

# 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.)

BILL: CS/SB 2082

SPONSOR: Banking and Insurance Committee and Senator Carlton

SUBJECT: Public Records and Meetings Exemptions for HMO Risk-Based Capital Reports and Proceedings

DATE: April 2, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Thomas	Wilson	HC	Fav/3 amendments
2.	Johnson	Deffenbaugh	BI	Favorable/CS
3.	_____	_____	GO	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

The committee substitute creates s. 641.264, F.S., to provide that all documents, materials, or other information specifically related to risk-based capital reports regarding a health maintenance organization (HMO) in the custody of the Department of Insurance are confidential and privileged and are exempt from public record disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, with the exception of information required to be set forth in a publicly available annual statement schedule. The results or report of any Department of Insurance examination or analysis of an HMO, and any department corrective orders, are also made confidential and exempt. The above information is not subject to subpoena or discovery, and may not be admitted into evidence in any private civil action. Department proceedings and hearings related to HMO risk-based capital information are exempt from the open government meeting provisions under s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution. This bill is tied to CS/SB 2080, which provides for risk-based capital for HMOs.

The committee substitute provides that such exemptions from public records must terminate 1 year following the conclusion of any risk-based capital plan or revised risk-based capital plan; or on the date of entry of any order of seizure, rehabilitation, or liquidation pursuant to ch. 631, F.S.

Neither the Department of Insurance nor any person receiving confidential risk-based capital information may be permitted or required to testify in any private civil action concerning such materials, other than as provided in this section. The department is authorized to receive, share, and enter into agreements regarding confidential risk-based capital information with other government and regulatory entities, provided that such entities maintain the confidentiality of the material.

The Legislature expressly finds that the comparison of HMOs' total adjusted capital to risk-based capital levels is a regulatory tool and is not intended as a means to rank HMOs. The use in any manner of risk-based capital levels of any HMO by any person engaged in any manner in the HMO business would be misleading and is therefore prohibited. In the event any materially false statement regarding an HMO's total adjusted capital compared to its risk-based capital levels is published, and the HMO can demonstrate to the department substantial proof of the inappropriateness or falsity of the statement, the HMO may publish a rebuttal of the materially false statement.

The Legislature also finds that the risk-based capital reports provide early warning signs that may necessitate corrective action before serious financial problems arise. Providing confidentiality to such records and proceedings enables HMOs to reduce risk to members of the HMOs and encourages the HMO to be more open in the information provided.

The provisions of the bill are subject to the Open Government Sunset Review Act of 1995 and shall stand repealed on October 2, 2006, unless reviewed and re-enacted. The bill provides a statement of the public necessity for the public records and meetings exemptions.

This bill creates section 641.264, Florida Statutes, and one undesignated section of law.

## **II. Present Situation:**

### ***Risk-Based Capital***

Risk-based capital is a method of financial review of insurance companies and health maintenance organizations which measures the minimum amount of capital necessary to support their overall business operations, given the size and risk profile of the respective companies. The capital requirements are generally assessed against four types of risk: asset risk, credit risk, underwriting risk, and off-balance sheet risk.

Chapter 97-292, Laws of Florida, enacted the Risk-Based Capital for Insurers Act in 1997. The act essentially instituted reporting and disclosure requirements for risk-based capital levels for domestic insurers based on a formula adopted by the National Association of Insurance Commissioners (NAIC). Insurers are required to internally monitor trigger levels and respond as necessary. A comparison of the insurer's actual capital level and its risk-based capital levels may trigger any of several levels of regulatory action by the Department of Insurance (DOI) or DOI supervision of corrective actions by the insurer.

Section 624.40851, F.S., establishes the confidentiality of risk-based capital information. The section also provides public records and public meetings exemptions for such information maintained by the Department of Insurance and for proceedings and hearings conducted by the department.

SB 2080, to which this bill is tied, contains a number of provisions relating to insurance, including the establishment of risk-based capital provisions for HMOs.

