

CLIENT ALERT

NYDFS Issues Circular Letter Related to Investments in New York Domestic Insurance Companies

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On April 19, 2022, the New York Department of Financial Services (“NYDFS”) issued a [Circular Letter](#) to all New York domiciled insurers and other interested parties entitled “Acquisitions of Control and Disclaimers of Control.”

As background, Section 1501(a) of the New York Insurance Law (“NYIL”) defines “control” of an insurer to mean “the possession direct or indirect of the power to direct or cause the direction of the management and policies [of the insurer], whether through the ownership of voting securities, by contract . . . or otherwise; but no person shall be deemed to control another person solely by reason of his being an officer or director of such other person . . . control shall be presumed to exist if any person directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of any other person.” Section 1506 of the NYIL requires that no person may acquire “control” of a New York domestic insurer unless it has filed an application with and received an approval from the Superintendent of Financial Services (the “Superintendent”). This application is known in New York as an Application for Approval of Acquisition of Control and in other states as a “Form A.”

Based on the definition in Section 1501(a) of the NYIL, the Circular Letter states that NYDFS has become aware of “several potential investors” that have attempted to structure investments in New York domestic insurers as an acquisition of less than 10% of the insurer’s voting securities and/or to limit an investor’s board representation to a single board seat, based on an expectation that such a structure would avoid the Form A filing requirements.

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The Circular Letter cautions that a determination of “control” under the NYIL “depends on all the facts and circumstances,” and thus, “an acquiror of less than 10% of an insurer’s voting securities, or with the right to appoint a single board member, may still be deemed to control the insurer based on all the facts and circumstances, including the terms and conditions of the proposed transaction.” The presumption of control at 10% or more of an insurer’s voting securities does not “create a safe harbor for acquisitions below the 10% threshold.” Indeed, even “in the absence of *any* ownership of voting securities of an insurer,” a finding of control can be made. Similarly, while a director of an insurer is not presumed to control the insurer under Section 1501, “in combination with other factors” such directorship “may lead to a control determination.”

The Circular Letter also emphasizes that, notwithstanding the definition of control in Section 1501(a) of the NYIL, Section 1501(b) allows the Superintendent to find that a controlling relationship exists if a person exercises a sufficient “controlling influence over the management or policies of an authorized insurer as to make it necessary or appropriate in the public interest or for the protection of the insurer’s policyholders or shareholders that the person be deemed to control the insurer.”

The NYDFS urges parties involved in transactions concerning New York domestic insurers that could give rise to control issues to “engage with [NYDFS] as early in the transaction structuring process as practicable, even if the parties believe that such transaction will not give rise to a control relationship,” to allow NYDFS an opportunity to review the transaction and the parties’ position and determine whether a Form A filing will be required.

The NYDFS guidance comes amid a time of renewed regulatory interest in insurance company acquisitions generally. The National Association of Insurance Commissioners (“NAIC”) has recently undertaken a project focused on risks posed to insurers by complex acquisition structures and affiliated transactions, with a specific focus on private equity buyers and investment management affiliates. This initiative is discussed in greater detail [here](#). As on past issues, the Circular Letter may indicate NYDFS’s desire to get ahead of the NAIC and establish itself as a leader in this area.

Based on the Circular Letter, potential investors in insurance companies domiciled in New York should carefully consider whether an investment below 10% of voting securities could nevertheless give rise to a control determination by the NYDFS, particularly when combined with a board seat. As urged in the Circular Letter, early communication with NYDFS will be key in any transactions involving the ownership or control of New York insurers.

Please contact any of the authors listed herein if you have questions regarding investments in New York insurers or the definition of control under the NYIL.

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