



GIBSON DUNN

Recent Developments at the
New York State Department
of Financial Services

Presentation by Mylan Denerstein,
Akiva Shapiro, and Seth Rokosky

Department Overview

- The New York State Department of Financial Services (“DFS”) is the state’s primary regulator of financial institutions and insurance companies with jurisdiction over approximately 1,400 financial institutions and 1,800 insurance companies.
- This year, the agency appears ready to expand its regulatory footprint into new areas, while continuing to focus on emerging issues of significance such as consumer protection and data privacy.



DFS Regulated Entities

- When DFS was established in **2011**, it combined the functions and authority of the **NYS Banking Department** and the **NYS Insurance Department**. Therefore, DFS regulated entities are those that are operating under or required to operate under a license, registration, charter, certificate, permit, accreditation or similar authorization under the **Banking Law, Insurance Law, or Financial Services Law**.
- You can check see which institutions are covered by running a search on DFS's "**Who We Supervise**" portal, available at: <https://myportal.dfs.ny.gov/web/guest-applications/who-we-supervise>

DFS Regulated Entities

- Banks and trust companies;
- Budget planners;
- Charitable foundations;
- Check cashers;
- Consumer credit reporting agencies;
- Credit unions;
- Domestic representative offices;
- Foreign agencies, branches, or representative offices of a Foreign Banking Organization licensed by the Superintendent to conduct banking business in New York;
- Health insurers;
- Holding companies;
- Insurance companies, including life, property, and casualty insurance;
- Investment companies;
- Licensed lenders;
- Money transmitters;
- Mortgage bankers, brokers, loan originators, and loan servicers;
- NYS regulated corporations;
- Safe deposit companies; and
- Service contract providers.

Department Functions

- DFS has several different functions.
 - Licensing
 - Policy
 - Regulation
 - Enforcement
- DFS regularly conducts examinations of banks, insurance companies, bitcoin licenses, money transmitters, and more.
- Examinations can lead to agency action.



Themes and Trends

1. New leadership.
2. Very active agency footprint.
3. Issuance of reports, finding no wrongdoing but urging action, often legislative.
4. Enforcement actions that can result in large civil penalties.
5. Emerging areas of significance such as equity and climate change.
6. Continued use of monitors.
7. Continuation of robust examinations.

Roadmap

1. New Acting Superintendent
2. COVID-19 Developments
3. Insurance
4. Cybersecurity
5. Consumer Protection and Fair Lending
6. Fiscal Empowerment, Inclusion, and Equity
7. Fintech and Cryptocurrency
8. Climate Change
9. Conclusions

1. New Acting Superintendent

New Acting Superintendent: Adrienne Harris

- On August 31, 2021, Governor Hochul nominated **Adrienne Harris** as Superintendent of DFS.
- After graduating from **Georgetown University**, Ms. Harris received a JD from **Columbia Law School** and an MBA from **New York University**.
- Early in her career, Ms. Harris served as an advisor to **Cory Booker's** Senate and mayoral campaigns.
- Ms. Harris later served as **Senior Advisor at the Treasury Department**, and then as **Special Assistant for Economic Policy to President Obama**.
- In 2017, she served as **General Counsel and Chief Business Officer at States Title, Inc. (DOMA)**, which provides title insurance and settlement services.

New Acting Superintendent: Adrienne Harris

- **Governor Hochul**: “New Yorkers can rest assured that this administration isn’t simply focused on just protecting consumers, but on **advancing an equitable economic recovery that seeks to lift up all citizens, not just the privileged few . . .** From her time working with President Obama to help the nation forge a path forward in the aftermath of 2007’s Great Recession to her vast experience in the private sector helping **ensure companies of all sizes act as good corporate citizens**, there is no one better suited to help lead this state’s economy forward.”
- **Congresswoman Carolyn Maloney**: “Adrienne Harris has incredible experience with the Obama Administration, particularly around **protecting consumers.**”
- Broad experience on issues like **consumer protection, cybersecurity, and fintech.**
- Some state senators have argued against the nomination of Ms. Harris due to alleged **“notable business ties.”**
- DFS retains much of its leadership.

2.

