

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 821 Insurer Solvency

**SPONSOR(S):** Regulatory Affairs Committee; Insurance & Banking Subcommittee; Ingram

**TIED BILLS:** CS/CS/HB 823 **IDEN./SIM. BILLS:** SB 836

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Bauer	Cooper
2) Regulatory Affairs Committee	18 Y, 0 N, As CS	Bauer	Hamon

### SUMMARY ANALYSIS

The Office of Insurance Regulation (OIR) is a member of the National Association of Insurance Commissioners (NAIC), an organization consisting of state insurance regulators. As a member of the NAIC, the OIR is required to participate in the organization's accreditation program. NAIC accreditation is a certification that legal, regulatory, and organizational oversight standards and practices are being fulfilled by a state insurance department. The OIR is slated for its accreditation review during the fall of 2013.

The NAIC also periodically reviews its solvency standards as set forth in its model acts, and revises accreditation requirements to adapt to evolving industry standards. The OIR has identified several model act components not found in the current Insurance Code, and which must be implemented in order for the OIR to maintain its accreditation.

CS/CS/HB 821 implements the following NAIC components:

- Requires insurers to file actuarial opinion summaries and supporting workpapers annually;
- Requires acquirers of controlling interests to disclose "enterprise risk" and for ultimate controlling persons to file an annual enterprise risk report;
- Requires insurance holding companies to file an annual registration statement;
- Allows the OIR to examine any insurer and its affiliates to ascertain enterprise risk;
- Provides for confidentiality of enterprise risk reports, actuarial opinion summaries;
- Provides a privilege for memoranda supporting actuarial opinions on reserves, actuarial opinion summaries and related information;
- Requires health maintenance organizations and prepaid limited health service organizations to file risk-based capital filings;
- Incorporates a risk-based capital trend test for life and health and property and casualty insurers; which expands the scenarios in which a company may be required to take corrective action;
- Allows the OIR to initiate the establishment of and to participate in supervisory colleges with other state insurance regulators;
- Authorizes the OIR to impose sanctions for violations of acquisition, enterprise risk reporting, and holding company registration requirements; and
- Updates the Financial Services Commission's rulemaking authority to reflect these new NAIC requirements.

The bill does not have a fiscal impact on state and local government. The bill has an indeterminate impact on the private sector.

The bill provides a contingent effective date of October 1, 2013, if the linked public records bill (CS/CS/HB 823) or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background: NAIC Accreditation**

The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. The membership consists of the state government officials, who along with their departments and staff, regulate the conduct of insurance companies and agents in their respective state or territory. The mission of the NAIC is to assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:

- Protect the public interest;
- Promote competitive markets;
- Facilitate the fair and equitable treatment of insurance consumers;
- Promote the reliability, solvency and financial solidity of insurance institutions; and
- Support and improve state regulation of insurance.<sup>1</sup>

As a member of the NAIC, the Office of Insurance Regulation (OIR) is required to participate in the organization's Financial Regulation Standards and Accreditation Program.<sup>2</sup> NAIC accreditation is a certification that legal, regulatory, and organizational oversight standards and practices are being fulfilled by a state insurance department. The accreditation program is designed to allow for interstate cooperation and reduces regulatory redundancies. For example, the OIR's examinations may be recognized by other member states, thereby avoiding the need to have a Florida domestic insurer examined by multiple states. All fifty states, the District of Columbia, and Puerto Rico are accredited by the NAIC. Once accredited, a state is subject to a full accreditation review every five years, as well as interim reviews. The OIR is slated for review by the NAIC Accreditation Team during the fall of 2013.

