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ATTORNEY GENERAL OF TEXAS

May 6, 2020

The Honorable Larry Taylor
Chair, Committee on Education
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0302

Re: Matters related to the Texas Windstorm Insurance Association and its compliance with House Bill 1900 and Senate Bill 615 (RQ-0318-KP)

Dear Senator Taylor:

You ask several questions regarding the Texas Windstorm Insurance Association (“the Association”) and its compliance with various laws, including recent legislation passed by the Eighty-sixth Legislature.¹ At the outset, we emphasize that attorney general opinions advise on the meaning of laws and how they apply to specific circumstances, but this office is not authorized to investigate alleged violations of law through the opinion process. *See* Tex. Att’y Gen. Op. No. GA-1033 (2013) at 1 (declining to opine on questions regarding the Association’s alleged failure to perform its statutory duties). Because some of your questions involve fact issues about whether the Association violated provisions of the Insurance Code, we cannot provide definitive answers but can offer general guidance on the construction of statutes with regard to your other questions.

Chapter 2210 of the Insurance Code governs the Association’s operations. *See* TEX. INS. CODE §§ 2210.001–.705. Recognizing the seacoast territory of the State lacked adequate windstorm and hail insurance, the Legislature created the Association “to serve as a residual insurer of last resort for windstorm and hail insurance” in that area, providing “insurance coverage to those who are unable to obtain that coverage in the private market.” *Id.* § 2210.001(2). The Association “is composed of all property insurers authorized to engage in the business of property insurance” in Texas. *Id.* § 2210.051(a). Those members “participate in insured losses and operating expenses” of the Association based on each member’s proportionate share of net direct premiums as compared to all members of the Association. *Id.* § 2210.052(a). The Association is governed by a Board of Directors (“the Board”), which is “responsible and accountable” to the

¹*See* Letter from Honorable Larry Taylor, Chair, Senate Comm. on Educ., to Honorable Ken Paxton, Tex. Att’y Gen. at 1–4 (Dec. 10, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

Commissioner of Insurance. *Id.* §§ 2210.101, .102.; *see also id.* § 31.001(1) (defining “Commissioner” for purposes of the Insurance Code to mean “the commissioner of insurance”).

Relevant to your questions, the Legislature requires the Association to “maintain total available loss funding in an amount not less than the probable maximum loss . . . for a catastrophe year with a probability of one in 100.” *Id.* § 2210.453(b). The Association may “purchase reinsurance or use alternative risk financing mechanisms or both as necessary,” in addition to other resources, to achieve the required funding level. *Id.* § 2210.453(a), (b). Any costs of the reinsurance or alternative financing mechanisms in excess of the probable maximum loss must be paid by assessments on the Association’s members. *Id.* § 2210.453(d).

In your first question, you ask whether the Association violated subsection 2210.453(d) by failing to require “member insurer companies to pay for the cost of the Association’s 2019 funding sources in excess of the . . . statutory minimum level.” Request Letter at 2. The Legislature enacted subsection 2210.453(d) during the 2019 legislative session, and it became effective June 10, 2019.² Prior to that time, chapter 2210 required the Association to maintain the statutory minimum level of funding but did not require a specific funding source for amounts in excess of the minimum.³ Briefing submitted in response to your request explains that the Association’s decision to purchase reinsurance for the 2019 storm season, and its decision about the amount of that reinsurance, occurred prior to implementation of House Bill 1900.⁴ Briefing also explains that the reinsurance contract for the 2019 storm season was effective beginning June 1, 2019.⁵ The requirement that Association member assessments fund the cost of reinsurance or alternative financing mechanisms in excess of the probable maximum loss applies to reinsurance purchases made on or after the effective date of House Bill 1900. To the extent the Association purchased reinsurance for the 2019 storm season prior to June 10, 2019, subsection 2210.453(d) would not apply to such purchases. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (“Courts generally presume that the Legislature intends a statute or amendment to operate prospectively and not retroactively.”).

