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FISCAL IMPACT REPORT

SPONSOR Leavell ORIGINAL DATE 01/21/14
 LAST UPDATED 02/14/14 HB _____

SHORT TITLE Update Model Acts of Insurance Code SB 56/aSCORC/aSFI#1

ANALYST Clark

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY14 | FY15 | FY16 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|------|------|----------------------|------------------------------|------------------|
| Total | | NFI | | | | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 7

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of Superintendent of Insurance (OSI)

Administrative Office of the Courts (AOC)

Attorney General’s Office (AGO)

SUMMARY

Synopsis of SFI#1 Amendment

Senate Floor Amendment #1 to Senate Bill 56 revises several provisions regarding confidentiality to address concerns from the Attorney General’s Office listed in the “Significant Issues” section of this document. The Office of Superintendent of Insurance (OSI) notes the amendment provides that while documents identified and specified in the bill must be kept confidential by the superintendent of insurance and shall not be subject to the Inspection of Public Records Act, it clarifies that an insurer cannot assert these provisions as a privilege or bar to production of documents or evidence in civil litigation against the insurer regardless of whether the superintendent of insurance is a party. The amendment also deletes terms which made OSI exempt from subpoena or civil discovery in civil litigation related to the documents produced under the terms of the bill and the Insurance Code. Additionally, the amendment completely removes a provision which had provided confidentiality protection to the National Association of Insurance Commissioners. Finally, the amendment performs minor language clean-up unrelated to the confidentiality provisions.

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee amendment to Senate Bill 56 makes 12 changes to correct inaccurate or ambiguous cross-references and to remove certain redundant phrases.

Synopsis of Original Bill

The Office of Superintendent of Insurance (OSI) reports Senate Bill 56 amends the Insurance Code to incorporate updates to model laws promulgated by the National Association of Insurance Commissioners (NAIC) in the following areas:

1. Risk-based capital requirements;
2. Valuation of life insurance reserves to incorporate “principle-based” reserving;
3. Credit allowed to insurers for obtaining reinsurance;
4. Insurance holding company systems; and
5. Insurers in hazardous financial condition.

SB 56 also amends the Insurance Code to:

1. Clarify the calculation of quarterly premium tax estimates;
2. Exclude health care plans and prepaid dental plans from the definition of “member insurers” in the Life and Health Insurance Guaranty Association Act; and
3. Clarify the superintendent’s authority to cooperate with federal and international regulatory agencies and to grant confidential status to certain required filings.

The Administrative Office of the Courts (AOC) provides a list of the specific sections of law within the Insurance Code and the Provider Service Network Act amended by SB 56:

1. Statutory sections governing the insurance division (Section 59A-2-1);
2. Statutory sections within the Risk-Based Capital Act (Section 59A-5A-1);
3. Statutory sections governing fees and taxes (Section 59A-6-2);
4. Statutory section governing reinsurance (Section 59A-7-11);
5. Statutory section governing life insurance standard nonforfeiture law (Section 59A-20-31);
6. Statutory sections within the Insurance Holding Company Law (Section 59A-37-1);
7. Statutory sections within the Insurers Conservation, Rehabilitation, and Liquidation Law (Section 59A-41-1);
8. Statutory section governing definitions of terms within the Life and Health Insurance Guaranty Association Act (Section 59A-42-3);
9. Statutory section governing examination within the Provider Service Network Act (Section 59A-42A-7);
10. Statutory section governing annual reports within the Health Maintenance Organization Law (Section 59A-46-9);
11. Statutory section governing annual statements within the Nonprofit Health Care Plan Law (Section 59A-47-14); and
12. Statutory section governing annual reports within the Prepaid Dental Plan Law (Section 59A-48-10).

In addition to the above statutory amendments, SB 56 enacts the Standard Valuation Law (Section 59A-8A-1 et. seq.). AOC also reports SB 56 contains a severability clause. The

effective date of Sections 1 through 14 and 28 through 54 of the Act is July 1, 2014. The effective date of Sections 15 through 27 of the Act, enacting the Standard Valuation Law (consisting of new material as well as amended and recompiled existing statutory sections), Section 59A-8A-1 NMSA 1978 et. seq., and amending the Standard Nonforfeiture Law of Life Insurance, Section 59A-20-31 NMSA 1978, is the January 1 of the first calendar year following the first July 1 after which the Superintendent of Insurance (hereafter “superintendent”) certifies to the New Mexico Compilation Commission and the director of the Legislative Council Service that particular laws have been enacted by 42 states, and that certain instructions have been adopted by a specific number of NAIC members. SB 56 provides that if these conditions have not been met by January 1, 2020, then Sections 15 through 27 of the Act shall not take effect.

FISCAL IMPLICATIONS

There are no significant fiscal implications.

SIGNIFICANT ISSUES

OSI reports NAIC requires all states to amend their Insurance Codes to incorporate these updates, and states that fail to do so face the risk of losing their accreditation with NAIC.

The Attorney General’s Office (AGO) focuses on potential conflicts with the New Mexico Constitution and on policy concerns related to the New Mexico Rules of Evidence.

