a subsidiary after approval by the OIR if certain criteria are met;

- Permits an insurer to invest any amount on investments (common stock, preferred stock, debt obligations and other securities) for a subsidiary that engages exclusively in the ownership and management of assets authorized as investments, if the subsidiary follows investment guidelines applicable to the insurer;
- If an insurer ceases to control a subsidiary, it must dispose of any investment in the subsidiary made pursuant to this section within 3 years, or longer if the Director of the OIR allows it;
- Provides requirements for a person other than the insurer to acquire a voting security of a domestic insurer if such person would directly or indirectly control the insurer;
- Authorizes the OIR to require a person acquiring control of insurer to maintain or restore the capital of insurer to the levels required by Florida law;
- Gives the OIR the power to order a registered member of an insurance holding company to produce records, books, and papers of the insurer or its affiliates that are reasonably necessary to ascertain the financial condition of the insurer or determine compliance with the NAIC model act;
- Allows the OIR to retain at the expense of a registered member of an insurance holding company attorneys, actuaries, accountants and other experts reasonably necessary to assist in conducting an examination into the financial condition of the insurer or to determine compliance with the NAIC model act, and requires registered the insurer to pay the expense of the exam;
- Requires that documents obtained by the OIR or any other person pursuant to section 4, 5, or 6 of the Model Act are confidential and not subject to Florida's Sunshine law, with exceptions;
- Permits solvency proceedings to be initiated if the OIR determines that any person has violated the provisions of the model act, and such violation threatens the solvency of a domestic insurer or is hazardous to its policyholders, creditors, shareholders or the public;
- Specifies the receiver's right to recover assets in an insolvency proceeding;
- Provides that the OIR has authority suspend, revoke, or refuse to renew the insurer's license to do business—after notice and opportunity for hearing—when it appears to the Director that any person has violated the model act in a way that makes the continued operation of the insurer contrary to the interests of the policyholders and public. Such determination must be accompanied by specific findings of fact and conclusions law.
- Provides for judicial review of regulatory decisions, acts, and rules made pursuant to the Model Act.

The bill takes effect on January 1, 2006.

This proposed bill substantially amends the following sections of the Florida Statutes: 624.316, 624.424, and 628.801. The proposed bill also creates section 624.4087, Florida Statutes.

II. Present Situation:

State Regulation of Solvency

Solvency regulation is designed to protect policyholders against the risk that insurers will not be able to meet their financial responsibilities.[1] Ensuring the solvency[2] of insurance companies is a primary responsibility of state regulators. Solvency regulation includes the requirements for starting and operating an insurance company,[3] monitoring the financial health of insurers through examinations and audits, and procedures for the administrative supervision,[4] rehabilitation,[5] or liquidation[6] of an insurance company if it is in unsound financial condition or insolvent.

In Florida, the Office of Insurance Regulation (OIR or Office) is primarily responsible for ensuring that insurers remain solvent, obey applicable laws, and sell policies at a fair rate for both the insurer and the public. The Division of Rehabilitation and Liquidation is the court appointed receiver[7] of insurers once they become financially unsound or insolvent. Once an insurer enters receivership,[8] the Division will either attempt to rehabilitate the insurer, or will gather the insurer's assets, distribute them to policyholders and creditors, and liquidate the company.

Although each state regulates the insurance industry within its borders, many states often voluntarily join together to create and enact uniform solvency legislation. The National Association of Insurance Commissioners (NAIC) is a voluntary association of insurance regulators from all 50 states.[9] The NAIC was created to coordinate regulation of multi-state insurers, provide a forum for addressing major insurance issues, and promote consistent laws among the states. The NAIC also has a national accreditation program of reviewing state insurance departments,[10] serves as a national insurer information clearinghouse, provides a structure for interstate cooperation in examining multi-state insurers, and develops model laws.

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[1] Robert W. Klein, *The Growing Sophistication of Solvency Policing Tools*, JOURNAL OF INSURANCE REGULATION, Winter 2000, Vol. 19 Issue 2, pg. 235.

[2] An insurer is solvent if all the assets of the insurer would be sufficient to discharge all its liabilities, and the insurer is able to pay its debts as they become due in the usual course of business. See s. 631.011(14), F.S.

[3] s. 624.411-s. 624.414, F.S.

[4] Administrative supervision allows the Office of Insurance Regulation to supervise the management of a consenting troubled insurance company in an attempt to cure the company's troubles rather than close it down.

