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KEYNOTE

INSURANCE SUPERVISION MEETS THE MARKETPLACE: THE REGULATORY RESPONSE TO DERIVATIVES AS A RISK MANAGEMENT TOOL IN THE INSURANCE INDUSTRY

*Hon. Neil D. Levin**

A lot has changed in a year. I have been the Superintendent of Insurance since April of 1997. When I first arrived, I encountered an industry and a supervisory infrastructure that was not really current with the capital markets and derivatives. Also, there was no effective dialogue between the regulatory community and the insurance industry.

The good news is that if we fast-forward to where we are today, I am extremely pleased with the progress that we have made at the New York State Insurance Department (the "Department"). The Department has put in place legislative building blocks that allow us to discuss managing risk and expanded derivatives authority.¹

We are accomplishing a lot internally at the Department. For example, the Department had a Current Issues Seminar about a month ago where we invited several CEOs and speakers from the marketplace.² Our leadoff speaker was Hank Greenberg, the chairman and CEO of AIG. Tony Nicely, the CEO of GEICO, also attended. This seminar exemplifies how we are attempting to forge a much closer connection between the Department and the marketplace. The seminar focused on the potential impact of S. 900,³

* Superintendent of Insurance of the State of New York Hon. Neil D. Levin delivered this speech at Fordham University School of Law on February 25, 2000, as part of the the Fordham Institute on Law and Financial Services International Symposium on Derivatives and Risk Management.

1. See generally N.Y. Ins. Law § 1410 (McKinney 1999 & Supp. 2000) (providing the legislative framework governing the use of derivatives in the insurance industry).

2. The Seminar was held on January 12, 2000.

3. See Gramm-Leach-Bliley Financial Modification Act, Pub. L. No. 106-113, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.). The Gramm-Leach-Bliley Act eliminated the many ineffectual barriers that prevented the "combination of banking, investment banking and insurance." Lee Meyerson & Gary Rice, *The Gramm-Leach-Bliley Act of 1999*, 1156 PLI/Corp 961, 965 (1999). The Act "also achieves the secondary goal of rationalizing, at least to some degree, the

and e-commerce, which is an important issue confronting society today.

At this conference last year, I spoke about initiating fourth-quarter meetings with all of our licensees. We have now gone through two cycles of these meetings. This practice has long been utilized in the banking industry by both the Federal Reserve Bank of New York and the New York State Banking Department.

The meetings, which took place at the Department, involved the major licensees. Almost all the insurance companies came to the Department in November, December, and January to do a post mortem on 1999 and to discuss key internal and external issues that may affect their operations for the year 2000.

The goal of these meetings was getting to know our customers. As a result of getting to know our licensees better, there is now a much more effective dialogue between them and the Department. Also, the entire Department has a much better sense that for every action we take, there will probably be a reaction in the marketplace.

Presently, there is quite an interest in moving towards the use of risk-based examinations. In the insurance industry, triennial exams have been the national norm.⁴ State insurance regulators conduct insurance examinations of licensed insurers every three-to-five years.⁵ Since I first arrived on the job, I have been highly critical of the effectiveness and reliability of these exams because conducting an exam every three years and then negotiating the final report with the licensee for yet another year to eighteen months in a rapidly evolving marketplace is an ineffective way to measure risk in the industry. By the time a report comes out, what are you in effect measuring? Unfortunately, by the time the report is issued, the horse is already out of the barn. Although the Department and the insurance companies expend a great deal of effort and resources to create these comprehensive reports, the bottom line is that the Department and the companies do not benefit as much as we should from our exam reports.

One of the things the Department has pursued is re-engineering the examinations process. But is it, as they say, "soup yet?" Well, it is almost soup. We have had teams charged with developing and furthering our risk-based examination process. These teams have put together a risk matrix that is intended to identify the areas of risk in an insurer's operation. We are very close to rolling it out and will

regulatory structure for the financial services industry." *Id.*

4. See generally N.Y. Ins. Law § 309 (McKinney 1984 & Supp. 2000) (providing the traditional framework for conducting examinations).

