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Part II

**A VIEW FROM INSIDE:
A GUIDE TO NYDFS INVESTIGATIONS**

This article is the second in a two-part series concerning CFPB and NYDFS investigations. The first article (Part One) provided a detailed description of the steps in the CFPB's investigation process from the triggers for an investigation to settlement strategies with the agency. In this second article, the authors provide a similarly detailed look at the process for investigations conducted by NYDFS, from inception to resolution.

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**I. AUTHORITY TO INVESTIGATE POTENTIAL
VIOLATIONS OF CONSUMER FINANCIAL LAWS**

The New York State legislature created the New York State Department of Financial Services (“NYDFS”) in 2011 by combining two of the nation’s oldest regulatory bodies, the New York State Banking and Insurance Departments, first organized in 1851 and 1859, respectively.¹ Prompted by incoming Governor Andrew Cuomo, the legislature sought to create a more powerful and effective regulator in the wake of the 2008 financial crisis.²

¹ Available at: https://www.dfs.ny.gov/our_history.

² Available at: https://www.dfs.ny.gov/our_history;
<https://www.governor.ny.gov/news/governor-cuomo->

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Entities that must obtain a license and are subject to NYDFS supervision include banks that do not have a national charter from the Office of the Comptroller of the Currency; money service businesses, such as money transmitters; cryptocurrency exchanges serving New York residents or operating within the state; admitted insurance companies; and insurance brokers. Currently, NYDFS supervises more than 3,500 licensees with assets totaling approximately \$7 trillion.³

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[announces-unanimous-senate-confirmation-benjamin-lawsky-superintendent.](#)

³ NYDFS 2019 Annual Report, https://www.dfs.ny.gov/system/files/documents/2020/07/dfs_annualrpt_2019.pdf.

FORTHCOMING

● **CYBER THREATS FROM NORTH KOREA AND CHINA:
RISKS AND RECOMMENDATIONS**

NYDFS primarily enforces three laws. The first is the New York Banking Law, which governs the conduct of most licensed entities that are not insurance companies.⁴ Under the Banking Law, the Superintendent may issue an order “in his or her discretion” requiring a licensed institution to discontinue any “unsafe or unsound” practice.⁵ Established law treats the term “unsafe and unsound” practice quite broadly and, unsurprisingly, banking regulators regularly view it that way.⁶ This proscription easily could apply to banking practices determined to be injurious to consumers.

Similarly, following notice and a hearing, the Superintendent may impose a civil monetary penalty against a licensed entity for any violation of the Banking Law, regulations issued under that law, licensing requirements, or any other written agreement entered into with the agency. The Banking Law structures penalties to accrue on a per-day basis; at the highest level of culpable intent, each discrete violation can accrue a daily penalty of up to \$250,000.⁷ This penalty regime is one of the tools that has permitted NYDFS to become a major player in enforcement of consumer and other banking matters.

The second law principally enforced by NYDFS is the New York Insurance Law. This law also contains a number of provisions designed to protect consumers from insidious market conduct. Section 2405, for example, prohibits a variety of “unfair and deceptive

acts,” while Section 2601 forbids “unfair claim settlement practices.” Penalties under the Insurance Law can reach as high as \$2,500 per violation. The law has been construed such that violations may be based on the number of solicitations or communications with consumers; a mass marketing campaign thus may amount to tens or even hundreds of thousands of individual violations. At \$2,500 for each violation, penalties could be steep.⁸

The third law enforced by NYDFS is the Financial Services Law (“FSL”). The 2011 enabling legislation also empowered NYDFS with additional enforcement authority to protect consumers anywhere in the state under this statute, including Section 408, which is designed to police intentional fraud and other misconduct in connection with the offering or sale of virtually any “financial product or service” impacting New York consumers. Known as NYDFS “gap authority,” Section 408 reaches any entity that deals in a covered “financial product or service” without regard to whether it is licensed by the Department. Providing for civil enforcement and penalties, a primary purpose of the FSL is to prevent financial firms from intentionally making fraudulent statements or misrepresentations to New York consumers in connection with a covered financial product or service.⁹

A relatively recent area of expanded authority under the FSL is the first-in-the-nation mandatory cybersecurity regulation, known as “Part 500.” Under this regulation which became fully effective in March 2019, covered institutions must implement and

⁴ N.Y. Banking Law § 10.

⁵ N.Y. Banking Law § 44(1)(c).