The NAIC also periodically reviews its solvency standards as set forth in its model acts,<sup>3</sup> and revises accreditation requirements to adapt to evolving industry practices. The OIR has identified elements of several NAIC model acts that are not in the current Insurance Code,<sup>4</sup> and must be implemented in order for the OIR to maintain its accreditation. This bill implements these model act elements, to be discussed in further detail below:

- *Model Holding Company Act & Regulations*<sup>5</sup>
  - Acquisition and controlling stock reporting
  - Registration and regulation of insurance holding companies
  - Enterprise risk reporting
  - Supervisory colleges
- *Risk-Based Capital for Insurers & Health Organizations*
  - Risk-based capital trend test for property and casualty insurers<sup>6</sup>
  - Risk-based capital trend test for life and health insurers<sup>7</sup>
- *Property & Casualty Actuarial Opinion Model Law*<sup>8</sup>

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<sup>1</sup> About the NAIC, [http://www.naic.org/index\\_about.htm](http://www.naic.org/index_about.htm) (last accessed February 27, 2013).

<sup>2</sup> NAIC Financial Regulation Standards and Accreditation Committee: [http://www.naic.org/committees\\_f.htm](http://www.naic.org/committees_f.htm)

<sup>3</sup> NAIC Model Laws, Regulations and Guidelines: [http://www.naic.org/store\\_model\\_laws.htm](http://www.naic.org/store_model_laws.htm)

<sup>4</sup> The Insurance Code consists of chs. 624, 632, 634, 635, 636, 641, 642, 648, and 651, F.S.

<sup>5</sup> The NAIC's 2010 revisions to the Model Holding Company Act have a tentative accreditation date of January 1, 2016. Information on file with the Regulatory Committee staff.

<sup>6</sup> The accreditation effective date for the risk-based trend test for property and casualty insurers is January 1, 2015. Information on file with the Regulatory Affairs Committee staff.

<sup>7</sup> The accreditation effective date for the risk-based trend test for life and health insurers is January 1, 2017. Information on file with the Regulatory Affairs Committee staff.

- Actuarial opinion summary
- Confidentiality<sup>9</sup> and privilege
- *Standard Valuation Law*<sup>10</sup>
  - Confidentiality<sup>11</sup> and privilege

In addition, the OIR has identified rulemaking provisions of the Insurance Code that require updating to reflect the new NAIC requirements. The OIR's rulemaking body is the Financial Services Commission.<sup>12</sup>

## **CS/CS/HB 821**

The ten substantive sections of the bill implement the four NAIC model laws described above.

### **1. Model Holding Company Act and Regulations**

For years, the OIR's financial oversight authority has included a review of transactions among affiliates and members of insurance holding companies by adopting the NAIC's Model Insurance Holding Company Act.<sup>13</sup>

In response to the recent financial crisis, the NAIC's Solvency Modernization Initiative (SMI)<sup>14</sup> studied key group supervision issues for insurance holding company systems. In light of the 2008 liquidity crisis and collapse of American International Group, Inc., the SMI's efforts focused on the risks and activities of non-insurance entities within insurance holding companies, concluded there was a corresponding regulatory need to obtain affiliates' financial information, such as *enterprise risk*. The NAIC model act defines "enterprise risk" as:

[A]ny activity, circumstance, event, or series of events involving one or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance company as a whole, including, but not limited to, anything that would cause the insurer's risk-based capital as set forth in [state requirement] or would cause the insurer to be in a hazardous financial condition.<sup>15</sup>

As a result, the NAIC adopted revisions to its *Model Insurance Holding Company System Regulatory Act and Regulations* in December 2010, which states must adopt as an accreditation component.<sup>16</sup> These revisions include:

- expansions to regulators' ability to evaluate any entity within an insurance holding company system;
- enhancements to the regulator's rights to access books and records and to compel production of information;
- establishment of expectation of funding with regard to regulator participation in supervisory colleges;
- enhancements in corporate governance, such as board of directors and senior management responsibilities;
- the inclusion of financial statements as part of an affiliate's registration requirements; and
- enterprise risk reporting requirements.<sup>17</sup>

Sections 1, 5, 6, 7, and 8 of the bill relate to the NAIC's Model Holding Company Act and Regulations.

