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BILL ANALYSIS



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House Bill 6520 (Substitute H-3 as passed by the House)
Sponsor: Representative Lana Theis
House Committee: Insurance
Senate Committee: Insurance

Date Completed: 12-12-18

CONTENT

The bill would add Chapter 17a (Corporate Governance Annual Disclosure) to the Insurance Code, which would do the following:

- **Require an insurer, or the insurance group of which the insurer was a member, to submit to the Director of the Department of Insurance and Financial Services a corporate governance annual disclosure (CGAD) no later than June 1, 2020, and each June 1 after that date.**
- **Require the CGAD to be prepared as prescribed by the Director.**
- **Require an insurer that was a member of an insurance group to submit the CGAD to the commissioner of the lead state for the insurance group.**
- **Allow an insurer or insurance group to provide information regarding corporate governance at several levels.**
- **Specify that an insurer or insurance group that provided information substantially similar to the information required by the bill in other documents provided to the Director would not be required to duplicate that information in the CGAD.**
- **Specify that documents, materials, or other information relating to the bill, including the CGAD, in the possession or control of the Director would be considered proprietary and to contain trade secrets, and that the information would be considered confidential and privileged.**
- **Prohibit the Director or any person who received documents, materials, or other CGAD-related information, from testifying in any private civil action concerning any confidential documents, materials, or information.**
- **Specify the actions the Director could take in regards to the information collected under the bill.**
- **Subject the National Association of Insurance Commissioners (NAIC) and third-party consultants to the same confidentiality standards and requirements as the Director.**
- **Specify what a written agreement with the NAIC or a third-party consultant, or both, governing sharing and use of information would have to contain.**
- **Prescribe a daily civil fine of \$1,000 for an insurer or insurance group that did not, without just cause, timely file the CGAD as required, after written notice and hearing, up to a maximum of \$75,000.**
- **Require proposed Chapter 17a to be void if in a final decision a court held certain provisions to be invalid.**
- **Prohibit a Michigan court from applying a principle from the American Law Institute's "Restatement of the Law, Liability Insurance" in ruling on an issue in**

a case unless the principle was clearly expressed in a statute of the State, the common law, or case law precedent of the State.

The proposed Chapter 17a would apply to all insurers domiciled in the State.

The bill would take effect January 1, 2020.

CGAD

An insurer, or the insurance group of which the insurer was a member, no later than June 1, 2020, and each June 1 after that date, would have to submit to the Director a corporate governance annual disclosure as prescribed by the Director. Notwithstanding any request from Director described below, if the insurer were a member of an insurance group, it would have to submit the report to the commissioner of the lead state for the insurance group, in accordance with the laws and requirements of the lead state.

("Corporate governance annual disclosure", or "CGAD", would mean a confidential report filed by the insurer or insurance group made in accordance with the requirements of the proposed Chapter 17a. "Insurance group" would mean insurers and affiliates included within an insurance holding company system.)

The CGAD required above would have to include a signature of the insurer or insurance group's chief executive officer or corporate secretary attesting to the best of that individual's belief and knowledge that the insurer or insurance group 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.

An insurer not required to submit a CGAD under the above provisions would have to submit a CGAD on the Director's request.

For purposes of completing the CGAD, the insurer or insurance group could provide information regarding corporate governance at the ultimate controlling parent level, an intermediate holding company level, or the individual legal entity level, or any one or more of those levels, depending on how the insurer or insurance group had structured its system of corporate governance. The insurer or insurance group would be encouraged to make the CGAD disclosures at the level at which the insurer's or insurance group's risk appetite was determined, or at which the earnings, capital, liquidity, operations, and reputation of the insurer were overseen collectively and at which the supervision of those factors was coordinated and exercised, or the level at which legal liability for failure of general corporate governance duties would be placed. If the insurer or insurance group determined the level of reporting based on the criteria described in these provisions, it would have to indicate which of the three criteria was used to determine the level of reporting and explain any subsequent changes in level of reporting.

The review of the CGAD and any additional requests for information would have to be made through the lead state in accordance with its laws and requirements.

An insurer or insurance group that provided information substantially similar to the information required by proposed Chapter 17a in other documents provided to the Director, including proxy statements filed in conjunction with Form B requirements, or other State or Federal filings provided to the Department would not be required to duplicate that information in the CGAD and only would have to cross-reference the document in which the information was included.

The insurer or insurance group would have discretion over the responses to the CGAD inquiries if the CGAD contained the material information necessary to permit the Director to gain an understanding of the insurer's or group's corporate governance structure, policies, and practices. The Director could request additional information that he or she considered material and necessary to provide the Director with a clear understanding of the corporate governance policies, the reporting or information system, or the controls implementing those policies.

Notwithstanding the provisions above, the CGAD would have to be prepared as prescribed by the Director. Documentation and supporting information related to the CGAD would have to be maintained and made available on examination or on the Director's request.

Documents, Materials, & Information Obtained Under the Bill

Documents, materials, or other information, including the CGAD, in the possession or control of the Director that were obtained by, created by, or disclosed to the Director or any other person would be considered proprietary and to contain trade secrets. The documents, materials, or other information would be confidential and privileged, would not be subject to disclosure under the Freedom of Information Act, would not be subject to subpoena, and would not be subject to discovery or admissible in evidence in any private civil action. However, the Director could use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as a part of the Director's official duties. The Director otherwise could not make the documents, materials, or other information public without the written consent of the insurer or insurance group. These provisions would not require written consent of the insurer or insurance group before the Director could share or receive confidential documents, materials, or other CGAD-related information to assist in the performance of the Director's regular duties.