⁶ See, e.g., https://www.dfs.ny.gov/system/files/documents/2020/10/ea20201021_goldman_sachs.pdf (Consent Order finding The Goldman Sachs Group, Inc. engaged in unsafe and unsound practices via its New York license); see generally *In the Matter of Patrick Adams*, OCC AA-EC-11-50 (Final Decision of Comptroller of Currency, Sept. 30, 2014.) (“any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds”).

⁷ N.Y. Banking Law § 44(4).

⁸ Interestingly, the New York Insurance Law makes almost all of its violations a criminal misdemeanor, as well as a civil regulatory violation. See Ins. L. § 109(a) (“Every violation of any provision of this chapter shall, unless the same constitutes a felony, be a misdemeanor.”). However, the criminal authority provided by the Insurance Law is typically employed to investigate and prosecute schemes to defraud insurance companies over substantial property, casualty, or health insurance claims. In those instances, penalties often rise to the level of felonies under New York criminal law.

⁹ FSL § 408(1)(A). Excluded from the scope of the FSL are financial products or services regulated by the New York Attorney General or where such regulation would be preempted by federal law. See FSL § 104(2).

maintain a “robust” cybersecurity program, including such core elements as written policies and procedures; an incident response plan; periodic risk assessments; notification to NYDFS within 72 hours of a qualifying cybersecurity event; appointment of a Chief Information Security Officer; risk-based limits on user access privileges to information systems and use of multi-factor authentication; and annual certification of compliance by the board of directors or a senior officer of the entity.¹⁰

Section 500.20 of the regulation states that “[it] will be enforced by the superintendent pursuant to, and is not intended to limit, the superintendent’s authority under any applicable laws.” The agency recently brought its first enforcement action under Part 500, indicating that an animating basis for the enforcement action was its far-reaching impact on consumers. “The New York State Department of Financial Services (“DFS”) today filed a statement of charges against First American Title Insurance Company. DFS alleges that First American exposed hundreds of millions of documents, millions of which contained consumers’ sensitive personal information (“Nonpublic Information”) including bank account numbers, mortgage and tax records, Social Security Numbers, wire transaction receipts, and drivers’ license images.”¹¹ Additional enforcement activities under this regulation aimed at remediating consumer harm appear likely.

Another recent grant of authority impacting consumer enforcement is NYDFS’ supervision over student loan servicers operating in New York. In April 2019, the state legislature granted NYDFS additional powers to regulate loan servicers that administer student loans held by New Yorkers. A regulation issued under this new law now requires servicers (among other things) to provide clear information to borrowers concerning fees, terms and conditions of loans; apply payments in a manner that serves the borrower’s best interest; and provide timely and substantive responses to consumer complaints.¹²

In short, there is expansive authority under New York laws and regulations for NYDFS to commence and execute upon a civil consumer protection investigation.

¹⁰ Matthew L. Levine, “Anticipating the First Cybersecurity Enforcement Action by NYDFS,” <https://www.law.com/newyorklawjournal/2020/01/06/anticipating-the-first-cybersecurity-enforcement-action-by-nydfs/>.

¹¹ Available at: https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202007221.

¹² 3 N.Y.C.R.R. 409.

These investigations are expected to be a mainstay of enforcement priorities for the foreseeable future.

II. COMMON TRIGGERS FOR A NYDFS INVESTIGATION

A. Examinations

Like the CFPB, NYDFS conducts examinations of regulated financial institutions. For many of these entities, NYDFS is the primary prudential regulator. NYDFS examiners inspect almost all of its regulated entities — New York chartered banks, branches of foreign banks, fintech lenders, money service businesses, and insurance companies. The examinations are thorough, parsing capital requirements, liquidity, operations, compliance, information technology, and cybersecurity. In more ordinary times, NYDFS examiners will spend a good deal of time at the offices of regulated entities, reviewing documents, inspecting systems, and interviewing firm staff.

Depending on the entity, examinations can occur as frequently as once a year, as is typically the case with branches of foreign banks. If an entity has landed in regulatory hot water, spot inspections may occur more frequently. Sometimes NYDFS conducts its examinations jointly with another regulator; for example, examinations of foreign bank branches located in New York typically involve examiners from the supervision staff of the Federal Reserve Bank of New York as well.