<sup>8</sup> It is noted that the NAIC made the Property & Casualty Actuarial Opinion Model Law an accreditation component effective January 1, 2010. Information on file with the Regulatory Affairs Committee staff.

<sup>9</sup> See the linked/public records exemption bill, CS/CS/HB 823.

<sup>10</sup> According to the NAIC, an effective accreditation date for the changes to the Standard Valuation Law has not yet been determined. Information on file with the Regulatory Affairs Committee.

<sup>11</sup> See linked/public records exemption bill, CS/CS/HB 823.

<sup>12</sup> Section 20.121(3)(c), F.S.

<sup>13</sup> Bill analysis by the OIR (received March 9, 2013), on file with the Insurance & Banking Subcommittee.

<sup>14</sup> NAIC Solvency Modernization Initiative Roadmap (Mar. 29, 2012), accessed on [http://www.naic.org/committees\\_e\\_isftf.htm](http://www.naic.org/committees_e_isftf.htm)

<sup>15</sup> Section 1(F) of the NAIC Model Insurance Holding Company System Regulatory Act.

<sup>16</sup> As of November 2012, 11 states have adopted the Model Holding Company law. These states are: California, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Nebraska, Pennsylvania, Rhode Island, Texas, and West Virginia. OIR bill summary (dated January 24, 2013), on file with Insurance & Banking Subcommittee staff.

<sup>17</sup> NAIC Group Supervision, [http://www.naic.org/cipr\\_topics/topic\\_group\\_supervision.htm](http://www.naic.org/cipr_topics/topic_group_supervision.htm) (last accessed February 27, 2013).

- **Section 1** of the bill creates a new provision, s. 624.085, F.S., within the Insurance Code to define “affiliate,” “affiliated person,” and “control” for purposes of reporting acquisition of controlling stock.
  - The bill takes the definition of “affiliated person” currently defined in s. 628.461(12)(a), F.S., and places it in this new provision.
  
- **Section 5** of the bill amends s. 628.461, F.S. (acquisition of controlling stock), with the following:
  - Currently, an individual or company must file a letter of notification and a statement for the OIR’s approval before concluding a tender offer to acquire 5% or more of a domestic stock insurer or of a controlling company. During the pendency of the OIR’s review of an acquisition filing, the insurer is not permitted to make a “material change” to its operation or management, unless the OIR has approved or been notified, respectively. A “material change” consists of a disposal or obligation of 5% or more of the insurer’s capital and surplus, or a change in management involving a person who has the authority to dispose or obligate 5% of the insurer’s capital and surplus.
  - Section 5:
    - Deletes the provision stating in “lieu of filing an acquisition statement, a party acquiring less than 10 % of the outstanding voting securities of an insurer, may file a disclaimer of affiliation and control.” Amended language is relocated in a new s. 628.461(12)(a), F.S.
    - Specifies that the acquiring party’s statement must include an agreement to file an “annual enterprise risk report,” if control exists as described in section 6 of the bill.
    - Adds language that states the person required to file the statement pursuant to s. 628.461(1), F.S. will provide the annual report specified in s. 628.801(2), F.S., if control exists.
    - Adds a provision that the presumption of control may be rebutted by filing a disclaimer of control which will be in effect unless the OIR disallows the disclaimer.
    - Adds a provision that any controlling person of a domestic insurer that seeks to divest its controlling interest in the domestic insurer shall file with the OIR a confidential notice of its proposed divestiture at least 30 days prior to the relinquishment of control.
    - Deletes the definition of “affiliated person” which is moved to the new s. 624.085, F.S., found in Section 1 of the bill.
    - Retains the definition of “controlling company,” which means any corporation, trust, or association that owns 25% or more of the voting securities of one or more domestic stock insurance companies.
  