[5] In rehabilitation, the Department of Financial Services (DFS) is authorized as receiver to conduct all business of the insurer in an attempt to place the insurance company back in sound financial condition.

[6] In liquidation, the DFS is authorized as receiver to gather the insurance company's assets, convert them to cash, and distribute them to various claimants, and shut down the company.

[7] BLACK'S LAW DICTIONARY 1268 (6th ed. 1990). A receiver is the person appointed by a court for the purpose of preserving property of a debtor or using the property to satisfy creditor's claims when there is the danger that the property will be lost, removed or injured.

[8] BLACK'S LAW DICTIONARY 1269 (6th ed. 1990). A receivership is a proceeding in which a receiver is appointed for an insolvent corporation, partnership or individual to preserve its assets for the benefit of affected parties. In this context it is the placement of an insurer under the receiver's control pursuant to a delinquency proceeding under Chapter 631, F.S.

[9] Also includes the District of Columbia and four U.S. territories.

[10] Florida was the first state to be accredited by the NAIC and has since been reaccredidated twice.

A wide array of insurer practices is regulated by the state to ensure that domestic insurers remain solvent and in healthy financial condition. Solvency regulation includes establishing capitalization requirements for insurers,[11] examining the financial condition of insurers,[12] the approval and pricing of insurance products,[13] requiring minimum insurance company reserve and surplus requirements,[14] and regulating the ways in which an insurer can invest[15] its money. The reinsurance contracts that insurers enter into are subject to requirements to ensure that when an insurer purchases reinsurance to cover certain policies, the reinsurer will assume responsibility for the payment of claims on policies assumed by the reinsurer.[16] If the insurance company has affiliates or is set up in a holding company system, transactions between affiliates are regulated to attempt to provide that the transactions are beneficial to the insurer.[17]

State insurance regulators monitor the financial condition of insurers using detailed financial reports and periodic on-site examinations. Insurance companies are required to file annual financial statements in each state where they are licensed. This information is then analyzed using tests developed by the NAIC, that look at whether the insurer's financial condition is at an unacceptable level, possibly leading to immediate regulatory action if the problems are sufficiently severe.

The OIR monitors the financial condition of each insurer in Florida. The Office reviews quarterly and annual financial statements of insurers using criteria developed by the NAIC in its Financial Analysis Handbook. As a result of a financial analysis, the OIR may require additional reporting from the insurer, require the insurer to develop a plan to correct deficiencies, conduct a targeted examination of the insurer, or even restrict, suspend or revoke the insurer's certificate of authority to conduct business in Florida.[18]

In addition to constantly monitoring insurers, the OIR also conducts more in-depth on-site examinations of each insurer in the state. The Office is authorized to examine[19] each insurer authorized to do business in Florida[20] as often as is warranted for the protection of policyholders and the public interest.[21] Generally, each insurer must be examined a minimum of once every 3

[11] See s. 624.407, F.S.
[12] See s. 624.316, F.S. .
[13] See Part I of Chapter 627, F.S. (The "Rating Law" for property and casualty insurance).
[14] See s. 625.081, F.S. (Reserve requirements for health insurers); s. 625.051, F.S. (Unearned premium reserve requirements); s. 624.408, F.S. (Surplus requirements for insurers. Insurers must maintain a minimum surplus in order to maintain a certificate to transact insurance.); FLA. ADMIN. CODE r. 69O-143.047 (2), (2003) (Criteria used to determine sufficiency of insurer's surplus).
[15] See Part II of Ch. 625, F.S. (Investment requirements for domestic and commercially domiciled insurers. Includes requirements for diversification of investments.).
[16] See s. 624.610, F.S. .
[17] See s. 624.310, F.S. ; FLA. ADMIN. CODE
r. 69O-143.047(1) (2003).
[18] s.624.418-s.624.421, F.S.
[19] In lieu of making its own examination, the OIR may accept an independent certified public accountant's audit report prepared according to the requirements of the Florida Insurance Code. However, OIR staff indicates that very few companies choose this option because it is much more expensive than opting to have state employees conduct the audit.
[20] For foreign insurers (insurers domiciled in a United States state, territory, commonwealth or district other than Florida) the OIR may accept a full report of the last recent examination certified to by the insurance supervisory official of another state. F.S. s .624.316(2)(c).
[21] See s. 624.316 F.S. .

years. An insurer that has been authorized in Florida for over 15 years without a change in ownership need only be examined once every 5 years. Insurers who have been authorized to conduct business in Florida for less than 3 years must be examined once each year. After completion of the examination, the OIR publishes a report of its findings.