Most NYDFS examinations result in certain recommendations for improvements, known as “Matters Requiring Attention” or “MRAs.” Deficiencies that require urgent remediation are known as “Matters Requiring Immediate Attention” (“MRIAs”). While it might be appropriate to have cured an MRA by the next examination cycle, which can occur a year or more later, MRIAs require immediate attention because the regulator believes it is an acute deficiency and is likely to expect resolution of the matter in as little as 90 days, if not sooner.¹³

Where an institution is found to have repeated deficiencies over several examination cycles, or a demonstrated inability to cure material deficiencies, NYDFS may undertake an enforcement action. Although it is theoretically possible for an enforcement

¹³ See, e.g., Commercial Bank Examination Manual, Board of Governors of the Federal Reserve, <https://www.federalreserve.gov/publications/files/cbem.pdf>.

action to arise from a single examination, this tends not to be the case. The occurrence of repeated material deficiencies is, in fact, one of the principal triggers of NYDFS enforcement actions. Since the agency's inception in 2011, a number of the public enforcement actions have been premised on this type of conduct.¹⁴

B. Self-Reporting Violations of Law

Because NYDFS is the prudential regulator for many entities, there is an expectation that such entities will self-report any significant investigations or potential violations of law. For entities subject to the Banking Law, these self-reporting obligations are inscribed in regulation.

For example, Part 300 of the NYDFS Banking regulations require self-reporting for a very broad range of misconduct: “[e]very organization organized, licensed, or registered under the Banking Law shall submit a report to the superintendent immediately upon the discovery of any of the following events:

(a) embezzlement, misapplication, larceny, forgery, *fraud, dishonesty, making of false entries and omission of true entries, or other misconduct, whether or not a criminal offense*, in which any director, trustee, partner, officer, employee (excluding tellers), or agent of such organization is involved”¹⁵ The regulations prescribe the information to be set forth in the report, and require the entity to provide updates to NYDFS on the matter following any “material developments.”¹⁶

Because of the agency's prudential role, the regulations require a covered institution to go even further — not just report potential or actual wrongdoing, but provide a statement of the entity's Board of Directors as to how it has been rectified: “[s]uch organization [submitting a report under Part 300.1(a)] shall also submit to the superintendent a statement of the changes, if any, in its operations which are deemed desirable and feasible by its directors or trustees in order to avoid repetition of similar events.” These reports are generally considered “confidential supervisory information” and may only be disclosed in the sole discretion of the Superintendent.¹⁷

Thus, unlike with prosecutorial agencies, where the decision to self-report may be complex and evolving, the determination whether or not to self-report covered misconduct frequently weighs heavily towards timely, even prompt, disclosure to NYDFS. Entities that have failed to do so have been called out for this omission and penalized more heavily in NYDFS enforcement actions.¹⁸ In contrast, entities that have timely self-reported and offered prompt updates of material developments have been treated more leniently.¹⁹

C. Other Investigation Triggers

NYDFS may initiate an investigation based on other traditional triggers. One such trigger is a referral, where another government agency refers a matter to NYDFS for consideration. A recent example of this is a now public investigation into violations of insurance law committed by at least two insurance companies and an insurance broker. This matter was referred to NYDFS from a local district attorney's office, which was of the view that, while a criminal investigation was unwarranted, a regulatory investigation might be appropriate and referred the matter to NYDFS.²⁰

Another common source for an investigation is a report from a whistleblower. NYDFS receives reports from whistleblowers not infrequently, some of which come from insiders at covered entities and some from outsiders who claim to have relevant knowledge of misconduct. While NYDFS does not have the authority to award whistleblowers monetarily for tips that result in financial penalties issued against an entity, it does encourage whistleblowing and has issued general guidance for covered entities on how to structure and implement appropriate whistleblowing programs.²¹

And like with the CFPB, a media report may also cause NYDFS to launch an investigation. The press can be a solid source of new information for regulators and prosecutors — the anonymity typically provided by

¹⁴ See, e.g., *In the Matter of Industrial Bank of Korea* (NYDFS Apr. 20, 2020) https://www.dfs.ny.gov/system/files/documents/2020/04/ea20200419_co_ibk_ibk_ny.pdf.

¹⁵ 3 N.Y.C.R.R. 300.1(a) (emphasis supplied).

¹⁶ 3 N.Y.C.R.R. 300.2, 300.3.

¹⁷ 3 N.Y.C.R.R. 300.8; N.Y.B.L. § 36.10.

¹⁸ See, e.g., https://www.dfs.ny.gov/system/files/documents/2020/03/ea180104_western_union.pdf (Western Union); https://www.dfs.ny.gov/system/files/documents/2019/04/ea190415_uniCredit.pdf (UniCredit AG).

¹⁹ See, e.g., Deutsche Bank, AG Consent Order, https://www.dfs.ny.gov/system/files/documents/2020/03/ea180620_deustche.pdf.

²⁰ Dkt. No. 28-1, *Nat'l Rifle Assoc. of Am. v. Andrew Cuomo, et al.*, 18-cv-566 (TJM/CFH) (July 2, 2018).

