The Florida Senate

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Committee on Banking and Insurance — Senator Bill Posey, Chairman

REVIEW OF PUBLIC RECORDS EXEMPTION FOR RISK-BASED CAPITAL INFORMATION FURNISHED TO THE DEPARTMENT OF INSURANCE

(S. 624.40851, F.S.)

SUMMARY

The public records exemption for risk-based capital information submitted by insurance companies to the Department of Insurance, as required by s. 624.40851, F.S., is scheduled for repeal on October 2, 2002, unless reviewed and reenacted by the Legislature, pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

In 1997, the Legislature enacted ch. 97-293, L.O.F., the risk-based capital requirements for insurers and confidentiality provisions for such information. The act instituted reporting and disclosure requirements for risk-based capital levels for domestic insurers based on a formula adopted by the National Association of Insurance Commissioners (NAIC). Insurers are required to internally monitor trigger levels and respond as necessary. A comparison of the insurer's actual capital level and its risk-based capital levels may trigger any of several levels of regulatory action by the Department of Insurance or supervision of corrective actions by the insurer.

Section 624.40851, F.S., establishes the confidentiality of risk-based capital information. The section also provides public records and public meetings exemptions for such information maintained by the Department of Insurance and for proceedings and hearings conducted by the department. The section provides that it is subject to the Open Government Sunset Review Act of 1995 and shall stand repealed on October 2, 2002, unless modified or retained from repeal through reenactment.

It is recommended that the current public records exemption and confidentiality be maintained and reenacted.

BACKGROUND

Constitutional Access to Public Records and Meetings—Article I, s. 24 of the State Constitution provides every person with the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of the official business by any agency. This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by

which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995—Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, an exemption is to 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.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

(a) What specific records or meetings are affected by the exemption?

(b) Whom does the exemption uniquely affect, as opposed to the general public?

(c) What is the identifiable public purpose or goal of the exemption?

(d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without 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; or

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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is

sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(3)(e), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

METHODOLOGY

Committee staff interviewed representatives of the Department of Insurance and the National Association of Insurance Commissioners (NAIC), and domestic insurers. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act.

FINDINGS

Risk-Based Capital Reporting and the Confidentiality of Risk-Based Capital Information—In 1997, the Legislature enacted ch. 97-293, L.O.F., the NAIC's Risk-Based Capital for Insurers Model Act. The risk-based capital reporting requirements and confidentiality provisions are contained in ss. 624.4085 and 624.40851, F.S., respectively, of the Florida Insurance Code. The act instituted reporting and disclosure requirements for risk-based capital levels for domestic insurers based on a formula adopted by the NAIC. According to the NAIC, "The RBC system was meant to replace fixed minimum capital and surplus standards with a more flexible system that increases minimum capital commensurate with risk…"[1]

The NAIC established a program for accreditation of states in 1989. As of July 2001, 47 states were accredited. Nevada, New York, and West Virginia are not accredited. In order to be accredited, a state must adopt by law or rule the substance of a number of NAIC model laws and rules relating to insurer solvency. According to the NAIC, 47 of the United States' insurance jurisdictions have adopted laws or regulations that are substantially similar to the Risk-Based Capital for Insurers Model Act.

Accreditation of a state provides a benefit to insurers domiciled in that state. Because of accreditation, other accredited states accept Florida examination reports of Florida domestics. Other state laws may provide exemptions for insurers domiciled in accredited states; for example, Florida's insurance holding company law applies to Florida domestics and to insurers domiciled in nonaccredited states. Florida relies on the accreditation process to assure itself that insurers domiciled in other accredited states are adequately regulated as to solvency. Accreditation also provides a national system of solvency regulation, relying on each accredited state to regulate the solvency of its domestic insurers sufficiently to meet national standards.

