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: SB 2306

INTRODUCER: Senator Atwater

SUBJECT: HMOs/Risk-Based Capital/Public Records

DATE: March 25, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	**Favorable**
2.			HE	
3.			GO	
4.			RC	
5.				
6.				

I. Summary:

Senate Bill 2306 provides for the confidentiality of risk-based capital information related to a health maintenance organization (HMO). A separate bill, SB 2294, would require that HMOs file such information with the Office of Insurance Regulation (OIR). The following materials related to a HMO are to be held confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

- Risk-based capital reports;
- Adjusted risk-based capital reports;
- Risk-based capital plans;
- Revised risk-based capital plans;
- Working papers and reports of examination or analysis of a HMO performed pursuant to a plan, corrective order, or regulatory action level event held by the office pursuant to s. 641.224, F.S.;
- Transcripts of hearings made as required by s. 641.2241, F.S.

Hearings conducted pursuant to s. 641.224, F.S., relating to the Office of Insurance Regulation's (OIR) actions regarding any HMO's risk-based capital plan, revised risk-based capital plan, risk-based capital report, or adjusted risk-based capital report are exempt from s. 286.011, F.S. and s. 24(b), Art. I of the Florida Constitution except as otherwise provided.

The bill provides Legislative findings as to the necessity for enacting the public records and meetings exemptions contained in this legislation.

The bill is effective January 1, 2007 if Senate Bill 2294 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

This bill creates the following sections of the Florida Statutes: 641.2241

II. Present Situation:

Public Records; Exemptions

Section 24(a), Art. I of the Florida Constitution states, "Every person has 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, except with respect to records exempted pursuant to this section or specifically made confidential by this constitution."

Section 24(c), Art. I of the Florida Constitution permits the Legislature to create exemptions from the public records law. However, the bill creating the exemption must contain a statement of public necessity that justifies the exemption, and the exemption must be no broader than necessary to accomplish its purpose. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

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."[1]

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?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

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

[1] Section 119.15(3)(b), F.S.

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."[2]

Risk Based Capital

Insurance companies must meet the risk-based capital requirements of s. 624.4085, F.S. HMOs currently do not have to meet such requirements. The National Association of Insurance Commissioners (NAIC) is a voluntary association of insurance regulators from all 50 states. One function of the NAIC is as a promulgator of model laws. Two of those model laws that serve similar purposes are the Risk Based Capital For Insurers Model Act and the Risk-Based Capital for Health Organizations Model Act. Twenty-eight states have adopted the Risk-Based Capital for Health Organizations Model Act. Florida has adopted the RBC for Insurers Model Act, but not the RBC for Health Organizations Model Act.

The risk-based capital (RBC) system uses a formula to assess the adequacy of an insurer's or HMO's capital. The RBC system determines a company's minimum necessary capital level by evaluating the risk level of an insurer or HMO's underwriting, investments, and other factors depending on the lines of business the company writes. If a Florida insurer's actual capital level falls below certain levels when compared with the minimum capital level, s. 624.4085, F.S., authorizes the DFS to take action to require the insurer to rectify the shortfall or begin receivership proceedings. The various action levels under the risk-based capital system are based on the company's "control level"—the level of capital at or below which the OIR is authorized to petition a court to place the insurer in receivership. There are four RBC action levels that are used by both the RBC for Insurers Model Act and the RBC for Health Organizations Model Act:

- Company Action Level[3]—If an insurer's total adjusted capital is only 150 percent to 200 percent above the company's control level, this level is triggered. The insurer must submit to the OIR a comprehensive financial plan that identifies the causes of the financial condition and contains proposals to correct the financial problems identified and restore total adjusted capital to 200 percent or above. The financial plan must contain

[2] Section 119.15(4)(b), F.S.
[3] s. 624.4085(3), F.S.

projections[4] of the insurer's expected financial condition for the current year and the four succeeding years both if the financial plan is implemented and if it is not. Failure to file the plan as required or filing of an unsatisfactory plan can trigger a regulatory action level event at the discretion of the OIR.

- Regulatory Action Level[5]—If an insurer's total adjusted capital is 100 percent or higher but less than 150 percent above the company's control level, this level is triggered. At this level, the company must submit a comprehensive financial plan to the office. Additionally, the OIR must perform either an on-site examination of the insurer pursuant to s. 624.316, F.S., or an analysis of the insurer's liabilities, assets and operations. The OIR is also mandated to issue a corrective order detailing the corrective actions the office determines are required.
- Authorized Control Level[6]—If an insurer's total adjusted capital is 70 percent or higher up to 100 percent of the authorized control level, then this action level is triggered. The authorized control level permits the OIR to petition to put the insurer into receivership pursuant to Part I, Chapter 631, F.S., the Insurers Rehabilitation and Liquidation Act. This power is in addition to all powers available in the action levels detailed above.
- Mandatory Control Level[7]—If an insurer's total adjusted capital is less than 70 percent of the authorized control level, then the OIR must place the insurer into receivership pursuant to the Insurers Rehabilitation and Liquidation Act.

