

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1817 CS PCB GO 05-02 Review Under the Open Government Sunset Review Act
SPONSOR(S): Governmental Operations Committee, Kottkamp
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Everhart
1) Finance & Tax Committee	9 Y, 0 N	Diez-Arguelles	Diez-Arguelles
2) State Administration Council	7 Y, 0 N, w/CS	Williamson	Bussey
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Open Government Sunset Review Act of 1995 requires the Legislature to review each public records and each public meetings exemption five years after enactment. If the Legislature does not reenact the exemption, it is automatically repealed on October 2nd of the fifth year after enactment.

The bill reenacts and narrows the public records exemption for the Certified Capital Company Act. It removes the public records exemption for:

- Information regarding Office of Financial Regulation personnel or their families because such exemption has never been utilized.
- Information provided on a confidential or similarly restricted basis because such exemption appears overly broad.
- Social security numbers because it is somewhat duplicative of an existing exemption.

The bill repeals Program Two of the Certified Capital Company Act because it has not been funded, nor has it been implemented. It repeals, in five years, Program One and the public records exemption because Program One participants claim insurance premium tax credits expire after 10 years, and because the exemption will no longer be needed if Program One no longer exists.

In addition, the bill removes the requirement that a capital company (CAPCO) invest 100 percent of its certified capital prior to making a distribution to its equity holders. It replaces the 100 percent investment provision with a requirement that the CAPCO obtain an audit by a certified public accountant to verify that any proposed distributions will be made in compliance with the law, and to determine the fair market value of all CAPCO investments in qualified businesses. The bill allows for voluntary decertification by a CAPCO provided certain requirements are met, and upon approval by the Office of Financial Regulation of the Department of Financial Services. It allows tax credits earned by a certified investor to carry forward through the 2017 tax year.

The bill may have a minimal non-recurring fiscal impact on state expenditures. It does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill narrows the public records exemption for the Certified Capital Company Act, thereby increasing public access to government information. The bill eliminates Program Two of the Certified Capital Company Act, and, in five years, eliminates Program One and the premium tax exemption.

The bill allows voluntary decertification of a capital company provided certain requirements are met.

B. EFFECT OF PROPOSED CHANGES:

Background

Certified Capital Company Act

In 1998, the Legislature created the Certified Capital Company Act.¹ 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.”² The act is designed to contribute to employment growth in the state through investments in new or expanding businesses, which is intended to:

- Contribute to employment growth;
- 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.

The incentives to insurance companies 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 in 2000, 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 due to lack of funding, 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.³

¹ Chapter 98-257, L.O.F.; s. 288.99, F.S.

² Section 288.99(2), F.S.

³ Section 288.99(17), F.S.

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.⁴

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.⁵ 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.⁶

Public Records Exemption

Current law provides a public records exemption for information a CAPCO provides relating to an investigation or review by the Office of Financial Regulation (OFR) of a certified capital company (CAPCO), including a consumer complaint, until the investigation or review is complete or ceases to be active.⁷ 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.⁸

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:

- Reveal a trade secret;
- Jeopardize the integrity of another active investigation or review; or
- Disclose the identity of a confidential source or investigative techniques or procedures.⁹

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

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 of such personnel is confidential and exempt from public disclosure:

- The home addresses, telephone numbers, places of employment, and photographs;
- The home addresses, telephone numbers, photographs, and places of employment of spouses and children; and
- The names and locations of schools and day care facilities attended by the children.¹⁰

⁴ 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.

⁵ Section 288.99(10)(a), F.S.

⁶ Senate STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT for SB 1024, March 7, 2005.

⁷ An investigation or review is considered "active" so long as OFR, 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. Section 288.99(15)(a), F.S.

⁸ *Id.*

⁹ Section 288.19(15)(b), F.S.

¹⁰ Section 288.99(15)(d), F.S.

This exemption has never been utilized, and the likelihood of OFR employees being placed in danger because of a CAPCO investigation or review is reported to be remote.¹¹

The statute also provides a public records exemption for information obtained by OFR from any person that is made available only to the office on a confidential or similarly restricted basis.¹² This exemption appears to be overly broad.¹³ Potentially, any person or business, including a CAPCO, may offer OFR information and request that the information be kept confidential and exempt from public disclosure. OFR staff reported that this provision has been invoked only once – by a CAPCO during the initial application process.