COVID-19 Developments

COVID-19 and Health Insurance

- After an extremely active response early the pandemic, DFS has continued to take a number of recent steps relating to the **health insurance industry**:
 - In August 2020, DFS **responded to consumer complaints** by issuing guidance directing health and dental insurers to ensure that providers had not improperly retained **fees for personal protective equipment** like masks, gowns, and gloves.
 - In April 2021, DFS extended the emergency regulation from December 2020 requiring health insurers to **waive co-pays for the COVID-19 vaccine**.
 - The waiver will be in place until the expiration of the federally declared public health emergency and the Governor's state disaster emergency declaration.
 - DFS also protected consumers by easing **burdens on the health care system**.
 - Insurers are prohibited from denying as medically unnecessary any emergency department or inpatient hospital service certified as provided to treat COVID-19.

COVID-19 and Mortgage Lenders

- In September 2020, DFS issued instructed mortgage lenders and servicers **not to collect fees** collected by municipalities for **registering mortgages in default**.
- The guidance explained that applicable regulations permit mortgagees to collect only certain specified fees, but the list does not include registration fees.
- **DFS noted** that such fees are not only impermissible by law, but “particularly **troubling for consumers** who are already grappling with the **financial hardship arising from the pandemic**.”

COVID-19 and Prescription Drug Investigation

- In January 2021, DFS's newly formed Office of Pharmacy Benefits initiated **investigations into price jumps for six drugs during the pandemic.**
- The drugs were **part of a treatment regime for the virus** or part of a clinical trial.
- Public statements imply a view that the price increases are exploitative and profit-driven:
 - Former DFS Superintendant Lacewell: "When drug manufacturers exploit a global pandemic for their own benefit, it cannot go unanswered. **DFS will use every power at its disposal to shine a light on the world of drug prices.** Today, we have taken our first steps in addressing the problem of excessive drug prices that has hit consumers' pocketbooks directly and through insurance premiums."
 - Former State Health Commissioner Zucker: "It requires extreme greed and cynicism to see a global pandemic costing millions of lives as an opportunity for profit . . . I applaud DFS and Superintendent Lacewell for taking these steps to address the problem of excessive drug prices during this international public health crisis."

3. Insurance

Health Insurance: Enrollment & Premium Rates

- In February 2021, DFS extended the **State's open enrollment period** to allow consumers to enroll as late as May 15, 2021 due to the COVID-19 pandemic.
 - The extended enrollment period was consistent with extensions in the federal marketplace as well as other state-based marketplaces.
- In August 2021, DFS announced that 2022 health insurance premium rates would **increase more than in 2021**, which indicates **improved conditions** following the peak of the pandemic.
 - The rate increase in the **individual market** is 3.7%, which is more than **twice the 2021 rate increase** for this market. The rate increase in the **small group market** is 7.6%, **almost double the 2021 percent increase** for this group.

New Requirements For Medical & Mental Health Coverage

- On December 29, 2020, final regulations took effect pertaining to **coverage of mental health and substance use disorders**. The regulations contemplate “disorder parity compliance programs” through which insurers seek to treat mental health and substance use disorders comparably to how they treat medical or surgical care.
 - Insurers must designate an appropriately experienced individual to manage compliance.
 - The regulations prohibit a number of practices that insurers must remedy.
- In March 2021, DFS released new guidance prohibiting insurers from **denying hospital claims for administrative reasons**, with certain exceptions.
 - The guidance establishes additional requirements for what DFS considers to be prompt and **equitable settlement of health care claims** and payments.

Insurance Regulation Enforcement Actions and Defense

DFS has undertaken several significant **enforcement actions**.

- In July 2020, two student health insurers agreed to pay \$1.6 million for **charging rates pursuant to an unapproved methodology**, and more than \$480,000 to students.
- In September 2020, DFS brought charges against a company and certain subsidiaries for allegedly contributing to the growing opioid crisis.
- DFS seeks civil penalties and an additional amount in insurance overcharges.

