

NY Banking Brief: All The Notable Legal Updates In Q4

By **Franca Harris Gutierrez, Julie Williams and Andrew Lindsay** (January 16, 2024, 5:11 PM EST)

In this ***Expert Analysis series***, attorneys provide quarterly recaps discussing the biggest developments in New York banking regulation and policymaking.

New York's banking and financial sector saw notable regulatory and legislative changes in the final quarter of 2023.

Backed by Gov. Kathy Hochul and the Legislature, New York regulators advanced key reforms in banking and payments law, focusing on risk management efforts and virtual currency oversight.

We discuss these developments in more detail below.

NYDFS Issues Final Guidance on Climate-Related Risk Management

On Dec. 21, 2023, the New York State Department of Financial Services issued final guidance concerning the material financial and operational risks associated with climate change for "New York State-regulated banking organizations, New York State-licensed branches and agencies of foreign banking organizations, and New York State-regulated mortgage bankers and mortgage servicers."^[1]

The final guidance highlights several components of effective climate risk management programs, including:

- "[C]orporate governance" involving boards or governing bodies' ongoing "care for [an] organization's operational resilience and safety and soundness";^[2]
- "[I]nternal control frameworks," identifying "clear lines of authority and responsibility" and integrating monitoring and controls "across the three lines of defense";^[3]
- "[R]isk management processes," incorporating monitoring and controls within "existing risk frameworks and categories, in line with their board approved risk appetites";^[4]



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- "[D]ata aggregation and reporting," using data commensurate with the sophistication of regulated organizations' "operations and levels of exposure" for informed decision making;[5] and
- "[S]cenario analysis," evaluating "a range of climate scenarios based on assumptions regarding the impact of climate-related financial and operational risks over different time horizons."[6]

The NYDFS' final guidance recognizes the need for a "proportionate approach" to managing material climate-related risks based on existing resources and risk exposure.[7]

It suggests that a regulated entity base its assessment of materiality "on the nature, scale, and complexity of its business" and permits NYDFS-regulated foreign banking organizations to "account [for their] home-country regulators' requirements, as appropriate."[8]

The final guidance also provides regulated organizations the option to "periodically reassess their materiality assumptions, especially in the event of a significant change in circumstances."[9]

Meanwhile, the final guidance emphasizes the importance of not causing "undue harm or disadvantage to at-risk communities" in the face of climate risk mitigation practices.[10] However, it falls short in providing clear directives for situations in which such practices might inadvertently affect these communities.[11]

Regulated organizations should anticipate opportunities to engage actively with regulators by providing input on their governance and risk management practices in a request for information later this year.[12]

They should also expect increased NYDFS coordination with federal banking regulators as both work to integrate the final guidance into supervisory examinations, likely resulting in a slow implementation timeline to allow for adjustments to the new rule.[13]

NYDFS Finalizes Cybersecurity Guidance for Banks and Other Regulated Entities

On Nov. 1, 2023, the NYDFS adopted amendments to Title 23 of the New York Codes, Rules and Regulations, Part 500,[14] requiring covered entities to implement heightened cybersecurity protocols in accordance with revisions to the regulation.[15]

Changes include requiring stricter reporting from senior officers and boards;[16] improved data safeguards, such as more stringent requirements related to encryption policies and encryption "in transit";[17] and heightened risk-based controls,[18] among other measures, which suggest an uptick in NYDFS cybersecurity enforcement in the coming year.[19]

Generally, covered entities have until April 29 — 180 days following adoption — to meet the new standards.[20] However, the compliance mandates of the final amendment will be implemented in phases.

Immediate changes, such as updates to Section 500.17(a) that require cybersecurity event notifications to the NYDFS and Section 500.17(b), which relates to compliance certifications, went into effect on Dec. 1, 2023. Other provisions have a time frame of up to two years for complete implementation.[21]

The final amendment introduces "Class A" status for larger entities and affiliates meeting the following conditions: (1) \$20 million in annual revenue, including New York affiliate operations, and (2) either over 2,000 global employees or \$1 billion in global revenue annually, considering each of the past two years.[22]

For calculating employee count and annual revenue, "affiliates" are defined as "only those that share information systems, cybersecurity resources or all or any part of a cybersecurity program with the covered entity." [23]

The final amendment also imposes obligations on Class A entities that may require significant enhancements to larger firms' existing cybersecurity programs. The amendment requires Class A companies to, among other things:

- Execute "independent audits based on its risk assessment," to be reviewed and updated at least annually; [24]
- Implement a "privileged access management solution" and "an automated method of blocking commonly used passwords;" [25] and
- Deploy tools including multifactor authentication, [26] "endpoint detection to monitor suspicious activity," [27] and "solutions that centralize logging and security event alerting." [28]

Further, the final amendment heightens the responsibility of senior leadership in overseeing and managing cybersecurity risk.

