

STATE OF NEW YORK

2374

2003-2004 Regular Sessions

IN SENATE

February 27, 2003

Introduced by Sen. SEWARD -- (at request of the Governor) -- (at request of the New York State Insurance Department) -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to modifying criteria for formation of a captive insurance company in New York, providing standards for which entities are affiliated to the owner of a captive insurance company in order to establish which such entities are eligible to be insured by a captive insurance company and permitting a city with a population of one million or more persons to form a captive insurance company for liability related to or arising out of activities in or near the World Trade Center site in response to the attacks of September 11, 2001; to amend the public authorities law, in relation to permitting various public entities to form captive insurance companies as subsidiary corporations; to amend the workers' compensation law, in relation to permitting the state insurance fund to form a captive insurance company as a subsidiary corporation; and to amend the tax law, in relation to making conforming amendments regarding computation of tax for captive insurance companies

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

- 1 Section 1. Subsections (a), (c), (e), (f) and (g) of section 7002 of  
2 the insurance law, as added by section 146 of part A of chapter 389 of  
3 the laws of 1997, are amended to read as follows:  
4 (a) [~~"Affiliates" shall include the metropolitan transportation  
5 authority or any subsidiary thereof, the directors or members of which  
6 are the same persons holding the offices of the members of the parent or  
7 metropolitan transportation authority]~~ **"Affiliated companies" means  
8 companies in the same corporate system as an industrial insured by  
9 virtue of common ownership, control, operation, or management; or, in  
10 the case of a pure captive insurance company, shall also mean companies**

EXPLANATION--Matter in **italics** (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 that maintain a contractual or sub-contractual relationship with, and  
 2 have risk management controlled by, the industrial insured or its other  
 3 affiliated companies, provided such companies voluntarily elect such  
 4 affiliated status. The term shall also include any statutory subsidiary  
 5 or affiliate of a public entity as well as any contractor, subcontractor  
 6 and consultant of any tier of a city with one million or more persons  
 7 for liability related to or arising out of activities in or near the  
 8 World Trade Center site in response to the attacks of September elev-  
 9 enth, two thousand one.

10 (c) "Captive insurance company" means any pure captive insurance  
 11 company ~~[ex]~~, any group captive insurance company or any sponsored  
 12 captive insurance company licensed to do a captive insurance business  
 13 under the provisions of this article.

14 (e) "Industrial insured" means:

15 (1) for a pure captive insurance company, an insured:

16 ~~[(1)]~~ (A) whose net worth or annual revenue exceeds ~~[one hundred]~~  
 17 twenty-five million dollars;

18 ~~[(2)]~~ (B) who is a member of a holding company system whose net worth  
 19 or annual revenue exceeds ~~[one hundred]~~ twenty-five million dollars; ~~[ex]~~

20 ~~[(3)]~~ (C) who is ~~[the metropolitan transportation authority and its~~  
 21 ~~statutory subsidiaries. When filing an application to form a pure~~  
 22 ~~captive insurance company the metropolitan transportation authority~~  
 23 ~~shall submit written notice of such filing to the governor, the tempo-~~  
 24 ~~rary president of the senate and the speaker of the assembly]~~ a not-for-  
 25 profit organization or public entity with a total annual budget that  
 26 exceeds twenty-five million dollars; or

27 (D) who otherwise demonstrates to the superintendent that it is quali-  
 28 fied to form and operate a captive insurance company as a subsidiary;

29 (2) for a group captive insurance company, an insured:

30 (A) who procures the insurance of any risk or risks by use of the  
 31 services of a full-time employee acting as an insurance manager or  
 32 buyer;

33 (B) whose aggregate annual premiums for insurance on all risks total  
 34 at least twenty-five thousand dollars; and

35 (C) who has at least twenty-five full-time employees; or

36 (D) who is a public entity.

37 (f) "Group captive insurance company" means any domestic insurance  
 38 company licensed under the provisions of this article for the primary  
 39 purpose of providing insurance or reinsurance covering the risks of the  
 40 industrial insureds, or their affiliated companies, that comprise the  
 41 industrial insured group.

42 (g) "Industrial insured group" means any group of unaffiliated indus-  
 43 trial insureds that are engaged in similar or related businesses or  
 44 activities, however, ~~[the metropolitan transportation authority shall~~  
 45 ~~not]~~ in the case of a public entity, a public entity may only be a  
 46 member of an industrial insured group with other public entities, and  
 47 that ~~[collectively]:~~

48 (1) own, control or hold with power to vote all of the outstanding  
 49 voting shares of stock of a group captive insurance company incorporated  
 50 as a stock insurer; ~~[ex]~~

51 (2) represent one hundred percent of the voting members of a group  
 52 captive insurance company organized as a mutual insurer; or

53 (3) is created under the Product Liability Risk Retention Act of 1981,  
 54 15 U.S.C. § 3901 et seq., as amended, as a corporation or other limited  
 55 liability association taxable as a stock insurance company or mutual  
 56 insurer under the laws of New York.

1 § 2. Subsection (h) of section 7002 of the insurance law is relettered  
2 subsection (k) and six new subsections (h), (i), (j), (l), (m) and (n)  
3 are added to read as follows:

4 (h) "Participant" means an entity as defined in subsection (d) of  
5 section seven thousand three-a of this article, and any affiliates ther-  
6 eof, that are insured by a sponsored captive insurance company, where  
7 the losses of the participant are limited through a participant contract  
8 to the assets of a protected cell.

9 (i) "Participant contract" means a contract by which a sponsored  
10 captive insurance company insures the risks of a participant and limits  
11 the losses of such participant to the assets of a protected cell.

12 (j) "Protected cell" means a separate account established and main-  
13 tained by a sponsored captive insurance company for one participant.

