# Legal Alert: New York Tax Reform to Impact Captive Insurance Companies

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In January, New York Governor Andrew Cuomo proposed broad corporate tax reform in his budget bill, which is currently winding its way through the legislature.  The most significant proposal is a shift from a separate entity reporting regime to a full unitary combined group reporting regime.  As part of this combined reporting methodology, the proposal would include captive insurance companies in the combined group—a stark departure from current New York tax law.

New York tax law consists of multiple Articles that provide distinct tax regimes for certain types of corporations.  New York tax law imposes tax on general business corporations under Article 9-A, and on insurance corporations under Article 33.  Specifically, New York tax law imposes a premium tax on captive insurance corporations under New York Tax Law § 1502-b.  Under current New York tax law, an insurance corporation cannot be included in an Article 9-A or Article 32 combined return.  The one exception, however, is an overcapitalized (or "stuffed") captive insurance company.  New York enacted this provision based on a perception that the state was losing revenue because some captive insurance companies earned significant non-premium revenues.  New York tax law considers a captive insurance company to be overcapitalized if fifty percent or less of the company's gross receipts for the taxable year consists of premiums.  New York Tax Law § 211(4)(a)(7) essentially disregards an overcapitalized captive insurance company's status as an insurance corporation and imposes tax under Article 9-A as if it were a general business corporation.  Because the captive insurance company is included in a combined group, premium payments (and other intercorporate transactions) from members of the group are eliminated.  Accordingly, more specifically, premium deductions are eliminated for insureds, and investment income is picked up on the combined return.

Under the New York tax reform proposal, all "combinable" captive insurance companies would be excluded from Article 33, and included in an Article 9-A combined return, and the

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premium tax imposed on New York captives under New York Tax Law § 1502-b would not be applicable.[1] New York Tax Law § 2 would include all captive insurance companies, which satisfy the combined reporting requirements, in the definition of a "combinable" captive insurance company.[2] An alien captive insurance company can be included in a combined report only if it has effectively connected income for the taxable year. There is no limitation that the captive insurance company be domiciled or licensed in New York State. If enacted into law, this captive insurance combination provision would likely result in a significant tax increase.

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[1] The legislature would create a new section to address combined reporting, New York Tax Law § 210-C.

[2] Identical to the current law addressing overcapitalized captive insurance companies, a combinable captive insurance company must be: "[A]n entity that is treated as an association taxable as a corporation under the internal revenue code (a) more than fifty percent of the voting stock of which is owned or controlled, directly or indirectly, by a single entity that is treated as an association taxable as a corporation under the internal revenue code and not exempt from federal income tax; (b) that is licensed as a captive insurance company under the laws of this state or another jurisdiction; (c) whose business includes providing, directly and indirectly, insurance or reinsurance covering the risks of its parent and/or members of its affiliated group." New York Tax Law § 2.

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