The adequacy of an insurer's capital is primarily examined using the risk based capital[22] (RBC) system, which uses a formula to determine a company's minimum necessary capital level by evaluating the risk level of an insurer's underwriting, investments, and other factors depending on the lines of business the company writes.[23] The RBC system examines whether insurers have met minimum financial requirements. The overall financial strength of insurers is analyzed by various rating agencies. Currently, a total adjusted capital to authorized control level ratio of 200 percent or higher is necessary for an insurer to be considered a "no action" level company—no action needs to be taken by regulators. As RBC ratio levels drop below the 200 percent threshold, regulators are authorized to take increasingly aggressive action, culminating in mandatory control of the insurer by the regulator if the RBC level drops below 70 percent. The NAIC has recently proposed raising the risk based capital requirements for property and casualty insurers by 50 percent.

When an insurance company domiciled in Florida becomes insolvent[24] in Florida, the DFS has the authority to petition the Leon County Circuit Court to place the insurance company in rehabilitation or liquidation, with the Division acting as receiver. In both rehabilitation and liquidation the receiver suspends all powers of the company's directors, officers and managers. If an insurance company is insolvent and placed in receivership, often an attempt will be made to rehabilitate the company. In rehabilitation, the receiver/Division is authorized to conduct all business of the insurer, including managing all the property and assets of the insurer, directing the actions of employees, and hiring or firing employees. If the rehabilitation is successful, then control of the company is turned back over to private sector ownership. If, however, the insurer is insolvent and there is no realistic chance that the company can be rehabilitated, then the Division will petition the court to place the company in liquidation. In liquidation, the receiver takes possession of the insurer's assets, marshals them, and eventually uses them to pay claimants to the extent possible and then dissolves the corporate existence of a domestic insurer.

When an insurance company becomes insolvent, the result is high costs for the State, the insurance industry, and ultimately policyholders in the State of Florida. Florida has established three guaranty funds[25] to avoid financial loss to claimants or policyholders because of the

[22] See s.624.4085, F.S.

[23] The risk based capital system is now used instead of fixed capital standards such as a minimum surplus because it provides a more comprehensive measure of the financial needs of each individual insurer than a uniform requirement.

[24] See. s. 631.011, F.S., The Florida Statutes defines "insolvency" as when 1) all the assets of the insurer would be insufficient to discharge all its liabilities, or; 2) the insurer is unable to pay its debts as they become due in the usual course of business. Also, insolvency can occur when an "impairment of capital" exists, meaning that the minimum required surplus is dissipated and the insurer lacks assets equal or greater than its liabilities. Finally, insolvency can occur when an insurer has an "impairment of surplus" by failing to comply with the surplus requirements of s. 624.408, F.S.

[25] See s. 631.55 and s. 631.57, F.S. (Florida Insurance Guaranty Association—handles claims against insolvent property and casualty insurers); s.631.715 and s. 631.717, F.S. (Florida Life and Health Insurance Guaranty Association—handles claims dealing with health insurance, life insurance, annuity contracts and supplemental contracts); s. 631.911 and s. 631.913, F.S. (Florida Workers Compensation Guaranty Association—handles claims against workers' compensation insurers).

insolvency of an insurer.[26] When an insurer or HMO goes insolvent, the various state guaranty funds are left to pay claims against those entities. Guaranty funds are funded via assessments against insurance companies and HMOs, with the result being that the rest of the market ends up paying for the failures of insolvent insurers.[27] Investors and creditors of insolvent insurers also often lose money in an insolvency, with such losses likely to lead to diminished confidence among investors.

Most importantly, the costs of insurer insolvencies are passed on to Florida consumers. When insurers become insolvent, it diminishes the overall capacity of the insurance market. This sometimes forces customers to purchase coverage from a state insurer of last resort that is required by statute to charge higher rates than private insurers.[28] Insolvencies also decrease competition within the insurance market, which gives consumers less options and likely increases costs. Plus, statutory limits are placed on the payments that state guaranty funds make to policyholders, thus some Floridians do not make a full recovery when their insurer goes insolvent.