Under the provisions of s. 624.508, F.S., insurers are required to internally monitor trigger levels and respond as necessary. A comparison of the insurer's actual capital level and its risk-based capital levels may trigger any of several levels of regulatory action by the Department of Insurance or supervision of corrective actions by the insurer. Risk-Based Capital (RBC) analysis measures the minimum amount of capital necessary to support their overall business operations, given the size and risk profile of the respective companies. The capital requirements generally are assessed against four types of risk: (1) asset risk; (2) credit risk; (3) underwriting risk; and (4) off-balance sheet risk. Different risk-based capital calculations apply to life and health companies, property/casualty companies, and health maintenance organizations, since these entities operate in different economic environments.

According to the NAIC, the "…RBC formula produces a regulatory minimum amount of capital that is tailored to each specific company."[2] The RBC formula is not meant to be used as a tool to compare or rank insurers. The risk-based capital system is just one of many tools a regulator uses for evaluating the solvency of an insurer. Insurers are prohibited from advertising the results of these calculations, and the department is prohibited from using the information in rate making. The department is authorized to use the reports solely for monitoring the solvency of insurers and assessing the need for corrective action with respect to insurers.

Section 624.40851, F.S., establishes the confidentiality of such risk-based capital information. The section

[1] Mike Barth, "Ranking Insurers by RBC Results: Still Not Such A Smart Move," *NAIC Research Quarterly*, April 1995, p. 46.

[2] Ibid.

specifically provides public records and public meetings exemptions for such information maintained by the Department of Insurance and for proceedings and hearings conducted by the department. The exemptions terminate one year following the conclusion of any risk-based capital plan or revised risk-based capital plan or on the date of an order of seizure, rehabilitation, or liquidation pursuant to ch. 631, F.S.

However, s. 624.40851, F.S., does provide an exception to the confidentiality provision. The department is authorized to open such proceedings or hearings or provide a copy of the transcripts of such hearings or proceedings, or disclose other reports or records to a department or agency of this state or another state, if the department determines that the disclosure is necessary or proper for the enforcement of the laws of the United States or of this or another state.

The section provides that it is subject to the Open Government Sunset Review Act of 1995 and shall stand repealed on October 2, 2002, unless modified or retained from repeal through reenactment by the Legislature.

Answers to Questions Posed by the Open Government Sunset Act—Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions.

First, what specific records or meetings are affected by the exemption? According to representatives of the Department of Insurance, the following records obtained from an insurance company are exempt: initial risk-based capital reports, risk-based capital plans, revised risk-based capital plans, adjusted risk-based capital reports, transcripts of any hearings conducted pursuant to s. 624.40851, F.S., and workpapers and reports of examination or analysis of an insurer performed pursuant to: a risk-based capital plan, regulatory action level event, or corrective order issued regarding a risk-based capital plan or report.

Second, whom does the exemption uniquely affect, as opposed to the general public? Domestic insurance companies.

Third, what is the identifiable public purpose or goal of the exemption? The information filed with the department is necessary to monitor the capital adequacy of individual insurers. Domestic insurers would be reluctant to make this type of filing if the information was available to their competitors.

Fourth, can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how? Information concerning the general financial condition of an insurer could be evaluated through a review of the insurer's annual statement and the audit report of the financial statements that are required to be submitted to the Department of Insurance, pursuant to s. 624.424, F.S. These documents are public records and are available from the department. The annual statement submitted to the department includes some of the results of the risk-based formula, such as the authorized control level risk-based capital and a company's total adjusted capital. The National Association of Insurance Commissioners has stated "…that public disclosure of the results of the formulas…is an appropriate means of providing consumers with valuable information about the capital adequacy of insurance companies."[3]

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. [See, s. 119.15(4)(b), F.S., quoted above, for the specified purposes.] The exemption must be no broader than is necessary to meet the public purpose it serves. Finally, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

The exemption under review best fits under s. 119.15(4)(b)3., F.S., which permits an exemption that protects information of a confidential nature which protects 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.

RECOMMENDATIONS

Staff recommends that the public records exemption in s. 624.40851, F.S., be maintained and reenacted. The exemption provided for risk-based capital reports protects information of a confidential nature which protects a business advantage, the disclosure of which could injure the insurer in the marketplace. Key results of the risk-based capital formula are included in an insurer's annual statement, which is a public record.

[3] Ibid.