²¹ Available at: https://www.dfs.ny.gov/system/files/documents/2019/02/whistleblower_guidance.pdf.

news organizations allows for concerned whistleblowers, or persons with other motivations, to disclose potential wrongdoing to a journalist. Examples of recent investigations commenced by NYDFS following a press report include privacy concerns for certain apps that use Facebook software development kits²² and a cybersecurity investigation following press reports of a hack of internal systems at Twitter.²³

III. THE INVESTIGATOR'S TOOLS AND THE INVESTIGATION PROCESS

A. NYDFS Investigative Authority and Tools

The investigative authority of NYDFS is broad and sourced in several places. Chief among them is the investigative power provided by FSL Sections 308 and 404, which authorize the agency to issue non-judicial administrative subpoenas for documents and testimony from any person or entity without regard to whether they are licensed by DFS. While this subpoena power generally is subject to the limitations of the New York Civil Practice Law and Rules,²⁴ in any challenge to a subpoena a state court judge is likely to give NYDFS significant leeway that is traditionally afforded to any governmental agency in seeking evidence that furthers its regulatory mission.

Other provisions of law empowering the Superintendent to conduct investigations include Banking Law Section 37 and Insurance Law Section 308, each of which permits the Superintendent to seek reports, documents, and other information from certain licensed entities by verbal or written request. Typically, where NYDFS can use a letter request to seek documents or information, it will do so, thus avoiding the possibility that the subject matter or scope of the request will be challenged in court. There is no such option to go to court to quash for a licensed entity receiving a written request under these longstanding statutes.

From time to time, NYDFS will use a letter request to seek information voluntarily from an entity that is not regulated by the agency. This tends to occur when NYDFS is examining an industry or financial product as a whole, or where an investigation has many branches

that flow out from a licensed entity and touch unlicensed entities.²⁵

NYDFS is not known to be shy about employing its subpoena power to seek testimony. The agency regularly takes sworn testimony in support of its investigations, no matter the type, and findings included in its Consent Orders and Notices of Charges frequently contain the fruits of accumulated examinations. The testimonial process is investigative and provides very limited opportunities for a witness' counsel to object to an enforcement attorney's questions. Indeed, it is the position of the New York Attorney General that the right to counsel is not implicated in this type of administrative testimonial setting for a witness and that attendance at a testimonial session by a witness' counsel is merely a privilege granted by the investigating agency that may be revoked.

It is unusual (but not unheard of) for an entity or person to level a challenge to a subpoena issued by NYDFS. Any such challenge must be made pursuant to CPLR § 2304, which governs motions to quash or modify subpoenas generally in state court practice.²⁶ The standard for challenging a subpoena is substantial: the movant must prove that the requested information or testimony is "utterly irrelevant to any proper inquiry."²⁷ The agency seeking court enforcement of a non-judicial subpoena must show that the records or testimony sought bear a reasonable relation to the subject matter under investigation and the public purpose to be served.²⁸ Unless the subpoena calls for documents which are "utterly irrelevant to any proper inquiry," or where the "futility to uncover anything legitimate is inevitable or obvious," a court "will be slow to strike it down."²⁹ In other words, a regulatory agency like NYDFS, with a broad mandate to protect consumers,

²² Available at: https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1902221.

²³ Available at: https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202007161.

²⁴ C.P.L.R. § 2304.

²⁵ See, e.g., https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1908061 ("New York leads regulators from 10 states and Puerto Rico in investigating companies that engage in payroll advances. . . . DFS is sending out letter requests for information to members of the payroll advance industry.").

²⁶ CPLR § 2304; see *Matter of Derle Farms, Inc. v. Barber*, 79 A.D.2d 1050 (3d Dep't 1981).

²⁷ E.g., *Ayubo v. Eastman Kodak Co., Inc.*, 158 A.D.2d 641, 551 N.Y.S.2d 944 (2d Dep't 1990).

²⁸ *Myerson v. Lentini Bros. Moving & Storage Co., Inc.*, 33 N.Y.2d 250, 256 (1973).

²⁹ *Abrams v. Thruway Food Market and Shopping Center, Inc.*, 147 A.D.2d 143, 147 (2d Dep't 1989).

investors, and the financial system, will likely be given great latitude to seek relevant information.