14 (l) "Public entity" means:

15 (1) in the state of New York, any entity of the types listed in  
16 subparagraph (A), (B), (C) or (D) of this paragraph which is permitted  
17 under its governing laws or other authority to form and operate a  
18 subsidiary which would not be precluded from engaging in the activities  
19 of a captive insurance company:

20 (A) any department, bureau, division, commission, board or other agen-  
21 cy of the state of New York, including any public benefit corporation or  
22 any public authority;

23 (B) any governmental entity, or combination of governmental entities,  
24 operating a college, community college or university;

25 (C) any city with a population of one million or more persons; or

26 (D) any public corporation created pursuant to agreement or compact  
27 with another state or Canada; and

28 (2) outside the state of New York, any entity of the types listed in  
29 subparagraph (A), (B), (C) or (D) of paragraph one of this subsection  
30 which is permitted under its governing laws of other authority to form  
31 and operate a subsidiary which would not be precluded from engaging in  
32 the activities of a captive insurance company.

33 (m) "Sponsor" means any entity that meets the requirements of  
34 subsection (c) of section seven thousand three-a of this article and is  
35 approved by the superintendent to provide all or part of the capital and  
36 surplus required by paragraph three of subsection (a) of section seven  
37 thousand four of this article and to organize and operate a sponsored  
38 captive insurance company.

39 (n) "Sponsored captive insurance company" means any captive insurance  
40 company:

41 (1) in which the minimum capital and surplus required by applicable  
42 law is provided by one or more sponsors;

43 (2) that is formed or licensed under the provisions of this article;

44 (3) that insures the risks of separate participants through contract;  
45 and

46 (4) that segregates each participant's liability through one or more  
47 protected cells.

48 § 3. Subsection (a) of section 7003 of the insurance law, as added by  
49 section 146 of part A of chapter 389 of the laws of 1997, is amended to  
50 read as follows:

51 (a) Any captive insurance company, when permitted by its articles of  
52 association, incorporation or charter, shall apply to the superintendent  
53 for a license to do a captive insurance business under this article. A  
54 captive insurance business consists of the kinds of insurance set forth  
55 in section one thousand one hundred thirteen and section one thousand  
56 one hundred fourteen of this chapter, provided that:

- 1 (1) a pure captive insurance company shall insure, on a primary basis,  
 2 only risks of its parent and affiliated companies;
- 3 (2) a group captive insurance company shall insure, on a primary  
 4 basis, only risks of the industrial insureds that comprise the indus-  
 5 trial insured group;
- 6 (3) a [~~pure captive insurance company or a group~~] captive insurance  
 7 company shall not be authorized to provide, on a primary basis or as  
 8 reinsurance, the kinds of insurance specified in paragraphs one, two,  
 9 three, [~~eighteen,~~] twenty-three and twenty-five of subsection (a) of  
 10 section one thousand one hundred thirteen of this chapter;
- 11 (4) a [~~pure captive insurance company or a group~~] captive insurance  
 12 company shall not be authorized to provide, on a primary basis:
- 13 (A) workers' compensation and employers' liability insurance; or  
 14 (B) any other kind of insurance, including motor vehicle liability  
 15 insurance, that is required, under the laws of this state or any poli-  
 16 tical subdivision of this state, as a demonstration of financial respon-  
 17 sibility for obtaining a license or permit to undertake specific activ-  
 18 ities when such requirement must be satisfied by obtaining insurance  
 19 coverage from an insurer authorized in this state, up to the minimum  
 20 amount of insurance so required under such laws; and  
 21 (C) except that subparagraphs (A) and (B) of this paragraph shall not  
 22 prohibit a pure captive insurance company from providing primary indem-  
 23 nity coverage to its parent and affiliated companies for any insurance  
 24 or self-insurance program specified in such subparagraphs (A) or (B),  
 25 provided the insurance or self-insurance program has qualified under the  
 26 applicable state or federal law requiring the program; and
- 27 (5) a sponsored captive insurance company may insure only risks of its  
 28 participants;
- 29 (6) a group captive insurance company insuring the risks of an indus-  
 30 trial insured group as defined in paragraph three of subsection (g) of  
 31 section seven thousand two of this article shall be subject to the  
 32 provisions of subsections (d) and (e) of section five thousand nine  
 33 hundred four and subsections (a), (b), (c) and (d) of section five thou-  
 34 sand nine hundred five of this chapter; and
- 35 (7) a [~~pure captive insurance company or a group~~] captive insurance  
 36 company shall reinsure only risks as set forth in section seven thousand  
 37 ten of this article.
- 38 § 4. Subsection (c) of section 7003 of the insurance law, as added by  
 39 section 146 of part A of chapter 389 of the laws of 1997, is amended to  
 40 read as follows:
- 41 (c) (1) Before receiving a license to do a captive insurance business,  
 42 a captive insurance company shall file an application for license with  
 43 the superintendent for review and approval. Such application shall  
 44 include a certified copy of its charter and bylaws, articles of incorpo-  
 45 ration or association, a financial statement certified by two principal  
 46 officers, a plan of operation, which shall include an actuarial report  
 47 prepared by a qualified independent actuary, and any other statements or  
 48 documents required by the superintendent.
- 49 (2) In evaluating the plan of operation, the superintendent shall  
 50 consider the following factors:
- 51 (A) the amount and liquidity of its assets relative to the risks to be  
 52 assumed;
- 53 (B) the adequacy of the expertise, experience, and character of the  
 54 person or persons who will manage it;
- 55 (C) the overall soundness of the plan and the projections contained  
 56 therein;

1 (D) the adequacy of the loss prevention programs of its parent, member  
2 organizations, or industrial insureds as applicable; and

3 (E) such other factors deemed relevant by the superintendent in ascer-  
4 taining whether the proposed captive insurance company will be able to  
5 meet its policy obligations.

6 (3) In the case of a pure captive insurance company formed by a city  
7 with a population of one million or more persons to insure such city and  
8 its affiliated companies for liability related to or arising out of  
9 activities in or near the World Trade Center site in response to the  
10 attacks of September eleventh, two thousand one, the superintendent, in  
11 addition to the provisions set forth in paragraph two of this  
12 subsection, shall consider such factors as the unique risk insured by  
13 such captive and the source and limits of the premium payments along  
14 with any limitations on the acceptance of claims and the payment of  
15 accepted claims so long as such limitations provide an equitable basis  
16 for the allocation of the assets of such company to pay claims.