Insurance Company Solvency Interim Project

In the Interim Project *Insurance Company Solvency Regulation* (2005-106), staff of the Senate Banking and Insurance Committee examined solvency regulation in Florida to detect any weaknesses in Florida's solvency laws. The following are some of the findings of the report:

<u>Transactions with Affiliates</u>
According to representatives with the OIR and the Division, insurance companies frequently establish affiliated entities to provide services to the insurer. The services provided may include claims servicing, policy administration, premium collection, premium financing, investment management services, accounting services, or other administrative or management services. Specific disclosure requirements and guidelines as to the agreements between insurers and affiliated parties are necessary, according to these representatives, to ensure that the affiliated entities are not unjustly enriched for the services they provide and to preserve and protect the assets of the insurer. Specific requirements are also needed for officers, directors, and stockholders of insurers to comply with affiliated party transactions.

Four problematic practices were identified dealing with transactions between an insurer and its affiliates. First, some insurers have improperly paid for the expenses of an affiliated company or made improper "loans" to affiliates. In a similar vein, some insurers enter into contracts with affiliates that provide excessive compensation to the affiliate and are not in the best interest of the insurer. A third problem is the failure of an affiliated Managing General Agent to remit payment to remit premiums to the insurer. Finally, some insurers simply do not report their transactions with affiliates.

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[26] The state has also established the Florida Health Maintenance Organization Consumer Assistance Plan to protect Floridians by assuring payment for services under covered subscriber contracts for up to 6 months after the HMO goes insolvent and to help subscribers of the insolvent HMO to find coverage. See Part IV of Ch. 631, F.S.
[27] See s. 631.57(3), F.S. (Authority for FIGA to assess insurers); s. 631.64, F.S. (Permits insurers to pass along the costs of a FIGA assessment to consumers in their rates and premiums). Insurers are also permitted to consider the cost of an assessment in ratemaking for life and health policies. See s. 631.718(7), F.S.
[28] Such as Citizens Property Insurance Corporation and the Florida Worker's Compensation Joint Underwriting Association.

An excellent example of the potential problems related to the affiliate party agreements with insurers is found in the insolvency and later liquidation of Aries Insurance Company.[29] Aries had a number of affiliated companies including a managing general agent, an adjusting company, multiple premium finance companies, a computer services company, and a collections company. When Aries was placed in liquidation, millions of dollars were owed to the company by its affiliates.

Reserve Requirements

Reported gross loss estimates from the four major hurricanes of the 2004 hurricane season are at over $20 billion dollars. An insurer that lacks the reserves, via their assets or reinsurance, to pay claims that result from a severe hurricane is likely to become insolvent. A review of Florida law reveals that there is no requirement that an insurer maintain and secure the assets and reinsurance necessary to establish a reserve that will enable the insurer to pay for claims that result from a catastrophic storm. Interviews with representatives from the insurance industry indicated that many insurers maintain reserves that will enable them to cover two 100-year probable maximum loss (PML)[30] storms or a 250-year probable maximum loss storm. When questioned by staff about establishing a reserve requirement on property and casualty insurers that mandates the ability to cover a single 100-year PML, representatives from the OIR indicated that such a standard would be prudent given the threat of severe storms in Florida.

Loss Reserve Certification

In the September 2004 Auditor General's operational audit of OIR procedures for monitoring insurer solvency, a recommendation was made that the OIR obtain independent actuarial certifications of an insurer's reported loss reserve. A loss reserve is the insurer's estimate of liabilities the insurer faces based on an actuarial determined estimate of the value of all claims. A determination of whether an insurer is solvent is largely based on whether the insurer's loss reserve is adequate, and are also used in the setting the insurer's rates.

On-Site Financial Examinations

Representatives from the Office of Insurance Regulation have expressed their desire to change the maximum time between financial examinations from 3 to 5 years for all insurers that have been certified in Florida for more than 3 years. These representatives claim that many insurers are in sound financial condition and that requiring all insurers to be examined every 3 years diverts resources and personnel from directing more time and effort to monitoring and examining insurers that are in more troublesome financial condition. Office personnel report that by going to a 5-year interval, Florida will be able to join in the examination process of multi-state insurers who currently are only examined once every 5 years by the state in which they are domiciled. The 5-year interval is the maximum time permissible to maintain accreditation with the NAIC.

[29] Aries was placed in rehabilitation on May 9, 2002 and subsequently declared insolvent and placed in liquidation on November 14, 2002.