- **Section 6** of the bill amends s. 628.801, F.S. (regarding the registration and regulation of insurance holding companies), with the following:
  - Currently, all insurers authorized to do business in Florida, and who are members of insurance holding companies, are required to register with the OIR and be subject to regulation in relation to their holding companies. The Financial Services Commission has rulemaking authority to adopt rules regarding registration, and those rules must include the requirements and standards of certain NAIC model regulations.<sup>18</sup>
  - The bill imposes a statutory requirement that insurers file an annual holding company registration statement, including disclosure of material transaction between affiliates. Additionally, it requires that the controlling person of every insurer file an annual enterprise risk report which identifies material risk within the insurance company holding system that could pose enterprise risk to the insurer. These changes align Florida’s oversight structure with those adopted by the NAIC.
  - This section:
    - Requires authorized insurers to file a registration statement on or before April 1 of each year. The bill also states a material transaction between an insurer and its affiliates shall be filed with the OIR as provided by rule.
    - Adds a provision that requires the ultimate controlling person of every insurer subject to registration file an annual enterprise risk report on or before April 1 and comply with the

<sup>18</sup> A domestic insurer who is fully compliant with the registration laws of its holding company’s state of domicile (if NAIC-accredited) may request a waiver from the Florida filing requirements. Section 628.801(1), F.S.

December 2010 NAIC Insurance Holding Company System Model Regulation and subsequent amendments.

- Defines the term “ultimate controlling person” as a person that is not controlled by any other person.
  - Provides that the filings and related documents filed pursuant to this section (and not just the enterprise risk report) are confidential and exempt from public records disclosure, are not subject to subpoena or discovery, and are not admissible in evidence in any private civil action.
  - Adds a provision that prohibits the waiver of any applicable privilege or claim of confidentiality in the filings and related documents required under this section, as a result of disclosures to the OIR.
  - Allows the insurer to satisfy the filing requirement by filing the parent corporation’s reports that have been filed with the Securities and Exchange Commission if compliant with requirements.
  - Defines the term “Enterprise Risk.”
  - Allows the OIR to examine the financial condition of the insurer and its affiliates pursuant to ch. 624, F.S. and to evaluate enterprise risk.
  - Adds a provision that states the failure to file a registration statement or enterprise risk filing report is a violation of s. 628.801, F.S.
  - Adds a provision to define criteria under which an insurer may apply for waiver of the requirements contained in s. 628.801, F.S.
- **Section 7** of the bill amends s. 628.803, F.S. (regarding sanctions), with the following:
    - Currently, the Insurance Code states that noncompliant insurance companies (and their directors, officers, employees, and agents) can be subject to a number of sanctions:
      - monetary penalties for failing to file registration statements or certificate,
      - civil forfeitures for knowingly engaging in transactions that have not been properly filed, approved, or in accordance with commission rule,
      - a cease and desist order for engaging in transactions or entering into contracts that violate commission rules, and rescission orders if in the best interests of the policyholders, creditors, or public.
      - Additionally, an officer, director, or employee of an insurance holding company willfully and knowingly submits a false statement, false report, or false filing with the intent to deceive the OIR,
    - The bill incorporates a model NAIC sanction that specifies that if there are violations of s. 628.461 (i.e., the filing requirements for acquisition of controlling stock described in section 5 of the bill) and s. 628.801 (i.e., registration and regulation of insurance holding companies), OIR can disapprove dividends and distributions and place the insurer under an order of supervision per part VI of ch. 624, F.S.
  - **Section 8** creates s. 628.805, F.S., regarding supervisory colleges, with the following:
    - According to the Center for Insurance Policy & Research, “a supervisory college is a meeting of insurance regulators or supervisors where the topic of discussion is regulatory oversight of one specific insurance group that is writing significant amounts of insurance in other jurisdictions.”<sup>19</sup> Supervisory colleges facilitate oversight of internationally active insurance companies at the group level and promote regulatory information-sharing, subject to applicable confidentiality agreements.<sup>20</sup>
    - The bill:
      - Allows the OIR to participate in supervisory colleges with other regulators and to initiate the establishment of a supervisory college, clarify membership, participation and

<sup>19</sup> “Supervisory Colleges: A Regulatory Tool for Enhancing Supervisory Cooperation and Coordination,” [http://www.naic.org/cipr\\_newsletter\\_archive/vol4\\_supervisory\\_colleges.htm](http://www.naic.org/cipr_newsletter_archive/vol4_supervisory_colleges.htm) (last accessed March 1, 2013).