17 (4) In addition to the information required by paragraphs one and two  
18 of this subsection, each applicant sponsored captive insurance company  
19 shall file with the superintendent the following:

20 (A) a business plan demonstrating how the applicant will account for  
21 the loss and expense experience of each protected cell at a level of  
22 detail found to be sufficient by the superintendent and how it will  
23 report such experience to the superintendent;

24 (B) a statement acknowledging that all financial records of the spon-  
25 sored captive insurance company, including records pertaining to any  
26 protected cells, shall be made available for inspection or examination  
27 by the superintendent or the superintendent's designated agent;

28 (C) all contracts or sample contracts between the sponsored captive  
29 insurance company and any participants; and

30 (D) evidence that expenses shall be allocated to each protected cell  
31 in a fair and equitable manner.

32 (5) Any material filed with the superintendent pursuant to this  
33 subsection shall be given confidential treatment and shall not be  
34 subject to public inspection under article six of the public officers  
35 law, or to discovery under article thirty-one of the civil practice law  
36 and rules, except to the extent the superintendent finds release of  
37 information necessary to protect the public or necessary to initiate any  
38 proceeding or action as provided by this article or except where a court  
39 of competent jurisdiction in an action involving a private litigant and  
40 a captive insurer finds that discovery of same should be allowed upon a  
41 showing that such information is essential to the establishment of the  
42 claim or defense brought or asserted and the party seeking discovery has  
43 demonstrated to the satisfaction of the court that such party is unable  
44 to otherwise obtain the substantial equivalent of the material.

45 [~~4~~] (6) In order to provide for the review of the application  
46 submitted pursuant to this subsection in a timely manner, the super-  
47 intendent may engage such other qualified persons and services as may be  
48 necessary. Prior to retaining any such persons and services, the super-  
49 intendent shall notify the applicant and provide an estimate of the cost  
50 of such services. The superintendent shall recover such costs in the  
51 manner prescribed in section three hundred thirteen of this chapter.

52 § 5. Subsection (d) of section 7003 of the insurance law, as added by  
53 section 146 of part A of chapter 389 of the laws of 1997, is amended to  
54 read as follows:

55 (d) Any proposed amendments or revisions to the charter and bylaws of  
56 a captive insurance company shall be filed with the superintendent for

1 review and approval. Any proposed amendments to the articles of incorporation of a not-for-profit captive insurance company shall be submitted to the superintendent for approval before filing with the secretary of state.

5 § 6. The insurance law is amended by adding a new section 7003-a to read as follows:

7 § 7003-a. Sponsored captive insurance companies. (a) One or more sponsors may form a sponsored captive insurance company under this article.

9 (b) A sponsored captive insurance company formed or licensed under the provisions of this article may establish and maintain one or more protected cells to insure risks of one or more participants, subject to the following conditions:

13 (1) the shareholders of a sponsored captive insurance company shall be limited to its participants and sponsors;

15 (2) each protected cell shall be accounted for separately on the books and records of the sponsored captive insurance company to reflect the financial condition and results of operations of such protected cell, net income or loss, dividends or other distributions to participants, and such other factors as may be provided in the participant contract or required by the superintendent;

21 (3) the assets of a protected cell shall not be chargeable with liabilities arising out of any other insurance business the sponsored captive insurance company may conduct;

23 (4) no sale, exchange or other transfer of assets may be made by such sponsored captive insurance company between or among any of its protected cells without the consent of such protected cells;

27 (5) no sale, exchange, transfer of assets, dividend or distribution may be made from a protected cell to a sponsor or participant without the superintendent's approval and in no event shall such approval be given if the sale, exchange, transfer, dividend or distribution would result in insolvency or impairment with respect to a protected cell;

31 (6) each sponsored captive insurance company shall annually file with the superintendent such financial reports as the superintendent shall require, which shall include, without limitation, accounting statements detailing the financial experience of each protected cell;

35 (7) each sponsored captive insurance company shall notify the superintendent in writing within ten business days of any protected cell that is insolvent or otherwise unable to meet its claim or expense obligations;

39 (8) no participant contract shall take effect without the superintendent's prior written approval, and the addition of each new protected cell and withdrawal of any participant of any existing protected cell shall constitute a change in the business plan requiring the superintendent's prior written approval; and

43 (9) the business written by a sponsored captive insurance company, with respect to each cell, shall be:

45 (A) fronted by an insurance company licensed under the laws of any state;

47 (B) reinsured by a reinsurer authorized or approved by the state of New York; or

49 (C) secured by a trust fund in the United States for the benefit of policyholders and claimants funded by an irrevocable letter of credit or other asset that is acceptable to the superintendent. The amount of security provided by a trust fund shall be no less than the reserves associated with those liabilities which are neither fronted nor reinsured, including reserves for losses, allocated loss adjustment

1 expenses, incurred but not reported losses and unearned premiums for  
2 business written through the participant's protected cell. The super-  
3 intendent may require the sponsored captive insurance company to  
4 increase the funding of any trust as established under this subpara-  
5 graph. If the form of security in the trust is a letter of credit, the  
6 letter of credit must be established, issued or confirmed by a bank  
7 chartered in this state, a member of the federal reserve system, or a  
8 bank chartered by another state if such state chartered bank is accepta-  
9 ble to the superintendent. A trust and trust instrument maintained  
10 pursuant to this subsection shall be established in a form and upon such  
11 terms approved by the superintendent.

12 (c) A sponsor of a sponsored captive insurance company shall be an  
13 insurer licensed under the laws of any state, a reinsurer authorized or  
14 approved under the laws of any state or a captive insurance company  
15 formed or licensed under this article. A risk retention group shall not  
16 be either a sponsor or a participant of a sponsored captive insurance  
17 company.

18 (d) Associations, corporations, limited liability companies, partner-  
19 ships, public entities, trusts and other business entities may be a  
20 participant in any sponsored captive insurance company formed or  
21 licensed under this article.

22 (e) A sponsor may be a participant in a sponsored captive insurance  
23 company.

24 (f) A participant need not be a shareholder of the sponsored captive  
25 insurance company or any affiliate thereof.

26 (g) A participant shall insure only its own risks through a sponsored  
27 captive insurance company.

