

Legislative Analysis



CORPORATE GOVERNANCE ANNUAL DISCLOSURE MODEL ACT

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House Bill 6520 as introduced
Sponsor: Rep. Lana Theis
Committee: Insurance
Complete to 11-29-18

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 6520 would create a new chapter in the Insurance Code to require all insurers domiciled in the State of Michigan to write a Corporate Governance Annual Disclosure (CGAD) once a year and submit it to the Director of the Department of Insurance and Financial Services (DIFS). The bill would incorporate a model act¹ from the National Association of Insurance Commissioners (NAIC) into Michigan statute. The model act is an NAIC accreditation requirement effective January 1, 2020. It had been adopted in 24 states as of June 30, 2018.²

The bill would require an insurer, or the insurance group of which it is a member, to submit a CGAD to the Director no later than June 1 of each calendar year. The CGAD would have to be signed by the insurer or insurance group's CEO or corporate secretary attesting that the insurer had implemented the corporate governance practices and that a copy of the disclosure had been provided to the insurer's board of directors or the appropriate committee of the insurer's board of directors. If the insurer were a member of an insurance group, then it would submit the CGAD to the lead state of the insurance group in accordance with the lead state's laws and in accordance with the procedures outlined in the most recent Financial Analysis Handbook³ from the NAIC.

The bill would require insurers and insurance groups to provide information regarding the corporate governance of their firm to a level that reflected their overall governing system. The bill would encourage the insurer to make the CGAD disclosures according to one of the following three criteria, while indicating which criterion was used:

- The level at which the insurer's or insurance group's risk appetite was determined.
- The level at which the earnings, capital, liquidity, operations, and reputation of the insurer were overseen and supervised collectively.
- The level at which legal liability for the failure of general corporate governance duties would be placed.

The bill states that the review of the CGAD and any additional requests for information would have to be made through the lead state in accordance with the procedures of the NAIC. In addition, the bill would consider other documents provided to the Director that provided information substantially similar to the information required as sufficient for the CGAD

¹ Corporate Governance Annual Disclosure Model Act: https://www.naic.org/documents/committees_e_isftf_corp_governance_related_cgad_model_act_140728.pdf?19

² See https://www.naic.org/documents/cmt_e_legislative_liaison_brief_corp_governance.pdf

³ NAIC Financial Analysis Handbook, 2017. https://www.naic.org/prod_serv/FAH-ZU-16-02.pdf

requirements as long as those documents were cross-referenced for the information that they include.

The bill would give the insurer or insurance group discretion over their responses to the CGAD inquiries as long as the CGAD gave the Director sufficient understanding of the insurer's or insurance group's corporate governance, structure policies, and practices. To this end, the Director could request additional information in order to gain that level of understanding. The CGAD would have to be prepared consistent with Chapter 10 of the Code, which governs annual audited financial reports, and documentation and supporting information would have to be maintained and made available to the Director upon request.

Confidentiality of information disclosed

Any information disclosed to the Director in compliance with the bill would be considered proprietary and to contain trade secrets. As such, the Director would have to treat it as confidential and privileged and would not be required to disclose it under the Freedom of Information Act (FOIA), under subpoena, or as evidence in any private civil suit. The Director would be able to use this information to fulfill the extent of his or her duties but could not make the information public without the written consent of the insurer. This requirement would extend to anyone who received this information while acting under the authority of the Director or anyone else with whom this information could be shared.

In addition, except as otherwise specified in the bill, the Director would be allowed to share the information described with other parties—such as other financial regulatory agencies, NIAC, or third-party consultants—only if the recipient submitted a written agreement to uphold the confidentiality of the information. The Director would be able in turn to receive any such information from those parties with notice or the understanding that it was confidential and privileged. The sharing or disclosure of any of the information handled as part of the bill would not be considered a delegation of regulatory authority or rule-making or a waiver of an applicable privilege or claim of confidentiality.

Third-party consultants

The bill would allow the Director to retain third-party consultants—such as attorneys, actuaries, and accountants—at the insurer's expense to assist the Director in reviewing the CGAD and related information or the insurer's compliance with the bill. Such a person would be under the direction and control of the Director and thus act in a purely advisory capacity. These consultants would be subject to the same confidentiality standards and requirements as the Director. The consultant would need to verify with the Director and notify the insurer that he or she was free of any conflict of interest and had procedures in place to monitor any conflict and to comply with the standards and requirements of confidentiality. Any written agreement with the NAIC and/or a third-party consultant over the sharing and use of the insurer's information would need to contain all of the following:

- A requirement for the expressed consent of the insurer before making any of the insurer's information public.
- Specific procedures and protocols for keeping the insurer's information confidential and secure.
- Procedures and protocols specifying that the NAIC could share information only with other state regulators in states in which the insurance group had domiciled insurers,

along with the recipient's agreement in writing to maintain the confidentiality and privileged status of the insurer's information.

- A provision specifying that ownership of such shared information would remain with DIFS and that the use of the information was subject to the direction of the Director.
- A provision prohibiting the NAIC or a third-party consultant from storing the information shared under the bill in a permanent database after the underlying analysis was completed.
- A provision requiring the NAIC or third-party consultant to notify the director and insurer about any subpoena, request for disclosure, or request for production of the insurer's CGAD-related information.
- A requirement that the NAIC or third-party consultant consent to the insurer's intervention in any judicial or administrative action that would require the NAIC or third-party consultant to disclose the insurer's confidential information.

Penalty for failure to submit CGAD

An insurer that failed to submit the CGAD by June 1 without just cause would, after notice and hearing, be required to pay a civil fine of \$1,000 for each day's delay, which would be recovered by the Director and paid into the state's general fund. The maximum civil fine charged for failure to submit the CGAD would be \$75,000. The Director would be allowed to reduce the penalty if the insurer demonstrated that the penalty would cause the insurer financial hardship.

Inseverability of Section 1761

Finally, the bill states that if a court ruled in a final decision that Section 1761—the section upholding the confidentiality of the insurer's information in the case of legal action—was invalid, then the entire chapter would be rendered void, as this section is to be considered inseverable from the rest of the bill.

Proposed MCL 500.1751 et seq.

FISCAL IMPACT:

House Bill 6520 would likely have a neutral fiscal impact on the Department of Insurance and Financial Services (DIFS) and a potentially significant impact on state general fund revenues. Any costs for DIFS arising from the bill would be administrative in nature and would likely be supported by existing departmental appropriations. The bill stipulates that the Director of DIFS may obtain the assistance of external experts to assist in reviewing the requisite CGAD filings, but the costs of such services would be recovered from insurers. The bill would establish a civil fine for insurers that fail to file CGAD, at a rate of \$1,000 for each day's delay, with a maximum civil fine of \$75,000. Revenues from the civil fine would be deposited to the state's general fund. The bill would have no impact on local units of government.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.