Even if section 2210.453(d) applied to reinsurance purchased for the 2019 storm season, your question requires a determination as to the “probable maximum loss” for the Association in a given year. TEX. INS. CODE § 2210.453(b). Chapter 2210 does not provide a formula for calculating that potential loss and instead delegates this calculation to the Association and the Department of Insurance in the first instance. *See id.* § 2210.008(b), (d). The Department of Insurance is in the process of proposing rules that establish how the Association will make that

²Act of May 23, 2019, 86th Leg., R.S., ch. 790, § 8, 2019 Tex. Sess. Law Serv. 2237, 2239 (H.B. 1900).

³Act of May 28, 2015, 84th Leg., R.S., ch. 615, § 20, 2015 Tex. Gen. Laws 2036, 2042.

⁴*See* Brief from John Polak, Gen. Manager, Tex. Windstorm Ins. Ass’n, to Honorable Ken Paxton, Tex. Att’y Gen. at 2 (Jan. 10, 2020) (on file with the Op. Comm.) (explaining that Board action to purchase reinsurance occurred on Feb. 5, 2019).

⁵*See* Brief from Jay Thompson, Thompson, Coe, Cousins, & Irons, L.L.P., on behalf of the Ins. Council of Tex. & Ass’n of Fire and Cas. Cos. of Tex., to Honorable Ken Paxton, Tex. Att’y Gen. at 3 (Jan. 21, 2020) (on file with the Op. Comm.) (explaining that the Association’s current reinsurance contract is effective June 1, 2019, through May 31, 2020).

determination.⁶ As briefing in response to your request recognizes, that calculation will involve numerous factual inquiries as well scientific and actuarial expertise.⁷ It is therefore beyond the scope of an attorney general opinion to determine the probable maximum loss. Without that initial fact determination, it is not possible to answer whether the Association violated subsection 2210.453(d) for any given storm season.

In your second question, you ask whether the Association or Board violated subsection 2210.071(b) of the Insurance Code. Request Letter at 2. That subsection, amended during the past session, now provides: “The association may not pay insured losses and operating expenses resulting from an occurrence or series of occurrences in a catastrophe year with premium and other revenue earned in a subsequent year.” TEX. INS. CODE § 2210.071(b).⁸ How the Association is funding losses from Hurricane Harvey is not a question we can answer without a factual inquiry into its finances, a task we do not undertake through the opinion process.

In your third question, you ask whether the Association or Board is in violation of section 2210.1052 of the Insurance Code. Request Letter at 3. That section provides:

If the ultimate loss estimate for an occurrence or series of occurrences made by the chief financial officer or chief actuary of the association indicates member insurers may be subject to an assessment under Subchapter B-1, the board of directors shall call an emergency meeting to notify the member insurers about the assessment.

TEX. INS. CODE § 2210.1052. You explain that at some point during 2019, the Association increased the total loss estimate for Hurricane Harvey. Request Letter at 2. Exactly when the chief financial officer or chief actuary determined to increase the ultimate loss estimate is unclear. At the time you submitted your request, the Association had “not taken action to approve the assessment” on its member insurers. *Id.* However, at its December 10, 2019 regular meeting, the Board voted to approve an assessment on insurance members:

⁶See TWIA Loss Funding Rules, Informal Working Draft & Requests for Informal Comments (July 18, 2019), <https://www.tdi.texas.gov/rules/2019/documents/lossfundingcvr.pdf>; see also Informal Working Draft of Rules, <https://www.tdi.texas.gov/rules/2019/documents/lossfndtext.pdf>.

⁷Briefing submitted by the Coastal Windstorm Insurance Coalition explains that the probable maximum loss determination “is an unknown quantity subject to actuarial estimation using actuarial judgment informed by estimated 2020 exposures, actual Texas hurricane experience from recent hurricanes . . . and the use of computerized hurricane simulation models.” Brief from Henry Freudenburg, Chairman, Coastal Windstorm Ins. Coal., to Honorable Ken Paxton, Tex. Att’y Gen. at 5 (Jan. 10, 2020) (“Coastal Windstorm Ins. Coal. Brief”) (on file with the Op. Comm.).

