Assessment of Public Comments for new Part 201 of 23 NYCRR.

The Department received a number of comments to the proposed Part 201 concerning the regulation of Credit Reporting Agencies ("CRAs"). The commenters included industry members, trade groups, consumer groups, and individual consumers. Having considered each of these comments, the Department has made a number of changes to the final regulation, none of which, individually or collectively, materially alter the purpose, meaning, or effect of the regulation.

Comment: One commenter suggested that CRAs should be subject to disciplinary action only in the event that it displays a pattern or practice of abuses or willfully violates an order. The commenter went on to suggest that such disciplinary action should only be based on a pattern or practice of violation of the federal or state Fair Credit Reporting Act

Response: A primary goal of this regulation is the protection of New York consumers. As the private personal and financial data of these consumers is collected and distributed by CRAs, without the knowledge or consent of the consumer, it is vital that CRAs act in an entirely safe and sound manner. The Superintendent is entrusted with reviewing the circumstances of violations by the various types of financial actors and institutions the Department regulates to determine the appropriateness of the various remedies for the specific violations. In general, the Department does not impose the most serious penalty for individual or isolated violations. There are however occasions where the isolated violation is of such a magnitude that it requires a stricter penalty to dissuade future noncompliance. Here, as with other financial institutions regulated by the Department, the Superintendent will exercise appropriate discretion in determining the appropriateness of any action based on the individual facts and circumstances attendant. No changes were made to the final regulation in response to these comments.

Comment: One commenter suggested that CRAs should be afforded due process before a CRA in violation of the regulation loses its ability to operate in New York. The commenter went on to suggest the manner and contents of the notice to be afforded.

Response: The regulation as proposed provides due process including in the form of notice and opportunity to be heard prior to the refusal to renew, the suspension or the revocation of a license already issued. To the extent that the commenter believed there were inconsistencies in the proposed regulation with how refusal to renew a registration are treated for hearing purposes, the final regulation clarifies that notice and a hearing precede such a decision by the Superintendent.

The manner and conduct of the notice and hearing required by the regulation will be governed by the State Administrative Procedures Act and regulations promulgated thereunder. As such no changes were made in response to the portion of the comment suggesting the manner and content of notices.

Comment: One commenter suggested that the proposed regulation's use of "applicant" in 201.02 and the use of "registrant" in 201.05 were inconsistent.

Response: The final regulation has incorporated the suggested edit by using the term "registrant" in both sections.

Comment: One commenter suggested that the requirement that a CRA that has had its registration suspended or revoked for violating the regulation, should be afforded a "reasonable" time to stop assembling, evaluating, and maintaining credit reports on New Yorkers. The commenter additionally suggests that only a period measured in years would be reasonable.

Response: Allowing a bad actor CRA, whose registration has been suspended or revoked for violations of Part 201, to continue to operate in New York by continuing to assemble, evaluate, and maintain the highly sensitive personal data related to credit reports, poses too great a risk to New York consumers of financial products. Further, allowing a bad actor CRA to continue operation despite the Department's knowledge of unsafe, unsound, and unlawful practices would be contrary to the powers and responsibilities granted to the Superintendent by the Financial Services Law. The regulation does not impose any greater burden than is necessary to protect New York consumers from bad actor CRAs. To the extent that the commenter suggested

that a CRA needs additional notice, the final regulation expands the notice period for a hearing on suspension or revocation from ten days to fifteen days.

Comment: One commenter suggested that CRAs will not be able to interpret words such as "untrustworthiness," "incompetence" or "financial irresponsibility in the conduct of business" and thus those grounds for suspension or revocation should be eliminated. An additional commenter suggested that these terms should be defined.

Response: These provisions have been deleted in the final regulation.

Comment: One commenter suggested that the final regulation abandon suspensions or revocations based upon findings, by the relevant regulator, that a CRA violated federal law or the laws of another state. The commenter suggested only those activities occurring in New York should be considered.

Response: It is common practice in the regulation of financial services to rely upon a sister state's or a federal authorities' determinations as to violations of the laws that those authorities enforce. This comity principal is fundamental to our federal system.

Comment: One commenter suggests that the final regulation abandon the ability to take disciplinary action based upon the unlawful actions of a member, principal, officer, director, or controlling person of a CRA. The commenter goes on to suggest that at a minimum only the unlawful acts of a controlling person should be considered. Further, one commenter suggested that the final rule remove the requirement that one or more directors be responsible for compliance with Part 201.

Response: Financial institutions act consistent with the direction of their leadership. Where the leadership—including members, principals, officers, directors, and controlling persons—cause a financial institution to act in an unlawful manner, the impact is most often realized upon the consumers of financial products and services. In order to protect these consumers, it is necessary that the Department be empowered to take action based on the actions of those who can direct the CRA. Ensuring that a director is named as responsible for the

compliance with the regulation, ensures that those who direct the CRA at the highest levels are engaged with, and have an appropriate stake in, the CRA's compliance. As such, no changes were made in the final regulation in response to these comments.

Comment: One industry commenter suggested that proposed rule's prohibition on including inaccurate information in a consumer credit report was an "unattainable" standard and that it should be abandoned. An additional industry commenter suggested that moving to a standard of "reasonable procedures" would be more appropriate.