[30] A 100 year probable maximum loss event is the probable loss resulting from a storm that is likely to strike with a probability of once every 100 years.

III. Effect of Proposed Changes:

Section 1. Amends s. 624.316, to change the maximum interval between financial condition examinations from 3 to 5 years if the Office of Insurance Regulation finds the insurer to be in sound financial condition if the insurer's risk based capital level ratio exceeds 250 percent. For insurers not meeting this threshold, the exam interval would remain at 3 years, and all insurers would continue to be subject to an on-site examination at any time if the Office determines one is necessary. The requirement is designed to provide a benefit to insurers who maintain a RBC ratio 50 percentage points higher than the 200 percent level necessary to avoid the instigation of regulatory action, and allow the OIR to direct its resources on insurers who financial condition requires comprehensive, in-depth examination.

Section 2. Creates s. 624.4087, F.S., to require that all property and casualty insurers transacting business in Florida maintain surplus and reinsurance adequate to pay obligations incurred as a result of a 100-year probable maximum loss event. The determination of a 100-year PML is presumed accurate if the insurer uses calculation methods that conform to standards adopted by the Florida Commission on Hurricane Loss Projection Methodology pursuant to s. 627.0628, F.S.

Section 3. Amends s. 624.424, F.S., to give the Office of Insurance Regulation authority to require an independent actuarial certification of the insurer's annual statement of opinion on its loss and loss adjustment expense reserves.

Section 4. Amends s. 628.801, F.S., to require that the Financial Services Commission to enact by rule all requirement and standards of the Insurance Holding Company System Regulatory Act promulgated by the National Association of Insurance Commissioners as it exists on January 1, 2005. The model act contains sixteen substantive sections, three of which (sections 8, 9, and 10) are currently enacted in the Florida Statutes (s. 628.401-628.403, s. 628.451-628.461, F.S.) and three of which (1, 4, and 5) have been adopted by rule in s. 69O-143.045, F.A.C.

Enactment of the entirety of the Insurance Holding Company System Regulatory Act will make the following changes, organized by section of the model act:

<u>Model Act s. 2</u> Allows domestic insurers to organize or acquire one or more subsidiaries that may conduct any kind of business. Limits are placed on the amount of certain kinds of investments (common stock, preferred stock, debt obligations and other securities) that a domestic insurer may make. The insurer's investments cannot exceed the lesser of 10% of insurer's assets or 50% of the insurer's surplus as regards policyholders. Additionally, the insurer's surplus as regards policyholders must be reasonable in relation to its outstanding liabilities and meet financial needs. If approved by the OIR, the insurer may invest a greater amount in a subsidiary if the insurer's surplus as regards policyholders remains reasonable in relation to outstanding liabilities and adequate to financial needs.

The act specifies which expenditures are considered investments. An insurer may invest any amount on investments (common stock, preferred stock, debt obligations and other securities) for a subsidiary that engages exclusively in the ownership and management of assets authorized as investments, if the subsidiary follows investment guidelines applicable to the insurer. Whether an investment made under these circumstances is eligible must be determined before the investment is made.

If an insurer ceases to control a subsidiary, it must dispose of any investment in the subsidiary made pursuant to this section within 3 years, or longer if the Director of OIR allows it. The investment may be kept if after the investment was made, it met the requirements for investment under this chapter, and the insurer notified the OIR.

Model Act s. 3 Provides requirements for a person other than the insurer to acquire or attempt to acquire a voting security of a domestic insurer if such person would directly or indirectly control the insurer or, merge with or acquire control of a domestic insurer or a person controlling a domestic insurer. Such person must file notice with the OIR and send to the insurer a statement containing information required by this section. The OIR has the right to disapprove the offer, agreement or acquisition. A domestic insurer must file a pre-acquisition notification with OIR sixty days prior to the effective date of acquisition. Failure to file is subject to penalty as provided in s. 628.802 and s. 628.803, F.S.

The OIR must approve a merger or acquisition of control unless, after a public hearing, the Director finds one or more of the following: (1) the insurer cannot meet insurance licensure requirements, (2) the merger or acquisition will lessen competition or create monopoly, (3) the financial condition of acquiring party is poor and would jeopardize the insurer or its policyholders, (4) the plans to liquidate insurer, merge it, or otherwise change it are unfair and unreasonable to policyholders and not in public interest, (5) persons who would control insurer lack competency, expertise or integrity, or (6) the acquisition is likely to be hazardous or prejudicial to public.

