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The Honorable Greg Abbott
Office of the Attorney General
Opinion Committee
209 W. 14th Street, Floor 6
P. O. Box 12548
Austin, Texas 78711-2548

FILE # ML-47465-13

I.D. # 47465

RQ-1169-GA

Re: Request for Attorney General Opinion

Dear Attorney General Abbott:

ISSUE

Pursuant to §402.042(b)(2), Government Code, the Board of Directors, by and through the Executive Director of the State Office of Risk Management (Office), respectfully requests an opinion from the Office of the Attorney General on the following issue: Whether state agencies, including institutions of higher education, that purchase property, casualty or liability insurance coverage, are permitted to purchase such insurance without the approval of the State Office of Risk Management.

BACKGROUND

Prior to the 77th Legislature, a state agency or an institution of higher education was generally permitted to purchase its own insurance policies without specific review or approval. In 2001, however, the Legislature determined that these state entities may have purchased unnecessary or questionable policies without oversight, which potentially posed an additional cost to the state. In response, House Bill 1203, 77th RS (2001), attached at Appendix A, designated and required the State Office of Risk Management to administer insurance services obtained by state agencies and operate as a full-service insurance and risk manager, and in administering insurance services, to purchase insurance coverage for state agencies.

As now codified in §412.011(b)(1), Texas Labor Code, the Office operates as a full-service risk manager and insurance manager for state agency. The Board is required by Section 412.011(d) to phase in, by line of insurance, the requirement that a state agency purchase coverage only through the Office. Section 412.011(e), Texas Labor Code, provides that a state agency subject to Chapter 501, except for an institution subject to Section 501.022, may not

purchase property, casualty, or liability insurance coverage without the approval of the Board.¹ Relevant portions of Chapter 412 are attached at Appendix B.

PROGRAM DETAIL

House Bill 1203, 77th RS, does not mandate that state entities must purchase insurance; however, once an entity determines it does intend to purchase insurance, it must notify the Office and either purchase through the Office's programs or obtain Board approval to purchase an alternative policy. Notification of intent to purchase property, casualty or liability insurance is required by Section 412.051, Texas Labor Code. The Office sponsors specific lines of insurance identified by the statute and/or identified by the Board as lines which could benefit state entities through a statewide policy.²

Administrative rules have been formally promulgated by the Board at 28 TAC 252.301, *et seq.*, identifying the processes and procedures for the submission of requests for approval of insurance purchases consistent with statutory provisions, attached at Appendix C.

To maintain competition in services and costs the Board established an administrative mechanism for state entities to request an exception to obtain an alternative policy under a line of insurance otherwise sponsored through the Office. Entities may also choose to seek a policy outside of a sponsored line and may submit a request for Board approval of the purchase. In either case, pursuant to 28 TAC 252.303, the Office reviews the submission to determine if the submitting entity has unique exposures, if the purchase is necessary because of substantial or unusual risk of loss, or if the coverage is necessary to protect the interests of the state. The request is reviewed for a number of factors including coverage, exposures, contractual requirements and cost. By policy, the Board has delegated daily administration of the Insurance Program to the Executive Director, including approval or denial of purchases consistent with promulgated rules, subject to quarterly reporting and oversight. After a review considering information submitted by a requesting entity, as well as Sections 412.011(c)(2)–(e) and 412.051(b) of the Texas Labor Code; Chapter 1803 of the Texas Insurance Code; and Title 28, Part 4, Chapter 252, of the Texas Administrative Code, as well as the legislative history and intent for HB1203, 77th RS, a formal recommendation is then made to the Executive Director, and a formal determination on behalf of the Board is provided to the submitting entity either approving or disapproving the requested purchase.

¹ Only the Texas A&M System, the University of Texas System, and the Texas Department of Transportation are not subject to Chapter 501, Texas Labor Code. These entities are assigned specific applicable Labor Code chapters (502, 503, and 505, respectively) under authority of Section 412.052, Texas Labor Code. Only one other exemption exists, Section 501.022, Texas Labor Code, which exempts Texas Tech University, Texas Tech University Health Sciences Center, Angelo State University, and other agencies under the direction and control of the board of regents of Texas Tech University System on a limited basis.

² As of the date of this letter, four such lines have been implemented by the Board: Property, Directors and Officers, Automobile Liability, and Volunteer. Additional information about these programs is available at the Office website at sorm.state.tx.us, including required legislative reports and mandated studies.

PURPOSE OF THE REQUEST

The statutory insurance program is an enterprise-level program negotiated with global underwriters on behalf of the state, that leverages economies of scale. The efficacy of the statutory program relies upon stability in the program and a reasonable expectation of compliance by covered entities. The opinion request arises as a result of instances in which state entities have not complied with the implemented program, creating market confidence instability and necessitating a definitive opinion of the Attorney General as to whether non-compliance is in violation of the statutes and rules. Two categories of non-compliance have been identified:

Failure to Comply with Law or Communicate with the Office. Certain state entities have not purchased through the sponsored program, nor sought an exception through the identified process set forth in statute or through Office rules. Office involvement is dependent upon notification consistent with legal requirements. Procedurally, Office approval is verified by the the Office's approval of insurance-related expenditures in the Comptroller's USAS system. In some case, the Office's sole notification of an intended purchase has been through Comptroller USAS notification. These controls have been circumvented in some cases through the use of non-general revenue fund sources or utilization of non-insurance purchasing coding in the USAS system, raising a concern of purposeful non-compliance. The Office has communicated with known entities and requested each come into compliance with the statutes and rules and reported violations to the Legislature, as required.

Failure to Abide by Board Determination of Denial. The second instance involves state entities which have previously complied with purchasing through a sponsored program, and sought an exception through the identified process set forth in statute and Office rules, but did not comply with Office's final determinations and knowingly purchased outside the program without approval of the Board. In such cases, the enterprise efficacy of the statutory program may be significantly negatively affected, with substantial potential harm to remaining program participants and the state enterprise.

ANALYSIS

There is no indication or evidence the Legislature intended to exempt entities other than the Texas A&M System, the University of Texas System, the Texas Department of Transportation, and aspects of the Texas Tech University System from the requirements of all other covered state agencies. The Code Construction Act, found in Section 311.021, Government Code, specifically provides that, in enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;

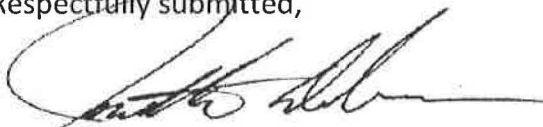
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

Had the Legislature intended to exclude any other entities from the definition of a state agency or institution of higher education subject to the insurance purchasing program, or intended another meaning for the terms "shall" or "may not," the Office respectfully submits that it would specifically have done so.

Section 412.011(e), Texas Labor Code, makes clear that only Texas A&M System, the University of Texas System, the Texas Department of Transportation, and aspects of the Texas Tech University System are exempted from the requirements of all other covered state entities. That this was an intentional and exhaustive list of exemptions is confirmed by the transcript of the floor debate of amendments to HB 1203, 77th RS, attached at Appendix D.

On behalf of the State Office of Risk Management, I respectfully ask that the Office of the Attorney General issue a definitive opinion confirming that state agencies, including institutions of higher education, that purchase property, casualty or liability insurance coverage, are not permitted to purchase such insurance without the approval of the State Office of Risk Management.

Respectfully submitted,



Jonathan D. Bow, J.D.
Executive Director
State Office of Risk Management

By Certified Mail No.
7013 0600 0001 9880 0946
Return Receipt Requested