To ensure compliance, covered entities must establish their own criteria for what counts as "material compliance," requiring covered entities to base their mitigation efforts on accurate data and documentation that demonstrate compliance with Part 500 requirements or to describe the "nature and extent" of their noncompliance. [29]

The final regulation now clearly defines a chief information security officer as "a qualified individual responsible for overseeing and implementing a Covered Entity's cybersecurity program and enforcing its cybersecurity policy." [30]

It also specifies that the "senior governing body" refers to the "board of directors (or an appropriate committee thereof) or equivalent governing body" or, in their absence, senior officers. [31]

Building on that foundation, the chief information security officer must now "timely report" material cybersecurity events and significant cybersecurity program changes to the covered entity's senior governing body or most-senior officials.

This imposes top-level accountability,[32] forcing the C-suite to gain a well-informed understanding of its firm's cybersecurity posture before annually providing the NYDFS a notice of compliance signed by the covered entity's "highest-ranking executive and its [chief information security officer]" or equivalent senior officer.[33]

Publicly listed financial services firms face the added challenge of aligning these NYDFS requirements with the U.S. Securities and Exchange Commission's cybersecurity disclosure rule, which also tasks boards with a more rigorous oversight role in managing material cybersecurity risks.[34]

While both rules require incident reporting and materiality considerations, specific disclosure obligations may vary between a covered entity and its affiliate under each rule.[35] Covered entities under the final amendment could also be one of several subsidiaries of a parent company subject to the SEC's disclosure rule, highlighting the importance of senior governing bodies enhancing their understanding of their firms' cybersecurity issues and risk-mitigating strategies.

The next implementation deadline is April 15, which requires all covered entities to certify material compliance or acknowledge noncompliance.[36]

In 2024, covered entities should prepare for increased NYDFS cybersecurity enforcement and ensure timely compliance with the new phased regulatory requirements.

NYDFS Issues Final Guidance for Virtual Currency Listing

On Nov. 15, 2023, the NYDFS announced final revisions to the regulatory framework for virtual currency listing in New York.[37]

The industry letter, effective immediately, supersedes all previous guidance and requires so-called BitLicensees and limited-purpose trust companies — collectively known as virtual currency, or VC, entities — to adhere to updated coin-listing and delisting policies before offering virtual currency services in New York or to New Yorkers.[38]

Under this policy, a coin can only be approved by a VC entity if "the coin's intended use is consistent with this guidance," adheres to the "standards embodied in 23 NYCRR Part 200," and upholds the "safety and soundness of the VC Entity."

VC entities with NYDFS-approved coin-listing policies must secure NYDFS re-endorsement after aligning existing policies with the industry letter. Policy compliance is continuously monitored by the NYDFS, while noncompliance risks the NYDFS "taking action to revoke a coin-listing policy."

Additionally, VC entities without NYDFS-approved coin-delisting protocols are restricted to NYDFS-greenlisted coins, e.g., bitcoin and Ether.[39]

The industry letter imposes stricter conditions for listing coins and allows the NYDFS to make risk assessments based on a broader set of considerations. VC entities must provide the NYDFS "a particular business use case for listing the coin."

Additionally, the NYDFS has empowered itself to "take into consideration such factors as [it] deems appropriate, including whether effective compensating controls are in place to, for example, address safety and soundness concerns and ensure consumer protection," per the

letter.

The industry letter increases scrutiny of coin-listing self-certification, focusing on whether a coin's design itself was intended to hide user identities rather than how its features might be used for that purpose, and extends this oversight from "customers" and "counterparties," as previously guided, to "individuals" and "entities."^[40]

The industry letter stipulates that VC entities can only self-certify a stablecoin if it features on the Greenlist, limiting the flexibility offered in earlier guidance, which permitted "separate, prior written [NYDFS] approval for a stablecoin not included on the Greenlist."^[41]

It also mandates that VC entities exert "all reasonable efforts" to verify whether a coin exhibits any other features that, according to the NYDFS, disqualify it from self-certification.^[42]

Otherwise, VC entities must notify the NYDFS in writing about delisting decisions with at least 10 days' advance notice, unless "exigent circumstances" require "immediate action."

