

Assessment of public comments for new 11 NYCRR 90 (Insurance Regulation 215).

The Department of Financial Services (“Department”) received comments from a trade organization representing health plans (“health trade”), a trade organization representing life insurance companies (“life trade”), a national trade organization representing property/casualty insurers (“national p/c trade”), a state trade organization representing property/casualty insurers (“state p/c trade”), and a property/casualty insurer (“p/c insurer”).

Comment: The p/c insurer commented that the regulation ignores the fact that the National Association of Insurance Commissioners’ (“NAIC’s”) Corporate Governance Annual Disclosure (“CGAD”) Model Act and Model Regulation (collectively, the “Models”) apply to domestic insurers and require an insurer to file its CGAD with the insurer’s lead state regulator. The health trade requested that the Department add language to the regulation that states that “[n]otwithstanding any request from the Superintendent made pursuant to this Regulation, if the insurer is a member of an insurance group, the insurer shall submit the report required by this Regulation to the Commissioner of the lead state for the insurance group, in accordance with the laws of the lead state, as determined by the procedures outlined in the most recent Financial Analysis Handbook adopted by the NAIC.”

The p/c insurer also commented that the regulation circumvents the directives of the Models by requiring the information set forth in a CGAD filed with the Superintendent of Financial Services to be comparable to the information required by the regulation. The health trade, p/c insurer, and national p/c trade noted that there are requirements in the regulation that go beyond the requirements of the Models that the Department should remove. The p/c insurer requested that the Department permit an insurer that files a CGAD with the regulator of its domiciliary state to submit, upon request, the same copy to New York without the additional expense of tendering a second submission to New York.

Response: The Models do not have the force of law and do not bind states. To the extent that a state chooses to adopt the Models because they are an NAIC accreditation standard, the Models are “floors” and not “ceilings.” Thus, there is nothing that prevents the regulation from applying to all authorized insurers, rather than just domestic insurers, or from requiring additional information. To the extent the regulation requires information that is not required in the Models, an insurer still may submit a CGAD filed with another state and merely needs to add to that CGAD the additional information that is required by the regulation.

Moreover, as stated in the alternatives section of the regulatory impact statement for the regulation, the Department decided not to adopt the lead state concept because the Department believes it would be an impermissible delegation of authority to require an insurer to submit a report to another state. In addition, the Department has met resistance from both insurers and other state regulators when requesting copies of certain reports filed by insurers in other states.

Therefore, the Department did not make any changes in response to these comments.

Comment: The p/c insurer and national p/c trade commented that the regulation does not include the confidentiality provision set forth in the NAIC’s Model Act and requested that the Department consider including that provision in the regulation. The state p/c trade commented that it was surprised that New York is not seeking to pass the NAIC Model Act via legislation and recommended that the Department do so in order to include the confidentiality provision that is set forth in the Model Act. The p/c insurer and national p/c trade stated that the confidentiality protection provided under Insurance Law § 1504(c) alone is inadequate for CGAD filings because that section does not treat filings as being proprietary and as containing trade secrets and does not exempt filings from the Freedom of Information Law (“FOIL”).

Response: Public Officers Law Article 6 sets forth FOIL and Public Officers Law § 87(2) requires an agency to make available records unless those records, or any portion thereof, fall within one of the exceptions to disclosure set forth in that section, such as if the records are specifically exempted from disclosure by state statute,

or if the records are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise. As a preliminary matter, Insurance Law § 1504(c) is a state statute that exempts a record from disclosure under Public Officers Law § 87(2) and an insurer may always request trade secret protection under Public Officers Law § 87(2) when it submits a record to the Department.

However, being exempted from disclosure by a state regulation is not one of the exceptions to disclosure in Public Officers Law § 87(2). Thus, the regulation may not create confidentiality and override the Public Officers Law by regulation.

As discussed in the regulatory impact statement for the regulation, the Department believes it currently has statutory authority to promulgate this regulation and that a legislative amendment to the Insurance Law is not necessary. In addition, contrary to the claims of the state p/c trade, the confidentiality provision set forth in Insurance Law § 1504(c) and the trade secret exception set forth in Public Officers Law § 87(2)(d) should provide enough confidentiality protection to the extent anything in a CGAD is confidential.

The Department did not make any changes in response to these comments.

Comment: The national p/c trade recommended amending § 90.3(a)(v)(f) and (g) of the regulation by replacing “ensures” with “seeks to ensure” because insurers do not have actual control over the actions or inactions of their directors. Accordingly, insurers cannot “ensure” that directors comply with their fiduciary duties of acting in good faith and with reasonable care.

Response: While it is understood that insurers cannot completely ensure that directors comply with their fiduciary duties of acting in good faith and with reasonable care, changing “ensure” to “seeking to ensure” sounds like insurers have a lesser responsibility, especially since the regulation and the Model Regulation use “ensures” in other places. Therefore, the Department did not make any changes to the regulation in response to this comment.

Comment: The life trade requested that the Department eliminate the first CGAD filing for December 1, 2020 and instead require that the first report be due by June 1, 2021 because the current circumstances relating to the COVID-19 pandemic have been challenging for the Department and insurers.

Response: While the Department understands that the current COVID-19 pandemic has been challenging for everyone, the Department believes that insurers have had more than enough notice that the first CGAD filing would be due this year, especially since it became an NAIC accreditation standard as of January 1, 2020. As a result, the Department did not make any changes to the regulation in response to this comment.

Comment: The health trade requested that the Department revise the regulation to expressly state that the regulation does not apply to a health maintenance organization (“HMO”) certified pursuant to Public Health Law Article 44.

Response: The regulation defines “insurer” as “an insurer authorized to do an insurance business in this State, including a domestic corporation organized pursuant to Insurance Law article 43.” This definition does not include an HMO and the Department does not believe it is necessary to amend the regulation to explicitly state as much. Thus, the Department did not make any changes to the regulation in response to this comment.

Comment: The health trade requested “that this new requirement replace current and redundant document requests.”

Response: It is unclear what “current and redundant document requests” the health trade is suggesting that the regulation replace. Since the health trade is not requesting a change to the regulation, the Department did not make a change in response to this comment.

Comment: The state p/c trade expressed its appreciation that the regulation places significance on the corporate governance framework being appropriate for each regulated entity. The state p/c trade explained that it thinks the requirements allowing for flexibility based on the needs of each individual insurer are crucial and encouraged the Department to adopt corresponding policies and procedures in relation to compliance with this

regulation to ensure that each company has the ability to create a corporate governance framework suited to its individual circumstances.

Response: The Department will take the recommendation under consideration. Since the state p/c trade did not suggest a change to the regulation, the Department did not make a change to the regulation to address this comment.