28 § 7. The opening paragraph of subsection (a) of section 7004 of the  
29 insurance law, as added by section 146 of part A of chapter 389 of the  
30 laws of 1997, is amended to read as follows:

31 No pure captive insurance company [~~or~~], group captive insurance compa-  
32 ny or sponsored captive insurance company shall be issued a license  
33 unless it shall possess and thereafter maintain unimpaired paid-in capi-  
34 tal and surplus as regards policyholders of:

35 § 8. Paragraphs 3 and 4 of subsection (a) of section 7004 of the  
36 insurance law are renumbered paragraphs 4 and 5 and a new paragraph 3 is  
37 added to read as follows:

38 (3) in the case of a sponsored captive insurance company, not less  
39 than one million dollars of paid-in capital and surplus;

40 § 9. Subsection (a) of section 7005 of the insurance law, as added by  
41 section 146 of part A of chapter 389 of the laws of 1997, is amended to  
42 read as follows:

43 (a) A pure captive insurance company may be incorporated (1) as a  
44 stock insurer with its capital divided into shares and held by the  
45 stockholders; or (2) as a mutual insurer without capital stock, the  
46 governing body of which is appointed by the parent industrial insured;  
47 or[~~r~~] (3) in the case of a public benefit corporation, public authority  
48 or other public entity, as the applicable state law may require. In the  
49 case of a city with a population of one million or more persons, a pure  
50 captive insurance company also may be formed as a public benefit corpo-  
51 ration or not-for-profit corporation at the discretion of the mayor of  
52 such city, for any legal purpose including but not limited to insurance  
53 that is retroactive to September eleventh, two thousand one, for risks  
54 incurred by such city and its affiliated companies related to or arising  
55 out of activities in or near the World Trade Center site in response to  
56 the attacks of September eleventh, two thousand one. Any captive insur-

1 ance company formed by a city with a population of one million or more  
 2 persons shall be exempt from all state and local taxes. The members or  
 3 directors, as the case may be, of such captive insurance company shall  
 4 be appointed by the mayor of such city or by such other city official as  
 5 the mayor may designate. Neither the mayor of such city, nor any of the  
 6 captive's members, directors, officers, employees or agents appointed by  
 7 or with the approval of such city, nor any officials, officers, employ-  
 8 ees or agents of the city, while acting within the scope of their  
 9 authority, shall be subject to any personal liability resulting from the  
 10 exercise or carrying out of any of the city's purposes or powers under  
 11 this article.

12 § 10. Subsections (c), (d), (e), (f), (g), (h) and (i) of section  
 13 7005 of the insurance law are relettered subsections (d), (e), (f), (g),  
 14 (h), (i) and (j) and a new subsection (c) is added to read as follows:

15 (c) A sponsored captive insurance company may be incorporated:

16 (1) as a stock insurer with its capital divided into shares and held  
 17 by the stockholders, or

18 (2) as a mutual insurer without capital stock, the governing body of  
 19 which is elected by the participants and sponsors of the sponsored  
 20 captive insurance company.

21 § 11. Section 7006 of the insurance law, as added by section 146 of  
 22 part A of chapter 389 of the laws of 1997, is amended to read as  
 23 follows:

24 § 7006. Annual report. (a) Every captive insurance company licensed  
 25 to do a captive insurance business in this state shall file with the  
 26 superintendent:

27 ~~[(a)]~~ (1) annually on or before March first, a statement of its finan-  
 28 cial condition and any amendment to the plan of operation at last year-  
 29 end, verified by the oath of at least two of its executive officers. The  
 30 statement shall be in the form prescribed by the superintendent except  
 31 that any group captive insurance company insuring the risks of an indus-  
 32 trial insured group as defined in paragraph three of subsection (g) of  
 33 section seven thousand two of this article shall file its report in the  
 34 form and according to the standards set forth in paragraphs one and two  
 35 of subsection (a) of section three hundred seven of this chapter; and

36 ~~[(b)]~~ (2) annually on or before July first, a report of its financial  
 37 condition at last year-end with an opinion of an independent certified  
 38 public accountant; and

39 ~~[(c)]~~ (3) annually on or before July first, evidence in a form  
 40 prescribed by the superintendent, that the industrial insured or member  
 41 of the industrial insured group owning the captive insurance company  
 42 continues to meet the financial standards set forth in subsection (e) of  
 43 section seven thousand two of this article~~[-]~~; and

44 ~~[(d)]~~ (4) the superintendent shall report to the governor, the tempo-  
 45 rary president of the senate, and the speaker of the assembly, by  
 46 September first of each year on the state of the captive insurance  
 47 industry in New York. The report shall include a status on the number  
 48 and type of captive insurers, the lines of insurance written through  
 49 them, and their overall effect on the New York insurance market.

50 (b) In addition to the requirements set forth in subsection (a) of  
 51 this section, a pure captive insurance company formed by a city with a  
 52 population of one million or more persons to insure such city and its  
 53 affiliated companies for liability related to or arising out of activ-  
 54 ities in or near the World Trade Center site in response to the attacks  
 55 of September eleventh, two thousand one, shall file with the superinten-  
 56 dent annually on or before July first, evidence in a form prescribed by

1 the superintendent, that the industrial insured continues to meet the  
 2 standards set forth in paragraph three of subsection (c) of section  
 3 seven thousand three of this article.

4 § 12. Subsection (a) of section 7009 of the insurance law, as added by  
 5 section 146 of part A of chapter 389 of the laws of 1997, is amended to  
 6 read as follows:

7 (a) No captive insurance company shall be subject to any restrictions  
 8 on allowable investments, except as set forth in subsections (b) ~~and~~,  
 9 (c) and (d) of this section.

10 § 13. Section 7009 of the insurance law is amended by adding a new  
 11 subsection (d) to read as follows:

12 (d) A group captive insurance company insuring the risks of an indus-  
 13 trial insured group as defined in paragraph three of subsection (g) of  
 14 section seven thousand two of this article shall comply with the invest-  
 15 ment requirements set forth in paragraph two of subsection (a) of  
 16 section one thousand four hundred three of this chapter.