Finally, the social security number of any customer of a CAPCO, complainant, or person associated with a CAPCO or qualified business is exempt from public disclosure. This exemption is somewhat duplicative of s. 119.0721, F.S., which makes confidential and exempt social security numbers held by an agency.

Pursuant to the Open Government Sunset Review Act of 1995, the CAPCO exemptions will repeal on October 2, 2005, unless reenacted by the Legislature.

Effect of Bill

The bill reenacts and narrows the CAPCO public records exemptions. It removes the exemption for:

- Information regarding OFR personnel or their families because such exemption has never been utilized.
- Information provided on a confidential or similarly restricted basis because such exemption appears overly broad.
- Social security numbers because it is somewhat duplicative of an already existing exemption.

The bill removes all reference to CAPCO Program Two, thus repealing the program because it has not been funded nor has it been implemented. It repeals Program One and the public records exemption effective December 31, 2010, because Program One participants' ability to claim insurance premium tax credits expire after 10 years, which is 2010, and because the exemption will no longer be needed if Program One no longer exists.

In addition the bill removes the requirement that a CAPCO invest 100 percent of its certified capital prior to making a distribution to its equity holders. It replaces the 100 percent investment provision with a requirement that the CAPCO obtain an audit by a certified public accountant to verify that any proposed distributions will be made in compliance with the law, and to determine the fair market value of all CAPCO investments in qualified businesses. The bill requires a CAPCO to submit audits to the Office of Financial Regulation of the Department of Financial Services prior to its fiscal year end and prior to any planned distribution to equity holders. It allows tax credits earned by a certified investor to carry forward through the 2017 tax year.

The bill allows for voluntary decertification by a CAPCO provided certain requirements are met and upon approval by the office. The CAPCO must submit a detailed business plan to the office on or before December 31, 2005. It must detail how the CAPCO intends to decertify prior to December 31, 2010.

¹¹ Meeting with OFR staff, September 24, 2004.

¹² Section 288.99(15)(c), F.S.

¹³ 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.

Finally, the bill makes editorial changes, removes unnecessary language, and removes the October 2, 2005, repeal of the public records exemptions.

C. SECTION DIRECTORY:

Section 1 amends s. 288.99, F.S., relating to the Certified Capital Company Act.

Section 2 provides an effective date of "upon becoming a law."

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill may create a minimal non-recurring increase in state expenditures. A bill enacting or amending the public records law causes a non-recurring negative fiscal impact in the year of enactment for training employees who are responsible for replying to public records requests. In the case of bills being reviewed under the Open Government Sunset Review process, the cost of such training will be incurred if the bill does not pass or if the exemption is amended, as employees would have to be informed that formerly exempt records are now open or additional information is either now made public or is made exempt from public disclosure. Because the bill narrows the public records exemption, employee training activities will be required thus causing a minimal nonrecurring increase in expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

None. The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

By repealing Program Two, the bill eliminates the ability for companies to participate in the program if it was ever funded and implemented, thus removing the ability to take advantage of insurance premium tax credits.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Open Government Sunset Review Act of 1995

The Open Government Sunset Review Act of 1995,¹⁴ provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or, 3. Protecting trade or business secrets.

Section 119.15, F.S., also sets forth a Legislative review process that requires newly created or expanded exemptions to include an automatic repeal of the exemption on October 2nd of the fifth year after enactment or substantial amendment, unless the Legislature reenacts the exemption.

If, and only if, in reenacting an exemption that will expire, the exemption is expanded (essentially creating a new exemption), then a public necessity statement is required as a result of the requirements of Art. 1, s. 24, Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes (that do not expand the exemption), if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement is not required.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 20, 2005, the State Administration Council adopted an amendment and reported the bill favorably with committee substitute. The amendment:

- Removes the requirement that a CAPCO invest 100 percent of its certified capital prior to making a distribution to its equity holders.
- Replaces the 100 percent investment provision with a requirement that the CAPCO obtain an audit by a certified public accountant to verify that any proposed distributions will be made in compliance with the law, and to determine the fair market value of all CAPCO investments in qualified businesses.
- Requires a CAPCO to submit audits to the office prior to its fiscal year end and prior to any planned distribution to equity holders.
- Allows tax credits earned by a certified investor to carry forward through the 2017 tax year.
- Allows for voluntary decertification by a CAPCO provided certain requirements are met and upon approval by the office.

¹⁴ Section 119.15, F.S.