New York's 'shot-across-the-bow' to PE firms

By Kerry Pechter *Fri, Apr 29, 2022*

'Given the apparent misconception in the marketplace and the recent increase in insurance company transactions,' one industry analyst said, 'The Department [of Financial Services] wishes to remind industry participants of its expectations.'

In a message that may have been inspired by Blackstone's 2021 purchase of a 9.9% equity stake in AIG Life & Retirement, the New York Department of Financial Services issued Insurance Circular Letter No. 5 (2022) on April 19.

"People are paying attention to this," Tim Zawacki of S&P Global Intelligence told *RIJ* this week. "It appears the NY superintendent intends to exercise wide latitude to determine what constitutes a 'change in control' of a life insurance company. My reading of letter is that the superintendent can subjectively determine whether even so little as a board appointment constitutes a change in control."

Zawacki called the letter a possible "shot across the bow" to PE firms that are forming strategic relationships with life/annuity companies. "I think that's a fair characterization in light of this statement in the letter: 'The Department wishes to remind industry participants of the requirements of the Insurance Law and the Department's expectations given the apparent misconception in the marketplace and the recent increase in insurance company transactions,'" he said.

A change in control would subject a transaction to "filing and approval requirements imposed under New York Insurance Law ("Insurance Law") §1506," the circular said.

Besides Blackstone's equity stake, its deal with AIG included an agreement that Blackstone would manage $50 billion of AIG Life & Retirement's assets immediately and the right to manage up to $92.5 billion for the company over the next six years. In addition, Blackstone president and chief operating officer Jon Gray joined the AIG Life & Retirement board. AIG intends to spin off its Life & Retirement business as an independent company later this year.

Here's the text of the circular:

STATUTORY REFERENCES: N.Y. Insurance Law §§ 1501, 1505, 1506 and 1510

> The New York State Department of Financial Services ("Department") has become aware that several potential investors in New York domestic insurers have structured

their investments as an acquisition of less than 10% of the insurers' voting securities, at least in part, based on the expectation that an investment below that level would avoid filing and approval requirements imposed under New York Insurance Law ("Insurance Law") § 1506.

Similarly, transactions have been structured to limit an investor's board representation to a single board seat, which, by itself, does not create a presumption of control. As discussed below, 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 Department wishes to remind industry participants of the requirements of the Insurance Law and the Department's expectations given the apparent misconception in the marketplace and the recent increase in insurance company transactions.

A determination of "control" under Insurance Law § 1501(a)(2) depends on all the facts and circumstances. Control is *presumed* under § 1501(a)(2) if a person, directly or indirectly, owns, controls, or holds with the power to vote, 10% or more of an insurer's voting securities. However, this presumption does not create a safe harbor for acquisitions below the 10% threshold, which may still result in a control determination. In addition, while § 1501(a)(2) makes clear that any director of an insurer, or any person with the right to appoint such a director, is not presumed to control the insurer, these facts may, in combination with other factors, lead to a control determination.

The statute makes clear that a control relationship can arise from a contract or other factors, in the absence of *any* ownership of voting securities of an insurer. Section 1501(a)(2) defines "control" in relevant part as "the possession direct or indirect of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise…". Furthermore, § 1501(b) provides that the Superintendent of Financial Services (the "Superintendent") may find a controlling relationship if a person "exercises directly or indirectly either alone or pursuant to an agreement with one or more other persons such a 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 Department urges parties contemplating a transaction that raises potential control issues (including, but not limited to, transactions involving the acquisition of an insurer's voting securities by, the grant of a board seat to, or a new contractual relationship with, a transaction counterparty, or any combination of these factors) to engage with the Department 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 give the Department a reasonable opportunity to review the transaction and the parties' position. The Department encourages this informal engagement to avoid delay and other adverse consequences (including penalties under Insurance Law § 1510(a)) should the Superintendent reach a different conclusion. If, notwithstanding the parties' position, the Superintendent determines that the transaction would result in a change of control, the parties must either submit an application under § 1506 or request a determination of non-control pursuant to § 1501(c).
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> Please direct questions regarding this circular letter to counsel@dfs.ny.gov.

On April 26, lawyers at the firm of Locke Lord offered the following **opinion**:

> Under NY Ins. Code § 1501, "control" is defined as "the possession direct or indirect of the power to direct or cause the direction of the management and policies of a person, 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 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." NY Ins. Code § 1501(a)(2). Under NY Ins. Code § 1506, no person "other than an authorized insurer, shall acquire control of any domestic insurer, whether by purchase of its securities or otherwise, unless: it receives the superintendent's prior approval." NY Ins. Code § 1506(a)(2).
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> The Letter addresses what the NY DFS views as a recent trend of investors seeking to avoid such filing and approval requirements by acquiring less than 10% of an insurer's voting securities. The Letter emphasizes that "'control' under Insurance Law § 1506(a)(2) depends on all the facts and circumstances" and that there is no "safe harbor for acquisitions below the 10% threshold, which may still result in a control determination." The Letter further cautions that "a control relationship can arise from a contract or other factors, in the absence of *any* ownership of voting securities of an insurer."

The Letter urges parties contemplating investments or other transactions which might result in control of a New York insurer to informally engage with the NY DFS as early in the process as possible so that the NY DFS can review the transaction and the parties' position. If the NY DFS determines that a change in control has occurred, the parties must either submit an application to the NY DFS for approval or attempt to disclaim control pursuant to NY Ins. Code § 1501(c). The NY DFS advises a lack of engagement could result in delays, and even adverse consequences, if the NY DFS determines that the parties have not complied with the requirements of Article 15 of the NY Ins. Code.