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Via Courier and Email
New York Department of Financial Services
Attn: Eugene Benger
General Counsel for Insurance
One State Street
New York, NY 10004
Email: Eugene.benger@dfs.ny.gov

Re: New York Department of Financial Services
Proposed Fifth Amendment to 11 NYCRR 80-1 (Insurance Regulation 52) – Holding Companies ("Proposed Regulation")

Proposed Rulemaking I.D. No. DFS-19-14-00012-P

Dear Mr. Benger:

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 Proposed Regulation of the New York Department of Financial Services (the "Department"). This letter constitutes public comment on the Proposed Regulation as contemplated by NYS Register dated May 14, 2014, p. 37.

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. This letter represents the views of the Committee as a whole and not necessarily those of any particular member thereof.[1]

[1] This letter was prepared by a subcommittee of the Committee consisting of Peter Bickford, Robert Fettman, Matthew Gaul 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 this letter.

We support the Department's clarification of the application of 11 NYCRR Section 80-1.6 (regarding acquisitions of insurers) to entities other than corporations and partnerships. We also understand that a number of additional requirements added to Item 5 of amended Section 80-1.6, including the Reg. 114-type trust requirements, are intended to codify the Department's actions in the acquisitions of Sun Life New York and Aviva New York by private equity ("PE") acquirers pursuant to applications under Section 1506(a) of the New York Insurance Law ("NYIL").

However, as discussed below, we are concerned that, in formalizing the result of these two particular Section 1506(a) applications, the Department is blurring the line between the oversight of *acquisitions* and its regulation of ongoing insurance company *capital adequacy*. As discussed below, we believe this could have the result of dissuading potential sources of new capital investment for New York-based insurers, which could adversely affect the insurance marketplace and the availability or affordability of certain life insurance and annuity products in this State. Also discussed below, for the Department's consideration, are some comments on the Proposed Regulation as drafted.

The Proposed Regulation Changes the Scope of Section 1506(a) from an Approval Provision to a Provision Concerning Ongoing Oversight and Remedies. Section 1506(a) provides that no person shall acquire control of a New York-domiciled insurer without the prior approval of the Superintendent. Under Section 1506(b), the Superintendent must disapprove such acquisition if he determines, on the basis of enumerated factors, that such action is "reasonably necessary" to protect the interests of the people of New York. *Id.* The intent of Section 1506(a)-(b) is that the Superintendent make a judgment, based on information available at the time, concerning the fitness of a particular acquirer. A Section 1506(a) application process is not intended to be a proxy for general oversight of an insurer or its parent *post*-acquisition. The Department has numerous existing tools at its disposal to exercise such ongoing oversight, and we support the continuing availability and rigorous use of these in insurance regulation in this State for the protection of policyholders. These include, among others:

- the other provisions of Article 15, including requirements addressing
  - registration of controlled insurers,
  - affiliate transactions,
  - "untrustworthiness" of management,
  - enterprise risk and
  - own risk and solvency assessment[2],
- risk-based capital,
- Section 1310 orders and
- Article 74.

Despite these various remedies available to the Department, the Proposed Regulation raises the possibility that a Section 1506(a) approval, upon which parties rely in order to complete a transaction, will be, in effect, subject to conditions subsequent and will not provide the contract certainty that both buyers and sellers need in order to close a transaction. In particular, the proposed requirement of Section 80-1.6, Item 5(b)(2), that the insurer, at a future time, "obtain" additional capital to resolve a perceived

[2] Emergency Regulation 203 of the Department.

"deficiency," seems misplaced in a regulation governing approvals of acquisitions and unnecessary given the Department's considerable existing statutory powers in the event an insurer is undercapitalized. This uncertainty could have an adverse impact on the willingness of an acquirer or other investor to pursue a transaction involving a New York insurer. This could be harmful to the State's insurance marketplace particularly where an insurer is in need of new capital that can be provided by such an investor. In particular, were a New York insurer to fail and be placed into receivership by the Department, its New York policyholders could see their benefits negatively impacted.

Specific Comments. Within the context of the Proposed Regulation as drafted, we offer the following comments:

1) In Item 3 ("Financial Statements"), among other items, of the amended Section 80-1.6, the phrase "each person identified pursuant to Note B" has been added. The effect of adding this phrase is that the applicant would be required to submit financial statements not only as to itself but as to its managing LLC member or general partner ("GP").