The industry letter also stresses the importance of identifying and disclosing "conflicts of interest in connection with the review and decision-making process."

It requires VC entities to monitor key personnel's personal digital asset holdings and implement mitigating policies and procedures to avoid undue influence and disclose potential conflicts.^[43]

VC entities should anticipate a stricter regulatory environment as they adapt to these guidelines and prepare to submit coin-delisting policy proposals to the NYDFS for approval by Jan. 31.

Other Notable Developments

Hochul signed the LLC Transparency Act^[44] into law on Dec. 22, 2023,^[45] establishing a beneficial owner database for limited liability companies to combat illicit activities like wage theft and money laundering.^[46] The law will take effect in approximately one year.^[47]

The LTA, modeled after the federal Corporate Transparency Act,^[48] requires all LLCs operating in New York, including those based out-of-state, to report their beneficial owners to the New York State Department of State and ensure that these records are kept up-to-date.

However, the major distinction between the LTA and the CTA is that the former mandates the New York State Department to create a public online database listing the legal names and details of LLC beneficial owners, whereas the CTA's collected data on them remains confidential,^[49] with limited government and financial institution access exceptions.^[50] However, when the LTA takes effect, the LLC database will only be accessible to law enforcement and state regulators following Hochul's inclusion of a chapter amendment that restricts public access, pending the Legislature's approval.^[51]

Notably, the LTA incorporates the CTA's definition of "beneficial owner," which applies to anyone who has significant control over a company or holds a minimum of a 25% percent stake in its ownership.^[52]

Otherwise, the LTA's effort to reflect the CTA is complicated by various administrative challenges for LLCs.

LLCs exempt from the CTA now have to explicitly validate their exemption status with the New York State Department, a step that adds complexity given the absence of the same requirement in the CTA.[53]

Moreover, LLCs might not be able to report beneficial owners' Financial Crimes Enforcement Network IDs as a stand-in for other required information, which could result in unnecessary collection of sensitive personal information in submissions.[54]

Compounding these issues is the LTA's requirement for business addresses, in contrast to the CTA's residential address requirements,[55] adding to the litany of issues that may complicate dual filers' compliance efforts.[56]

Correction: A previous version of this article contained incorrect dates regarding the LLC Transparency Act. The error has been corrected.

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[1] Guidance for New York State Regulated Banking and Mortgage Organizations Relating to Management of Material Financial and Operational Risks from Climate Change at 2 (Dec. 21, 2023), https://www.dfs.ny.gov/system/files/documents/2023/12/dfs_climate_change_guidance_banking_mortgage_orgs_202312.pdf.

[2] *Id.* at 9–10.

[3] *Id.* at 13.

[4] *Id.*

[5] *Id.* at 16–17.

[6] *Id.* at 17.

[7] See *id.* at 10 (Regulated Organizations do not all have the same level of resources to manage these risks and may be at different points in the process of incorporating these risks into their strategy, governance, and risk management. Regulated Organizations should take a proportionate approach to the management of the climate-related financial risks they

face, appropriate to each organization's exposure to these risks.").

[8] Id. at 3.

[9] Id.

[10] Id.

[11] Rather, the Final Guidance states that "[in] applying this Guidance, Regulated Organizations should continue to develop and effect reasonable risk-based business strategies and should seek to avoid unnecessary market disruptions. Further, they must in all instances adhere to applicable consumer protection laws, regulations, and guidance, including fair lending considerations." Id.

[12] Id. at 18 ("This request for information ("RFI") will solicit information relating to organizations' governance structures, business strategy and risk management processes, operational resiliency measures, and the metrics or targets Regulated Organizations are using or plan to use. ... The Department expects to issue this RFI during 2024.").

[13] "As part of setting one or more implementation timelines," the DFS will coordinate with relevant federal banking regulators to "determine when and how to incorporate an assessment of a [Regulated Organization's] implementation of this Guidance into supervisory examinations." Id.

[14] DFS, Second Amendment to 23 NYCRR 500: Cybersecurity Requirements for Financial Services Companies, https://www.dfs.ny.gov/system/files/documents/2023/10/rf_fs_2amend23NYCRR500_text_20231101.pdf; Notice of Adoption to State Register, Second Amendment to 23 NYCRR 500, https://www.dfs.ny.gov/system/files/documents/2023/10/rf_fs_2amend23NYCRR500_notice_20231101.pdf.