5. See *id.* § 309(b). Section 309(b) provides that "[t]he superintendent shall make an examination into the affairs . . . of every domestic life insurance company, at least once in every five years . . ." *Id.*

begin conducting exams that are narrower in scope, but targeted to the risk profile of the individual institution.

The new exams dovetail with our fourth-quarter meetings, which helps us to know our companies better and to be more attuned to what is occurring in the marketplace. I would hope by the end of this year that the Department will no longer be conducting these comprehensive exams every three-to-five years, but instead will satisfy our statutory requirement⁶ by doing annual, or close to annual, risk-based exams.

I had a conversation yesterday with George Nichols, President of the National Association of Insurance Commissioners ("NAIC"), regarding the risk-based exam initiatives that we are implementing at the Department. He was very interested. I promised that as soon as we finish the templates in each of the bureaus (Life, Property, and Health), we will share them with the NAIC so we can hopefully get the entire system to evolve rapidly towards utilizing risk based exams.

Turning to another topic, an issue we debated internally about eighteen months ago was what impact the Internet was going to have on the industry. I remember having a conversation with some of my staff regarding whether we should require our examiners to look at the websites of our licensees as part of our market conduct exams. I wanted a circular letter drafted requiring every one of our companies to notify us when they had established a website.⁷

There was some debate about whether the Department's examiners should inspect the companies' websites. Some people expressed the view that we should not examine websites as part of a market conduct exam. Ultimately, we decided to require all of our licensees to notify us when they set up a website. When you review marketing and sales conduct, whether there are many online sales occurring or companies are merely using the internet for marketing, you cannot possibly have a feel for a licensee's market conduct without reviewing what a company is doing on its website. We are aggressively integrating this idea into the Department's current policies.⁸

Now, moving on to the main issue: derivatives.⁹ Historically, the insurance industry was less engaged in derivatives transactions¹⁰ than

6. See *id.* (providing that the superintendent must conduct an exam at least once every five years).

7. See Supp. No. 1 to Circular Letter No. 15 from State of New York Insurance Department, to All Licensed Life Insurers et al. (Mar. 25, 1999) <<http://www.ins.state.ny.us/c19815s1.htm>>.

8. See *id.* The March 25 letter stated that because "it appears that the Internet will become a dominant distribution channel of the future," insurance companies must file certain information with the Department when they establish a web site. *Id.*

9. Derivatives are complex financial devices that are used to "manage risks, speculate for profit, and lower financing and transaction costs." Nathan Bouley, Note, *Statement of Financial Accounting Standards No. 133: Economics, Politics and the Woes of Accounting for Derivative Instruments*, 18 Ann. Rev. Banking L. 597, 597-98

its counterparts in the banking industry. That is why the Insurance Department has less experience with derivatives supervision than the bank and securities regulators. The securities and banking industries have used derivatives heavily for many years since the advent of the derivatives market. Because of the characteristics of its liabilities, the Health insurance industry has not been a big user of derivatives. Similarly, in the Property insurance industry, the ability to hedge the kinds of risks that Property and Casualty insurers write has been very difficult. That market, however, is starting to evolve with the creation of weather derivatives and the securitization of catastrophe risk. The use of derivatives in the insurance industry is growing in tandem with the development of products that mirror the unique risks underwritten by the insurance industry.