While NYDFS may issue a subpoena to any person or entity, if that person or entity is not otherwise subject to the ordinary jurisdictional reach of the New York state courts, the agency will have to avail itself of other means to enforce a subpoena outside of ordinary jurisdiction. For example, if an individual from whom NYDFS seeks testimony as a witness is not an officer or employee of a regulated entity and lives in another state, the agency will have to employ other procedural mechanisms to compel testimony if the witness is uncooperative. NYDFS would have to utilize, for example, the model Uniform Interstate Depositions and Discovery Act (the “UIDDA”), a multi-state statutory scheme designed to enable participating states to facilitate out-of-state depositions and discovery requests. New York has been a member of the pact since 2011³⁰ and NYDFS must follow its dictates in order for the subpoena to be enforceable in another member state. If the witness resides in a state that does not participate in the UIDDA, then the NYDFS enforcement attorneys will be obligated to proceed via a commission or letters rogatory, as appropriate under the rules of the state where the witness resides.³¹

B. Responding to a NYDFS Investigation

The initial steps to be taken by counsel in response to a NYDFS investigation generally mirror those described in Part One in connection with a CFBP investigation. Questions to be asked by counsel at the outset of an investigation specific to a NYDFS entity or investigation might include:

- Who are the key contacts at NYDFS who conduct and oversee the supervisory relationship with the entity? Are there any former NYDFS employees who now work at the entity, in a compliance or business function, and who might provide some insight about the entity’s historical relationship with NYDFS?
- What is the regulatory history of the entity with NYDFS? Has it generally received clean Reports of Examination? If there have been prior deficiencies identified, have they been remediated, and in a timely manner?

- Have there been any private or public enforcement actions taken by NYDFS against the entity? Have any other regulators or enforcement agencies taken actions against the entity?
- Are the documents necessary to represent the entity readily available? This question is particularly applicable to investigations involving U.S.-based conduct, or a New York branch of a foreign bank, where many of the relevant documents may be housed overseas, and where there may be a number of obstacles to obtaining them, including foreign data privacy laws and restrictions by foreign regulators. This question also is sometimes relevant for smaller entities, who may not have implemented the type of robust record keeping practices that most modern firms follow.

With respect to self-reporting and remediation, the expectations of NYDFS, both in law and in attitude, are set forth in Section II.B above. As a general matter, it is almost always beneficial to get ahead of a NYDFS investigation by quickly identifying the potential problems at issue and putting into place a remedial action plan. Although there is no written NYDFS enforcement manual that provides the type of guidance contained in the SEC Enforcement Manual³² or DOJ Justice Manual,³³ it is certainly an unwritten rule at NYDFS that early efforts at remediation will set an entity on the best footing ahead of any initial meeting with NYDFS in response to an investigation. Alternative approaches of denial and excuse-making are almost always doomed to fail.

Examples of this are many. Those publicly available can be found on the NYDFS Enforcement webpage, which lists numerous enforcement actions taken since 2012 and frequently describes the quality of an entity’s cooperation and the effectiveness of its remediation.³⁴ The recurring theme, evident in these enforcement orders, is that early intervention by senior management, counsel, and outside experts to remediate an issue identified by self-reporting or by a NYDFS investigation usually will have a positive impact on the outcome, sometimes quite dramatically.³⁵ Indeed, it is not unusual

³⁰ CPLR § 3113.

³¹ *E.g.*, C.P.L.R. § 328.

³² Available at: <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

³³ Available at: <https://www.justice.gov/jm/justice-manual>.

³⁴ Available at: <https://www.dfs.ny.gov/search/site?search=enforcement>.

³⁵ See, e.g., NYDFS enforcement action against Mashreq Bank PSC (“In its interactions with the Department concerning this

for NYDFS to decline to bring an enforcement action where the response from the entity to misconduct or identified deficiencies is swift, forceful, and enduring.

C. Understanding the Scope of a NYDFS Investigation

As a general matter, NYDFS is often quite transparent regarding the scope of its investigation. A letter request from NYDFS pursuant to Banking Law Section 37 or Insurance Law § 308 typically contains detailed questions for information and documents that contain significant clues as to the focus of the inquiry. Nor is it uncommon for NYDFS enforcement attorneys to follow up with numerous and probing questions and document requests, after an entity has provided a response to NYDFS that contains documents and/or information, or where an entity has provided an initial or subsequent presentation by outside counsel to NYDFS.