17 § 14. Article 9 of the public authorities law is amended by adding a  
 18 new title 12 to read as follows:

#### 19 TITLE 12

##### 20 CAPTIVE FORMATION BY PUBLIC AUTHORITIES

21 Section 2990. Powers of public authorities to form captive insurance  
 22 companies as subsidiary corporations.

23 § 2990. Powers of public authorities to form captive insurance compa-  
 24 nies as subsidiary corporations. Every public authority and every public  
 25 benefit corporation is authorized to form and operate a subsidiary as a  
 26 pure captive insurance company or as a group captive insurance company  
 27 pursuant to article seventy of the insurance law. Any such subsidiary  
 28 shall be established in the form of a public benefit corporation by  
 29 executing and filing with the secretary of state a certificate of incor-  
 30 poration, which may be amended from time to time by filing, which shall  
 31 set forth the name of such public benefit subsidiary corporation, its  
 32 duration, the location of its principal office and its corporate  
 33 purposes as provided in this section. Any such public benefit corpo-  
 34 ration shall be a body politic and corporate and shall have the privi-  
 35 leges, immunities, tax exemptions and other exemptions of the authority.  
 36 The board of directors of the subsidiary shall be the members of the  
 37 board of the authority or officers or employees appointed by the board  
 38 of the authority. Neither the members of the board of the authority, nor  
 39 any officers, employees or agents appointed by the board of the author-  
 40 ity, nor any officers, employees or agents of the authority, while  
 41 acting within the scope of their authority, shall be subject to any  
 42 personal liability resulting from the exercise or carrying out of any of  
 43 the authority's purposes or powers under this section and article seven-  
 44 ty of the insurance law.

45 § 15. Section 82 of the workers' compensation law is amended by adding  
 46 a new subdivision 6 to read as follows:

47 6. The commissioners of the state insurance fund are hereby authorized  
 48 to form and operate a subsidiary as a pure captive insurance company or  
 49 as a group captive insurance company pursuant to article seventy of the  
 50 insurance law. Any such subsidiary shall be established in the form of a  
 51 public benefit corporation by executing and filing with the secretary of  
 52 state a certificate of incorporation, which may be amended from time to  
 53 time by filing, which shall set forth the name of such public benefit  
 54 subsidiary corporation, its duration, the location of its principal  
 55 office and its corporate purposes as provided in this subdivision. Any  
 56 such public benefit corporation shall be a body politic and corporate

1 and shall have the privileges, immunities, tax exemptions and other  
2 exemptions of the state insurance fund. The board of directors of the  
3 subsidiary shall be the commissioners of the state insurance fund or  
4 officers or employees appointed by the commissioners of the state insur-  
5 ance fund. Neither the commissioners of the state insurance fund, nor  
6 any officers, employees or agents appointed by the commissioners of the  
7 state insurance fund nor any officer, employee or agent of the state  
8 insurance fund, while acting within the scope of their authority, shall  
9 be subject to any personal liability resulting from the exercise or  
10 carrying out of any of the state insurance fund's purposes or powers  
11 under this section and article seventy of the insurance law.

12 § 16. Subdivision (a) of section 1502-b of the tax law, as added by  
13 section 149 of part A of chapter 389 of the laws of 1997, is amended to  
14 read as follows:

15 (a) In lieu of the taxes and tax surcharges imposed by sections  
16 fifteen hundred one, fifteen hundred five-a, and fifteen hundred ten of  
17 this article, every captive insurance company licensed by the super-  
18 intendent of insurance pursuant to the provisions of article seventy of  
19 the insurance law, other than the metropolitan transportation authority  
20 and any public entity defined in subsection (1) of section seven thou-  
21 sand two of the insurance law, including any public benefit corporation  
22 or not-for-profit corporation formed pursuant to subsection (a) of  
23 section seven thousand five of the insurance law, each of which is  
24 expressly exempt from the payment of fees, taxes or assessments whether  
25 state or local, shall, for the privilege of exercising its corporate  
26 franchise, pay a tax on (1) all gross direct premiums, less return  
27 premiums thereon, written on risks located or resident in this state and  
28 (2) all assumed reinsurance premiums, less return premiums thereon,  
29 written on risks located or resident in this state. The rate of the tax  
30 imposed on gross direct premiums shall be four-tenths of one percent on  
31 all or any part of the first twenty million dollars of premiums, three-  
32 tenths of one percent on all or any part of the second twenty million  
33 dollars of premiums, two-tenths of one percent on all or any part of the  
34 third twenty million dollars of premiums, and seventy-five thousandths  
35 of one percent on each dollar of premiums thereafter. The rate of the  
36 tax on assumed reinsurance premiums shall be two hundred twenty-five  
37 thousandths of one percent on all or any part of the first twenty  
38 million dollars of premiums, one hundred and fifty thousandths of one  
39 percent on all or any part of the second twenty million dollars of  
40 premiums, fifty thousandths of one percent on all or any part of the  
41 third twenty million dollars of premiums and twenty-five thousandths of  
42 one percent on each dollar of premiums thereafter. The tax imposed by  
43 this section shall be equal to the greater of (i) the sum of the tax  
44 imposed on gross direct premiums and the tax imposed on assumed reinsur-  
45 ance premiums or (ii) five thousand dollars.