[15] Covered Entity is defined under Part 500 as "any person operating under a license, registration, charter, certificate, permit, accreditation or similar authorization under the Banking Law, the Insurance Law or the Financial Services Law, regardless of whether the Covered Entity is also regulated by other government agencies." 23 NYCRR § 500.1(e).

[16] 23 NYCRR § 500.17(b)(1).

[17] See, e.g., 23 NYCRR §§ 500.14(b), 500.15.

[18] 23 NYCRR § 500.14(a).

[19] The Final Amendment broadens enforcement authorities, specifying that violations include "the failure to secure or prevent unauthorized access to an individual's or an entity's nonpublic information due to noncompliance" and the "the material failure to comply for any 24-hour period with any section of this Part." 23 NYCRR § 500.20(b).

[20] DFS, Cybersecurity Resource Center: Key Compliance Dates, [https://www.dfs.ny.gov/industry_guidance/cybersecurity#:~:text=.](https://www.dfs.ny.gov/industry_guidance/cybersecurity#:~:text=)

[21] Id.

[22] 23 NYCRR § 500.1(d).

[23] Id.

[24] 23 NYCRR § 500.2(c).

[25] 23 NYCRR § 500.7(c).

[26] 23 NYCRR § 500.12(a).

[27] 23 NYCRR § 500.14(b).

[28] Id.

[29] 23 NYCRR § 500.17(b).

[30] 23 NYCRR § 500.1(c).

[31] 23 NYCRR § 500.1(q).

[32] Section 500.4(d) stipulates that a "senior governing body" is required to effectively oversee cybersecurity initiatives at Covered Entities. This body should "hav[e] sufficient knowledge" in cybersecurity to "exercise such oversight" and must ensure that the Covered Entity's "executive management, or its designees ... develop, implement and maintain" the cybersecurity program.

[33] 23 NYCRR § 500.17(b). The revised certification process offers two pathways for Covered Entities: (i) attest to material compliance with Part 500 based on sufficient data and documentation, or (ii) provide written acknowledgment of any noncompliance, detailing specific sections of Part 500 not adhered to and a remediation timeline or completion confirmation.

[34] The U.S. Securities and Exchange Commission (SEC) adopted final rules in September 2023 aiming to improve and standardize cybersecurity disclosures for public companies under the Securities Exchange Act of 1934. Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release No. 33-11216 (July 26, 2023) ("Adopting Release").

[35] Under the SEC's Adopting Release, companies must disclose the material components (i.e., nature, scope, timing, and impact on financial condition and operations) of a cybersecurity incident. Adopting Release at 11–12. The SEC also advises companies to considering qualitative factors, such as harm to reputation, customer relationships, competitiveness, and the potential for litigation or regulatory actions, when assessing the material impact of an incident. Adopting Release at 29–30.

[36] 23 NYCRR § 500.17(b).

[37] Adrienne A. Harris, Industry Letter: Guidance Regarding Listing of Virtual Currencies (Nov. 15, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20231115_listing_virtual_currencies (hereinafter "Final Letter").

[38] Id. n. 2.

[39] Except if "a VC Entity has otherwise been approved by DFS to list a coin as a material change to business under 23 NYCRR § 200.10." Further, "the Department may, at any time and in its sole discretion, require VC Entities to delist or otherwise limit New Yorkers' access to coins that are not included on the Greenlist."

[40] The Final Letter adopts a stricter approach to the self-certification process for coin-listings, shifting from earlier considerations of "features that may facilitate the obfuscation or concealment of the identity of a customer or counterparty," to whether the coin was "designed to facilitate the obfuscation or concealment of an individual or entity." See *id.*; Adrienne A. Harris, Industry Letter: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing (hereinafter "Proposed Letter").

[41] See Final Letter, *supra* note 37 ("A VC Entity cannot self-certify any stablecoin that is not included on the Greenlist. This restriction extends to any coin designed to serve as collateral for a stablecoin not included on the Greenlist"); Proposed Letter, *supra* note 39 ("A VC Entity cannot self-certify any stablecoin that is not included on the Greenlist, absent separate prior, written approval of DFS. This restriction extends to any coin designed to serve as collateral for a stablecoin not included on the Greenlist"). Any coin considered collateral for a stablecoin must also be on the Greenlist.

[42] The Final Letter specifies that certain coin features prohibit VC Entities from self-certifying them. These features include stablecoins not on the DFS Greenlist, coins issued by virtual currency exchanges, those associated with protocols with "decentralization concerns," coins not originally issued on their respective protocols, and any coins where less than 35% of the total supply is in circulation.