On the Life insurance side, a fundamental shift in the business has occurred. Historically, people were worried about not living long enough and, therefore, companies were selling traditional death benefits. Today, however, people are worried about living too long and out-stripping their savings. The Life insurance industry, therefore, has shifted heavily in the last three or four years from selling traditional death benefits to selling retirement and savings products. Suddenly, their balance sheets are starting to look more like a bank's or a securities firm's. As the Life insurance industry moves into accumulation products, there has been a greater dependency on the risk management techniques that have been previously used by banks and broker-dealers.¹¹

What is a regulator to do? The Department is discovering that there is a great need for the insurance industry to begin utilizing available capital markets tools. Rather than discourage the use of derivatives, the Department has encouraged it. Derivatives, if used

(1999). Definitional tension, however, surrounds the term derivative. See, e.g., Saul S. Cohen, *The Challenges of Derivatives*, 63 Fordham L. Rev. 1993, 1993 (1995) (stating "that there is no generally accepted meaning to the term derivative"); Christian O. Nagler, Note, *Derivatives Disclosure Requirements: Here We Go Again*, 6 Cornell J.L. & Pub. Pol'y 441, 443 (1997) (noting that "[a] derivative is a security whose value depends in some way upon the values of other more basic underlying securities"). There are many different types of financial instruments that are considered derivatives. See generally Carolyn H. Jackson, Note, *Have You Hedged Today? The Inevitable Advent of Consumer Derivatives*, 67 Fordham L. Rev. 3205, 3208-35 (1999) (discussing the various types of derivatives in general, and swaps in particular).

10. See Michael P. Goldman & Michael J. Pinsel, *A Regulatory Overview of the Insurance Industry's Use of Over-the-Counter Derivatives*, 1147 PLI/Corp 477, 481 (1999) (stating that "[a]lthough one would expect the insurance industry's use of derivative instruments to be pervasive" because "insurance companies are among the largest group of institutional investors," direct derivatives activity by insurance companies has lagged behind).

11. See generally Jan R. Williams & Tim V. Eaton, *The FASB's New Standard on Derivative Financial Instruments*, CPA J., Oct. 1, 1995, available in LEXIS, Nexis Library, News Group File (discussing how derivatives are important financial tools that can be used to hedge against interest rate changes and other business risks).

appropriately with “adult supervision,” are very important tools for risk management.¹²

Would I like to see insurance companies use derivatives the way the treasurer of Orange County, California did?¹³ No! Would I like insurance companies to use derivatives as a profit center the way the treasurer of Procter & Gamble did several years ago?¹⁴ Absolutely not! But used effectively, derivatives are very important risk management tools for insurance companies engaging in non-traditional activities such as retirement and savings products. Today, as the derivatives market begins to address insurance risks—for example earthquakes, hurricanes and other such contingencies in the complex marketplace—it is crucial that companies using derivatives understand them.

One of the things that we have to do simultaneously is to ensure that the Department ascends the learning curve at the same time that we are nudging our licensees to learn how to use derivatives and develop strong internal controls. The Insurance Department wants to avoid assuming the role of management consultant to our licensees.

12. See *Balancing Risks and Rewards*, Best’s Review, Jan. 2000, available in LEXIS, Nexis Library, News Group File; see also Ernest T. Patrikis et al., *Managing Risk Exposure in Derivatives: How to Deal with Recent Regulatory and Legislative Developments*, 873 PLI/Corp 69, 96 (1994) (stating that “derivatives serve a necessary and constructive purpose [by] helping to manage risk”); Michael S. Lesak, Comment, *FASB’s Folly: A Look at the Misguided New Rules on Derivatives Valuation and Disclosure*, 29 Loy. U. Chi. L.J. 649, 652 (1998) (recognizing “that the primary function of derivative instruments is to manage risks for corporations, banks, [and] insurance companies”). In fact, most corporations and financial institutions use derivatives for risk management purposes. See Lesak, *supra*, at 652.