The OIR also may require a person acquiring control of insurer to maintain or restore the capital of insurer to the levels required by FL law. The Office may retain at acquiring party's expense any outside attorneys, actuaries, accountants or other experts reasonably necessary to assist in the review of the proposed acquisition of control.

Exempt from this section are transactions dealing with the merger or consolidation of two or more insurers or a transaction the Director exempts as not changing or influencing the control of a domestic insurer.

Model Act s. 3.1 contains regulations for transactions not covered by section 3 of the model act. An acquisition covered under this section must be preceded by a pre-acquisition notification and compliance with a 30 day waiting period prescribed by the OIR. The waiting period begins when the Office receives a pre-acquisition notification and ends on the 30^{th} day or termination of the waiting period by the Director. The notification must conform to the requirements of the NAIC relating to those markets which would result in a minimal or no increase in market share. The Office may require additional information as necessary to determine whether the acquisition would violate the competitive standard provided in this section.

Exempt from the requirements of sec 3.1 of the model act are (1) acquisitions subject to approval by the OIR pursuant to sec. 3, (2) purchases of securities not used to cause a lessening of competition in the insurance market, (3) acquisitions when both persons are not directly or through affiliates primarily engaged in the business of insurance, if pre-acquisition notification is filed with the OIR or of the acquisition meets any of these requirements, (4) the acquisition of already affiliated persons, (5) acquisitions that do not surpass specified limits in market share control, (6) acquisitions where notice is required solely to examine the effect on the ocean marine insurance line of business, or (7) an acquisition of an insurer whose domiciliary insurance commissioner finds to be in failing condition and the benefits of improving the insurer's condition exceed the public benefits from not lessening competition.

Model Act s. 6 states the OIR has the power to order any registered insurer to produce records, books, and information papers of the insurer or its affiliates as are reasonably necessary to ascertain the financial condition of the insurer or determine compliance with the NAIC model act. If the insurer fails to comply with the order, the OIR has the power to examine the affiliates to obtain the information. The OIR may retain at registered insurer's expense attorneys, actuaries, accountants and other experts reasonably necessary to assist in conducting such examination, and the registered insurer is liable for and must pay the expense of the exam. Though the OIR currently has the power to review the records and documents of a receiver in s. 631.156, that section does not state the Office has the power to examine an affiliate to obtain the information.

Model Act s. 7 requires that documents obtained by the OIR or any other person pursuant to Section 4, 5, or 6 are confidential and not subject to Florida's Sunshine law. The Office may use information in furtherance of regulatory or legal action pursuant to his official duties, but cannot make information public without consent of insurer unless, after giving insurance notice and opportunity to be heard, the Office determines disclosure would be in the public interest. Exemptions are provided, allowing the Office to share information with other state, federal and international regulatory agencies and legal authorities, and the NAIC if the recipient agrees to maintain confidentiality. Additionally, the Office may receive confidential materials from law enforcement or the NAIC if confidentiality is maintained and may enter into agreements governing sharing confidential information consistent with this section. However, providing or sharing information does not constitute a waiver of confidentiality.

Model Act s. 11 Permits solvency proceedings to be initiated if it appears to the Office that any person has violated the provisions of the model act, and such violation threatens the solvency of a domestic insurer or makes further business transactions hazardous to its policyholders, creditors, shareholders or the public.

Model Act s. 12 Specifies the receiver's right to recover assets in an insolvency proceeding. The receiver has a right to recover on behalf of the insurer the amount of distributions (other than shares of the same class of stock) paid by the insurer on its capital stock or any payment in the form of a bonus, termination settlement or extraordinary lump sum salary adjustment made by the insurer or its subsidiary to a director, officer, or employee where the distribution or payment is made during the year preceding the petition the petition for receivership. Such recovery may be made from any parent corporation, holding company, person or affiliate who controlled the insurer. Generally, assets from affiliates are recoverable under s. 631.399, but the recovery power contained in that statute does not the right to recover a bonus, lump sum payment, or extraordinary lump sum salary adjustments given to a director, officer, or employee that are made within 1 year of the petition for liquidation, conservation, or rehabilitation.