Where the scope or nature of the investigation is still murky at the outset, counsel may achieve additional clarity by reviewing certain documents issued by NYDFS. These include:

- regulatory guidance, which set priorities for covered entities and indicate where examinations and investigations will be focused;³⁶

- press releases, which may indicate that an “industry sweep” is underway;³⁷
- budget proposals, which may seek additional authority for certain types of regulation and investigation, or additional authority to impose penalties;³⁸ and
- the annual NYDFS report, which discusses accomplishments and enforcement activity from the prior year, and may contain important clues as to existing or future enforcement priorities.³⁹

Nor can it hurt to simply call up the enforcement attorney handling the matter and ask for an in-person meeting (or the current day equivalent, a Zoom call), in order to better understand the investigation. It is not unusual for these to be granted, although it can depend on the personnel involved and the nature of the investigation. While obviously in the interest of the client institution, the benefit to NYDFS may also be evident — better informed outside counsel can expedite a response to requests for documents and information, and ultimately an efficient resolution of the investigation, no matter whether it results in enforcement, declination, or something in between.

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resolution of the deficiencies identified in the 2016 and 2017 Examinations, the Bank has demonstrated a keen interest in, and commitment to, remediating the shortcomings identified above, and to building an effective and sustainable BSA/AML and OFAC compliance infrastructure. Among other things, the Bank has demonstrated its commitment by devoting substantial financial and corporate resources to enhancing the compliance function at the New York Branch.”), found *at* https://www.dfs.ny.gov/system/files/documents/2020/03/ea181010_mashreqbank.pdf.

³⁶ See, e.g., https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1909111 (“Superintendent of Financial Services Linda A. Lacewell announced today that the Department of Financial Services (“DFS”) has issued guidance to life insurers and insurance producers to protect New York pension holders from unlicensed activity in New York’s pension risk transfer market. The Department has learned that unauthorized life insurers, as well as insurance producers and unlicensed individuals representing unauthorized insurers or pension plan sponsors with offices in New York, have been soliciting, negotiating, selling, and servicing group annuity contracts related to transferring pension risk, including terminal

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funding or close-out contracts, issued by companies that are not licensed in New York and in violation of New York Law.”).

³⁷ See, e.g., https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1909052 (“Superintendent of Financial Services Linda A. Lacewell today announced the Department of Financial Services (“DFS”) is launching a new investigation into the student “debt relief” industry. DFS is issuing subpoenas to eight student debt relief companies as part of an investigation into deceptive practices, including misleading advertising and unscrupulous fees.”).

³⁸ Available at: <https://www.budget.ny.gov/pubs/publications.html>.

³⁹ See, e.g., NYDFS 2019 Annual Report, Superintendent’s Legislative Recommendations for 2020 (“Protecting New Yorkers from Abusive Practices in the Financial Services Industry: This proposal would update the Financial Services Law by clearly defining unfair, deceptive, and abusive acts or practices; enhancing monetary penalties to deter undesirable conduct; authorizing DFS to require restitution to victims of financial abuse and eliminating intentionality as a prerequisite to DFS action.”), found *at* https://www.dfs.ny.gov/system/files/documents/2020/07/dfs_annualrpt_2019.pdf.

IV. MOVING A NYDFS INVESTIGATION TOWARD CONCLUSION

A. General Considerations

Although NYDFS has neither a written enforcement manual, nor a formal or informal Wells Notice-type notification, the usual steps necessary to move a complex investigation involving a financial institution toward a conclusion are applicable.

After NYDFS has concluded its investigation, it may request a presentation from an entity's counsel on specific issues. Alternatively, NYDFS enforcement staff may provide their own presentation to counsel in the form of a "reverse proffer," outlining the key evidence developed, the potential violations of the law implicated, and the possible range of penalties. In this latter instance, it has been common for NYDFS to permit counsel for the entity to offer one or more presentations in response to the initial agency presentation, along with one or more written submissions. Typically, this process is confidential, subject to protections of either or both of the confidential supervisory privilege and exemptions under the New York Freedom of Information Law.⁴⁰ Like many major regulatory or criminal investigations, the NYDFS investigatory process can play out over many years for a variety of reasons — although enforcement priorities may shift over time and with it, the timeline for the back and forth for the parties to stake out their final positions.

Given the relatively favorable burden of proof for NYDFS to establish violations in an administrative proceeding, the discussions towards resolution often focus on the number of potential violations and the penalties that may be issued pursuant to these violations. As with CFPB investigations, the consumer impact of the violations is likely to be a central focus of the discussions, as consumer protection has remained a key NYDFS enforcement priority.⁴¹ A number of NYDFS resolutions focus on consumer impact and remediation.⁴²

⁴⁰ N.Y. Bank. L. § 36.10; N.Y. Pub. Ofc. L. § 87.

⁴¹ Matthew L. Levine, "DFS Enforcement to Increase Focus on Consumer Protection," <https://www.law.com/newyorklawjournal/2019/09/03/dfs-enforcement-to-increase-focus-on-consumer-protection-where-cfpb-steps-down-dfs-has-to-step-up/>.

