

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1429

Florida Workers' Compensation Joint Underwriting Association, Inc.

SPONSOR(S): Grant

TIED BILLS:

IDEN./SIM. BILLS: SB 2276

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|-----------------|-----------------|----------------|
| 1) <u>Committee on Insurance</u> | <u>9 Y, 0 N</u> | <u>Callaway</u> | <u>Overton</u> |
| 2) <u>Jobs & Entrepreneurship Council</u> | <u></u> | <u>Callaway</u> | <u>Thorn</u> |
| 3) <u>Policy & Budget Council</u> | <u></u> | <u></u> | <u></u> |
| 4) <u></u> | <u></u> | <u></u> | <u></u> |
| 5) <u></u> | <u></u> | <u></u> | <u></u> |

SUMMARY ANALYSIS

This bill amends laws governing the Florida Workers' Compensation Joint Underwriting Association (JUA). It changes the appointing entity of the JUA's board from the insurance and insurance agent industries to the Financial Services Commission. It also requires the JUA to deposit all its assets in the Workers' Compensation Administration Trust Fund (WCATF) upon dissolution of the JUA. These two changes should assist the JUA in obtaining tax-exempt status. The JUA is required to apply to the Internal Revenue Service for tax-exempt status at its earliest reasonable opportunity.

The bill extends the expiration date of some of the JUA's deficit funding mechanisms provided under current law. First, the bill allows the JUA to assess employers in the voluntary market to fund its deficit indefinitely whereas current law prevents the JUA from doing so after July 1, 2007. Second, the bill extends the ability of the JUA to access a contingency reserve established in the WCATF from July 1, 2007 until July 1, 2012 and requires the JUA to return any unused funds to the WCATF by December 31, 2012. The JUA cannot use the contingency reserve without the Office of Insurance Regulation certifying the need for the release of the funds and the Legislative Budget Commission approving the release.

The contingency reserve was created by legislation in 2004 and funded with \$15 million of the WCATF. The contingency reserve is primarily used by the JUA to help defray the deficit it sustained prior to 2004 (in one of its former subplans, subplan D) and is accessed as the JUA needs funds to meet its cash needs in three-month intervals. The bill allows the JUA to access the contingency reserve funds to meet its cash needs at six-month, rather than three-month intervals. The JUA deficit was generated because it did not collect enough premium for the workers' compensation insurance policies in subplan D to cover the losses. The JUA premium in subplan D was set by statute at 25 percent above the voluntary market premiums which was too low for the risks the subplan insured; thus, the subplan incurred a deficit.

The bill authorizes a new deficit funding mechanism for JUA deficits by allowing the JUA to use surplus in its other former subplans to defray specific future deficits.

See Fiscal Comments Section for the fiscal impact of this bill.

The bill is effective July 1, 2007.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1429c.JEC.doc

DATE: 4/11/2007

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Background on Florida Workers' Compensation Joint Underwriting Association

Prior to the creation of the Florida Workers' Compensation Joint Underwriting Association (JUA) in 1993, the Florida Workers' Compensation Insurance Plan (FWCIP) was the residual market, or insurer of last resort, for workers' compensation insurance coverage. The FWCIP, administered by the National Council on Compensation Insurance (NCCI), provided workers' compensation insurance to employers who were required by law to maintain coverage and who were unable to purchase such insurance through the voluntary market. Deficits in the FWCIP were funded by assessments on carriers writing such coverage in the voluntary market based on their market share in the voluntary market.

In 1993, the Legislature eliminated the FWCIP and created the current JUA as a nonprofit, self-funding entity, governed by a nine-member board, to act as a residual market.¹ The board is comprised of three members appointed by the Financial Services Commission (FSC); two members representing the top 20 domestic insurers writing workers' compensation; two members representing the top 20 foreign insurers writing workers' compensation; one person appointed by the largest property and casualty insurance agents' association; and the Consumer Advocate for the Department of Financial Services (DFS).

The bill maintains a nine-member board, but changes the appointment process for the four insurer representatives on the board and the insurance agent representative. Under current law, the four insurer representatives are elected by insurers, whereas, the bill requires these representatives to be appointed by the FSC from a list of nominees submitted by insurers. Additionally, the insurance agent representative board member is currently appointed by the largest property and casualty insurance agent's association, whereas the bill requires this representative to be appointed by the FSC from a list of nominees submitted by the largest property and casualty insurance agent's association. The bill also gives the FSC authority to remove any board member for cause. Current law does not provide any removal protocol. These changes will assist the JUA in meeting Internal Revenue Services' (IRS) requirements regarding state governance of the JUA.