1. AGO identified a potential constitutional issue under Article III, Section 1 of the New Mexico Constitution with respect to those provisions of SB 56 that would limit or restrict the use in private civil litigation of certain information obtained by the superintendent. As noted in that analysis, the New Mexico Supreme Court has held that only the judicial branch of government has the power to promulgate rules regulating pleading, practice, and procedure for the courts, which includes testimonial privileges and discovery rules. *See Ammerman v. Hubbard Broad Co.*, 89 N.M. 307, 312 (1976); *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 338-39 (1991); *Sw. Cmty. Health Servs. v. Smith*, 107 N.M. 196 (1988); *Miller & Assoc. v. Rainwater*, 102 N.M. 170 (1985). Cf. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 138 N.M. 398 (2005) (upholding a confidentiality statute that the court construed to be consistent with the Supreme Court’s psychotherapist-patient privilege, Rule 11-504 NMRA).
2. Sections 18, 25, and 41 of SB 56 all contain similar provisions making specified documents and information obtained by the superintendent immune from discovery and not admissible into evidence in private civil court proceedings. *See, e.g.:* p. 67, lines 14-15; p. 107, lines 20-21. Sections 18, 25, and 41 further provide that neither the superintendent nor persons acting pursuant to the authority of the superintendent would be permitted to testify in private civil actions about documents or information made confidential by the bill. These sections of the SB 56 should be considered in the light the rules governing privilege in the New Mexico Rules of Evidence. Rule 11-501 NMRA (2013) provides that no person has a privilege to refuse to be a witness, refuse to produce any object or writing, or prevent another from testifying or producing any object or writing, unless required by the constitution, the rules of evidence, or other rules adopted by the Supreme Court of New Mexico. Rule 12-502 NMRA (2013) does recognize an evidentiary privilege covering returns or reports required to be made by law and providing for their confidentiality. However, if the privilege to be created by SB 56 exceeds the scope of Rule 12-502, an issue could arise under Article III, Section 1 of the New Mexico Constitution and the *Ammerman* line of cases.

RELATIONSHIP

SB 7 is comprised of Sections 2 through 12 of SB 56, containing the NAIC model law updates related to risk-based capital requirements.

TECHNICAL ISSUES

AGO reports it is not clear whether in all instances the term “insurer” when used alone, as opposed to “domestic insurer,” includes fraternal benefit societies. Some clauses refer to an “insurer or health organization” while other clauses refer to “every domestic insurer and health organization” or “a life or health insurer, fraternal benefit society or health organization.”

OTHER SUBSTANTIVE ISSUES

OSI analysis also points out SB 56 clarifies that health insurers are subject to risk-based capital requirements and that property/casualty insurers and health insurers are also subject to “trend tests.” The bill expands the allowances for reinsurance credit to include foreign reinsurers that are approved by another state with comparable laws, and also to include reinsurers that are “certified” by the superintendent as having adequately collateralized their obligations. The bill expands the Insurance Holding Company Law to allow domestic insurers to organize or acquire any type of subsidiary business, to require potential acquirers of a domestic insurer to submit an analysis of their enterprise risk exposures and mitigation, to establish standards for determining if an acquisition would materially lessen competition, and to allow the Superintendent to jointly regulate multi-state and international insurers through “supervisory colleges.” Lastly, SB 56 adds additional factors that the superintendent may consider when determining whether an insurer is in a hazardous financial condition.

AOC points out that several provisions may impact the courts by allowing for penalties, hearings, and matters of evidence. Specifically, AOC lists three sections within SB 56 that will impact the courts.

1. Section 25: provides that neither the superintendent nor another person who received documents, materials, or other information while acting pursuant to the authority of the superintendent shall be permitted or required in a private civil action to testify on the confidential material. The bill provides exceptions to confidentiality requirements.
2. Section 40: provides that the superintendent may require an insurer who cannot provide a detailed explanation for the insurer’s inability to provide requested information to determine compliance with the Insurance Holding Company Law, Chapter 59A, Article 37 NMSA 1978, after notice and a hearing, to pay a \$500 penalty per day for each day that the production of information is delayed, or the superintendent may suspend or revoke the insurer’s license.
3. Section 43: provides that if an acquisition violates standards set out in this statutory section governing “acquisitions that would lessen competition,” within the Insurance Holding Company Law, the superintendent may enter an order requiring an involved insurer to cease and desist from doing business in New Mexico with respect to the line or lines of insurance involved in the violation or an order denying the application of an acquired or acquiring insurer for a license to do business in New Mexico. Requires that a written decision by the superintendent setting forth findings of fact and conclusions of law accompany the order. Permits the superintendent to fine a person who violates a

cease-and-desist order up to \$10 thousand per day of the violation or suspend or revoke the person's license, or both, after notice and a hearing. Also permits the superintendent to fine an insurer or other person who fails to make a required filing and who fails to demonstrate a good faith effort to comply with a filing requirement up to \$50 thousand.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

OSI reports if neither SB 56 nor SB 7 is enacted during 2014, New Mexico will be at immediate risk of losing its accreditation with NAIC. If this were to happen, the state's domestic insurers that are licensed to do business in other states (such as New Mexico Mutual and Mountain States Mutual Insurance Companies) would have their books and operations periodically examined, at the companies' expense, by the insurance regulators in each state where they are licensed, rather than continue to be examined solely by the New Mexico Insurance Division. If SB 7 is enacted but SB 56 is not, the remaining components of SB 56 would need to be introduced during the 2015 legislative session in order to avoid future accreditation problems with NAIC.

JC/svb:ds