⁴² See, e.g., "DFS Fines Four Property and Casualty Insurers \$2.1 Million and Secures \$10.6 Million In Consumer Restitution," https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202011031.

Thus, as with the process around resolving CFPB investigations, counsel will want to have thought through how to frame the issue of consumer impact during the presentation process with NYDFS. While the creativity of counsel in this respect may never cease to amaze, NYDFS is like other major regulators and enforcement agencies — arguments unmoored to evidence or logic will, at best, get summary attention and, at worst, substantially undermine other, more solid arguments about an appropriate resolution.

It should also be noted that declinations do happen. They typically are not public (unless, for example, a public corporation has already disclosed it in SEC filings) and are not common (because NYDFS investigations for the most part are very well grounded). That said, strong equitable arguments, compelling cooperation, and an existing supervisory relationship that has been constructive, all can lead to a declination by the agency.

Since its inception in 2011, it has been the practice for senior enforcement staff to be engaged in the investigation and resolution process, more or less depending on the particular investigation or its phase. It should be the expectation that senior enforcement staff will be involved at key moments of the investigation, including the final drive toward resolution. Moreover, enforcement staff typically will update the Superintendent on particular matters periodically, and the Superintendent can be expected to be knowledgeable about the progress of investigations in order to ensure that they are being conducted in a manner consistent with the agency's supervisory and enforcement priorities.

Thus, an appeal to the "highest levels" of the agency about a charging position or proposed penalty may not yield the desired results, since senior enforcement staff are almost always involved to a significant degree in an investigation. That is not to say that it is unheard of to achieve this request; but client expectations should be managed carefully. Once again, however, at a critical juncture prior to resolution it may be appropriate to take such steps.

B. Resolutions and Actions Where NYDFS Determines to Litigate

1. Administrative Proceedings

NYDFS may initiate charges in an administrative proceeding that is housed at the agency. The action must proceed in a manner consistent with the New York

State Administrative Procedures Act.⁴³ Generally, in an administrative proceeding, a hearing officer is appointed by the Superintendent. Typically, no discovery is allowed and a limited ability to subpoena documents or witnesses for the hearing exists. At the hearing, both the agency and the entity charged are permitted to present documents and witnesses, and cross-examine adverse witnesses. These procedures are enshrined in regulations issued by NYDFS.⁴⁴

While NYDFS does conduct such hearings regularly, they tend to be for less complex matters. That said, the agency is not hesitant to issue a Notice of Charges and set down a matter for an administrative hearing. Notices of Charges and scheduled hearings typically may be found on the NYDFS website.⁴⁵

Following the hearing, the hearing officer issues findings of fact and law that render a determination on the NYDFS charges. The hearing officer's findings are then sent to the Superintendent, who may adopt them, reject them, or modify them. Once the Superintendent acts on these findings, it constitutes a final agency action that is subject to review under Article 78 of the New York Civil Practice and Rules.⁴⁶ That review is similar to a review of an agency determination under the analogous federal Administrative Procedure Act, and as a general matter a challenger carries a heavy burden to overturn a reasonably founded determination by the agency.

2. Court Action

The Financial Services Law provides a separate mechanism to protect consumers from injurious conduct by giving NYDFS power to seek injunctive relief to restrain any violation of the Financial Services, Banking, or Insurance Laws, including authority to obtain a temporary restraining order.⁴⁷ Under this provision, the agency may maintain and prosecute an action against any person subject to the FSL, the Insurance law, or the Banking law, or the person's officers, directors, trustees, or agents, for the purpose of obtaining an injunction restraining such person or persons from doing any acts in violation of the provisions of these laws.

⁴³ N.Y. State Administrative Procedure Act § 100 *et seq.*

⁴⁴ 23 N.Y.C.R.R. Part 2.

⁴⁵ Available at: https://www.dfs.ny.gov/reports_and_publications/public_hearings.

⁴⁶ N.Y. C.P.L.R. Art. 78.

⁴⁷ FSL § 309.

