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NYDFS Roundup: Crypto, Cybersecurity, And Insurance Companies

By **Matthew L. Levine**

Change has been a constant at the New York State Department of Financial Services. Since its first superintendent departed the agency in June 2015, there have been six confirmed and acting superintendents for DFS. With each change in the agency's helm there is an inevitable shift in priorities, including its enforcement emphasis.

In August 2021, Gov. Kathy Hochul appointed Adrienne Harris as DFS Superintendent, shortly after Governor Hochul took office. This article discusses DFS' evident enforcement priorities since the beginning of 2021, and as they have evolved under the new DFS administration, along with what might be expected in the near term.

Cybersecurity Enforcement: As Promised

DFS officials have repeatedly emphasized that cybersecurity is a central prudential concern. In mid-2021, the agency's top cybersecurity official noted there might be as many as a half-dozen serious cybersecurity investigations underway. See "Cybersecurity Enforcement Activity From NYDFS Fashions Regulatory Expectations," *New York Law Journal* (June 8, 2021).

As promised, DFS has brought four settled enforcement actions based on cybersecurity violations since the beginning of 2021: two against insurance companies, one against an insurance broker, and another against a mortgage banking firm. These actions demonstrate a clear focus on enforcing the obligations contained in "Part 500," the DFS cybersecurity regulation.

This initial round of enforcement focused on implementing key requirements of Part 500, such as (a) effective multi-factor authentication, (b) timely notification to DFS of a covered Cybersecurity Event, and (c) implementation of required policies and procedures. Moreover, DFS' administrative enforcement action filed against First American Title Corporation, which alleges violations of Part 500, also remains pending.

DFS has not hesitated to use all available tools in upholding its cybersecurity requirements. For example, in addition to bringing actions under Part 500 and the Financial Services Law against other entities, DFS penalized a mortgage banking firm under the New York Banking Law for apparent "unsafe and unsound practices" arising out of alleged cybersecurity deficiencies. See *In the Matter of Residential Mortgage Services* (March 3, 2021). Cybersecurity enforcement is now in full swing.

Cryptocurrency Enforcement on Its Way

This will soon be the case with cryptocurrency enforcement as well. While agencies including the U.S.

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Department of Justice, U.S. Securities and Exchange Commission, Commodity Futures Trading Commission, Financial Crimes Enforcement Network and New York Attorney General all have issued public enforcement actions involving cryptocurrency, DFS has been quiet on this front. No more. Although no enforcement actions have yet been announced by DFS, two of its cryptocurrency licensees have reported in public filings that they are under investigation by DFS relating to their cryptocurrency business.

In July 2021, Robinhood Markets first reported that, following an examination by DFS, the agency determined Robinhood's cryptocurrency affiliate committed violations of DFS anti-money laundering requirements, as well as violations of 23 N.Y.C.R.R. §200, the DFS regulation governing virtual currency businesses.

According to Robinhood, DFS also identified certain violations of the cybersecurity regulation. Robinhood announced it reached a settlement in principle with DFS regarding these allegations, pursuant to which it may have to pay a $30 million penalty and engage an independent monitor. See https://s28.q4cdn.com/948876185/files/doc_financials/2021/q4/5da70128-0b89-456d-802a-047969b23ad9.pdf.

And in February 2022, Coinbase, which holds both a Bitlicense and trust company charter from DFS, publicly reported that DFS was investigating its "compliance with the Bank Secrecy Act and sanctions laws, cybersecurity, and customer support." Coinbase further reported that "it is cooperating fully" with the DFS investigation "and has undertaken initial remedial measures, and may face additional remedial and other measures." See https://investor.coinbase.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=15601874.

> In an interview with the Brookings Institution, Superintendent Harris noted that she intended to "reorient" the agency's enforcement work to focus on "kitchen table issues."