<sup>20</sup> NAIC on Supervisory Colleges, [http://www.naic.org/cipr\\_topics/topic\\_supervisory\\_college.htm](http://www.naic.org/cipr_topics/topic_supervisory_college.htm) (last accessed March 1, 2013).

Additionally, the linked/public records bill, HB 823, provides for confidential treatment of regulatory information, including within the context of a supervisory college, that shared between insurance regulators and law enforcement, pursuant to confidentiality agreements.

functions of the role of other regulators, coordinate ongoing activities and establish a crisis management plan.

- Allows the OIR to participate in a supervisory college if the insurance company is registered pursuant to s. 628.801, F.S., for any domestic insurer that is part of a holding company system.
- Allows the OIR to assess a registered insurer for the reasonable expenses to participate in a supervisory college.

## 2. Risk-Based Capital for Insurers & Health Organizations (#312 and 315); Trend Test Requirements

Risk-based capital (RBC) is a capital adequacy standard that represents the amount of required capital that an insurer must maintain, based on the inherent risks in the insurer's operations. It is determined by a formula that considers various risks depending on the type of insurer (e.g., subsidiary insurance companies, fixed income, equity, credit, reserves, and net written premium). RBC raises a safety net for insurers, is uniform among states, and provides state insurance regulators with authority for timely corrective action.<sup>21</sup> The NAIC's *Risk-Based Capital for Insurers Model Act (#312)* provides that states must require both life and health and property and casualty insurers to submit RBC filings with their regulators. Presently, this requirement is reflected in the Insurance Code, but does not apply to health maintenance organizations (HMOs) and prepaid limited health service organizations.<sup>22</sup> "Prepaid limited health service organizations" provide limited health services (such as dental or vision care) through an exclusive panel of providers in return for a prepayment,<sup>23</sup> and "health maintenance organizations" generally provide a range of health coverage with providers under contract.<sup>24</sup>

In 2010, the NAIC adopted a recommendation to make the *Risk-Based Capital for Health Organizations (#315) Model Act* an accreditation standard.<sup>25</sup> This Model Act defines "health organization" to include health maintenance organizations and limited health service organizations.<sup>26</sup> Accordingly, effective January 1, 2015, member states must require HMOs and prepaid limited health service organizations to submit risk-based capital filings in order to maintain accreditation.

In addition, the NAIC has developed a new "trend test" within RBC calculations for life and health and P/C insurers, as well as for health organizations. The trend test flags companies whose RBC is trending in a negative direction, and companies failing the trend test would trigger a "company action level event" and be required to file a corrective action plan.

Sections 2, 9, and 10 of the bill relate to the NAIC Risk-Based Capital for Health Organizations model act, and Section 2 includes the new trend test requirements.

- **Section 2** amends s. 624.4085, F.S., to expand the definition of "life and health insurer" to include health maintenance organizations and prepaid health service organizations (that are authorized in Florida and one or more other states, jurisdictions, or countries) for purposes of risk-based capital requirements. Section 2:
  - Clarifies the RBC requirements for a life and health insurer that reports using the life and health annual statement instructions and changes a company action level event to total adjusted capital that is greater than or equal to its company action level RBC but less than the product of its authorized control level risk-based capital and 3.0.
  - Defines the RBC requirements for a life and health or property and casualty insurer that reports using the health annual statement instructions and defines a company action level event as total adjusted capital that is greater than or equal to its company action level risk-based capital but less than the product of its authorized control level RBC and 3.0 and triggers the trend test calculation.