⁸Prior to the 2019 legislative session, that subsection provided that the association “shall pay losses in excess of premium and other revenue of the association from available reserves of the association and available amounts in the catastrophe reserve trust fund.” Act of June 1, 2009, 81st Leg., R.S., ch. 1408, § 16, 2009 Tex. Gen. Laws 4396, 4400. An opinion from Attorney General Abbott concluded that nothing in that provision restricted the Association’s use of available premiums, current or future, to satisfy prior obligations. Tex. Att’y Gen. Op. No. GA-1033 (2013) at 3.

Resolved, that TWIA staff is authorized and directed to seek the approval of the Texas Commissioner of Insurance to levy and collect an assessment from the member companies in the amount of \$90 million to provide funds for the payment of Hurricane Harvey losses and loss adjustment expenses. The effective date of the assessment levy is January 15, 2020.⁹

Section 2210.1052 provides that the Board “shall call an emergency meeting to notify member insurers about the assessment.” TEX. INS. CODE § 2210.1052 (emphasis added). Generally, the word “shall” denotes a mandatory duty. *Lewis v. Jacksonville Bldg. & Loan Ass’n*, 540 S.W.2d 307, 310 (Tex. 1976); *see* TEX. GOV’T CODE § 311.016(2) (explaining that shall imposes a duty unless the context in which the word appears necessarily requires a different construction). But subsection 2210.1052 does not provide a deadline by which the Board must call an emergency meeting. *See, e.g., AC Interests, L.P. v Tex. Comm’n on Envtl. Quality*, 543 S.W.3d 703, 714 (Tex. 2018) (explaining that when a statutory provision “does not have an explicit or logically necessary consequence, we presume the provision was intended as a direction rather than a mandate”). Furthermore, it provides no consequence if the Board does not call an emergency meeting upon a determination that member insurers may be subject to an assessment. If the first opportunity for the Board to provide the requisite notice to member insurers about an assessment was at a regularly scheduled Board meeting, it is unlikely a court would require the Board to call an emergency meeting in addition to the regularly scheduled meeting in order to provide the requisite notice.

In your fourth question, you ask whether the Association, its Board, staff, or third-party vendors violated any conflict-of-interest provision in chapter 2210 of the Insurance Code, the Association’s Plan of Operation, or Department of Insurance Rule “as it relates to their fiduciary role in serving residential and commercial policyholders not otherwise eligible to receive wind coverage along the coast.” Request Letter at 3. You do not point to a specific conflict-of-interest provision but ask generally whether one might exist.

Senate Bill 615, enacted during the past legislative session, adopted section 2210.109, requiring members of the Board or members of certain subcommittees of the Board to disclose potential conflicts of interest:

A member of the board of directors, or a member of a subcommittee of the board of directors that relates to underwriting and actuarial matters, shall disclose any potential conflict of interest of the member known by the member with respect to a matter for discussion or vote by the board or subcommittee, as applicable, before the discussion or vote. A potential conflict of interest is an interest that may reasonably be expected to diminish the member’s independent judgment with respect to the matter for discussion or

⁹Tex. Windstorm Ins. Ass’n Bd. of Directors, Dec. 10, 2019, Meeting, YOUTUBE (Dec. 12, 2019), *see also* <https://www.twia.org/news-and-announcements/twia-board-votes-on-rates-and-member-company-assessments/>.

vote. Potential conflicts of interest required to be disclosed under this section include:

- (1) a financial or personal interest in an entity that may financially benefit from the outcome of the discussion or vote; and
- (2) holding an insurance policy issued by the association that may be affected by the discussion or vote.

TEX. INS. CODE § 2210.109. Whether any Board member or Association staff has a conflict of interest and failed to disclose that conflict when required by statute involves fact questions beyond the scope of an attorney general opinion.¹⁰

In your fifth question, you ask whether the Association or its Board is in violation of “any professional or ethical code of conduct” that prohibits members of a state governmental body from taking an action that would financially burden or financially discriminate against residents not currently represented on the Board as contemplated by chapter 2210 of the Insurance Code. Request Letter at 3. You do not point to any specific professional or ethical code of conduct that includes such a standard but ask generally whether one might exist.