13. The previously successful and sophisticated Treasurer of Orange County lost \$1.5 billion in “inverse floaters” because he bet incorrectly on interest rates. See Cohen, *supra* note 9, at 2007-08, 2007 n.73 (discussing the disastrous use of derivatives in Orange county); see also Sarah Lubman & John R. Emshwiller, *Hubris and Ambition in Orange County: Robert Citron’s Story*, Wall St. J., Jan. 18, 1995, at A1 (describing the Orange County fiasco and discussing the background and motivations of Treasurer Robert Citron); Leslie Wayne, *\$1.5 Billion Loss Seen for County*, N.Y. Times, Dec. 2, 1994, at D1 (noting that Orange County suffered a tremendous financial loss because of the improper use of derivatives). Following the Orange County disaster, the SEC conducted official investigations to determine if any wrongdoing had occurred. See Jeffrey Taylor, *SEC is Probing Orange County on Two Fronts*, Wall St. J., Dec. 7, 1994, at A3 (noting that the SEC mounted “a two-pronged investigation of the Orange County debacle”). Despite the importance of derivatives as a risk management tool, the “spectacular losses” suffered by derivatives users such as Orange County have caused a great deal of concern. See Bouley, *supra* note 9, at 597-99.

14. P&G engaged in a swap transaction which cost the company \$157 million before taxes. See Cohen, *supra* note 9, at 1995 n.8. See generally G. Bruce Knecht, *P&G Amends Lawsuit Naming Bankers Trust*, Wall St. J., Feb. 7, 1995, at A3 (outlining the swap agreement between P&G and Bankers Trust New York). If derivatives are used improperly, tremendous losses can result. See, e.g., Leslie Wayne, *Local Governments Lose Millions in Complex and Risky Securities*, N.Y. Times, Sept. 25, 1994, at A1 (discussing the tremendous losses suffered by local governments that utilized mortgage derivatives).

The Department does not want to dictate to the companies what they can or cannot do with their capital, and then look over their shoulders to ensure compliance.

If you examine the Department's regulation of the insurance industry, the real focus is ensuring that there are adequate internal controls at the company level.¹⁵ One of the controversial plans we put into place was requiring that each licensee's board of directors or a committee of the board get engaged in the process by approving the Derivatives Use Plan ("DUP") and ensuring the capability of the staff managing the derivatives portfolio.¹⁶ The bottom line is that the boards have to step up to the plate. Corporate governance is an extremely important tool in the derivatives world. The existence of a regulator is not a substitute for effective corporate governance.

In many ways, insurance companies have been insulated from many of the market pressures that banks and broker-dealers have confronted. But it is very important for the boards of directors to be engaged in what is happening and to understand the complexity of their own balance sheets. I would also say, quite frankly, that if the boards do not want to deal with these issues, then these companies need to upgrade the quality of their board by hiring more sophisticated directors. There is not a lot of sympathy from me or from my Department for board members who are unwilling to deal with these critical issues.

The Department has implemented another relatively new practice in the past two years. When we see a company doing something we do not like, we go to a board meeting or a meeting of the audit committee. We get the board of directors engaged. It is amazing how you get the attention of management when you talk to the board of directors.

Last year we talked about getting derivatives legislation passed. Subsequently, derivatives legislation was adopted and now regulations are in place.¹⁷ Through this legislation, the Department attempted to expand derivatives authority for all of our licensees and, at the same time, eliminate some of the inconsistencies. It was not a level playing field for the Life and Property & Casualty insurance industries. There were different rules.¹⁸ There were limitations in the types of

15. See generally N.Y. Ins. Law § 1410 (McKinney 1984 & Supp. 2000) (providing regulations that attempt to ensure adequate internal controls within insurance companies).

16. See *id.* § 1410(b)(3)(A). Section 1410(b)(3)(A) states that "the board of directors of the insurer or a committee thereof charged with the responsibility for supervising investments shall: (i) authorize such transactions, (ii) assure that all individuals [responsible for] . . . derivative transactions are suitably qualified and . . . (iii) approve a derivative use plan." *Id.*

17. See N.Y. Comp. Codes R. & Regs. tit. 11, § 178 (2000) (providing new legislation governing the use of derivatives by insurance companies).