46 § 17. Subdivision (a) of section 1500 of the tax law, as amended by  
47 chapter 597 of the laws of 1999, is amended to read as follows:

48 (a) The term "insurance corporation" includes a corporation, associ-  
49 ation, joint stock company or association, person, society, aggregation  
50 or partnership, by whatever name known, doing an insurance business,  
51 and, notwithstanding the provisions of section fifteen hundred twelve of  
52 this article, shall include (1) a risk retention group as defined in  
53 subsection (n) of section five thousand nine hundred two of the insur-  
54 ance law, (2) the state insurance fund and (3) a corporation, associ-  
55 ation, joint stock company or association, person, society, aggregation  
56 or partnership doing an insurance business as a member of the New York

1 insurance exchange described in section six thousand two hundred one of  
2 the insurance law. The definition of the "state insurance fund"  
3 contained in this subdivision shall be limited in its effect to the  
4 provisions of this article and the related provisions of this chapter  
5 and shall have no force and effect other than with respect to such  
6 provisions. The term "insurance corporation" shall also include a  
7 captive insurance company doing a captive insurance business, as defined  
8 in subsections (c) and (b), respectively, of section seven thousand two  
9 of the insurance law; provided, however, "insurance corporation" shall  
10 not include the metropolitan transportation authority, any public entity  
11 defined in subsection (1) of section seven thousand two of the insurance  
12 law, including any public benefit corporation or not-for-profit corpo-  
13 ration formed pursuant to subsection (a) of section seven thousand five  
14 of the insurance law, each of which is expressly exempt from the payment  
15 of fees, taxes or assessments, whether state or local. The term "insur-  
16 ance corporation" shall also include an unauthorized insurer operating  
17 from an office within the state, pursuant to paragraph five of  
18 subsection (b) of section one thousand one hundred one and subsection  
19 (i) of section two thousand one hundred seventeen of the insurance law.

20 § 18. Subsection (a) of section 108 of the insurance law, paragraph 1  
21 as amended by chapter 598 of the laws of 2000, is amended to read as  
22 follows:

23 (a) The business corporation law applies to every corporation hereto-  
24 fore or hereafter formed under:

25 (1) this chapter, except corporations subject to section one thousand  
26 one hundred ten or article forty-three, forty-five, forty-six or sixty-  
27 seven of this chapter, or a captive insurance company formed in accord-  
28 ance with the not-for-profit corporation law, or

29 (2) any other statute of this state, or any other law, if the corpo-  
30 ration's purposes include a purpose for which a corporation may be  
31 formed under this chapter.

32 § 19. This act shall take effect immediately.

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**NEW YORK STATE SENATE**  
**INTRODUCER'S MEMORANDUM IN SUPPORT**  
**submitted in accordance with Senate Rule VI. Sec 1**

**BILL NUMBER:** S2374

**SPONSOR:** SEWARD

**TITLE OF BILL:** An act to amend the insurance law, in relation to modifying criteria for formation of a captive insurance company in New York, providing standards for which entities are affiliated to the owner of a captive insurance company in order to establish which such entities are eligible to be insured by a captive insurance company and permitting a city with a population of one million or more persons to form a captive insurance company for liability related to or arising out of activities in or near the World Trade Center site in response to the attacks of September 11, 2001; to amend the public authorities law, in relation to permitting various public entities to form captive insurance companies as subsidiary corporations; to amend the workers' compensation law, in relation to permitting the state insurance fund to form a captive insurance company as a subsidiary corporation; and to amend the tax law, in relation to making conforming amendments regarding computation of tax for captive insurance companies

**PURPOSE:** To amend the Insurance Law to allow the City of New York to form a captive insurance company to provide insurance coverages for liability related to or arising out of activities in or near the World Trade Center in response to the attacks of September 11, 2001. It also permits a broader range of sophisticated financial entities, including public entities, to form pure and group captive insurance companies and sponsored insurance companies in New York State.

**SUMMARY OF PROVISIONS:** Section 1 of the bill:

-- amends Section 7002(a) of the Insurance Law to change the defined term "affiliates" to "affiliated companies" and to define an affiliated company as a company in the same corporate system as an industrial insured by virtue of common ownership, control, operation or management; or, relative to pure captive companies, companies that maintain a contractual or sub-contractual relationship with, and which have risk management controlled by, the industrial insured or its other affiliated companies, provided such companies voluntarily elect such affiliated status. Such term shall also include any statutory subsidiary or affiliate of a public entity as well as any contractor, subcontractor and consultant of any tier of a city with a population of one million or more persons for liability related to or arising out of activities in or near the World Trade Center site in response to the attacks of September 11, 2001.

-- amends Section 7002(c) of the Insurance Law to add sponsored captive insurance companies to the definition of "captive insurance company" for purposes of Article 70 of the Insurance Law.

-- amends the definition in Section 7002(e) of "industrial insured" (which are the entities permitted to form pure and group captive insurance companies) to reduce the threshold for businesses to operate a pure captive from a net worth of \$100 million to a net worth or annual revenues of at least \$25 million. Not-for-profit organizations and public entities with a total annual budget that exceeds \$25 million would have the ability to form and operate a pure captive. It also provides the

Superintendent with discretionary authority to allow an industrial insured to operate as a pure captive that may not meet the specified standards in the definition, but which otherwise demonstrates to the Superintendent that it is qualified to do so. The definition of "industrial insured" for a group captive has also been amended, reducing the threshold from a net worth of \$100 million, to now apply to any insured who has a full-time employee acting as a risk manager, whose aggregate annual premiums for insurance is at least \$25,000, who has at least 25 full-time employees, or who is a public entity.

-- amends the definition of "group captive insurance company" in Section 7002(f) to clarify that the captive insurance company can insure the risks of the owners' affiliated companies.

-- amends the definition of "industrial insured group" in Section 7002(g) to provide that a public entity may only be a member of an industrial insured group with other public entities and to include risk retention groups formed pursuant to the federal Product Liability Risk Retention Act of 1981.

Section 2 of the bill reletters subsection (h) of section 7002 of the Insurance Law subsection (k) and adds six new subsections (h), (i), (j), (l), (m) and (n) which set forth the following new definitions:

--"participant" shall mean an entity insured by a sponsored captive insurance company where the losses of the participant are limited by contract to the assets of a protected cell.

--"participant contract" shall mean a contract by which a sponsored captive insurance company insures the risk of a participant and limits the losses of the participant to the assets of a protected cell.

--"protected cell" means a separate account established and maintained by a sponsored captive insurance company for one participant.

--"public entity" shall mean any of the following entities which are authorized to form and operate a subsidiary which would not be precluded from engaging in the activities of a captive insurance company: any department, bureau, division, commission, board or other agency of the State of New York, including any public benefit corporation or any public authority; any governmental entity operating a college, community college or university; any city with a population of one million or more persons; or a public corporation created pursuant to agreement or compact with another state or Canada.