The Director or any person who received documents, materials, or other CGAD-related information, through examination or otherwise, while acting under the authority of the Director, or with whom the documents, materials, or other information were shared under the Code, could not testify in any private civil action concerning any confidential documents, materials, or information.

Allowable Director Actions

The Director could do any of the following:

- Except as otherwise provided, on request, share documents, materials, or other CGAD-related information, including the confidential and privileged documents, materials, or information described above, including proprietary and trade secret documents and materials, with other state, Federal, and international financial regulatory agencies.
- Except as otherwise provided, receive documents, materials, or other CGAD-related information, including otherwise confidential and privileged documents, materials, or information, including proprietary and trade-secret information or documents, from regulatory officials of other state, Federal, and international financial regulatory agencies.

The Director could not share documents, materials, or other CGAD-related information unless the recipient agreed in writing to maintain the confidentiality and the privileged status of the CGAD-related documents, materials, or other information and had verified in writing the legal authority to maintain confidentiality. The Director also would have to maintain as confidential or privileged any documents, materials, or information received with notice or the understanding that it was confidential or privileged under the laws of the jurisdiction that was the source of the document, material, or information.

The sharing of information and documents by the Director would not be a delegation of regulatory authority or rule-making, and the Director solely would be responsible for the administration, execution, and enforcement of proposed Chapter 17a.

The disclosure or sharing of documents, proprietary and trade-secret materials, or other CGAD-related information to the Director would not be a waiver of an applicable privilege or claim of confidentiality.

The Director could retain, at the insurer's or insurance group's expense, third-party consultants, including attorneys, actuaries, accountants, and other experts not otherwise a part of the Director's staff as could be reasonably necessary to assist him or her in reviewing the CGAD and related information or the insurer's or insurance group's compliance with Chapter 17a. A person who was retained would be under the direction and control of the Director and would have to act in a purely advisory capacity.

Third-Party Consultant & NAIC

As part of the retention process, a third-party consultant would have to verify to the Director, with written notice to the insurer or insurance group, that it was free of any conflict of interest and that it had internal procedures in place to identify and monitor compliance with any conflict that could arise after engagement and to comply with the confidentiality standards and requirements of the proposed Chapter 17a.

A written agreement with the NAIC or a third-party consultant, or both, governing sharing and use of information would have to contain all of the following provisions and expressly require the written consent of the insurer or insurance group before making public information provided under the proposed Chapter 17a:

- Specific procedures and protocols for maintaining the confidentiality and security of CGAD-related information share with the NAIC or a third-party consultant.
- Procedures and protocols for sharing by the NAIC only with other state regulators from states in which the insurer or insurance group had domiciled insurers.
- A provision specifying that ownership of the CGAD-related information shared with the NAIC or a third-party consultant would remain with the Department and that the NAIC's or third-party consultant's use of the information would be subject to the direction of the Director with written notice to the insurer or insurance group.
- A provision that prohibited the NAIC or a third-party consultant from storing the information shared under Chapter 17a in a permanent database after the underlying analysis was completed and that required the NAIC or third-party consultant to promptly return or destroy all CGAD-related information provided by the insurer or insurance group.
- A provision requiring the NAIC or third-party consultant to provide prompt written notice to the Director and to the insurer or insurance group regarding any subpoena, request for disclosure, or request for production of the insurer's CGAD-related information.
- A requirement that the NAIC or a third-party consultant consent to intervention by an insurer or insurance group in any judicial or administrative action in which the NAIC or a third-party consultant could be required to disclose confidential information about the insurer shared with the NAIC or a third-party consultant.

The agreement would have to provide that the recipient agreed in writing to maintain the confidentiality and privileged status of the CGAD-related documents, materials, or other information and had verified in writing the legal authority to maintain confidentiality.

Penalties

An insurer or insurance group that did not, without just cause, timely file the CGAD as required, after written notice and hearing, would have to pay a civil fine of \$1,000 for each day's delay, to be recovered by the Director and paid into the General Fund. The maximum civil fine would be \$75,000. The Director could reduce or waive the penalty if the insurer demonstrated to the Director that either of the following applied:

- The penalty would cause a financial hardship to the insurer.
- There was just cause for the delayed filing.

On written request, the Director could grant a 90-day extension for filing the CGAD.

Additional Provisions

If in a final decision a court held the provisions regarding the exclusion of the documents, materials, or other information considered proprietary and to contain trade secrets from being subpoenaed or subject to discovery or admissible in evidence in any private civil action, among others, to be invalid, those provisions would not be severable, and Chapter 17a would be void as of the date of the court decision.

In an action brought in a court in Michigan, the court could not apply a principle from the American Law Institute's "Restatement of the Law, Liability Insurance" in ruling on an issue in the case unless the principle was clearly expressed in a statute of the State, the common law, or case law precedent of the State.

Proposed MCL 500.3032

Legislative Analyst: Drew Krogulecki

FISCAL IMPACT

The bill would have no fiscal impact on the Department of Insurance and Financial Services (DIFS) and a minor positive fiscal impact on the General Fund. Costs associated with the responsibilities of the DIFS Director and staff included in the bill would be covered by existing appropriations. The bill would establish a civil fine of \$1,000 per day for insurers who did not file the CGAD in a timely manner. Revenue from this fine would be deposited into the State General Fund.

The bill would have no fiscal impact on local government.

Fiscal Analyst: Elizabeth Raczkowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.