Current law requires the JUA to have a market assistance plan to assist employers in finding workers' compensation insurance coverage in the voluntary market. The bill retains the market assistance plan requirement and requires it to be reviewed and updated periodically; the current law does not require any review and update.

Regulation of the JUA

The JUA, as a residual market mechanism, is exempt from many provisions of the Insurance Code that are applicable to insurers in the voluntary market, such as surplus and solvency requirements. However, the JUA and the other residual markets are subject to market conduct examinations pursuant to the Office of Insurance Regulation's (OIR) authority under s. 624.3161, F.S., to determine whether the entity is complying with applicable provisions of the Insurance Code and the Workers'

¹ Section 627.311(5), F.S. (2006).

Compensation Law. In addition, the JUA's plan of operation and any changes to the plan are subject to the approval of the OIR pursuant to s. 627.311, F.S.

Due to concerns regarding the accountability of the JUA, the Legislature directed the Auditor General to perform an operational audit of the JUA.² In 2004, the Auditor General released the audit report, which included findings and recommendations regarding the administration, rates, and funding of the JUA.³

2003 JUA Legislation

In 2003 and 2004, the Legislature addressed concerns regarding affordability and availability of workers' compensation insurance for small employers in the JUA. In 2003, the Legislature established subplan D in the JUA to provide coverage for generally small employers (15 or fewer employees).⁴ Prior to this legislation, the JUA divided its policies into three subplans: subplan A, subplan B, and subplan C. When subplan D was created by the 2003 legislation, premiums in the subplan were capped at 25 percent over the voluntary market premium, but, the policies were also subject to assessments for additional premium to cover any deficit in the subplan. At the time of the 2003 legislation, the JUA estimated the premium for subplan D should have been 2.57 times higher than the voluntary market premium to remain actuarially sound; hence, it projected subplan D would likely incur a deficit. As predicted, the JUA reported a \$9.9 million deficit on December 31, 2003, a deficit attributed to approximately 2,500 policies in subplan D.

2004 JUA Legislation

In 2004, the Legislature enacted changes to the JUA law to address the growing deficit in subplan D and to provide affordable coverage for small employers that were unable to obtain coverage in the voluntary market.⁵ The law provided a one-time appropriation of \$10 million from the Workers' Compensation Administration Trust Fund (WCATF) in the DFS to fund any deficit in the JUA. Additionally, the bill authorized the JUA to request periodic transfers, not to exceed a total of \$15 million, from the WCATF to cover any remaining subplan D deficit, subject to approval by the Legislative Budget Commission. The Governor subsequently vetoed the \$10 million appropriation to the JUA.

The law also restructured the JUA by eliminating subplans A, B, C, and D and replacing them with a three-tier coverage system with eligibility for each tier based on an employer's loss experience. The tier system of coverage became effective on July 1, 2004.⁶

JUA Rates

The JUA is authorized to establish and use its rates at any time, but no more than two times per calendar year for any rating class. This is commonly referred to as "use and file." This method of rate regulation allows the JUA to file its rates and immediately begin using the new rates (before the OIR approves them). If the Office of Insurance Regulation subsequently determines that the rates are excessive, the JUA is required to refund the excess premium collected. In contrast, the OIR must approve rate filings for workers' compensation insurers in the voluntary market before the rates become

² Chapter 2004-266, L.O.F.

³ Auditor General, State of Florida, *Operational Audit of the Florida Workers' Compensation Joint Underwriting Association, Inc.* (2004).

⁴ Chapter 2003-412, L.O.F. The law also provided coverage for certain charitable organizations that was capped at 10 percent over the voluntary market rates.

⁵ Chapter 2004-266, L.O.F.

⁶ Tier One provides coverage for employers that have an experience-rating modification factor of less than 1.0 or, if nonrated, the employers must have a continuous three-year history of workers' compensation coverage and a good loss history. Tier Two provides coverage for new employers, employers with moderate experience (experience-rating modification factor equal to or greater than 1.0 but not greater than 1.10), and employers with good experience who do not have a continuous 3-year history of workers' compensation coverage. Tier Three provides coverage for all other employers.

effective (i.e. the voluntary market insurers cannot begin using their workers' compensation rates until receiving approval from the OIR).⁷ The standard for approving insurance rates in Florida is that the rate may not be excessive, inadequate, or unfairly discriminatory.⁸

The 2004 legislation creating the tier system of coverage in the JUA capped premiums for Tiers One and two until the JUA had sufficient experience for the establishment of actuarially sound rates for these tiers. However, the legislation precluded the JUA from setting actuarially sound rates for these tiers until January 1, 2007, at the earliest. The premium cap for Tier One was 25 percent above the voluntary market premium and was 50 percent above the voluntary market premium for Tier Two. The 2004 legislation required Tier Three rates to be actuarially sound and made these policies subject to assessments for additional premium to cover any deficit incurred in the Tier.