### ***Public Records and Meetings Exemptions***

The Public Records Law, chapter 119, F.S., and the Public Meetings Law, s. 286.011, F.S., specify the conditions under which public access must be provided to governmental records and meetings of the executive branch and other governmental agencies. While the state constitution provides that records and meetings of public bodies are to be open to the public, it also provides that the Legislature may create exemptions to these requirements by general law if a public need exists and certain procedural requirements are met. Article I, s. 24, Fla. Const. governs the creation and expansion of exemptions to provide, in effect, that any legislation that creates a new exemption or that substantially amends an existing exemption must also contain a statement of the public necessity that justifies the exemption. Article I, s. 24, Fla. Const. provides that any bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions.

Under s. 119.15(4)(b), F.S., an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

- (a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption?
- (b) Does the exemption protect 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? However, in exemptions under this paragraph, only information that would identify the individuals may be exempted; or,
- (c) Does the exemption protect 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?

### ***Open Government Sunset Review***

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

### III. Effect of Proposed Changes:

**Section 1.** Creates s. 641.264, F.S., to provide that all risk-based capital reports, risk-based capital plans, or other information specifically related to risk-based capital reports, to the extent the information is not required to be set forth in a publicly available annual statement schedule or other documents of an HMO that are in the custody of the Department of Insurance are confidential and exempt from public record disclosure under s. 119.07(1), F.S., and Art. I, s. 24(a), Fla. Const., with the exception of information required to be set forth in a publicly available annual statement schedule. The results or report of any department examination or analysis of an HMO performed under s. 641.263, F.S., and any department corrective orders, are also made confidential and exempt. The above information is not subject to subpoena or discovery, and may not be admitted into evidence in any private civil action. The department is authorized to use a risk-based capital report or related information in furtherance of any regulatory or legal action brought as a part of official duties. Proceedings and hearings conducted under s. 641.263, F.S., related to the department's actions regarding HMO risk-based capital reports and related information are exempt from the provisions of s. 286.011, F.S., and Art. I, s. 24(b) Fla. Const.

Neither the department nor any person receiving a confidential risk-based capital report or related information may be permitted or required to testify in any private civil action concerning such materials, other than as provided in this section.

The exemptions provided in this section must terminate 1 year following the conclusion of any risk-based capital plan or revised risk-based capital plan; or on the date of entry of any order of seizure, rehabilitation, or liquidation pursuant to ch. 631, F.S.

The department is authorized to receive, share, and enter into agreements regarding confidential risk-based capital reports and related information with other government and regulatory entities, provided that such entities maintain the confidentiality of the material.

No waiver of any applicable privilege or claim of confidentiality will result from submitting risk-based capital reports and related information to the department, or from the subsequent sharing of such submitted material.

The Legislature expressly finds that the comparison of HMOs' total adjusted capital to risk-based capital levels is a regulatory tool that may indicate the need for corrective action by the department, and is not intended as a means to rank HMOs. The use in any manner of risk-based capital levels of any HMO by any person engaged in any manner in the HMO business would be misleading and is therefore prohibited. In the event any materially false statement regarding an HMO's total adjusted capital compared to its risk-based capital levels is in any manner published, and the HMO can demonstrate to the department substantial proof of the inappropriateness or falsity of the statement, the HMO may publish a rebuttal of the materially false statement.

The provisions of the bill are subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2006, unless reviewed and re-enacted.

**Section 2** Provides that the Legislature expressly finds that the public records and meetings exemptions provided in s. 641.264, F.S., are a public necessity because unrestricted public access to confidential risk-based capital information and proceedings might damage an HMO if made available to competitors and the public. Damage to an HMO's solvency could also have a negative effect on the public and other HMOs. The Legislature finds that risk-based capital information reveals investment decisions and is a trade secret that gives the HMO a competitive advantage in the private market. Public access to such proprietary information could affect an HMO's ability to do business and remain solvent. Therefore, it is a public necessity to maintain the confidentiality of the risk-based capital information and proceedings relating to the information. The Legislature finds that the public has access through other means to information regarding the financial strength of an HMO and its ranking with regard to other HMOs.

The section also provides additional legislative findings in the statement of public necessity for the exemptions to provide that providing confidentiality of the information would encourage the HMOs to be more open and frank in the information provided.

**Section 3.** Provides that the bill is effective October 1, 2001, if SB (2080) is adopted in the same legislative session or an extension thereof and becomes law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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