<sup>21</sup> NAIC on Risk-Based Capital, [http://www.naic.org/cipr\\_topics/topic\\_risk\\_based\\_capital.htm](http://www.naic.org/cipr_topics/topic_risk_based_capital.htm) (last accessed March 1, 2013).

<sup>22</sup> Section 624.4085, F.S.

<sup>23</sup> Section 636.003(7), F.S.

<sup>24</sup> Section 641.19(12), F.S.

<sup>25</sup> NAIC Financial Regulation Standards and Accreditation Committee, at: [http://www.naic.org/committees\\_f.htm](http://www.naic.org/committees_f.htm)

<sup>26</sup> Section 1(F) of the NAIC Risk-Based Capital for Health Organizations Model Act (#315).

- Defines the RBC requirements for a property and casualty insurer that reports using the property and casualty annual statement instructions and defines a company action level event as total adjusted capital that is greater than or equal to its company action level RBC but less than the product of its authorized control level risk-based capital and 3.0 and triggers the trend test calculation.
- Adds HMOs and prepaid limited health service organizations for consideration of regulatory control, if the company's RBC triggers a mandatory control level event.
- **Section 9** amends s. 636.045, F.S. (regarding minimum surplus requirements for prepaid limited health service organizations), with the following:
  - Subjects prepaid limited health service organizations to the risk-based capital requirements of s. 624.4085 (Section 2 of the bill) and the confidentiality provision for risk-based capital information in s. 624.40851, F.S.
- **Section 10** amends s. 641.225, F.S. (surplus requirements for HMOs), with the following:
  - Subjects HMOs that are authorized in Florida and one or more other states, jurisdictions, or countries to the risk-based capital requirements of s. 624.4085 (i.e., Section 2 of this bill) and the confidentiality provision for risk-based capital information in s. 624.40851, F.S.
- **Section 11** amends s. 641.255, F.S. (acquisition, merger, or consolidation) with the following:
  - Subjects HMOs that are members of a holding company system to the acquisition and enterprise risk reporting requirements of s. 628.461, F.S. (i.e., Section 5 of this bill), but not to the acquisition requirements for specialty insurers in s. 628.4615, F.S.

### 3. Property and Casualty Actuarial Opinion Model Law (#745)

The *NAIC Property and Casualty Actuarial Opinion Model Law (#745)*, adopted in October 2003, specifies that states must require property and casualty insurers to submit a Statement of Actuarial Opinion, which is a public document. The model act also requires the submission of an Actuarial Opinion Summary, an Actuarial Report and workpapers to support each actuarial opinion, which must be treated as confidential and privileged.

Current law requires insurers (except those providing life insurance and title insurance) to provide to OIR an annual statement of its financial condition and a statement of opinion on loss and loss adjustment expense reserves prepared by an actuary or a qualified loss reserve specialists. These insurers are also required to provide supporting workpapers upon the OIR's request.<sup>27</sup> Currently, these materials are not exempt from public records disclosure.

**Section 3** of the bill relates to the NAIC's Property & Casualty Actuarial Opinion Model Law. It amends s. 624.424, F.S., to:

- Require insurers to provide *actuarial opinion summaries*, in accordance with NAIC instructions, with their annual statements to the OIR. This section excludes life and health insurers from this requirement.
  - The section also states that "proprietary business information" contained in these summaries are confidential and exempt from public records disclosure (see CS/CS/HB 823). This section also protects the summary and related information from subpoena, discovery, or admissibility in any private civil action.
- Updates the Financial Services Commission's rulemaking authority under this section to specify that rule must be in substantial conformity with the 2006 Annual Financial Reporting Model Regulation adopted by the NAIC.

### 4. Standard Valuation Law (#820)

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<sup>27</sup> Section 624.424, F.S.