18. See generally N.Y. Ins. Law § 1403(d)(2) (McKinney 1984 & Supp. 2000)

derivatives that could be utilized.¹⁹ Property & Casualty companies were basically limited to using exchange-traded futures and options.²⁰

In light of the evolving ways to manage the kind of risks that Property & Casualty insurers have on their balance sheets, the idea of the industry being limited to using only exchange-traded derivatives was not going to be very helpful in managing risk. The Department, therefore, has allowed Property and Casualty insurers to go beyond that. We found that there were inappropriate measures of the limits on the amount of derivatives that could be utilized and, therefore, we have embraced a more expansive view. There were also inconsistent applications to foreign-licensed insurers.²¹ In short, there were many anomalies in the law.

The new law takes a reasonable and prudent approach to derivatives authorization. The new law authorizes derivative transactions for hedging purposes and for certain income generation purposes.²² It is not a huge change, but we do allow covered calls to be written.²³ As I mentioned before, the new law requires that the insurer's board of directors specifically authorize and monitor derivatives activity, including appointing the individuals responsible for such activity.²⁴ This was also somewhat controversial. But again, this requirement promotes involvement by the boards of directors and embraces a belief in the importance of corporate governance and, therefore, is part of the new law. The new law also requires each insurer to submit a DUP to the Department for approval on an annual basis.²⁵ And finally, another controversial aspect of the new law that caused a visceral reaction from the accounting and auditing profession was the requirement that the internal controls relative to derivative

(setting forth guidelines for the buying and selling of derivatives).

19. See N.Y. Comp. Codes R. & Regs. tit. 11, § 175 (1999) (setting forth guidelines allowing only a few types of derivatives for hedging purposes); see also *id.* § 177 (noting that property/casualty insurers had previously been limited to engaging "in the sale of exchange traded call options").

20. See *id.* § 177 (recognizing the previous limitations on property/casualty insurers).

21. See *id.* § 175 (stating that the "authority to hedge was given solely to domestic . . . insurers"); see also *id.* § 177.2 (qualifying applicability to foreign insurers).

22. See N.Y. Ins. Law § 1410(c) (providing the statutory framework allowing insurers to engage in derivatives transactions in order to hedge risk).

23. See *id.* § 1410(d). Section 1410(d) provides that "[a]n insurer may enter into income generation transactions under this section only through the sale of call options on securities, provided that the insurer holds, or can immediately acquire . . . the underlying securities during the entire period the option is outstanding." *Id.*

24. See N.Y. Ins. Law § 1410(b)(3)(A); see also *supra* note 16 (discussing § 410(a)(3)(A) in more detail).

25. See *id.* § 1410(b)(3)(B) (stating that "the insurer shall submit a written derivative use plan or amendment thereto to the superintendent for approval").

transactions be reviewed as part of the annual audit by the independent CPA.²⁶

Upon examination of the law, it is evident that the Department does not look over companies' shoulders, and the Department does not want to. Essentially, the Department wants to ensure the adequacy of companies' internal controls to make sure that there is "adult supervision" in the use of derivatives and prevent a repeat of Orange County or Proctor & Gamble.²⁷ If you look at the elements of the new law, I think you will agree that it is a very sensible approach. We have rationalized derivatives authority. The Department has also expanded the types of acceptable instruments and provided a great flexibility for new instruments which will evolve and come onto the market.²⁸ Also, there is now a more appropriate definition for valuing derivatives that are on the books.²⁹

But at the same time, we are saying, "okay, you've got greater authority; now you've got to be more responsible." The board has to be involved, approve the DUP, and make sure that they are comfortable with the staff.³⁰ Companies have to submit a DUP to the Department so we can see the changes from year to year. In a "belt and suspenders" approach, we require that the outside auditor examine the company's internal controls as part of the annual audit.