Unauthorized Activity

DFS has also sought penalties for **unauthorized operation in the insurance industry:**

- In October 2020, DFS brought charges against two companies for **conducting an illegal health insurance business** and operating as “sham insurers.” The companies allegedly sold **overstated insurance coverage** that consumers would receive or **fraudulently diverted consumer premiums** rather than providing reimbursement for legitimate medical expenses.
- For unauthorized insurance actions, the National Rifle Association (“NRA”) agreed to pay a **\$2.5 million penalty** in November 2020. The NRA impermissibly **accepted royalties for offering and/or marketing certain insurance products.**

The “Best Interest” Rule

- In October 2020, DFS entered into a consent order with a life insurance company, which agreed to pay \$6 million for **failure to properly disclose income comparisons and suitability information**. The insurer agreed to take **corrective actions, including revising disclosure statements** and suitability procedures, in order to comply with New York’s best interest rules.
- In March 2021, DFS entered into a consent order with another insurer, which would pay \$5.4 million in restitution and \$5.5 million in penalties for **failing to comply with the state’s best interest rule**.
- In April 2021, the New York State Appellate Division held that Regulation 187 is unconstitutionally vague. The court reasoned that it fails to provide sufficient concrete, practical guidance for insurance producers to know what would comply. The case is currently on appeal to the New York Court of Appeals.

4. Cybersecurity

Cybersecurity

Cybersecurity issues have drawn **increasing attention** in recent years, **especially during COVID**.

- DFS's groundbreaking **cybersecurity regulations** went into full effect in March 2019.
- In July 2020, DFS brought its **first enforcement action** against the second largest U.S. title insurance provider. DFS alleges that a website vulnerability exposed millions of documents containing consumer information.
- DFS has issued numerous **reports** regarding investigations into alleged cybersecurity violations.
 - For example, DFS investigated the New York financial services industry's response to the **supply chain attack of an IT company**, where hackers corrupted routine software updates that were downloaded onto thousands of organizations' information systems.
 - DFS summarized the attack, the response by DFS-regulated companies, and key measures to prevent or mitigate against future supply chain attacks.

Cybersecurity (Cont'd)

- From March to May 2021, DFS announced **three major settlements**:
 - **\$1.5 million settlement with** a mortgage broker for an unreported cyber breach in 2019.
 - **\$3 million settlement with** an insurance company for four breaches between 2018 and 2020.
 - **\$1.8 million settlement with** life insurance companies for two phishing attacks in 2018 and 2019.
- In July 2021, Robinhood announced a settlement with DFS regarding alleged violations.

Cybersecurity (Cont'd)

- In November 2020, DFS partnered with the Global Cyber Alliance to develop a **free cybersecurity toolkit for small businesses**, which may not be covered by the regulations but are targeted in 40% of cyberattacks. The toolkit is intended to cover a wide array of areas like identifying hardware and software and protecting email systems.
- In February and March 2021, DFS also issued **two cybersecurity alerts** to all of its regulated entities:
 - DFS warned about a widespread **campaign to steal consumers' nonpublic information** ("NPI") from public-facing websites that transmit or display redacted NPI.
 - DFS warned about **vulnerabilities discovered in Microsoft Exchange** servers from 2013 and later.
- In June 2021, DFS issued **new guidance on ransomware attacks**, responding to the reported rate of ransomware attacks increasing 300% in 2020. In its guidance, DFS identified cybersecurity controls that significantly reduce the risk of an attack.

5. Consumer Protection and Fair Lending

Consumer Protection and Fair Lending

DFS has aimed to improve **consumer protection** and **fair lending practices**.

- In March 2021, DFS **announced “Mental Health Matters,”** a series of initiatives to ensure that New York consumers who need mental health and substance use disorder services are not discriminated against when seeking coverage under their health insurance policies.
- In June and July 2021, DFS announced **two settlements**:
 - Two trust companies paid **\$275,000 and \$350,000 penalties** for violating New York’s Fair Lending Law. DFS found that they caused members of protected classes to pay higher interest rates for automobile loans, without regard to creditworthiness.
 - An insurance company paid a **\$500,000 penalty** after DFS’s investigation uncovered failure to timely comply with New York Insurance Regulation 150’s prohibition on insurers using an individual’s occupational status and/or educational level in setting rates.
- In August 2021, **DFS issued guidance to regulated mortgage lenders to develop and implement compliance programs** to comply with New York’s Fair Lending Law, which prohibits discrimination in credit on the basis of sexual orientation.
- In September 2021, DFS announced new consumer protections in its **public adjusters regulation**, such as fee disclosures and permitting insureds to choose contractors.