   We are mindful of the Department's need for disclosures concerning the applicant and those with the ability to control it. In the case of an applicant that is an LLC or limited partnership (such as a private investment fund), we support the requirement that such LLC or limited partnership submit its financial statements as part of a Section 1506(a) application. However, the financial condition of such entity's managing member or GP may have little bearing on the fitness of the applicant or the financial soundness of the acquisition. In many typical fund structures, the managing member or GP entity is an arm of the fund sponsor, functioning mainly as a vehicle by which the sponsor can exercise legal control. In such cases the managing member or GP is typically *not* an entity with independent financial resources. The financial resources being brought to bear on the acquisition – and therefore most relevant for Article 15 purposes – are those of the limited partnership or LLC (*i.e.*, the fund) itself, whose financial condition should be fully visible to the Department.

   We would accordingly suggest that the phrase "each person identified pursuant to Note B" be deleted from Item 3, and a conforming change should be made to Note B itself.

2) In Item 5 ("Objectives in acquisition of control") of the amended Section 80-1.6, acquirers are required to disclose plans to "declare any dividend" or "change the insurer's investment portfolio," and such plans cannot be changed without the Superintendent's approval. Because the analogous provisions that govern *ongoing* regulatory oversight differ from these *application* requirements, this leads to potential uncertainty for acquirers concerning the New York regulator's role in supervising ordinary corporate activities. We would suggest the following clarifications to provide additional certainty and predictability to potential investors in New York insurers and potentially encourage such investments.
   - Under any plan to declare dividends submitted as part of an application, the insurer could declare ordinary dividends (that is, dividends falling under the quantitative thresholds of NYIL Section

4207 for life companies and Section 4105 for property-casualty companies) without regulatory pre-approval.

- An insurer could engage in ordinary securities trading or other asset management activities under appropriate authority from its board of directors in accordance with New York law[3] without violating any plan regarding "changes" in the investment portfolio.

We note also that the restrictions on "changes in . . . investment portfolio" seem redundant in light of the detailed statutory restrictions on insurer investments set forth in Article 14 of the NYIL.

3) The same item requires that new financial projections be submitted at a future time if, within five years after the acquisition, the insurer enters into any reinsurance, investment, lending, asset purchase or asset encumbrance transaction with the applicant or its affiliates. We have two concerns:

   (a) First, such a requirement is more onerous than those imposed in a typical affiliate transaction filing under Section 1505, in which projections are not required or routinely requested.

   (b) Second, assuming such a requirement must be imposed here, we would suggest a *de minimis* threshold (such as 3% of admitted assets, the threshold for certain Section 1505 filings) so that a minor or ordinary-course transaction does not become a trigger for a disproportionate response in terms of time and effort required (both at the company and at the Department) to prepare and digest new financials.

4) The Proposed Regulation permits the Superintendent to require that an acquirer establish a Reg. 114-type trust (*i.e.*, capital support) based on the acquirer's *or its affiliate's* status as an entity

   - registered or required to register with the U.S. Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940, or that would be required to register pursuant to such provisions if it had $150 million or more in assets under management;
   - that is an investment company, pursuant to the Investment Company Act of 1940 (the "1940 Act"), but without giving effect to the exemptions set forth in 15 U.S.C. Sections 80a-3(c)(1) and (3) "for companies with less than 100 owners, or where all owners are qualified purchasers;"
   - formed within the prior 36 months;
   - primarily engaging in investing or investment management activities; or
   - that holds for investment purposes a portfolio in which non-publicly registered securities or holdings represent 50% or more of the assets.[4]

[3] NYIL §1411(a).
[4] Proposed Regulation, §80-1.6, Item 5(c).

We refer to the five items enumerated above as the "Proposed Criteria."

(a) We would suggest that the Proposed Criteria be limited to the applicant itself and any controlling entity(ies), and not include all *affiliates* of the applicant as currently drafted in the Proposed Regulation. While we understand the Department's motivation in applying such criteria to the applicant itself (which will be the controlling parent of the New York-domiciled insurer) and any entity(ies) in its direct ownership chain, the mere presence, somewhere else in the corporate family, of an entity covered by such a criterion that does not exercise control over the applicant should not *per se* rise to the level of regulatory concern.

(b) The reference in the second Proposed Criterion to 15 U.S.C. Section 80a-3(c)(3) in the phrase "15 U.S.C. Section 80a-3(c)(1) *or (3)*" would appear to be meant as a reference to Section 80a-3(c)*(7)*. Section 80a-3(c)(7) is the exemption from the 1940 Act's definition of "investment company" that relates to qualified purchasers. By contrast, 15 U.S.C. Section 80a-3(c)*(3)*, the provision referred to in the Proposed Regulation, is an exception from the definition of "investment company" for banks, insurers, common trust funds and certain other regulated entities. (We do not believe that it is the Department's intent to treat as a private fund an acquirer that is exempt from the 1940 Act by virtue of being such a regulated entity.) Therefore, we concluded that this is likely a ministerial error.

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,

Daniel A. Rabinowitz
Chair, Committee on Insurance Law