The JUA premiums for new and renewal business as of January 1, 2007 are:

- Tier One: 34 percent above the voluntary market premium;
- Tier Two: 115 percent above the voluntary market premium;
- Tier Three: 188 percent above the voluntary market premium.

These premiums result in the following premium changes from the 2006 JUA premiums:

- Tier One: 5.6 percent premium decrease;
- Tier Two: 18.5 percent premium increase;
- Tier Three: 21.4 percent premium decrease.

Although the OIR has not yet approved the rates requested by the JUA for 2007, the JUA was able to charge them as of January 1, 2007 in accordance with the "use and file" rate filing method. The bill does not revise the JUA rates or premiums in any way.

Deficit Funding Available to the JUA

On June 30, 2004, the JUA ceased writing policies in subplans A, B, C, and D when these subplans were eliminated and Tiers One, Two, and Three were created. As of February 28, 2007, the JUA had 2,964 policies in force.⁹

According to the 2006 annual statement, the JUA recognized an overall surplus of \$8,472,398. The following table summarizes the financial condition of the subplans and tiers for calendar years 2004, 2005, and 2006:

| Subplan/Tier | 2006 Surplus/(Deficit) | 2005 Surplus/(Deficit) | 2004 Surplus/(Deficit) |
|--------------|---------------------------|---------------------------|---------------------------|
| A, B, and C | \$39,890,318 | \$30,092,485 | \$17,506,004 |
| D | (\$2,430,546) | (\$11,834,198) | (\$20,545,523) |
| Tier 1 | \$2,069,992 | (\$1,467,245) | (\$466,859) |
| Tier 2 | \$2,432,075 | (\$4,823,657) | (\$2,894,005) |
| Tier 3 | \$6,832,253 | (\$3,494,984) | (\$2,936,215) |

According to the table, the only JUA subplan or tier experiencing a deficit in 2006 was subplan D.

Deficit Funding Available for Subplan D Deficits

Under current law, there are two funding mechanisms for funding subplan D deficits: assessments on policyholders in the voluntary market except individual self-insured employers and governmental self-

⁷ Section 627.101(2), F.S. (2006).

⁸ Sections 627.062(1) and 627.151, F.S. (2006).

⁹ Board of Governors Bulletin 07-09 dated March 14, 2007 available at <http://www.fwcjua.com/reporting.asp> (last viewed March 15, 2007).

insurance funds (i.e. the below-the-line assessment) and the \$15 million contingency reserve created by the 2004 legislation and discussed previously. Access to the contingency reserve is eliminated as of July 1, 2007. Thus, without legislative action, the only available source of additional funding for the Subplan D deficit after July 1, 2007 is the below-the-line assessment

To date, the JUA has received a total of \$7.9 million of the \$15 million contingency reserve in the WCATF established by the 2004 legislation. As of March 9, 2007, the JUA does not believe it will need additional monies from the contingency reserve as it believes it can fund the \$2.4 million deficit in subplan D with future investment income.¹⁰

The bill extends the expiration date of the contingency reserve from July 1, 2007 to July 1, 2012 even though it is not anticipated at this time the JUA will have to access further funds from the contingency reserve as its future investment income is projected to be sufficient to cover the subplan D deficit. The bill also allows the JUA to access the contingency reserve to obtain funds to meet its projected cash need in six-month intervals rather than in three-month intervals as required by current law. The bill retains the oversight of the contingency reserve access by the Office of Insurance Regulation and the Legislative Budget Commission. The bill moves the law establishing the contingency reserve from a footnote in the statute governing the JUA (s. 627.311(5)) to a stand-alone statutory section. The bill requires any contingency reserve monies distributed to the JUA that are not used by the JUA to be returned to the Workers' Compensation Administration Trust Fund by December 31, 2012.