6.

Financial Empowerment, Inclusion, and Equity

Financial Empowerment, Inclusion, and Equity

- In March 2021, **DFS approved a new Banking Development District (BDD)** covering the neighborhoods of East Harlem, Harlem, Randall's Island Park, and Ward Island Park, in the Borough of Manhattan, continuing New York State's efforts to expand access to affordable financial services.
- In April 2021, **DFS announced a Statewide Office of Financial Inclusion and Empowerment**, which will:
 - Maintain a centralized list of financial services counseling providers across housing, student loan, debt and general financial literacy throughout the State.
 - Coordinate services aimed at expanding access to credit and opportunities for building wealth.
 - Incubate new programs to expand access to safe and affordable banking services, credit and financial education, and coordinate public-private partnerships.
 - Foster high-quality, low-cost financial products statewide.
- In July 2021, DFS started a **new action to promote diversity, equity and inclusion** in the banking and non-depository financial industries. In an industry letter, DFS outlined an expectation that financial organizations make diversity of boards and senior leadership a business priority and a key part of their corporate governance, including cultivating a diverse pipeline of future leaders.

Financial Empowerment, Inclusion, and Equity

Over the past year, DFS has also aimed to improve **financial empowerment, inclusion, and equity**:

- In February 2021, **DFS issued a new report on redlining in Buffalo**. DFS's report found a **lack of lending by mortgage lenders**, particularly non-depository lenders to minority homebuyers, especially in neighborhoods with majority-minority populations.
 - The report recommended a referral to the New York Department of State to investigate certain real estate agents as well as independent state and federal legislative action.
- DFS also announced a **settlement with a nonbank mortgage lender**, after it found weaknesses in fair lending and compliance programs that contributed to poor performance in lending to people of color and in majority-minority neighborhoods.
 - The lender agreed to increase marketing to people of color, develop a special financing program, provide annual fair lending training, and conduct an annual fair lending audit.

7. Fintech and Virtual Currency

Fintech and Virtual Currency

Over the past year, DFS made significant efforts to **encourage “fintech” innovation** in New York.

- In October 2020, DFS announced that **PayPal**, partnering with Paxos, would be the **first company to receive an official, conditional BitLicense**, which is given to companies that partner with an entity already authorized to engage in virtual currency business activity that is willing to provide support until the licensee could obtain full DFS approval.
- DFS has continued to approve **virtual currencies and trust charters** under its BitLicense regime.
 - In December 2020, DFS granted a trust charter to **GMO-Z.com Trust Company Inc.**, which will issue, administer, and redeem novel Yen- and Dollar-pegged stablecoins.
 - In March 2021, DFS granted a trust charter to **BitGo New York Trust Company LLC** to operate as a limited liability trust company.
 - In March 2021, DFS approved the application of **Bakkt Marketplace, LLC** for virtual currency and money transmitter licenses
 - In May 2021, DFS granted a trust charter to **Standard Custody & Trust Company, LLC** to operate as a limited liability trust company.

Fintech and Virtual Currency (Cont'd)

- DFS has been **focusing in recent years on encouraging fintech innovation.**
- In June 2020, DFS launched **DFS Fastforward** to support innovators “in the COVID-19 era.”
- In June 2020, DFS signed a **memorandum of understanding** with French authorities to boost international fintech cooperation.
- In March 2021, DFS concluded its first ever **Techsprint**, a two-week exercise that attracted participation from nearly 100 professionals in cryptocurrency and financial regulation.

Fintech and Virtual Currency (Cont'd)

- In June 2021, **the Second Circuit dismissed a lawsuit by DFS, challenging the authority of the federal Office of the Comptroller of the Currency (“OCC”) to grant special purpose national bank (“SPNB”) charters.** Those charters have attracted the attention of fintech companies.
- The decision reversed a holding that placed greater power in DFS’s hands in finding that OCC lacked authority because non-depository institutions are not in the “business of banking.”
- The Second Circuit’s decision, which was based on threshold standing and ripeness grounds, maintains ambiguity in the federal-state balance with respect to regulation of SPNBs and threatens to narrow DFS’s regulatory and supervisory reach over cutting-edge financial products and services, which the agency has sought to expand.

