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## Report Identifies Issues Affecting New York Insurance Holding Company Regulation Post-NAIC Model Act Amendments

On August 18, 2011, the Insurance Law Committee of the New York City Bar Association issued a report entitled "[Insurance Holding Company Regulation in New York in Light of the 2010 Amendments to the NAIC Model Act](#)" (the "Report"). The Report, which was approved for release by the President of the City Bar, addresses implications for New York insurance law arising from the National Association of Insurance Commissioners' recent changes to the model Insurance Holding Company Systems Act (the "Model Act"). The Report suggests specific issues and reforms that New York should consider in implementing changes to its law to conform to the NAIC amendments.

Chadbourne partner Dan Rabinowitz and special counsel Richard Liskov serve on the Insurance Law Committee. Mr. Rabinowitz chaired the subcommittee that prepared the Report and will begin a term as Committee Chair this fall. Mr. Liskov, a former deputy superintendent and general counsel of the New York Insurance Department, has served as chair of the Committee's Subcommittee on Legislation.

### Background

Very generally, the Model Act, currently in effect in virtually all of the states in some form, governs relationships between insurers and their affiliates, imposing standards of fairness on transactions between such entities and requiring prior approval of the state insurance commissioner before control over an insurer can be acquired. New York has not enacted the Model Act *per se* but has substantively similar provisions governing controlled insurers, namely Article 15 of the New York Insurance Law and New York Insurance Department ("Department")<sup>1</sup> Regulation 52.

The NAIC adopted significant changes to the Model Act in December 2010. The changes, which are largely a response to the 2008 financial crisis, increase certain disclosure requirements in filings with state insurance departments, including, most controversially, a new requirement that every controlled insurer file an annual report with its primary insurance regulator outlining the factors that comprise such insurer's "enterprise risks." "Enterprise risk" is defined in the Model Act amendments as "any activity, circumstance, event or series of events involving one or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer . . ."

The Report explains that because of these significant changes to the Model Act, New York will be required to amend the holding company provisions of its insurance law (*i.e.*, Article 15 and/or Reg. 52) in

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<sup>1</sup> On October 3, 2011, the New York Insurance Department will be abolished and replaced by a new Department of Financial Services pursuant to legislation adopted earlier this year by the legislature and signed by Governor Cuomo. Such department, generally, will combine the functions currently being performed by the Insurance Department and the New York Banking Department. The term "Department" as used in this Client Alert refers to such new department from and after such date.

order to maintain NAIC accredited status. New York will also face pressure to adopt at least some of the critical components of the NAIC amendments (such as enterprise risk and the related concept of group supervision) in order not to be perceived as falling behind other states in terms of level of oversight of holding companies.

### **Basic Principles Underlying the Report's Suggested Reforms**

Any amendments to New York's insurance holding company provisions should be based on the NAIC amendments but should also reflect the following overarching principles, according to the Report:

- Although group supervision (*i.e.*, the oversight of a group of affiliated companies as a whole rather than just the regulated insurance company) is a laudable goal, traditional notions of (i) territorial limits of a regulator's power and (ii) respect for a corporation's distinct identity (in the absence of fraud) must be observed.
- New York's reforms should be consistent with the goal of the U.S.'s achieving "equivalency" status for purposes of Solvency II, Europe's incipient regulatory regime for insurers.
- Obligations imposed on insurers and affiliates to report information to a regulator should be concomitant with the regulator's ability to act in response. In other words, if an annual form requests information concerning an agreement between two affiliates of an insurer, neither of which is an insurer itself, and it is not clear that the regulator has any authority over the content of the agreement, the information itself may be of little value relative to the burden associated with producing the information.

The Report notes that, even though the NAIC has not yet finalized standards concerning which specific provisions of the amendments are necessary for a state to maintain accredited status, some states have already taken steps to amend their holding company acts to conform to the NAIC revisions. At least three such states, Texas, Rhode Island and West Virginia, adopted legislation this past spring adopting the principal aspects of the NAIC changes (with some variation), while in other states, including Florida and Pennsylvania, bills were introduced in the most recent legislative session incorporating the NAIC amendments but were subsequently withdrawn or otherwise not brought to a final vote.

### **The Report's Conclusions on Possible Reforms to New York Insurance Holding Company Law**

The Report sets forth the following principal conclusions:

- New York already has in place, in its current version of Article 15, most of the enforcement and remedial mechanisms contemplated by the amended Model Act.
- If New York must incorporate a concept of "enterprise risk" in accordance with the NAIC Model Act, it should define such concept flexibly so as to acknowledge the inherent unforeseeability of risks affecting a group of companies. Possible ideas to accomplish this would include safe harbors for insurers whose affiliates are subject to SEC or similar filing requirements and choose to use such filings in reporting enterprise risk to the insurance regulator.
- New York should consider heightened confidentiality protections for filings made with the Department concerning an insurer's enterprise risk.

- New York should adopt the Model Act's new provision on disclaiming control over an insurer and eliminate the current ambiguity in New York law governing "non-control determinations." Specifically, a New York disclaimer filing should be deemed approved 30 days after filing if not objected to by the regulator.
- If New York adopts the NAIC provision on divestitures (requiring the insurance regulator's prior approval in order to divest control of an insurer), New York should include exceptions for cases where the acquirer has obtained an exemption from approval (Form A) requirements and for cases where a divestiture is being effected by means of a registered share offering.
- New York should expressly permit the New York insurance regulator to participate in multi-state Form A approval hearings (*i.e.*, hearings held on applications to acquire control over an insurer) in accordance with the Model Act. However, New York should continue not to require a hearing in every Form A proceeding and should preserve its strong confidentiality protections for materials submitted with a Form A.

## For More Information

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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