



**COMMITTEE ON
INSURANCE LAW**

March 6, 2014

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Re: New York Department of Financial Services
Proposed 11 NYCRR 82 (Insurance Regulation 203) –
Enterprise Risk Management and
Own Risk and Solvency Assessment (“Proposed Regulation”)

Proposed Rulemaking I.D. No. DFS-03-14-00014-P

Dear Mr. Bengler:

The Committee on Insurance Law of the New York City Bar Association (the “Committee”) appreciates this opportunity to provide its comments with respect to the above-captioned regulation proposed by the New York Department of Financial Services (the “Department”) governing Own Risk and Solvency Assessment (“ORSA”) and Enterprise Risk Management (“ERM”).¹ This letter constitutes public comment on the Proposed Regulation as contemplated by NYS Register dated January 22, 2014, pp. 6 – 8.

The Committee comprises lawyers representing a diverse cross-section of the insurance community, including lawyers in private practice, in-house counsel at insurance carriers and producers across multiple lines of insurance business, trade association officials, regulators, policyholder lawyers, insurance arbitrators and other types of insurance professionals.

¹ This letter was principally drafted by Committee members Charlene McHugh, Richard Liskov and Dan Rabinowitz. Two members of the Committee – Joana Lucashuk, Senior Attorney with the Department, and Robert Easton, Executive Deputy Superintendent of Financial Services for the State of New York – have recused themselves from all Committee deliberations on the position expressed herein and from the preparation of the instant letter.

This letter represents the views of the Committee as a whole and not necessarily those of any particular member thereof.

Form of ERM Report

We would ask the Department to clarify in the Proposed Regulation that the “enterprise risk report” requirement under Section 82.2(b), including the attestation requirement set forth in Section 82.2(b)(4), may be satisfied by using Form F as set forth in the model holding company regulations of the National Association of Insurance Commissioners (“NAIC”).² We believe that Form F is functionally equivalent to the requirements of Section 82.2(b), including the requirement that information be provided to the filer’s “best knowledge and belief.”³ Permitting filers to use Form F in satisfaction of the New York ERM filing requirement would create additional consistency between New York and other states on these new measures.

Confidentiality of ORSA Reports

The Proposed Regulation does not address confidentiality of ORSA summaries (“ORSA Reports”) and supporting materials. (This may be a function of the fact that ORSA requirements in other states have been or are being adopted by statute; only New York to our knowledge has acted to implement ORSA by means of regulation only.) We respectfully request that the Department resolve this deficiency in a manner that adequately recognizes the sensitive and proprietary nature of ORSA information.⁴

The Proposed Regulation requires non-exempt insurers to candidly disclose to the Department in its ORSA Reports highly sensitive and confidential information about material risks affecting their operations and those of their parent companies, affiliates and subsidiaries (none of which will necessarily be insurance companies licensed by the Department or any other jurisdiction). That information is extremely unlikely to be in the public domain already and will consist, *e.g.*, of evaluations of current and future risk management issues, models of future solvency positions and strategic plans. Recognizing the sensitivity of this information, the NAIC, in its model ORSA statute adopted in 2012 (the “Model ORSA Act”)⁵, included robust provisions to maintain confidentiality of ORSA Reports that extend to NAIC and third-party consultants and protect against disclosure of risk evaluations and encourage candid, thorough assessments to regulators.⁶ Such confidentiality provisions have been adopted by the legislatures in

² NAIC Insurance Holding Company System Model Regulation with Reporting Forms and Instructions, Form F.

³ *Id.*, Item 1.

⁴ Although we believe that confidentiality of ORSA reports is implicit in the law already by virtue of New York Insurance Law (“NYIL”) Section 1504(c), Section 1603(e) and Section 1709 (as applicable), this is not expressly prescribed, unlike the case in the NAIC model act discussed below. In addition, relying on these existing sections of NYIL would arguably leave uncovered insurers that are not subject to any of Article 15, 16 or 17 (that is, an insurer that has no upstream or downstream affiliates). We also note that ERM reports appear to be afforded confidential treatment, either expressly or implicitly, by Section 1504(c), Section 1603(e) and Section 1709.