Currently, life insurance companies doing business in Florida are required to submit an annual actuarial opinion of reserves, reflecting the valuation of reserve liabilities.<sup>28</sup> Any memoranda or material supporting the opinion is confidential and exempt from s. 119.07(1), F.S., subject to some exceptions.<sup>29</sup> The *NAIC Standard Valuation Law (#820)*, adopted in July 2010, provides that this information also should not be subject to subpoena or discovery, and should not be admissible in any civil action in either documentary or testimonial form.

**Section 4** of the bill relates to the NAIC's Standard Valuation Law. Section 4 amends s. 625.121, F.S. (relating to standard valuation law for life insurers), with the following:

- Protects memoranda and other material supporting the actuarial opinion of reserves from subpoena, discovery, or admissibility in any private civil action.
- Provides that no waiver of privilege or confidentiality shall occur as a result of the OIR disclosing such information pursuant to the Insurance Code or as a result of information-sharing under s. 624.4212, F.S., the new public records exemption created by CS/CS/HB 823.

## B. SECTION DIRECTORY:

**Section 1.** Creates s. 624.085, F.S., to provide definitions applicable to the Insurance Code.

**Section 2.** Amends s. 624.4085, F.S., to revise definitions, to provide additional calculations for determining whether an insurer has a company action level event, and to revise provisions relating to mandatory control level events.

**Section 3.** Amends s. 624.424, F.S., to require an insurer's annual statement to include an actuarial opinion summary and providing criteria for such summary, to provide an exception for life and health insurers, and to update provisions.

**Section 4.** Amends s. 625.121, F.S., to protect memoranda supporting an insurer's actuarial opinion from subpoena, discovery, or admissibility in a civil action, and prohibits waiver of confidentiality in specified circumstances.

**Section 5.** Amends s. 628.461, F.S., to revise the amount of outstanding voting securities of a domestic stock insurer or a controlling company that a person is prohibited from acquiring unless certain requirements are met; to delete a provision authorizing insurers to file a disclaimer of affiliation of control, to require annual statements to include enterprise risk, to provide for consideration of enterprise risk in an acquisition application, to provide that control is presumed under certain conditions and to specify how control may be rebutted and divested, and to delete a definition.

**Section 6.** Amends s. 628.801, F.S., to require insurers to file a registration statement every April 1, to revise the NAIC standards for the rules establishing the information and statement form for the registration, to require insurers to file an annual enterprise risk report, to provide that failure to file a registration or report is a violation of the section, to authorize the OIR to examine insurers for enterprise risk, and to provide criteria for a waiver from this section.

**Section 7.** Amends s. 628.803, F.S., to provide for sanctions for insurance holding companies that violate s. 628.461, F.S., relating to acquisition of controlling stock.

**Section 8.** Creates s. s. 628.805, F.S., to authorize the OIR to participate in supervisory colleges and to authorize the OIR to assess fees on insurers for participation.

**Section 9.** Amends s. 636.045, F.S., to apply risk-based capital requirements to prepaid limited health service organizations.

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<sup>28</sup> Section 625.121(3)(a)1., F.S.

<sup>29</sup> Section 625.121(3)(a)10., F.S.



**Section 10.** Amends s. 641.255, F.S., to apply requirements relating to acquisition of controlling stock to health maintenance organizations that are members of insurance holding companies.

**Section 11.** Provides that the act shall take effect October 1, 2013, if HB 823 (the public records bill) or similar legislation is adopted in the same legislative session or an extension thereof and becomes a law.<sup>30</sup>

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill's new regulatory requirements may have an indeterminate impact on the private sector.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds, reduce the authority of counties or municipalities to raise revenues in the aggregate, or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

*Incorporation by reference and delegation of legislative authority*

Currently, Section 628.801, F.S., gives rulemaking authority to the Financial Services Commission to adopt rules regarding annual registration statements to be filed by insurers within a holding company. Lines 561-563 of the bill specify that the rules must be in accordance with the most recent NAIC Holding Company Model Act (adopted December 2010). The bill also requires the commission to "adopt subsequent amendments thereto *if the methodology remains substantially consistent*" (emphasis added).<sup>31</sup>

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<sup>30</sup> Currently, there is a companion bill (SB 834) pending in the Senate.