If a domestic insurer is placed in receivership, often an attempt will be made to rehabilitate the company. In rehabilitation, the receiver (the Division of Rehabilitation and Liquidation) is authorized to conduct all business of the insurer, including managing its assets and controlling all employees. If the rehabilitation is successful, control of the company is turned back over to private sector ownership. If, however, the insurer is insolvent and there is no realistic chance it can be rehabilitated, then the receiver will petition the court to liquidate the company. In liquidation, the receiver takes possession of all 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 the domestic insurer.

Risk-based capital information may only be used for limited purposes by the regulatory authorities (OIR) and HMOs. HMOs are prohibited from publishing or making known in any way information regarding the risk-based capital level of an HMO. The comparison of an HMO's total adjusted capital to its risk-based capital levels is designed to indicate the need for corrective action regarding an HMO's finances. It is a regulatory tool designed to ensure solvency. Such information may not be used to provide rankings of HMOs. An exception exists if a materially false statement regarding such information is published in writing. If an HMO can substantially prove that the statement made is false or inappropriate, that HMO may publish a written announcement that has the sole purpose of rebutting the false statement. The OIR is also constricted in its use of risk-based capital information. Such information may only be used for

[4] The plan must also detail the assumptions underlying these projections.
[5] s. 624.4085(4), F.S.
[6] s. 624.4085(5), F.S.
[7] s. 624.4085(6), F.S.

monitoring the solvency of an HMO, and cannot be used for ratemaking purposes or as a means to calculate premiums.

III. Effect of Proposed Changes:

Section 1. Creates s. 641.2241, F.S., to provide for the confidentiality of risk-based capital information related to an HMO. The following materials related to a HMO are to be held confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

- Risk-based capital reports;
- Adjusted risk-based capital reports;
- Risk-based capital plans;
- Revised risk-based capital plans;
- Working papers and reports of examination or analysis of a HMO performed pursuant to a plan, corrective order, or regulatory action level event held by the office pursuant to s. 641.224, F.S.;
- Transcripts of hearings made as required by s. 641.2241, F.S.

Hearings conducted pursuant to s. 641.224, F.S., relating to the Office of Insurance Regulation's (OIR) actions regarding any HMO's risk-based capital plan, revised risk-based capital plan, risk-based capital report, or adjusted risk-based capital report are exempt from s. 286.011, F.S. and s. 24(b), Art. I of the Florida Constitution except as otherwise provided in this section. Hearing must be recorded by a court reporter, and the office must open such hearings or provide a transcript of the hearing or other information otherwise confidential pursuant to this section, to a department, agency, or instrumentality of this or another state if disclosure is necessary or proper for the enforcement of the laws of the United States, Florida, or another state.

The exemptions provided in this section terminate:

- One year following the conclusion of any risk-based capital plan or revised risk based capital plan; or
- On the date of entry of an order of seizure, rehabilitation, or liquidation pursuant to chapter 631, F.S.

The public records exemptions contained in this section are subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and will stand repealed on October 2, 2012, unless reviewed and saved from repeal through re-enactment by the Legislature.

Section 2. Provides a statement of public necessity for the public records exemptions contained in the bill. The Legislature finds that the exemptions are necessary because unrestricted public access to a HMO's risk-based capital information might damage the HMO if made available to its competitors and could substantially affect the solvency of an HMO. Damage to a HMO's solvency could have substantial negative effect on the public as well as other HMOs. Public access to such information is not in the public interest because such information can be misleading as to a HMO's ranking because risk-based capital data does not reflect all of the factors involved in assign the financial strength of an HMO.

The Legislature also finds that risk-based capital reports and plans reveal a HMO's investment competitive advantage in the state. Public access to such information could affect a HMO's ability to do business in the state and its solvency. Additionally, the Legislature finds that public access, through other means, to information regarding the financial strength of an HMO and its ranking in comparison to other HMOs is otherwise adequate.

Section 3. This act is effective January 1, 2007, if Senate Bill 2294 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Yes, the bill enacts a public records exemption.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption is designed to prevent harm from coming to an HMO because unrestricted public access to an HMO's risk-based capital information might damage it, if made available to its competitors and could substantially affect the solvency of an HMO. Damage to a HMO's solvency could have substantial negative effect on the public as well as other HMOs. Public access to such information is not in the public interest because such information can be misleading as to a HMO's ranking because risk-based capital data does not reflect all of the factors involved in assigning the financial strength of an HMO.

Disclosure of risk-based capital reports and plans would reveal an HMO's investment competitive advantage in the state. Public access to such information could affect a HMO's ability to do business in the state and its solvency. Additionally, the Legislature finds that public access, through other means, to information regarding the financial strength of an HMO, and its ranking in comparison to other HMOs is otherwise adequate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.