⁵ NAIC Risk Management and Own Risk and Solvency Assessment (RMORSA) Model Act.

⁶ *Id.* § 8.

all seven states that have adopted the Model ORSA Act since its 2012 adoption.⁷ We believe that confidential treatment of ORSA Reports is just as warranted in New York and that the Department ought to take all appropriate steps at its disposal to achieve this result.

Effective Dates of ERM and ORSA Reports

Section 82.3(b)(1) of the Proposed Regulation requires that domestic insurers electronically submit ORSA Reports by December 1 of each year and that they contain the information described in the ORSA guidance manual. Section 82.3(b)(3) requires that the summary report include the signature of the domestic insurer's Chief Risk Officer or executive with responsibility for oversight of the insurer's ERM function, attesting that the domestic insurer (or another member of the domestic insurer's holding company system, Article 16 system or Article 17 system) applies the ERM function described in the ORSA Report and that a copy of the report has been provided to the domestic insurer's or member's board of directors (or appropriate committee thereof). ERM reports are due by each April 30 per Proposed Regulation Section 82.2(b). Below we offer comments on clarifying some of these temporal requirements.

ERM timing

We would ask the Department to clarify in the Proposed Regulation that an ERM report is required to cover the calendar year ending the December 31 prior to the submission date. In other words, we seek clarification that a timely ERM report filed on April 30, 2016 need not cover a risk discovered or arising following December 31, 2015 (or, for that matter, any risk arising prior to January 1, 2015 which also ends prior to such date). To impose a stricter timing requirement would frustrate the purpose of the filing requirement by not permitting a full review of risks that come to the attention of the insurer shortly before filing. The nature of the reporting requires that there be some closure and predictability around what risks an insurer is supposed to identify, model, analyze and report in the given filing. This would be consistent with other types of statutory reports that insurers are required to submit to the Department, such as statutory annual statements and annual holding company registration statements. In each of these cases, the annual report, to be filed early in a calendar year, is not required to cover any event or period following the preceding December 31.

ORSA timing

Similarly, we would ask for clarification that an ORSA Report need only cover a prior period, rather than a year-long period up to and including the filing date itself. We believe this is implicit in the Proposed Regulation already insofar as it refers to the NAIC ORSA Guidance Manual. Such Manual states that an ORSA Report should be filed once

⁷ See Cal. Ins. Code § 935.8; Iowa Stat. Title XIII, § 522.8; Maine Ins. Code (Maine Stat. Title 24-A) § 222(13-A)(C), (E); NH Ins. Code § 401-C:1(III), 401-C:8; Penn. Uncodified Stat. HB 1481 § 2 (2013); RI Stat. § 27-77-1; Vt. Stat. Tit. 8 § 3581.

a year, “with the insurer apprising the commissioner as to the anticipated time of filing.”⁸ We would conclude that the intent of the NAIC ORSA process and the Department’s proposed administrative requirements is that an insurer select a year-long period that will be the coverage year for an ORSA Report. The coverage year need not correspond to a calendar year. The ORSA Report may be filed on a date, as agreed between the insurer and the Department, following the end of the coverage year, permitting time for the required analysis, modeling and other efforts. The December 1 deadline in the Proposed Regulation acts as an absolute backstop; an insurer would not be permitted to submit a report after December 1 for any part of the previous calendar year.

If this is the intent of the Proposed Regulation, read together with the Manual (which seems to us like the most natural interpretation), we would suggest additional detail in the Proposed Regulation to this effect, or alternatively interpretive guidance that this is correct. If this is not the intent, we would seek an explanation in the Proposed Regulation of timing expectations, which we believe should provide for an interval between the end of the coverage period and the date the ORSA Report actually needs to be *filed*.

The Committee would be delighted to answer any questions or respond to any concerns that the Department may have regarding the foregoing matters. Feel free to respond to us by contacting the undersigned.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Daniel A. Rabinowitz". The signature is written in dark ink and is positioned above the typed name and title.

Daniel A. Rabinowitz
Chair, Committee on Insurance Law

⁸ NAIC ORSA Guidance Manual § I(C).