Deficit Funding Available for Subplans A, B, and C and Tiers One and Two

The 2004 legislation allowed any deficits in Tiers One, Tier Two, or any deficit remaining from any of the former subplans to be funded by a "below-the-line" assessment on workers' compensation policies in the voluntary market until July 1, 2007. In other words, policyholders in the voluntary market and nongovernmental self-insurance funds would be assessed to defray any deficit in the JUA attributed to Tier One, Tier Two, or subplans A, B, C or D. However, if a deficit occurs after July 1, 2007, there is no funding mechanism available. The bill amends current law and allows the JUA to levy assessments against policyholders (i.e. employers) in the voluntary market and nongovernmental self-insurance funds indefinitely, rather than only until July 1, 2007.

Current law is unclear whether the JUA can use surplus funds in subplans or tiers to fund deficits in other subplans or tiers. The bill dispels any ambiguity in current law in this regard by specifying the JUA to use its discretion to decide whether to use some or all of its surplus in the former subplans to defray any deficit in Tier One, Tier Two, or the former subplans.¹¹

Before subplan C was abolished in 2004, it issued assessable policies to its policyholders, meaning subplan C policyholders had to pay any subplan C deficit themselves. The bill does not require subplan C policyholders to pay a future deficit in subplan C themselves if the JUA uses the surplus in the former subplan C to defray a deficit.

Under current law, if Tier Three sustains a deficit, the policyholders in that tier are assessed to defray the deficit. The law also provides the JUA another deficit funding mechanism if it is unable to collect enough in assessments from the Tier Three policyholders to pay off the Tier Three deficit. This mechanism allows the JUA to request the Department of Financial Services to transfer funds out of the Workers Compensation Administration Trust Fund to the JUA in order for the JUA to meet its cash needs in Tier Three in three month intervals.¹² The Legislative Budget Commission must approve the fund transfer after the OIR verifies the need for it. If a transfer is made, the JUA must report it to the Legislature and the Legislature must review the JUA. The bill retains this deficit funding mechanism for

¹⁰ Committee on Insurance staff conversation with representative of the JUA on March 9, 2007.

¹¹ This statutory change is consistent with the Auditor General's recommendation made in the 2004 audit of the JUA. The Auditor General report recommended the Legislature consider enacting legislation addressing the use of surplus funds attributable to other subplans, such as subplan C, to fund the deficit in subplan D.

¹² This deficit funding mechanism is different than the contingency reserve funding mechanism available for subplan D.

Tier Three but allows the JUA to request a transfer of funds from the WCATF to meet its Tier Three cash needs in six month intervals, rather than three month intervals.

Tax-Exempt Organizations

In 2004, the Auditor General report on the JUA noted that through legislative action, it might be possible to reduce the JUA's costs by making the JUA exempt from federal taxation. The report recommended the Legislature consider enacting legislation to qualify the JUA as a tax-exempt organization under s. 501(c) of the Internal Revenue Code. Currently, Citizens Property Insurance Corporation, the Property and Casualty Joint Underwriting Association, and the Florida Automobile Joint Underwriting Association qualify as tax-exempt organizations.

Under section 61 of the Internal Revenue Code, gross income means all income from whatever source derived, except as otherwise provided.¹³ Income earned by a state, a political subdivision of a state, or an integral part of a state or political subdivision of a state is generally not taxable in the absence of specific statutory authorization for taxing such income. In cases involving the status of an organization as an instrumentality of the state, the following factors are taken into consideration:¹⁴

- Whether it is used for a governmental purpose and performs a governmental function;
- Whether performance of its function is on behalf of one or more states or political subdivisions;
- Whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner;
- Whether control and supervision is vested in public authority;
- If express or implied authority is necessary for the creation, and/or use of such an instrumentality, and whether such authority exists; and
- The degree of financial autonomy and the source of its operating expenses.

In determining whether an entity is an integral part of a state, it is necessary to consider, in addition to factors established in revenue rulings addressing this issue, the totality of the circumstances, including the state's degree of control over the entity and the state's financial commitment to the enterprise.

The Legislature created the JUA in 1994 to serve as a residual market for workers' compensation insurance. A nine-member board comprised of five members appointed by the insurance industry and four members appointed by state government governs the JUA. Currently, the state does not exercise majority control of the board. In 2004, the Legislature exempted the JUA from premium insurance tax and assessments for the Workers' Compensation Administration Trust Fund and the Special Disability Trust Fund. In 2003 and 2004, the Legislature capped the premiums in subplan D and Tiers One and Two, respectively. Since 2004, the Legislature has provided approximately \$7.9 million to the JUA to fund deficits in subplan D. The JUA is subject to the public records and meeting laws of chs. 119, and 286, F.S., as an agency for purposes of ch. 119, F.S. However, the law does not address the distribution of assets of the JUA to the state upon dissolution of the JUA.