DFS is also expanding the reach of its cryptocurrency investigations. In connection with U.S. Treasury Department sanctions imposed following Russia's invasion of Ukraine, DFS stated it would increase its own monitoring of cryptocurrency transactions in real time to enhance enforcement efforts, including by implementing blockchain analytics technology to identify crypto businesses involved in evading federal economic sanctions.

Insurance Actions Multiply

Since the start of 2021, there have been at least 13 major public enforcement actions against insurance companies and brokers—12 of which have resulted in consent orders. This number excludes the three additional enforcement actions against insurance firms for alleged cybersecurity violations noted above.

Violations identified by DFS in connection with these enforcement actions include (a) failure to adhere to mental health parity co-payment requirements; (b) engaging in unlicensed insurance activity in New York involving the solicitation and administration of a pension risk transfer business; (c) non-compliance with prohibitions on using an individual's occupational status or educational level in setting auto rates; (d) inadequate disclosures concerning conversion of deferred annuities to immediate annuities; and (e) failure by a life insurer to check whether any insureds had passed away and were listed on the Social Security Administration's "Death Master File."

The number of enforcement actions against insurance firms is notably more than any other type brought by DFS against a major financial institution during the same time period. Reasons for this may vary. For example, the Insurance Law is highly technical and there are many more opportunities for an institution to commit a violation; moreover, most Insurance Law violations are considered strict liability offenses so they are not difficult to establish. Additionally, each investigation has its own pace, and it may be that some matters come to fruition at the same time for unrelated reasons. That said, given this volume of enforcement actions, it is reasonable to conclude that enforcement activity aimed at insurance companies has been a recent focal point for DFS.

Major Banking Enforcement Actions

DFS brought only two major actions against large banks since the beginning of 2021—notably fewer than in recent years. One of these actions concerned National Bank of Pakistan's allegedly inadequate controls for its anti-money laundering program. In addition to imposing a fine of $35 million and requiring further remediation and reporting, DFS reserved the right to impose an independent monitor at a future date. See *In the Matter of National Bank of Pakistan* (Feb. 24, 2022).

The second major banking enforcement action involved allegations that another large bank possessed inadequate controls for its OFAC sanctions screening program. DFS alleged Mashreqbank conducted non-transparent payments related to Sudan that were processed through New York financial institutions, including Mashreqbank's own New York Branch, in violation of U.S. sanctions laws. The matter was resolved with a $100 million fine, implementation of an improved compliance program, and periodic progress reporting to DFS. *See In the Matter of Mashreqbank, PSC* (Nov. 9, 2021).

DFS also issued an enforcement action against Moneygram International Inc., the global money transmitter, requiring it to pay an $8.25 million penalty arising out of alleged deficiencies identified during a routine examination. According to DFS findings, a number of Moneygram's New York agents contributed to a dramatic increase in transactions to China in a condensed time period. These transactions also were cause for concern because a good deal of them followed the suspicious "many-to-one" typology suggestive of money laundering. See *In the Matter of Moneygram International* (March 16, 2022).

Focus on Fair Lending

DFS also ramped up enforcement of fair lending laws. The agency conducted a redlining investigation into mortgage lending patterns in the Buffalo metropolitan area, and issued a report identifying a lack of lending by mortgage lenders in neighborhoods with majority-minority populations, and to minority homebuyers in general.

In conjunction with the report, DFS entered into a consent order with Hunt Mortgage Corporation after finding "a demonstrable lack of lending to minorities and in majority-minority neighborhoods in Western and Central New York." The consent order required Hunt Mortgage to overhaul its fair lending compliance program; it did not impose a fine, however, potentially because DFS found no evidence of intentional discrimination. See *In the Matter of Hunt Mortgage* (Feb. 4, 2021).

Relatedly, DFS entered into consent orders with two trust companies for allegedly violating New York's fair lending laws while engaged in indirect automobile lending, imposing penalties of $275,000 and $350,000, respectively.