8. Climate Change

Guidance for Financial Risks Due to Climate Change

DFS has been active in taking steps to address climate change.

- In September 2020, DFS issued a circular outlining the **increasing cost of climate change** and advising insurers to begin integrating such costs into their business approaches.
- In October 2020, DFS issued similar guidance to New York-regulated financial institutions, advising them to conduct an **“enterprise-wide assessment”** to evaluate the impact of climate change.
- DFS has become a supporter or partner in various **climate change initiatives and organizations.**

Guidance for Financial Risks Due to Climate Change

DFS has taken other steps to elicit action from regulated entities with respect to climate change.

- In February 2021, DFS issued an industry letter **encouraging banks to “support the climate resiliency” of low- and moderate-income and underserved communities**. Banks subject to the New York Community Reinvestment Act could receive a credit for certain financing activities.
- In March 2021, DFS announced its first proposed **climate-related guidance**. The proposed guidance advises insurers to **begin considering the financial risks** from climate change into their governance frameworks, risk management processes, and business strategies.
- In June 2021, DFS submitted a **public comment to the SEC** recommending that it adopt federal climate-related financial disclosure requirements that would take a **proportionate approach** to institutions’ climate risk exposure and the complexity of their business.

Reports Concerning Climated-Related Risks

DFS has **joined efforts with think tanks and insurers** to address financial risks from climate change:

- In June 2021, as part of a collaboration with 2° Investing Initiative (2DII), DFS released a climate-risk report **analyzing insurers' financial risks** arising from transition to a **low-carbon economy**.
 - Former FDS Superintendant Lacewell noted that a low-carbon global economy “**will have a material impact** on insurers investments.”
 - **Life insurers generally have greater exposure** to carbon intensive sectors than do P&C and health insurers, which allows them to take advantage of opportunities that arise from the transition.
- In July 2021, DFS issued a report that **analyzed insurers' management of climate-related** financial risks based on their **2020 self-reporting** in the National Association of Insurance Commissioners (NAIC) Climate Risk Disclosure Survey.
 - Insurers' responses showed that New York insurers had a **wide range of sophistication** in their understanding, assessment, and management of climate risks.

Conclusions

➤ **Mylan Denersten** – MDenerstein@gibsondunn.com

- Ms. Denerstein is a litigation partner and Co-Chair of Gibson Dunn’s Public Policy Practice Group. She leads complex litigation and internal investigations, typically involving state, municipal, and federal government agencies.
- Ms. Denerstein previously served as Counsel to New York State; in a diverse array of legal positions in New York State and City agencies; and as a federal prosecutor and Deputy Chief in the U.S. Attorney’s Office for the SDNY.



➤ **Akiva Shapiro** – AShapiro@gibsondunn.com

- Mr. Shapiro is a litigation partner whose practice focuses on a broad range of high-stakes constitutional, commercial, and appellate litigation matters.
- Mr. Shapiro has successfully represented parties in numerous industries in suits challenging government action and in enforcement proceedings, litigating First Amendment, Due Process, Article 78, and statutory issues in federal and state court.



➤ **Seth Rokosky** – SRokosky@gibsondunn.com

- Mr. Rokosky is a senior associate in Gibson Dunn’s Litigation Department whose practice focuses in the Appellate and Constitutional Law Group.
- He recently rejoined Gibson Dunn after serving in the New York Attorney General’s Office, Bureau of Appeals and Opinions, where he represented the State and its agencies as principal attorney on 43 appellate matters.



Conclusions

➤ **Bina Nayee**

- Ms. Nayee is an associate who focuses on constitutional and complex commercial litigation, as well as internal investigations involving state and federal regulators.
- Ms. Nayee graduated from Fordham University Law School.

➤ **Amanda LeSavage**

- Ms. LeSavage is a litigation associate and a member of Gibson Dunn's Appellate and Constitutional Law Group; Litigation; Media, Entertainment & Technology; and White Collar Defense and Investigations Practice Groups.
- Ms. LeSavage graduated from the University of Pennsylvania Law School with a joint degree, consisting of a J.D. and a Master of Science in Social Policy.

