

FEDERATION OF REGULATORY COUNSEL, INC.

FLORIDA RELAXES FORM A FILING REQUIREMENTS

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Insurance regulatory jurisdictions throughout the United States uniformly require a person seeking to acquire directly or indirectly a controlling interest in an insurance company or specialty insurer to obtain regulatory approval of the acquisition. An application for approval of a change of control, commonly referred to as a Form A application, must be filed with the insurance department in the insurer's state of domicile, and the acquiring party must also provide notice of the proposed transaction to the insurer.

Florida has a well-deserved reputation for rigorously reviewing change of control applications. Florida has also been something of an outlier in terms of the timing for filing the applications and its expansive view of the circumstances under which regulatory approval has to be obtained. The Florida Legislature, however, recently enacted legislation, now known as Chapter 2007-138, Laws of Florida,¹ which somewhat relaxed the state's historically stringent rules on filing Form A applications.² The new rules apply to insurance companies and specialty insurers alike.³

A MATTER OF TIMING

Prior to the enactment of the new law, change of control filings required by sections 628.461, Florida Statutes, had to be made within five days after entering into any definitive agreement to acquire five percent or more of the outstanding voting securities of a domestic stock insurer or controlling company of a domestic insurer. In the case of specialty insurers, section 628.4615, Florida Statutes, required Form A filings to be made within five days after entering into any definitive agreement to acquire 10 percent or more of the outstanding voting securities of a domestic specialty insurer or controlling company of a specialty insurer. For many years, the NAIC Model Laws, Regulations and Guidelines have presumed that control existed if a person directly or indirectly owned or controlled 10 percent or more of the voting stock of an insurer.⁴

Regardless of whether Florida's Form A filing requirements were triggered by the proposed acquisition of five percent or 10 percent of the voting stock, persons seeking to acquire a "controlling interest" in a Florida insurer or specialty insurer found it more than a little challenging to comply with the requirement that a complete change of control application had to be filed within a mere five days "after any form of tender offer or exchange offer is proposed, or no later than 5 days after the acquisition of the securities if no tender offer or exchange offer is involved." The only silver lining to the requirement was that the Florida OIR traditionally interpreted the law such that the "clock" did not begin to run until the definitive purchase agreement was signed by all parties to the transaction.

Nevertheless, the five-day filing requirement continued to pose a challenging hurdle to acquirers because Florida regulators required Form A applications to be substantially complete when filed. Thus, a "skeleton filing" containing incomplete information or placeholders was subject to immediate rejection and return to the applicant, and, as a result, the application might be deemed to be out of compliance with the state's change of control statute. In recent years, Florida regulators have become even more aggressive in their enforcement of this requirement.

Provisions of Chapter 2007-138 substantially relax the time constraints facing an applicant who wishes to

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acquire a controlling interest in a Florida-domiciled insurer or specialty insurer. The new law essentially establishes bifurcated filing requirements. Although Form A applicants must still initially communicate with the Florida OIR within five days after agreeing to acquire a controlling interest in a domestic insurer or specialty insurer, the initial communication is now limited to a "letter of notification" which must be filed with insurance regulators by the acquiring person. A copy of the letter must also be sent to the insurer or specialty insurer and, if applicable, to the controlling company.⁵

Complete change of control applications must still be filed in Florida. Now, however, an acquirer may take up to 30 days after entering into a definitive agreement to acquire a controlling interest in a domestic insurer or specialty insurer (or its controlling company) to file a Form A application.⁶ The additional time will no doubt allow an applicant to submit a more thorough and compliant application, which may in turn have the salutary effect of reducing the number of follow-up requests for information which applicants almost always receive from Florida insurance regulators.

WAIVERS FOR REORGANIZATIONS

In addition to bifurcating the change of control filing requirements, Chapter 2007-138 also revised both section 628.461 and section 628.4615 to allow the Florida OIR to waive the requirement for an acquiring person to submit a complete change of control application where the transaction is limited to a corporate reorganization. Historically, the Florida OIR did not interpret sections 628.461 and 628.4615 to allow it discretion to waive the change of control filing requirements where the change of control was limited to a corporate reorganization, even where the ultimate controlling persons remained the same. This left controlling persons in the unfortunate position of having to submit complete Form A applications and seek regulatory approval for the most basic of corporate reorganization transactions.

Under the new provisions of sections 628.461 and 628.4615, an acquiring person may, as part of its letter of notification, request the Florida OIR to waive the requirement to submit a full-blown change of control application if: (1) there is no change in the ultimate controlling shareholder or ownership percentages of the ultimate controlling shareholders and (2) no unaffiliated parties acquire any direct or indirect interest in the insurer or specialty insurer.⁷ The Florida OIR may grant the waiver if it determines that, in fact, there is no change in the ultimate controlling shareholder or ownership percentages of the ultimate controlling shareholders and no unaffiliated parties will acquire any direct or indirect interest in the insurer or specialty insurer.

The Florida OIR, which reportedly supported the revisions to the Florida change of control statutes, has not yet adopted rules or forms for the notification letter or waiver request. The notification letter seems fairly straightforward. It would seem prudent, however, to communicate with the Florida OIR prior to submitting waiver applications in order to avoid a misstep which might cost an acquiring person valuable time in the process. That said, it is probably reasonable to expect the Florida OIR to require a party seeking a waiver of the requirement to submit a complete Form A application to submit the following information: (1) a Management Information Form for the acquiring person, including the identification of the person's officers, directors or general partner, if applicable; (2) a Disclaimer of Control Affidavit; and (3) organizational charts showing the upstream ownership and control structure of the insurer and the holding company system to which it belongs, if applicable, prior to and after the proposed transaction.

In addition, the insurance company will still be required to file with the Florida OIR an amendment to its consolidated holding company system registration statement to reflect the change in ownership within 15 days after the end of the month in which the acquisition is concluded.⁸ That requirement is beyond the scope of this discussion, however.

CONCLUSION

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There is no reason to believe Florida insurance regulators will relax the rigorous review they give every change of control application. Chapter 2007-138, Laws of Florida, takes a step in the right direction, however, by acknowledging the difficulty of preparing a complete Form A filing within a mere five days after an agreement is reached to acquire an insurer or specialty insurer. The new law also rationally recognizes that requiring a Form A filing in the case of simple corporate reorganizations was a waste of scarce regulatory resources.

Endnotes

1. Effective June 15, 2007.
2. Chapter 2007-138, Laws of Florida, also modernized Florida law to allow licensed securities brokers and dealers that participate in a clearing corporation to serve as custodians of securities held by insurers. Previously, only national banks, state banks, and trust companies could serve in this capacity.
3. Section 628.461, Florida Statutes, governs change of control of insurance companies. Its counterpart, section 628.4615, Florida Statutes, governs change of control of specialty insurers, including premium finance companies.
4. NAIC Model Laws, Regulations and Guidelines, 440-1, section 1.C.
5. Section 628.461(1)(a), Florida Statutes, for insurers. Section 628.4615(2)(a), Florida Statutes, for specialty insurers.
6. This 30-day period appears to begin running from the same date which triggers the five-day period under sections 628.461 and 628.4615, Florida Statutes, such that a change of control application would be due within 25 days after the deadline to file the letter of notification.
7. Section 628.461(2), Florida Statutes for insurers. Section 628.4165(3), Florida Statutes, for specialty insurers.
8. Rule 69O-143.046(4), F.A.C.