[INSIGHT] By Peter H. Bickford

Start Up, New York!

It is hard to miss the ads all over the airwaves and print media extolling the virtues of New York State as a great place to do business. Offering tax breaks, access to human and natural resources, friendly regulations, minimal red tape, the State spends tens of millions – yours and my tax dollars at work – to lure businesses.

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The centerpiece of the campaign – START-UP NY – urges businesses to "start, expand or relocate your qualified business to a tax-free zone in New York State." What an exciting place to plant commercial roots! Unless, of course, you are seeking to conduct an insurance business here.

Over the past several years, since the establishment of the new Department of Financial Services, insurance regulators in New York have had numerous occasions to demonstrate their commitment to the very first enumerated mandate in the DFS statutory charge: "*To encourage, promote and assist banking, insurance and other financial services institutions to effectively and productively locate, operate, employ, grow, remain, and expand in New York state . . .*" (Yes, that is really what the law states. You can look it up!) Unfortunately, the DFS has not shown any significant inclination to do so, choosing instead to focus primarily on its enforcement authority. While the emphasis on enforcement has produced numerous headlines for the DFS and one-off revenue for the State, it has done little to "encourage, promote and assist" the growth and expansion of the business of insurance. But it is not for the lack of opportunity. The DFS has been presented with a number of chances to support ideas and projects to enhance the growth and development of the insurance industry with little or no downside to the State, and it has failed to take full advantage of any of them. Let's take a look at a few of these circumstances – in no particular order of importance – that DFS has passed over, ignored or impeded these past few years!

One of the first opportunities was handed to DFS as a result of the 2010 Dodd-Frank legislation expanding the possibilities for the Free Zone through a new category of permissible placements to large commercial insureds with expert risk management capability – a class of business often lost to foreign or alien insurers and excess carriers. While following the definitions in the Dodd-Frank legislation, the New York regulation also added unnecessary restrictions and requirements making the use of the new category almost meaningless for domestic insurers, as has been borne out by DFS's own reported statistics. As with the long standing efforts at reducing regulatory excesses for commercial insurers and their customers, the regulators seem reluctant or incapable of fully adopting recognizably important changes without imposing restrictions that largely undo or diminish the changes.

Another example is the industry effort to allow for the creation of domestic surplus lines companies similar to what has been done successfully in a number of other states. With annual E&S written premiums of close to $3 billion in New York, the modest proposal would have the potential for domestic companies to compete to keep more of that business in-state. Even though the proponents addressed regulators' concerns for specific financial and security issues in the proposed legislation, the DFS has not provided support for the legislation, resulting in its languishment in the Legislature for the past few years. Another loss for the domestic market and its customers!

Then there is the DFS attack on private equity and other non-traditional capital investment in the domestic insurance market. Rather than encouraging investment in insurance and insurance-related enterprises, New York's regulators imposed increased capital requirements and scrutiny on certain acquisitions by private equity firms of certain life insurance companies, and then followed up with new rulings incorporating these requirements as ongoing standards. These additional requirements were imposed out of fear that private equity firms are more short-term focused when insurance is essentially a long-term business. This truism, of course, is nothing new and is why the insurance laws of every state provide for regulatory control over investments, reserves, dividends and transfers of interest. But rather than working with new investors within the historic insurance regulatory framework, New York's regulators have created a two-tiered system with different requirements for one class of investors over others. Unfortunately this fear of private capital spawned by New York has also taken hold at the National level as well, which is likely to add to the decades old flight of capital from the New York and US insurance markets to offshore and alternative markets.

This fear of innovative capital is also a likely explanation for the lack of support by the DFS for industry efforts to re-establish a syndicated insurance underwriting market in New York. First raised by Superintendent of Insurance Eric Dinallo back in 2007, and actively pursued by his successor, James Wrynn, establishing a new risk insurance exchange on a financially secure, technologically advanced platform was highlighted as a goal in for-

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mer Governor Patterson's State of the State speech in 2010. A broad-based industry working group established by Superintendent Wrynn produced recommendations for an exchange in June 2010, and a plan to implement these recommendations was prepared the following year. Then along came the DFS.

Although industry and investor interest in a domestic syndicated underwriting facility continues to exist, DFS has shown no interest or support, and has failed to even allow release of the plan prepared under the auspices of the exchange working group. At first the excuse was that the administration was absorbed by the merger of the banking and insurance departments. In time, however, it was clear to insurance risk exchange proponents that the administration had no interest in any meaningful dialogue on the topic.

Unfortunately this attitude is not unexpected considering the DFS's seeming suspicion of any industry initiative. None of the examples in this column would be a financial burden to the State, nor would they pose any significant risk to regulatory control over financial services. There is, in fact, no significant downside to regulators' support for any of these initiatives. Quite the contrary. In each of these industry initiatives the upside includes increased revenue for the State, job creation, flexibility of product for consumers and growth of the industry. These are actually good things!

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It is time for the DFS to make good on its statutory charge to "encourage, promote and assist" our industry. It is time for the administration and the DFS to live up to their own PR campaign and support some positive industry initiatives. It is time for Start-Up NY to stand up for the insurance industry.[IA]

Peter Bickford has over four decades of experience in the insurance and reinsurance business, with particular focus on regulatory, solvency, agency, alternative market and dispute resolution issues. In addition to his experience as a practicing attorney, he has been an executive officer of both a life insurance company and of a property/casualty insurance and reinsurance facility. A complete biography for Mr. Bickford may be accessed at www.pbnylaw.com.