A person who received payments and was a parent corporation, holding company, or otherwise controlled the insurer or affiliate when the distributions were made is liable up to the amount of distributions or payments the person received. Any person who otherwise controlled the insurer when the distributions were declared is liable up to the amount of distributions that would have been received if they had been paid immediately. If two or more persons are liable with respect to the same distributions, they are jointly and severally liable. If such person is insolvent or fails to pay a due claim, the parent corporation, holding company, or person who controlled it when the distribution was paid is jointly and severally liable for a resulting deficiency in the amount recovered from the parent corporation, holding company, or person who otherwise controlled it. The maximum amount recoverable is the amount needed in excess of all other available assets of the impaired or insolvent insurer to pay the contractual obligations of the insurer and reimburse any guaranty funds.

Exception to the right of recovery exists if the parent or affiliate shows that distribution was lawful and reasonable when paid and insurer did not know and reasonably could not have known that the distribution might adversely affect the ability of the insurer to meet its financial obligations, recovery is not available.

<u>Model Act s. 13</u> Provides that the OIR has authority suspend, revoke, or refuse to renew the insurer's license to do business—after notice and opportunity for hearing—when it appears to the Director that any person has violated the model act in a way that makes the continued operation of the insurer contrary to the interests of the policyholders and public. Such determination must be accompanied by specific findings of fact and conclusions law.

<u>Model Act s. 14</u>. Provides that any person aggrieved by any act, determination, rule, regulation, order, or any other action of the OIR pursuant to this Act may appeal to the Circuit Court for Leon County. The court must conduct its review without a jury and via trial *de novo*, unless all parties including the Director stipulate that the review be confined to the record. Portions of the record may be introduced by stipulation into evidence in a trial *de novo* as to those parties so stipulating.

The filing of an appeal pursuant to this section stays the application of a rule, regulation, order or other action of the Director to the appealing party unless the court, after giving the party notice and opportunity to be heard, determines a stay is detrimental to the interest of policyholders, shareholders, creditors or the public. Any person aggrieved by the failure of the Director to act or make a determination required by this Act may petition the Circuit Court for Leon County for a writ of mandamus or peremptory mandamus directing the Director to act or make a determination.

<u>Model Act s. 15 & 16</u> State that all laws and parts of laws of Florida inconsistent with the model act are superseded with respect to matters covered by the act. Additionally, if any provision of the act or its application is held invalid, the invalidity shall not affect other provisions or applications of the Act that can be given effect without the invalid provisions or applications.

Section 5. This act takes effect January 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Two provisions in the proposed Senate bill raise public records/open meetings issues under Article I, Section 24(a) of the Florida Constitution and section 119.07(1) of the Florida Statutes.

Section 1 of the proposed bill uses the risk-based capital level of an insurer to determine the interval for on-site examinations of insurers. Section 624.40851 provides a public record exemption for risk-based capital information held by the Office of Insurance Regulation. As currently configured, the proposed bill uses the risk-based capital determination alone to determine the interval for insurer examinations. As such, the bill may serve to reveal a general knowledge of the risk-based capital levels of domestic insurers insofar as those insurers who are examined every 5 years can be assumed to have a risk-based capital level above 250 percent. The addition of accompanying criteria in making this determination may serve to cure this defect.

Section 4 of the proposed bill requires the Office of Insurance Regulation to enact the entirety of the NAIC Insurance Holding Company Model Act, portions of which are already codified in statute or law. One provision of the Model Act requires that the confidentiality of all information related to examination of insurers under s. 624.316, F.S., as well as the registration and standards for insurance holding companies under s. 69O-143.045, F.A.C. Examination reports are currently confidential until filed under s. 624.319, F.S. The registration requirements and standards of operation for insurance holding companies under s. 69O-143.046 and s. 69O-143.047, F.A.C., do not have a public records exemption currently, thus it is questionable whether the exemption contained in the Model Act is necessary with regard to such information.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The more stringent requirements for creation, acquisition and investment in affiliates of insurers may make the creation of such entities more difficult and costly. Thus, there may be a negative financial impact on insurers and policyholders to the extent that holding company systems reduce costs to industry and the public via their efficiency. Also, the independent actuarial certification of an insurer's loss reserve will result in additional costs for insurers. However, if the additional requirements contained in the proposed bill reduce insolvency in Florida, the bill should yield positive financial dividends both for insurers and the public.

C. Government Sector Impact:

The additional monitoring requirements contained in the proposed bill may require the increased use of resources for the OIR. However, increasing the interval for on-site examination of insurers from three to five years should result in a cost savings for the Office.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.