NYDFS may also avail itself of the federal Consumer Financial Protection Act ("CFPA"), 12 U.S.C. § 5552(a)(1), and in fact has done so on at least two occasions. The CFPA provides state banking regulators (and others) with authority to bring a federal civil lawsuit for injunctive relief, restitution, and other remedies for unfair, deceptive, or abusive practices. NYDFS was the first state banking regulator ever to use this authority, commencing an action in 2014 against a payday lender for improper conduct.⁴⁸

NYDFS continues to use this mechanism in actions seeking to protect New York consumers, having recently commenced an action under the CFPA (jointly with the New York Attorney General) against a company that allegedly engaged in offering predatory subprime home loans.⁴⁹

C. Resolutions Based on Settlements With NYDFS

Many NYDFS investigations resolve through settlement, frequently through a Consent Order. This type of order is similar to a Cease-and-Desist Consent Order issued by federal bank regulators. Sometimes, however, NYDFS must first file charges to bring a reluctant entity to the negotiating table.⁵⁰

A NYDFS Consent Order typically has several components. First, it will include the agency's findings of fact and charged violations of law. Many times the agency will structure the order such that the entity need not admit to the agency's factual findings, but does have to agree with the violations of law. Depending on the matter, there may be significant opportunity for counsel to negotiate both the language of the factual findings, as well as the number and type of violations charged.

Second, a Consent Order usually will include a civil monetary penalty. This is a standalone element that does

⁴⁸ Available at: https://www.dfs.ny.gov/system/files/documents/2020/04/ea140423_temp_restrain_order_condor.pdf.

⁴⁹ Available at: https://www.dfs.ny.gov/system/files/documents/2019/08/ea190801_vision.pdf.

⁵⁰ See, e.g., Statement of Charges and Notice of Hearing, *In the Matter of Habib Bank Ltd.*, https://www.dfs.ny.gov/system/files/documents/2020/03/ea170824_habib_notice.pdf; Statement of Charges and Notice of Hearing, *In the Matter of the National Rifle Association of America*, https://www.dfs.ny.gov/system/files/documents/2020/02/nra_statement-charges-and-notice-hearing-1.pdf.

not include any type of restitution, and the receipt of which by NYDFS gets turned over immediately to the state's general fund. Given the nature of the statutory penalty scheme described above under each of the Banking, Insurance, and Financial Services Laws, there is significant opportunity for counsel to negotiate the penalty number as well.

Third, some resolutions with NYDFS will include a component of restitution. This is typically the case where there is direct consumer harm.⁵¹

Fourth, there is almost always a requirement of a remedial plan, which will usually include reporting to NYDFS on progress made under the plan.

Fifth, a Consent Order may occasionally require the entity to hire an independent monitor or consultant to oversee the remediation plan and report to the entity's Board or NYDFS. Although NYDFS has required monitors on fewer occasions in connection with Consent Orders over the last several years, it is still an important supervisory and enforcement tool for the agency.⁵²

As noted above, senior enforcement staff are typically involved or knowledgeable about NYDFS investigations and therefore will be substantially involved in the negotiation, drafting, and finalizing of any resolution with an entity. Opportunities for appeal directly to the Superintendent appear to be limited and buy-in by senior management and the board of the entity is typically required by and often memorialized in the written Consent Order.

V. JOINT INVESTIGATIONS

As set forth in Part One of this article, pursuant to 12 U.S.C. § 5552 of the CFPA, states have the authority to investigate and where appropriate bring suit against consumer financial services companies for violation of the CFPA. Frequently, the CFPB investigates matters jointly with other regulators and attorneys general offices. NYDFS sometimes partners with the CFPB in investigating and resolving consumer financial services issues. To facilitate what the drafters of the CFPA envisioned would be a somewhat regular practice, the CFPA permits the CFPB to share information with state regulators and attorneys general offices. Other legal tools also exist that facilitate the exchange of information, such as common interest agreements and memoranda of understanding.⁵³

In light of the fact that the two agencies may be working in concert to investigate the perceived violation, the company should remain alert for developments in both agencies. In addition, the company should assume that what has been shared with the CFPB is being shared with NYDFS. A company should be strategic about how it communicates with either or both agencies. Attempts to pit the two agencies against each other, for example, are likely to be counterproductive. However, there are some areas of an investigation that might be outside of the jurisdiction of one or the other of the agencies. Careful scrutiny of these issues will permit outside counsel to offer the broadest set of options to offer a client that is in the sights of both agencies, and will likely also facilitate the best-case resolution if and when that time comes. ■

⁵¹ See, e.g., "DFS Fines Four Property and Casualty Insurers \$2.1 Million and Secures \$10.6 Million In Consumer Restitution," https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202011031.

⁵² See, e.g., "Boise Schiller Flexner Partners Selected as Independent Monitor for Deutsche Bank (Oct. 11, 2019), available at <https://www.law.com/newyorklawjournal/2019/10/11/boies-schiller-flexner-partners-selected-as-independent-monitors-for-deutsche-bank/>.

⁵³ Available at: https://files.consumerfinance.gov/f/201212_cfpb_statement_of_intent_for_sharing_information_with_sbfsr.pdf.

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