

# CLIENT UPDATE

## NEW YORK INSURERS' INVESTMENTS IN FIRMS ENGAGED IN IRANIAN ENERGY SECTOR ACTIVITIES TREATED AS "NONADMITTED"

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On November 13, 2013, New York enacted Chapter 481 of the Laws of 2013, which adds a new Section 1415 to the New York Insurance Law effective February 11, 2014. The new law treats as nonadmitted assets any investments made by domestic and foreign licensed insurers in designated persons engaged in energy sector investment activities in Iran.

The new law continues New York's intense focus on Iran and ensures that New York insurers and other regulated companies do not engage in activities that relate to or involve Iran. The New York Department of Financial Services, for example, has recently made inquiries to certain insurers and reinsurers regarding their compliance with the federal Iran Freedom and Counter-Proliferation Act of 2012, which took effect on July 1, 2013.

### BACKGROUND – NEW YORK'S IRAN DIVESTMENT ACT OF 2012

The new law follows on the heels of the Iran Divestment Act of 2012, which aims to divest New York's public pension funds from companies doing business with the Iranian energy sector. The Iran Divestment Act, which became effective on April 12, 2012, imposes limits on "persons" that are determined to be engaged in investment activities in the Iranian energy sector.

As required by the Act, the Commissioner of General Services has developed and maintains a list of persons determined to be engaged in energy sector investment activities in Iran. Once a person appears on the list, that person is considered a nonresponsive bidder/offerer and prohibited from entering into contracts with New York State or local governments. This "List of Entities," which was issued on September 12, 2013, is available at <http://ogs.ny.gov/about/regs/docs/ListofEntities.pdf>. The law requires the Commissioner of General Services to update the List of Entities every 180 days.

### **NONADMISSION OF INSURER INVESTMENTS IN LISTED PERSONS**

The new Section 1415 of the New York Insurance Law provides that insurer investments in persons that are included on the Commissioner of General Services' List of Entities shall be treated as nonadmitted assets. Nonadmitted asset status means that the investing insurer may continue to own the investment but may not count the investment as an asset on financial statements filed with the New York Superintendent of Financial Services. New York is not alone in taking this action: California enacted a substantially similar statute, Section 1241.2 of the California Insurance Code, effective January 1, 2013.

Since new Section 1415(1)(b) expressly incorporates by reference the definition of "person" from State Finance Law Section 165-a and that definition includes "any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with" any natural person or entity, Section 1415 may be read as applying to persons included on the "List of Entities," together with their affiliates.

Section 1415 is effective February 11, 2013. That date is after the "as of" date of the 2013 annual statutory financial statement (December 31, 2013) but before the filing date of the 2013 annual statutory statement (March 1, 2014). Therefore, it is unclear whether the first statutory financial statement to which this nonadmission requirement will apply is the 2013 annual statutory financial statement or the first quarter statutory financial statement made as of March 30, 2014 and filed by May 15, 2014. To date, the New York Department of Financial Services has issued no guidance in this regard.

### **ANNUAL REPORTING OF INVESTMENTS IN LISTED PERSONS**

Additionally, Section 1415 imposes a new annual reporting requirement. On or before December 30, 2013, and annually thereafter, a domestic insurer must determine what investments it had in the prior calendar year, including any transfers or other transactions, in persons included on the List of Entities. On March 1, 2014, and annually thereafter, a domestic insurer must provide the New York Department of Financial Services with a list

of investments it had in the prior calendar year, including any transfers or other transactions, in persons included on the List of Entities.

Again, since the December 30, 2013 determination date is before the effective date of Section 1415, but the March 1, 2014 filing date is after the effective date of Section 1415, it is unclear whether the first determination/filing must be made for investments the insurer had in calendar year 2013 or 2014. To date, the New York Department of Financial Services has issued no guidance in this regard.

## **INSURERS SUBJECT TO THE NEW REQUIREMENTS**

### *Domestic Insurers*

These new requirements expressly apply to a “domestic insurer.” That term is defined under the New York Insurance Law to mean “any insurer incorporated or organized under any law of this state.” This clearly includes New York incorporated stock and mutual insurers. Although the word “insurer” is not defined in the Insurance Law, the new requirements may also apply to other legal entities that assume insurance risk and that are organized under New York law, including Article 43 corporations, fraternal benefit societies, charitable annuity societies, retirement systems and property/casualty cooperative insurers.

### *Foreign Licensed Insurers*

The New York Insurance Law provides that the Superintendent of Financial Services may refuse a new or renewal license to any foreign insurer if he finds that its investments do not “comply in substance” with the investment requirements and limitations imposed by the Insurance Law applicable to domestic insurers organized to do the same kind or kinds of insurance business. The effect of this rule is to nonadmit, for purposes of financial statements filed with the Superintendent, investments of a foreign insurer licensed in New York that are not admitted assets for a similarly licensed domestic insurer. Since, under the new requirement, a domestic insurer will be required to nonadmit investments in persons that are included in the List of Entities, we believe that, under the substantial compliance requirement, a foreign licensed insurer will similarly be required to nonadmit investments in persons included in the List of Entities on its financial statements filed with the Superintendent. This adjustment is made in the New York Supplement to the NAIC annual statement filed by the foreign licensed insurer in New York.

## **“INVESTMENTS” SUBJECT TO THE NEW REQUIREMENTS**

The new Section 1415 defines “investments” subject to the nonadmitted treatment rule as any investment permitted under New York Insurance Law Section 1404 or 1405. Section 1404 applies to reserve investments for non-life insurers. Section 1405 applies to general account investments for life insurers. While these may be the primary provisions under which non-life and life insurers make permitted investments, they are by no means the only provisions under which domestic insurers make permitted investments. Life insurers may also make permitted investments under Section 4240 (separate account investments) and Article 16 (investment in subsidiaries). Non-life insurers may also make permitted investments under Section 1407 (non-reserve investments), 1408 (insurer subsidiary investments) and Article 16 (investments in subsidiaries). Furthermore, both life and non-life insurers may make permitted investments under Section 1403(e)(1) (certain “involuntary” investments, including those received as a dividend under a reorganization plan or exercise of conversion rights) and Section 1410 (derivative instruments).

The intent of the bill drafters may have been to require nonadmitted asset treatment for any investment in a person included in the List of Entities. The Memorandum in Support submitted by the bill’s sponsor merely mentions investments generally and not specified kinds of permitted investments. However, the new law clearly limits the nonadmitted asset treatment to those investments acquired under Insurance Law Section 1404 and 1405. This may leave investments made by domestic insurers under other provisions of the Insurance Law untouched by the new nonadmitted asset treatment requirement.

## **EXPIRATION OF THE NEW REQUIREMENTS**

The new nonadmitted asset treatment requirement and reporting requirement will cease to operate when both of the following apply:

- Iran is removed from the U.S. Department of State’s list of countries that have been determined to repeatedly provide support for acts of international terrorism – commonly known as the “state sponsors of terrorism” list.

- The President of the United States determines and certifies to the appropriate committee of the U.S. Congress that Iran has ceased its efforts to design, develop, manufacture or acquire a nuclear explosive device or related materials and technology.

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Please do not hesitate to contact us with any questions.

November 19, 2013