

New York Considers Changes to Proposed ERM and ORSA Regulation

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SUMMARY

Based on industry comments, the New York Department of Financial Services (the "NYDFS") is strongly considering making a number of changes to its proposed Regulation 203, concerning Enterprise Risk Management ("ERM") and Own Risk and Solvency Assessment ("ORSA"). A revised version of the proposed Regulation containing those changes is intended to be promulgated as an "emergency regulation" prior to April 30, 2014 (the date by which the first ERM report must be filed).

By way of background, on January 22, 2014, the NYDFS published in the New York Register its long-awaited proposed Regulation concerning ERM and ORSA. Interested parties were given 45 days after the proposed Regulation's publication to file comments with the NYDFS. Based on those comments, the NYDFS has indicated that it is strongly considering making the following changes to the proposed Regulation:

1. As ERM reports and ORSA summary reports often contain highly sensitive information, the proposed changes would clarify that insurers are permitted to seek to protect such information as trade secrets. The NAIC had recognized this confidentiality issue in its model acts; however, confidentiality requirements were not included in Regulation 203 as originally proposed. Based on industry feedback, the NYDFS intends to add confidentiality language to the proposed Regulation so as to clarify that insurers are permitted to request trade secret protection pursuant to New York's Public Officers Law. Additionally, the NYDFS intends to insert the word "confidential" into the definition of "ORSA summary report" and intends that the ERM report will be referred to as the "confidential ERM report."
2. The NYDFS intends that the proposed ERM function requirement for stand-alone insurers (as defined below) that are not New York domestics will be deleted from the proposed Regulation.
3. Consistent with NYDFS Circular Letter 2011-14, the NYDFS intends that the proposed Regulation's ERM function requirements will be recast as "objectives" that "should be appropriate for the nature, scale and complexity of the risk."

Additionally, the NYDFS intends to permit insurers to electronically file their ERM reports through its Article 15 Holding Company Portal Application.

Although there has been discussion concerning whether ERM reports and ORSA summary reports should cover a fixed period that ends prior to the date of the required filing, the NYDFS currently intends that the ERM report and ORSA summary report should cover the period up to the date of the applicable filing.

The Original Version of the Proposed Regulation

As originally proposed, Regulation 203 provides for the following:

ERM Requirements

The proposed Regulation would require (i) holding companies that directly or indirectly control a New York authorized insurer, and (ii) New York domestic insurers that are required to register with the NYDFS under Insurance Law Articles 16 or 17, to adopt an ERM function and to file an annual ERM report with the NYDFS. Additionally, the proposed Regulation would require New York authorized insurers that are stand-alone insurers (i.e., not part of an Article 15, 16 or 17 system), to adopt an ERM function. (As described above, that requirement is proposed to be eliminated for non-New York domestics.) Such stand-alone insurers would also be required to file an annual ERM report only if they are New York domestic insurers that have annual direct written and unaffiliated assumed premium totaling an amount equal to or greater than \$500 million.

The proposed Regulation sets forth minimum requirements for the ERM function. (As described above, that requirement is proposed to be recast as an "objective.") The proposed Regulation also requires the ERM report, which would be due by April 30 of each year, to include a discussion of the following items (which are essentially those listed in Model Form F/Enterprise Risk Report set forth in the NAIC's Insurance Holding Company System Model Regulation):

- any material developments regarding strategy, internal audit findings, compliance or risk management affecting the insurer, holding company system or the insurer's article 16 or article 17 system;
- any acquisition or disposal of insurance entities and reallocation of existing financial or insurance entities with regard to the insurer, holding company system or the insurer's article 16 or article 17 system;
- any changes in the shareholders of the insurer, holding company system, or the insurer's article 16 or 17 system that exceed ten percent or more of voting securities;

- developments in any investigations, regulatory activities, or litigation that could have a significant bearing or impact on the insurer, holding company system, or the insurer's article 16 or article 17 system;
- the business plan of the insurer, holding company system, or the insurer's article 16 or article 17 system, and a summary of the insurer's or system's strategies for the next 12 months;
- the identification of any material concerns regarding the insurer, holding company system, or the insurer's article 16 or article 17 system by a supervisory college, if any, held during the last year;
- the identification of capital resources and material distribution patterns with regard to the insurer, holding company system, or the insurer's article 16 or article 17 system;
- the identification of any negative movement, or any discussions with nationally recognized statistical rating organizations, that may have caused, or may cause, potential negative movement in the credit ratings and individual insurer financial strength ratings assessment of the insurer, holding company system, article 16 system, or article 17 system (including both the rating and outlook);
- information on any corporate or parental guarantees throughout the holding company system, or the insurer's article 16 or article 17 system, and the expected source of liquidity should the guarantees be called upon; and
- the identification of any material activity or development of the insurer, holding company system, or the insurer's article 16 or 17 system that, in the opinion of senior management, could adversely affect the insurer, holding company system, or the insurer's article 16 or article 17 system.

ORSA Requirements

New York domestic insurers that have annual direct written and unaffiliated assumed premium in an amount equal to or greater than \$500 million (or, \$1 billion, if the insurer is a member of a holding company system, Article 16 system, or Article

17 system) must also conduct an annual ORSA, consistent with the process set forth in the ORSA Guidance Manual (the "Guidance Manual") published by the NAIC. Insurers that are not exempt from the requirement to conduct an ORSA must submit an annual ORSA summary report to the NYDFS, beginning on December 1, 2015, and the summary report must be prepared in a manner consistent with the Guidance Manual. The ORSA summary report must be signed by the company's chief risk officer (or comparable executive) who has the responsibility for the oversight of the ERM function and attest, to the best of his or her knowledge and belief, that the domestic insurer or other member of the domestic insurer's holding company system, Article 16 system, or Article 17 system applies the ERM function described in the ORSA summary report. The officer must also attest that a copy of the ORSA

summary report has been provided to the company's board of directors, or "appropriate committee thereof."

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