<sup>31</sup> It is noted that other provisions in the current Insurance Code gives the Financial Services authority to adopt subsequent amendments to a NAIC model rule. See ss. 624.424(8)(e), F.S. and 625.121(3)(a)4., F.S.

As a general rule, a cross-reference to a specific statute incorporates the language of the referenced statute as it existed at the time the reference was enacted, unaffected by any subsequent amendments to or repeal of the incorporated statute.<sup>32</sup> The legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body “that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future.”<sup>33</sup>

A court would likely apply this same principle in reviewing a statute that incorporates a model act promulgated by an organization, although it is uncertain whether the qualifying language “if the methodology remains substantially consistent” would change a court’s conclusion. Accordingly, while the bill may adopt the current NAIC model act in effect, it is possible that a reviewing court would not uphold that part of a statute that adopts any future amendments to that model act.<sup>34</sup>

#### B. RULE-MAKING AUTHORITY:

The bill updates the Financial Services Commission’s rulemaking authority to reflect the current NAIC requirements.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2013, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment to the bill and an amendment to the strike-all amendment. The strike-all amendment retained the provisions of the bill, and made the following changes:

- Clarified that the threshold for acquisition filing requirements is 10% of outstanding voting securities of a domestic stock insurer or controlling company.
- Eliminated duplicative language regarding the exemption from the enterprise risk report requirement.
- Retained current law’s 5% threshold for “material changes,” which are transactions that dispose or obligate capital or surplus during the OIR’s review of an acquisition filing.
- Clarified the criteria for an exemption from the enterprise risk report requirements and provides that the waivers may be granted for up to two years.
- Clarified the requirements of health maintenance organizations for risk-based capital reporting, acquisition filings, and enterprise risk reporting.

The amendment to the strike-all amendment clarified that the OIR may participate in a supervisory college for any domestic insurer that is part of an insurance holding company system that has international operations. The Insurance & Banking Subcommittee reported the bill favorably as a committee substitute.

On March 27, 2013, the Regulatory Affairs Committee considered and adopted four amendments, and reported the bill favorably as a committee substitute:

- Amendment 1 extended the protection from waiver of confidentiality for the actuarial opinion summary filed by property and casualty insurers to the one filed by life and health insurers.
- Amendment 2 restored current law’s definition of “controlling company” in s. 628.461, F.S.
- Amendment 3 provided that the exemptions from subpoena, discovery, and admission into evidence or testimony by OIR employees in a civil action apply to all filings under s. 628.801, F.S., instead of only the enterprise risk report.
- Amendment 4 clarified the basis for the OIR to impose sanctions on insurers under s. 628.803, F.S.

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<sup>32</sup> See *Overstreet v. Blum*, 227 So. 2d 197 (Fla. 1969); *Hecht v. Shaw*, 151 So. 333 (1933).

<sup>33</sup> *Florida Industrial Commission v. State*, 155 Fla. 772, 21 So.2d 599 (1945). See also *Freimuth v. State*, 272 So.2d 473 (Fla.1972); *State v. Camil*, 279 So.2d 832 (Fla.1973).

<sup>34</sup> Courts may sever a valid portion of laws from the remainder and continue to enforce the valid portion. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Florida Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478 (Fla. 2008); *Ray v. Mortham*, 742 So.2d 1276 (Fla. 1999); *Wright v. State*, 351 So.2d 708 (Fla. 1977).

This analysis is drafted to the committee substitute as passed by the Regulatory Affairs Committee.