These requirements should help everyone sleep better at night, including policyholders and boards of directors. I do not believe that these new requirements will result in the Department micro-managing insurance companies. On the contrary, the focus is on education and strengthening insurance companies' internal controls. The new legislation is simply trying to maximize the value of corporate governance.

Newly enacted Regulation 163 defines terms³¹ and provides a bright line rule as to what the Department wants included in the DUP.³² Regulation 163 also delineates what the Department considers to be effective management oversight and adequate reporting.³³ The

26. *See id.* § 1410(b)(5). Section 1410(b)(5) provides that "[a]n insurer which enters into derivative transactions . . . shall be required to include, as part of the evaluation of accounting procedures and internal controls . . . a statement describing the assessment by the independent certified public accountant of the internal controls relative to derivative transactions." *Id.*

27. For a discussion of the significant losses suffered by Orange County and P&G as a result of risky derivative transactions, see *supra* notes 13-14.

28. *See* N.Y. Ins. Law § 1410; N.Y. Comp. Codes R. & Regs. tit. 11, § 178 (2000).

29. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 178.3(b) (providing a new method to value derivatives that are on an insurance company's books).

30. *See id.* §178.5(b)-(c). Section 178.5(b) places a greater responsibility on the board and Section 178.5(c) requires that the board, or a committee responsible for derivatives transactions, "inform management of its desired risk tolerance levels." *Id.*

31. *See id.* § 178.3.

32. *See id.* § 178.4.

33. *See id.* § 178.5.

regulation further addresses internal controls, documentation requirements, and sets accounting standards for derivatives transactions.³⁴

It is important to note that the Department's approach towards DUPs acknowledges that one size does not fit all. The Department allows for individual differences at every company, and that is healthy.³⁵ No two companies are the same and no two companies have the same market strategy, and therefore, companies should have the flexibility to develop different derivative use strategies.

I will admit that we made one modest mistake this year. Regulation 163 went into effect in July of 1999, and companies already engaged in derivatives activities were grand fathered in until December 31, 1999.³⁶ The Department made a mistake by failing to require that the new DUPs, which we need to review for the year 2000, be submitted earlier than December 31, 1999. The December 31 deadline did not give the Department enough time to review all of the plans. In fact, we are still reviewing some of the plans. We received over 130 DUPs in total. We are still wading through them and making headway; but my guess is that next year we will require that companies submit the DUPs earlier.

I will also tell you that I am not embarrassed in any way by the fact that the Department has not yet reviewed all 130 plans. Although I would like to have had the plans done by the end of March, the Department is ascending the same steep learning curve as the industry. Many of the DUPs were sent back to the insurance companies to be corrected and resubmitted. The bottom line is that the industry and the Department are going through this for the first time. This is a very exciting period, and my guess is that next year it will probably go smoothly because we will have the process down pat by then.

The Department has established an internal Capital Markets Group.³⁷ We moved one of our senior people from the Property Bureau and named him Director of Financial Solvency Strategy.³⁸

34. See *id.* §§ 178.7-178.8.

35. See generally Cohen, *supra* note 9, at 1996 ("Whether a derivative instrument is appropriate for a particular end-user ultimately depends upon an entity's management and internal controls . . .").

36. See N.Y. Comp. Codes R. & Regs. tit. 11, § 178.11 (1999) (providing a grand father provision for companies that were already engaged in derivative transactions).

37. See New York State Insurance Department, Press Release, *New York State Insurance Department Hires First Capital Markets Specialist*, (Mar. 1, 1999) <<http://www.ins.state.ny.us/p9903011.htm>>. The Capital Markets group was formed to allow the Department to "keep pace with the changing financial marketplace and the impact it has on the insurance industry." *Id.*

38. See New York State Insurance Department, Press Release, *Levin Appoints Michael Moriarty as Director of Financial Solvency Strategy*, (Oct. 4, 1999) <<http://www.ins.state.ny.us/p9910041.htm>>. The appointment of Mr. Moriarty was part of the Department's "continuing efforts to direct regulatory strategies towards

This pulls together how we are going to work with federal and state regulators, begin establishing a better dialogue with regulators overseas, and deal with issues such as derivatives and capital markets, whether such financial instruments are used for hedging, investing, or issuance purposes. This development will also help evaluate the impact of the risk-based exams and try to assess an insurer's enterprise risk. The Department, therefore, now has a group that is the focal point for all of these issues. The good news is that the Department is building up its capabilities internally while, at the same time, the industry is hopefully understanding and developing best practices.

