NYDFS proposed regulation addresses financial disclosure requirements for directors and officers of private equity buyers of insurance companies

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Insurance Alert

On August 9, 2017, the New York Department of Financial Services (NYDFS) released for public comment proposed amendments to its regulations governing the approval process for the acquisition of control of insurance companies domiciled in New York. The regulations, NYDFS Regulation 52 (11 NYCRR part 80), sets forth the information required to be furnished in applications (so-called "Form A" applications) to the NYDFS seeking approval to acquire control of New York domestic insurers.

Regulation 52 was last amended by the NYDFS in 2014 to address a growing trend of private equity firms acquiring insurers, particularly life insurers writing fixed and indexed annuity contracts, which the NYDFS feared could lead to potential conflicts of interests between firms seeking to maximize their short-term financial returns and policyholders counting on protection of their long-term benefits.

Among other requirements imposed by the 2014 amendments to Regulation 52—including the submission of a detailed plan of operation that cannot be changed without NYDFS approval and the potential establishment of a trust fund in the case of a life insurer—was a broadening of the list of entities and individuals associated with the Form A applicant with respect to which information in response to the various items of the Form A application must be provided. The list of such entities and individuals is separately delineated under Regulation 52 (in "Note B" under 11 NYCRR 80-1.6) and was expanded in the 2014 amendments to include vehicles favored by private capital investors, such as limited partnerships, limited liability partnerships and limited liability companies, and any person controlling such entities.

Significantly, a reference to "Note B" was added by the 2014 amendments to Item 3 of the Form A application, which calls for the submission of a consolidated balance sheet and statements of income and surplus (audited by an independent CPA) for the applicant and "each person identified pursuant to Note B." The consequence of this change meant that Regulation 52 appears to, on its face, require such financial information for every executive officer and director of the expanded list of entities subsumed by "Note B."

While the proposed exemption from financial disclosure requirements for directors and offices

presumably is an effort by the NYDFS to unwind the (likely unintended) inclusion of such individuals by the 2014 amendments—which were targeting private equity buyers—the scope of the proposed amendments is broader and would appear to be applicable to all directors and officers of corporate buyers of New York domestic insurers. The exemption provision, as drafted, however, appears to be limited to only directors and officers of a corporation, which may serve to exclude individuals serving in similar capacities at other entities such as general partners of limited partnerships or managers of limited liability companies, although such may not have been intended.

The current proposed amendments, which the NYDFS bills simply as a "clarification" to Regulation 52, provide that an "executive officer or director of a corporation may make a written application to the Superintendent for an exemption from the requirement that the person furnish a consolidated balance sheet as of the end of the applicant's fiscal year and related consolidated statements of income and surplus for the year then ended on the grounds that submitting the documents is not pertinent in determining the financial condition of the corporation of which the individual is an executive officer or director." The exemption request must explain why such information should not be deemed pertinent.

The proposed amendments also make several technical changes to Regulation 52 to change incorrect references to "controlled person" to "significant person." The term "significant person" is included in a number of items of the Form A application and is broadly defined to include, inter alia, any person within a holding company system whose (i) assets constitute 15% of the assets of the holding company or (ii) sales and operating revenues constitute 15% of the sales and operating revenues of the holding company, in each case on a consolidated basis.

The public comment period on the proposed amendments expires on September 25, 2017.

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