Recently, tax consultants engaged by the JUA provided written guidance as to the requirements for the JUA to be recognized as a tax-exempt entity for federal income taxes.¹⁵ The consultants recommended legislative changes to allow the state to have control of the board of governors and to require that, upon dissolution of the JUA, any remaining assets after payment of liabilities would be distributed to the state. Since its inception in 1994, the JUA has incurred \$33 million in federal income tax expenses, including \$16,590,095 for 2006. According to the JUA, the tax liability incurred in recent years was primarily due to the JUA's decrease in reserves set aside for claims payment.¹⁶

¹³ 26 U.S.C. s. 26.

¹⁴ Rev. Rul. 57-128.

¹⁵ Correspondence from Thomas Howell Ferguson P.A. to Laura Torrence, Executive Director of the JUA, dated February 14, 2006.

¹⁶ Conversation by House Committee on Insurance staff with a representative of the JUA on March 9, 2007.

Upon dissolution of the JUA, the bill requires all assets of the JUA be applied to pay all debts and obligations of the plan and any remaining assets to become property of the State and deposited in the Workers' Compensation Administration Trust Fund. This provision, and the change giving the state more appointments on the JUA board, will assist the JUA in its efforts to obtain tax-exempt status. The bill also requires the JUA to seek a letter ruling or determination from the IRS as to the JUA's eligibility as a 501(c) (3) tax-exempt organization but does not provide a deadline date for such. Rather, the bill requires the JUA to request the IRS determination "at its earliest reasonable opportunity."

C. SECTION DIRECTORY:

Section 1: Amends s. 627.311(5) relating to the Florida Workers' Compensation Joint Underwriting Association.

Section 2: Creates s. 627.3121 establishing a contingency reserve in the Workers' Compensation Administration Trust Fund for use by the Florida Workers' Compensation Joint Underwriting Association to defray Association deficits.

Section 3: Creates an unnumbered section requiring the Florida Workers' Compensation Joint Underwriting Association to request the Internal Revenue Service for a ruling as to the Association's status as a tax-exempt entity.

Section 4: Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Policyholders in the voluntary market may benefit from the extension of the contingency reserve from July 1, 2007 to July 1, 2012. If the subplan D deficit continues, the JUA will be able to assess the reserve rather than assessing voluntary market policyholders.

D. FISCAL COMMENTS:

To date, the JUA has received a total of \$7.9 million of the \$15 million contingency reserve in the WCATF established by the 2004 legislation. As of March 9, 2007, the JUA does not believe it will need additional monies from the contingency reserve as it believes it can fund the \$2.4 million deficit in subplan D with future investment income.¹⁷

The bill extends the expiration date of the contingency reserve from July 1, 2007 to July 1, 2012 even though it is not anticipated at this time the JUA will have to access further funds from the contingency reserve as its future investment income is projected to be sufficient to cover the subplan D deficit.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision does not apply because this bill does not: require counties or municipalities to spend funds or to take an action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 22, 2007, the Committee on Insurance considered the bill, adopted a strike-all amendment, and reported the bill favorably with an amendment. The amendment maintained many of the provisions of the original bill text, clarified some portions of the bill, and changed part of the bill. The amendment made the following changes to the bill:

- Changed the appointment process of JUA Board members.
- Subjects the JUA meetings and records to the public records and public meetings law.
- Required the Office of Insurance Regulation (OIR) to approve the JUA's plan of operation.
- Added procurement policies requiring competitive bidding for procurements over \$25,000 and a vote of the board for those over \$100,000.
- Required the JUA to use the surplus in former subplan C to fund JUA deficits before assessing employers in the voluntary market.
- Required the JUA to refund premiums to their policyholders if the OIR disapproves the rate.
- Added ethical and financial disclosure standards for board members and JUA employees.
- Sets a time period during which the JUA is allowed to assess employers in the voluntary market for deficits, rather than an indefinite period.
- Required the JUA to apply to the Internal Revenue Service for tax-exempt status by January 1, 2008.

¹⁷ Committee on Insurance staff conversation with representative of the JUA on March 9, 2007.