[43] Final Letter, *supra* note 37 ("The VC Entity must also maintain a record of coins held in a personal capacity by its Governing Authority members and other internal stakeholders that might influence a delisting decision in order to account for any potential conflicts of interest that may arise in a delisting process. The VC Entity should use this record to implement information barriers around conflicted decision-makers and others to avoid the risk of market manipulation or insider trading."); *id.* ("A VC Entity must have effective policies and procedures in place to mitigate any conflicts of interest from impacting the decisions, recommendations, and assessments made for each coin under review. In addition, a VC Entity must ensure that all potential conflicts of interest relating to coin-listing decisions are clearly disclosed to the public.").

[44] See LLC Transparency Act, Assemb. A03484, 2023 Sess. (N.Y. 2023-2024), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03484&term=&Actions=Y&Text=Y; LLC Transparency Act, Sen. S00995, 2023 Sess. (N.Y. 2023-2024), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S00995&term=&Text=Y (June 20, 2023) (hereinafter, the "LTA").

[45] The LTA targets "[w]age theft, money laundering, tenant mistreatment and other unlawful activity has been masked by the opaque ownership structure of an LLC." Governor Hochul Signs the LLC Transparency Act (Dec. 23, 2023), <https://www.governor.ny.gov/news/governor-hochul-signs-llc-transparency-act#:~:text=The%20new%20LLC%20Transparency%20Act,enforcement%20across%20New%20York%20State>

[46] Id.

[47] LTA § 10 ("This act shall take effect on the three hundred sixty-fifth day after it shall have become a law.").

[48] See Memorandum in Support of Legislation, Assemb. A03484, 2023-2024 Sess. (N.Y. 2023-2024), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03484&term=2023&Mo=Y. ("The bill adopts the same standards promulgated by the Treasury Department pursuant to the Corporate Transparency Act and requires that the same information also be filed with New York's Department of State.").

[49] New York's public database will list LLCs' names and business addresses, while more sensitive owner details like legal names remain confidential, unlike FinCEN's private database under the CTA where disclosures are largely restricted to government and financial institutions, except under specific authorized circumstances. Moreover, unlike the broader CTA, which covers various entities including corporations and trusts, LTA specifically mandates only LLCs to disclose owner details for the public database.

[50] According to the LTA, the Secretary of State is set to create regulations for beneficial owners with privacy concerns to apply for waivers to exclude their names or business addresses from the public database, but these procedures have not been established yet. See LTA § 100-b(2)(a).

[51] A chapter amendment is a bill that the Legislature passes to amend a specific law, in exchange for the Governor's approval of a related bill.

[52] LTA § 1(ii) ("Beneficial owner" shall have the same meaning as defined in 31 U.S.C. § 5336(a)(3), as amended, and any regulations promulgated thereunder."). Under 31 U.S.C. § 5336(a)(3) a "beneficial owner" is an individual who, at the time of reporting, holds directly or indirectly: (1) at least 25% ownership stake in a reporting company; or (2) has substantial control or influence over a reporting company's operations.

[53] LTA § 3(7) ("[I]n the case of an exempt company, a statement signed by a member or manager indicating the provision or provisions of 31 U.S.C. § 5336(a)(11)(B), excluding such company from the definition of a reporting company to file an initial report, or in the case of a reporting company, the beneficial ownership disclosure information as required pursuant to section two hundred fifteen of this article.").

[54] LTA § 215(b) ("The department of state shall, upon the filing of each beneficial ownership disclosure, assign each beneficial owner of a limited liability company an anonymized unique identifying number, which shall not be based on any personally identifying number including but not limited to a social security or tax identification number assigned to or associated with such beneficial owner."); Welcome to the FinCEN ID Application

for Individuals, FinCEN, <https://fincenid.fincen.gov/landing> ("What does a FinCEN ID do for individuals? An individual beneficial owner or company applicant's FinCEN ID can be reported instead of required information about that individual on the reporting company's Beneficial Ownership Information Report (BOIR) submitted to FinCEN.").

[55] LTA § 215(a)(3); 31 C.F.R §1010.380(b)(1)(ii)(C)(2).

[56] This mismatch may hinder dual filers trying to satisfy the LTA by submitting FinCEN's Beneficial Ownership Information Report to DOS. See LTA § 215(a)(3) ("Provided, however, that where an initial report contains the information required herein, a reporting company may submit a copy of the initial report, submitted to the federal government pursuant to 31 U.S.C. § 5336, to satisfy the requirements of this section.").