By statute, the Association’s Board is composed of nine members, appointed by the Commissioner of Insurance, representing different interests in relation to windstorm insurance. *See* TEX. INS. CODE § 2210.102. Three member positions represent the insurance industry, three member positions represent residents of the coastal region, and three represent individuals residing more than 100 miles from the Texas coastline. *Id.* § 2210.102(b)–(d). You explain that currently, two vacancies exist on the Board, “one inland member and one seacoast member.” Request Letter at 3. When a vacancy occurs on the Board, the “[C]ommissioner shall appoint a replacement.” TEX. INS. CODE § 2210.103(c). The Board itself has no authority to fill its vacancies.¹¹

Chapter 2210 does not address the effect of vacancies on the Board’s ability to take action. Under the Code Construction Act, a “grant of authority to three or more persons as a public body confers the authority on a majority of the number of members fixed by statute.” TEX. GOV’T CODE § 311.013(a). A majority of the Board fixed by statute is five, and five members of the Board may take action on an item over which the Board has authority. *See id.*; *see also* TEX. INS. CODE § 2210.102. Furthermore, through chapter 2210, the Legislature imposes numerous duties on the Board and does not condition the performance of those duties on all Board member positions being

¹⁰You also ask about potential conflict-of-interest provisions within the Association’s Plan of Operation. Request Letter at 3. Conflict-of-interest provisions within the Plan of Operation only address conflicts involving the Association’s legal counsel. *See* 28 TEX. ADMIN. CODE § 5.4001(b)(4).

¹¹With regard to the three positions designated to represent the insurance industry, the Association’s members nominate persons from its membership to fill those vacancies, and the Board submits those nominations to the Commissioner. TEX. INS. CODE § 2210.102(f). However, the Board plays no role in the appointment process for the two types of positions with current vacancies.

filled. *See, e.g., id.* §§ 2210.107 (“Primary Board Objectives; Report”), 2210.502 (requiring Board to “propose inflation adjustments to the maximum liability limits”). We find no authority suggesting that vacancies impair the Board’s ability to take action, so long as the Board satisfies the quorum requirement.¹²

¹²Briefing submitted in response to this request argues that the Board violates statutory requirements that rates “not unfairly discriminat[e]” against coastal policyholders “if the required number of coastal board members [are] not present” to vote on those rates. *See Coastal Windstorm Ins. Coal. Brief at 28–9; see also TEX. INS. CODE § 2210.355(c)* (“Rates must . . . not unfairly discriminat[e] . . .”). Whether unfair discrimination occurs in a specific instance involves a fact question, and the law does not recognize *de facto* or *per se* discrimination by virtue of a Board vacancy.

S U M M A R Y

Section 2210.453 of the Insurance Code requires the Association to maintain total available loss funding in an amount not less than the probable maximum loss for a catastrophe year with a probability of one in 100. Pursuant to House Bill 1900, which became effective June 10, 2019, any costs of the reinsurance or alternative financing mechanisms in excess of the probable maximum loss must be paid by assessments on the Association's members. To the extent the Association purchased reinsurance for the 2019 storm season prior to June 10, 2019, subsection 2210.453(d) would not apply to such purchases.

Section 2210.1052 of the Insurance Code requires the Association's Board to provide notice to member insurers if an assessment may be imposed due to an ultimate loss estimate for an occurrence as determined by the chief financial officer or chief actuary. If the first opportunity for the Board to provide the requisite notice to member insurers about an assessment is at a regularly-scheduled Board meeting, it is unlikely a court would require the Board to call an emergency meeting in addition to the regularly-scheduled meeting in order to provide the requisite notice.

A grant of authority to three or more persons as a public body confers the authority on a majority of the number of members fixed by statute. Vacancies on the Board do not impair the Board's ability to take action, so long as the Board satisfies the quorum requirement.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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