The Department is also doing a great deal of education internally. For example, we intend to have a number of our senior examiners attend an S&P credit analysis course. The Department is also working with an outside party to conduct seminars about capital markets and derivatives. So, although not everybody at the Department will be a capital markets or derivatives expert, the knowledge of these areas within the Department has increased dramatically in the last twelve months. I expect that over the next twelve months the in-house knowledge will probably double or triple.

I would like to think that we have our act together in New York State. We have responded quickly to disruptions in the marketplace. For example, one of the first things that the Department's Capital Markets Group worked on was the General American problem.³⁹ General American had very substantial losses because it had written nine-month liabilities, and included seven-day put options that had not been reported.⁴⁰ Also, the reinvestment on the asset side did not match in duration.⁴¹ We know the unfortunate result for General American; it was put into receivership and is now part of Met Life.⁴²

One of the measures taken by the Department in the aftermath of General American (and I believe we were the first and only state to do it) was sending out letters to all of our licensees, the Life insurance sector in particular. The letter asked them about any discrepancies regarding their reported liabilities- -does the stated term actually match any embedded put? We sent out letters to all of our licensees in an attempt to identify whether there was truth in disclosure, because the critical issue with General American was that they had reported nine-month term production but there were seven-day puts in the policies.⁴³

more risk-based financial review and real-time oversight of the industry's financial practices." *Id.*

39. See *Balancing Risks and Rewards*, *supra* note 12.

40. See *id.*

41. See *id.*

42. See *id.*

43. See Circular Letter No. 35 from State of New York Insurance Department, to

The other thing we learned from the General American saga is that you can have a run on an insurance company. The run was caused by a rating agency downgrade. The institutional investors had seven-day puts and caused a run on the insurance company.⁴⁴ We have asked the life insurance industry to provide information regarding any discrepancies about stated liabilities and embedded puts.⁴⁵

We also sent all of our licensees questionnaires regarding their Asset/Liability Management (“ALM”) capabilities and internal risk management monitoring processes.⁴⁶ We have notified our licensees that we will be looking at their asset liability management capabilities and their ability to monitor risk going forward as part of our ongoing examinations. The Department is attempting to evolve with the marketplace.⁴⁷

Although I am sure everybody has overdosed on Gramm-Leach-Bliley by now, I am going to talk briefly about S. 900 for a moment. One of the big unknowns for financial holding companies under Gramm-Leach-Bliley is whether the Fed is going to look at risk and capital requirements on a consolidated or de-consolidated basis. The question, therefore, is how will the Fed compute its overall total capital requirement for the new financial holding company, given the varying capital standards between banks and insurers.

The other issue at hand here, one that everybody needs to think about, is whether or not there is an opportunity for regulatory accounting arbitrage. If you are a financial holding company you may have an insurance subsidiary, a bank subsidiary, or possibly a broker-dealer subsidiary. If you are engaged in derivatives activities out of the insurance subsidiary, you will have different capital requirements than you would have if you engaged in such activity out of the bank subsidiary. There is a question of how this situation will play out because there is a short-term opportunity for regulatory accounting arbitrage. Again, the concern is that there is a gap depending on where you house some of these derivatives activities.

The final thing that I will discuss briefly is privacy.⁴⁸ Although privacy is not really the focus of this symposium, I want to note that

All Licensed Life Insurers et al. (Nov. 24, 1999)
<http://www.ins.state.ny.us/c199_35.htm>.