And DFS resolved an investigation into allegations certain consumers received different credit limits than that offered to their spouses when applying for an "Apple Card" credit card. DFS' investigation determined that, in fact, no evidence of gender discrimination existed in the card issuer's program administration; instead, alleged customer service inadequacies and a perceived lack of transparency undermined consumer trust in fair credit decisions. DFS noted that Goldman Sachs Bank (the card issuer) and Apple had taken steps to remediate these concerns.

Other Agenda Items: Facebook and Opioids

DFS moved to conclude other investigations in 2021 that fall outside its usual remit, including an investigation into Facebook. (Facebook's subsidiary, Facebook Payments, is a DFS licensee.) Based on reporting by the *Wall Street Journal,* DFS alleged Facebook wrongfully shared sensitive information, such as health diagnoses, blood pressure readings and fertility data, with app developers that had utilized Facebook's free software analytics tool. A DFS report recognized certain remedial steps taken by Facebook, alleged Facebook failed to "fully cooperate" with DFS' investigation, and ultimately took no action against the company. This report followed another one released by DFS in late

2020, which concerned the hack of Twitter accounts, and which called for increased regulation of technology companies.

Additionally, in September 2019, DFS launched an expansive inquiry involving the opioid crisis, issuing subpoenas and gathering evidence from opioid manufacturers and distributors, and pharmacy benefit managers. The enforcement theory underlying the investigation asserted that those in the chain of distribution knowingly defrauded New York health insurers by misrepresenting the safety and efficacy of opioids. In 2021, a branch of the inquiry involving Purdue Pharma was resolved preliminarily as part of a larger settlement involving state attorneys general across the country; ultimate resolution of that matter remains tied up in bankruptcy proceedings. Administrative charges filed by DFS remain pending against at least two other opioid manufacturers, according to the DFS website.

What's in the Pipeline?

Superintendent Harris has not yet spoken in depth about her vision for DFS enforcement priorities, but she has dropped some clues in recent comments. During her confirmation hearing in January 2022, Harris stated she would work to achieve a "robust, fair and sustainable financial system." And in testimony in February 2022 focused on health insurance, she highlighted the importance of an enforcement action involving mental health parity, stating that "[w]hen insurers are not compliant, DFS will bring enforcement actions as I did just a couple of months ago, where we were able to assess a penalty, require remediation, and put money back in New Yorkers' pockets."

More recently, in an interview with the Brookings Institution, Harris noted that she intended to "reorient" the agency's enforcement work to focus on "kitchen table issues," and provided as an example a recent enforcement action where an insurer allegedly had not properly compensated beneficiaries of life insurance policies. She reemphasized that enforcement should be shaped by its impact on "every day New Yorkers' lives," and in another interview indicated that DFS would target "predatory behavior."

And in several other published interviews, Harris indicated she would strive to modernize the licensing and regulatory process for cryptocurrency entities—including potentially regulating decentralized finance lending and asset management—while maintaining rigorous compliance requirements for these businesses. She also stated that agency personnel were focusing on updating the agency's cybersecurity regulation, but without any indication on how this might impact enforcement.

Harris also noted DFS will be issuing guidance on how its banking licensees should manage climate change risks. This would be similar to the agency's 2021 guidance that counseled insurance companies to evaluate climate risk in operation of their business. Compliance with existing and future guidance undoubtedly will be the subject of routine DFS examinations, and could also result in supervisory activity that concludes with an enforcement action. The Superintendent also indicated that a lack of diversity in the makeup of senior management and the Board of an entity is potentially a "safety and soundness issue."

Finally, Harris indicated that BSA/AML and OFAC enforcement "continues to be incredibly important" for DFS.

In sum, while DFS continues to actively engage in prudential supervision of its licensees, the new Superintendent's "kitchen table" approach to enforcement suggests DFS regulated entities with consumer facing businesses may be the biggest target for enforcement in the near term.