--"sponsor" shall mean any entity approved by the Superintendent to provide all or part of the capital and surplus required by law and to operate a sponsored captive insurance company.

--"sponsored insurance company" shall mean any captive insurance company in which the minimum capital and surplus required by law is provided by one or more sponsors, that is formed or licensed under the Insurance Law, that insures the risks of separate participants through contract and that segregates each participant's liability through one or more protected cells.

Section 3 of the bill amends subsection (a) of section 7003 of the Insurance Law to permit a captive insurance company to offer title insurance on a primary basis or as reinsurance, to include sponsored captives in the prohibition against captives offering on a primary basis workers' compensation insurance and other insurance involving a demonstration of financial responsibility, to limit a sponsored captive to insuring only the risks of its participants, and to provide that a group

captive insurance company insuring the risks of an industrial insured group would be subject to the provisions of section 5904(d) and (e) (requiring compliance with unfair claims settlement practices law and the unfair claims settlement practices) and section 5905 (a) (d) (relating to notices, prohibited solicitations, coverage and ownership with respect to riskretention groups) of the Insurance Law.

Section 4 of the bill amends subsection (c) of section 7003 of the Insurance Law to provide that where a captive insurance business was formed pursuant to articles of incorporation or association, such articles must be filed with the superintendent before such business receives a license to do a captive business. In the case of a pure captive insurance company formed by a city with a population of one million or more persons to insure such City and its affiliated companies for liability relating to or arising out of activities in or near the World Trade Center site in response to the attacks of September 11, 2001, the Superintendent shall consider, in addition to other statutory requirements, such factors as the unique risk insured by such captive and the source and limits of the premium payments together with any limitations on the acceptance of claims and the payment of accepted claims where such limitations provide an equitable basis for the allocation of assets of such company to pay claims. The bill also requires an applicant sponsored captive insurance company to file with the Superintendent: a business plan demonstrating how the applicant will account for the loss and expense experience of each protected cell and report such experience to the Superintendent; a statement acknowledging that all financial records of such company shall be made available for inspection by the Superintendent; all contracts or sample contracts between such company and any participants; and evidence that expenses shall be allocated to each protected cell in a fair and equitable manner.

Section 5 of the bill amends subsection (d) of section 7003 of the Insurance Law to provide that any proposed amendments to the articles of incorporation of a not-for-profit captive insurance company must be submitted to the superintendent for approval before filing with the secretary of state.

Section 6 of the bill adds a new section 7003-a to the Insurance Law to authorize one or more sponsors to form a captive insurance company under the Insurance Law and to establish and maintain one or more protected cells to insure the risk of one or more participants subject to the following: the shareholders of such company shall be limited to its participants and sponsors; such company shall maintain and account for separately the books and records of each protected cell to reflect the financial condition and results of operation of such protected cell, net income or loss, dividends/distributions to participants; the assets of the protected cell shall not be chargeable with the liabilities of any other insurance business conducted by such company; such company shall not sell, exchange or transfer assets between or among any of its protected cells without the consent of such protected cells; no sale exchange, transfer of assets, dividend or distribution may be made from a protected cell to a sponsor or participant without the Superintendent's approval (which cannot be given if such sale, exchange, etc., would result in insolvency or impairment with respect to a protected cell; each such company shall annually file with the Superintendent those financial reports requested by the Superintendent including, but not limited to, accounting statements detailing the financial experience of each protected cell; each such company shall notify the Superintendent in writing within ten business days of any protected cell that is insolvent or otherwise unable to meet its claim or expense obligations; participant contracts, including any changes in protected cell additions or withdrawals, shall not take effect without the prior written approval of the Superintendent. In addition, the business written by a sponsored

captive, with respect to each cell, must be fronted by an insurance company (which may be licensed in any state), reinsured by a reinsurer authorized or approved by the State of New York or secured by a trust fund in the United States for the benefit of policyholders and claimants funded by an irrevocable letter of credit or other asset approved by the Superintendent (sets forth the amount and form of such security). Provides that the sponsor of a sponsored captive insurance company must be an insurer licensed in any state, a reinsurer approved under the laws of any state, or a captive insurer licensed in New York. Provides that associations, corporations, limited liability companies, partnerships, trusts and other business entities may be participants in any sponsored captive insurance company formed or licensed under the Insurance Law. Provides that a sponsor may be a participant in a sponsored insurance company and that a participant need not be a shareholder of the sponsored captive insurance company or any affiliate thereof. Provides further that a participant shall insure only its own risks through a sponsored captive insurance company.

Sections 7 and 8 of the bill amend subsection (a) of section 7004 of the Insurance Law to provide that no sponsored captive insurance company shall be issued a license unless it shall possess and thereafter maintain not less than one million dollars of paid-in capital and surplus.

Section 9 of the bill amends section 7005(a) of the Insurance Law to provide that a city with a population of one million or more persons may form a pure captive insurance company as a public benefit corporation or a not-for-profit corporation for any legal purpose including insurance that is retroactive to September 11, 2001, for risks incurred by such City and its affiliated companies arising out of activities in or near the World Trade Center site in response to the September 11, 2001 terrorist attacks. Any such captive shall be exempt from all state and local taxes. The members or directors of such corporation shall be appointed by or with the approval of the mayor of such city. The bill also provides immunity from personal liability to certain personnel of such City and such captive while exercising or carrying out their powers.

Section 10 of the bill reletters subsections (c), (d), (e), (f), (g), (h) and (i) of section 7005 of the Insurance Law as subsections (d), (e), (f), (g), (h), (i) and (j) and adds a new subsection (c) which provides that a sponsored captive insurance company may be incorporated as a stock insurer with its capital divided into shares and held by the stockholders, or as a mutual insurer without capital stock, the governing body of which is elected by the participants and sponsors of the sponsored captive insurance company.

Section 11 of the bill amends section 7006 of the Insurance Law to require that any group captive insuring the risks of an industrial insured group that includes risk retention groups shall file its report in the form and according to the standards set forth under section 307 of the Insurance Law. A pure captive insurance company formed by a city with a population of one million or more persons to insure such city and its affiliates from liability related to or arising out of activities in or near the World Trade Center site in response to the terrorist attacks of September 11, 2001 must also file with the Superintendent evidence that the industrial insured continues to meet the standards set forth in Section 7002(c) of the Insurance Law.