44. See *Balancing Risks and Rewards*, *supra* note 12.

45. See Circular Letter No. 35 from State of New York Insurance Department, *supra* note 43.

46. See *id.*

47. See *id.* (stating that “[i]n the year 2000, the Department may be requiring enhanced reporting from insurers to facilitate better monitoring of liquidity risks deriving from asset/liability mismatches”).

48. “It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information.” 15 U.S.C.A. § 6801 (Supp. 2000).

the bill requires state insurance regulators to issue privacy regulations.⁴⁹ The New York Department has already begun the process internally and has reached out to our licensees for input. The Department is also working closely with federal regulators to determine what type of privacy policy we should issue.

A big concern resulting from the new bill is the potential issuance of fifty different privacy policies from the various state insurance departments: nightmare scenario for insurance companies. An even greater risk is that the states may get involved with regulating privacy for all financial activities and exceed S. 900 instead of tracking it. The potential problem is that a company such as Citigroup may be confronted with a nightmare regulatory scheme in which some states provide an opt-in requirement while other states provide an opt-out requirement.⁵⁰ In some cases, states may even require an opt-in requirement for inter-affiliate transactions.

Therefore, although I would not exactly call privacy the sleeper issue coming out of S. 900, the legislation poses a serious risk for financial services conglomerates. If you were Citigroup, for example, and had fifty different hard line privacy rules to deal with, you would suddenly find that a lot of the synergies you attempted to achieve by combining and forming one entity had disappeared. The privacy issue, therefore, is obviously something that needs to be watched carefully.

Gramm-Leach-Bliley preserved the primacy of the state insurance supervisors with regard to insurance supervision.⁵¹ I attended a meeting two weeks ago with my fellow commissioners, however, and the truth of the matter is that I believe that the NAIC recognizes that it is not business as usual. The ACLI is very focused on whether or not to move towards a federal option.

I believe that the states now recognize the need to process filings more quickly and the need to create some form of national treatment, whether it is for large institutions or small, in order to accommodate the national players in the United States. If we do not, we run the risk of having American insurance companies being acquired by European

49. *See id.* § 6801(b).

50. *See id.* § 6802(b).

51. *See id.* § 6711. Section 6711 provides that “[t]he insurance activities of any person . . . shall be functionally regulated by the States.” *Id.* The Gramm-Leach-Bliley Act reaffirmed “the validity of the McCarran-Ferguson Act and the primacy of the states in regulating the business of insurance.” Meyerson & Rice, *supra* note 3, at 996. The McCarran-Ferguson Act provides that “[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.” 15 U.S.C. § 1012(a) (1994). The McCarran-Ferguson Act further provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.” *Id.* § 1012(b).

and Asian companies operating under more efficient regulatory frameworks. Again, while the good news is that Gramm-Leach-Bliley preserves and recognizes the role of McCarran-Ferguson,⁵² nobody will say at this point “that’s great, now we can hide.” That is not the case.

All the state insurance departments are working hard—certainly the New York Department is—to make significant changes in the way reviewing forms and rate filings are processed, and to improve the turn-around times to ensure that companies can be nimble in the marketplace.⁵³ The Department also, as I mentioned before, is moving towards risk-based exams. I would like to think, based on what I have heard from my colleagues in the other states, that everybody sees the writing on the wall.

Major companies today are looking for national treatment. Whether such treatment comes from the states or a federal counterpart, we need to provide a more seamless national framework for the insurance industry in today’s marketplace. In that regard, I think that people can expect to see significant changes coming out of our Department and all of the state insurance departments.

52. *See supra* note 51 and accompanying text.

53. *See* Circular Letter No. 21 from State of New York Insurance Department, to All Insurers Authorized to Write Life Insurance and Annuities et al. (May 21, 1999) <http://www.ins.state.ny.us/c199_21.htm>.

Notes & Observations