Sections 12 and 13 of the bill amend subsection (a) and add a new subsection (d) to Section 7009 of the Insurance Law to restrict investments of group captives insuring the risks of an industrial insured group that includes risk retention groups to those set forth in Insurance Law § 1403.

Section 14 of the bill adds a new Title 12 to Article 9 of the Public Authorities Law to provide that every public authority and every public benefit corporation is authorized to form and operate a subsidiary as a pure captive insurance company or as a group captive insurance company pursuant to article seventy of the Insurance Law. Such Title also sets forth the form and composition of such subsidiaries.

Section 15 of the bill adds a new subdivision 6 to Section 82 of the Workers' Compensation Law to authorize the state insurance fund to form and operate a subsidiary as a pure or group captive insurance company.

Sections 16 and 17 of the bill amend sections 1500 and 1502-b of the Tax Law to exempt from the payment of certain fees, taxes or assessments those captives set up by any "public entity" as defined in Section 7002(1) of the Insurance Law. This expands the current exemption that applies now only to the MTA.

Section 18 of the bill amends section 108 of the Insurance Law to provide that the Business Corporation Law shall not apply to a captive insurance company formed under the Not-For-Profit Law.

Section 19 of the bill provides for an immediate effective date.

**EXISTING LAW:** Article 70 of the New York Insurance Law currently authorizes the formation, operation and regulation of captive insurance companies. Section 1502-b (a) of the Tax Law contains a provision regarding computation of tax for captive insurance companies, and includes a provision that specifically enables the Metropolitan Transportation Authority to establish a captive insurer.

**STATEMENT IN SUPPORT:** The events of September 11, 2001 have had a devastating impact on the availability and affordability of insurance coverage for public entities and businesses alike. In response to the terrorists attacks of September 11, 2001, Congress recently passed legislation directing the Federal Emergency Management Agency (FEMA) to provide the City of New York with up to \$1,000,000 in coverage for the City and its contractors for claims arising from debris removal performed after the collapse of the World Trade Center buildings. The legislation also directs the City of New York to use such funds to establish a captive insurance company or other appropriate insurance mechanism. After exploring various options to provide coverage for these claims, the City of New York decided it was in their best interest to form a captive insurance company for claims arising out of the clean-up effort at and near the World Trade Center.

In addition to the City of New York, public authorities across New York State also face increased premiums with reduced coverage limit. Businesses in lower Manhattan also are finding it extremely difficult to secure adequate insurance coverage at an affordable price. Many have investigated whether it would be in their best interest to form and operate a captive insurance company. In fact, several businesses from lower Manhattan have already approached the Insurance Department expressing an interest in forming a captive insurance company. It should be noted, though, that interest is not limited to New York City. Given this hard market, businesses and public entities throughout the State have also expressed a similar interest in captive formations. This bill would provide the City of New York, businesses and public entities with an alternative insurance solution. Private businesses of certain size are already authorized to form and operate captive insurance companies

under the original captive statute passed in 1997.

Captive insurance companies ("captives") are insurers owned by the entities that they insure. Captives are organized to reduce costs for the owner. When the amount of premiums that would have to be paid to conventional insurers to transfer insurance risk exceeds the costs of the losses incurred by the owner, the formation of a captive to retain that exposure is economically feasible. In other words, the premium that captives charge their parents can be lower than those that independent insurers would charge for similar coverage. Captive insurance companies do not market or sell direct insurance to parties other than entities affiliated to the owners and, therefore, merit less stringent regulation than insurers that sell direct coverage to third parties.

None. The current \$100 million threshold for operating a captive is somewhat arbitrary and a rough surrogate measure for sophistication. It is increasingly apparent that it is too restrictive.

Captives have been forming at a growing rate over the past two decades. Most of the Fortune 500 companies have already incorporated their self-insurance mechanisms into their risk management strategy. Many of the companies that meet the \$100 million threshold have either already formed a captive insurer elsewhere or are self-funding their risk without establishing a captive. The companies experiencing the greatest percentage growth, and those sponsoring captives in greatest numbers, are financially sophisticated companies experienced in risk management areas but whose net worth falls below New York's \$100 million net worth threshold.

This bill would reduce this net worth threshold to \$25 million for pure captives and use revenues as an alternate measure of financial sophistication. It would also permit the Superintendent to use other statistically sound measures of financial sophistication and expertise in risk management when determining whether a particular entity or entities should be permitted to establish a captive insurer.

Smaller businesses would benefit from this bill by being enabled to join group captive insurance companies that would pool the risks of similarly situated businesses. After meeting the aggregate premium threshold of \$25,000 and an employment threshold of 25, a small business that retains a full-time employee who acts as an insurance manager can join a group captive insurer.

This bill would also authorize sponsored captive insurers which establish a separate account for each participant. That is, it permits captive insurance companies to segregate each participant's liability through one or more protected cells. To exercise this privilege, however, a sponsored captive would have to meet all of the reporting requirements placed on standard captives. Each protected cell: would have to maintain separate accounts; could be charged only with those liabilities arising out of its insurance business; could not have its assets sold or transferred without its consent; and would have to obtain the Superintendent's approval to transfer assets, declare dividends, or make a distribution if the taking of any of these actions would impair the cell. Protected cells must, moreover, provide the Department with: a business plan; a plan to report the captive's experience to the Department; an acknowledgement that all financial records of the captive and protected cells will be made available to the Department upon simple request; copies of all contracts or sample contracts; and evidence that expenses will be allocated to each protected cell in a fair and equitable manner.

Any business written by a sponsored captive would have to be fronted by a fully licensed insurer, reinsured through a New York authorized or approved entity and be secured by a trust fund backed by an irrevocable letter of credit.

With insurance becoming increasingly harder to find and more expensive, permitting more entities to form captives in New York would provide an alternative for sophisticated commercial insurers to self fund their risks. This would increase capacity for other New Yorkers to obtain insurance at lower rates.

**BUDGET IMPLICATIONS**::; None.

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