Response: The Department has made changes to the final regulation to clarify that the applicable standard for accuracy of information that applies to CRA registrants is the standard applied under federal law. As this prohibition adopts a preexisting standard, all CRAs should be able to comply without issue.

Comment: One commenter suggested that the final rule should abandon the prohibitions on employing a scheme, device or artifice to defraud or mislead a consumer and on engaging in unfair, deceptive or predatory acts or practice toward any consumer, as overly broad.

Response: The final regulation clarifies that those prohibitions are meant to capture those activities that are already prohibited under state or federal law. As this prohibition adopts preexisting standards all CRAs should be able to comply without issue.

Comment: One commenter suggested that the CRAs who have their registrations denied, suspended or revoked for violations of the regulation should be permitted to continue to operate in New York and to sell consumer credit reports in New York. The commenter suggests that such a CRA whose registration has been denied, suspended or revoked should be permitted to sell consumer credit reports to any entities not regulated by DFS.

Response: A primary goal of this regulation is to protect New York consumers, who have no choice in what highly sensitive personal and financial information a CRA collects and distributes about them. Allowing a

bad actor CRA whose registration has been denied, suspended, or revoked to continue to assemble, evaluate, and maintain information about those very consumers is entirely inapposite to that goal. As the suggested change would unnecessarily endanger New York consumers, no changes were made in response to this comment.

Comment: A number of commenters suggested that the scope of CRAs covered under the regulation should be changed. One commenter suggested limiting the regulation's applicability to CRAs operating on a nationwide basis, another suggested a threshold of collecting and maintaining information on fifty thousand New Yorkers before the regulation would be applicable. One commenter suggested that the revocation and suspension powers not apply to nationwide CRAs. An additional commenter suggested increasing the number of CRAs that would be covered beyond consumer credit reporting agencies.

Response: The final regulation makes clear that the scope of the CRAs covered by the registration requirements of the regulation includes any CRA that assembled, evaluated, or maintained a consumer credit report on one thousand or more New Yorkers over the course of the preceding twelve months. After review, this threshold properly balances the need to protect New York consumers and the regulatory burden on those CRAs that do very little business involving New York consumers. The final regulation also clarifies the definitions of consumer reporting agency and consumer credit reporting agency so as to prevent the inclusion of those who are performing tasks outside of the intended scope of the regulation.

Comment: One commenter suggested that the final regulation define New York consumer to mean a person who, at the time the credit report is requested, has an address in New York as their principal address.

Response: The final regulation clarifies the intended meaning of New York consumer by providing a definition of the term. Similar to the commenter's suggestion, the final regulation defines this term to mean a person who is a resident of New York as reflected in the most recent information in the possession of a CRA.

Comment: One commenter suggested that the initial deadline to register a CRA should be at least 180 days following the effective date of the rule.

Response: The Department has determined that filing of a registration before September 15, 2018 will provide adequate time for CRAs presently operating. The final regulation pushes deadlines to come into compliance with the first aspects of Part 500's cybersecurity requirements until November 2018 and phases in compliance with other aspects of Part 500 through the end of 2019. These revisions provide CRAs ample time to be in compliance with the regulation.

Comment: One commenter suggested that the reporting requirements be narrowed to a specific list of questions and should only be required on an annual basis. Another commenter expressed support for the reporting requirements as drafted, however suggested that the Department make the reports it receives publicly available within one week of its filing.

Response: General reporting requirements are standard in the regulation of financial services. Annual and special reports appear in both the Insurance and Banking Laws in a variety of contexts. Limiting reporting to an annual report with a specified list of questions would prevent the Department from obtaining timely and targeted information based on changing circumstances. Recent cybersecurity breaches being the case in point, the Department needs to be able to collect relevant information from regulated entities to ensure that they are being managed in a safe and sound manner and to safeguard consumers to the maximum extent possible.

Comment: One commenter suggested the creation of a "safe harbor for compliance." The commenter suggests that the annual submission of an audit report prepared by a qualified auditor should be sufficient to show a CRA has adequately high information security standards.

Response: No such safe harbor for compliance has been incorporated into the regulation. While audit reports by a qualified auditor are valuable, the requirements of 23 NYCRR Part 500, the cybersecurity regulation applicable to entities regulated by the Department, establishes the framework for entities to establish an appropriate cybersecurity program based on individual risk assessments.

Comment: One commenter suggested that there was no avenue to appeal the determination by the Superintendent to suspend or revoke the registration of a CRA.

Response: The State Administrative Procedures Act and the Civil Practice Law and Rules provide the avenue to challenge a final determination of the Superintendent under Part 201. The Department sees no reason to subject CRAs to any different procedures than those that apply to the other financial services entities it regulates.

Comment: Some commenters raised objections to the legal authority of the Department to promulgate this regulation. These commenters further asserted that the regulation as proposed would violate federal law and thus would be preempted. One commenter also raised various state and federal constitutional objections to the regulation.

Response: The Department has considered the legal arguments raised in these comments and has found them to be without merit, particularly given the clarifications made in the final regulation. Among other powers and responsibilities that provide a firm basis for this regulation, the Superintendent has clear and unquestionable statutory authority to take actions to protect consumers of financial products and services in this State and that is the primary purpose of the regulation. *See, e.g.*, N.Y. Financial Services Law §§ 102, 201, 202, 301, 408. The regulation adequately protects any Constitutional rights that a CRA has in relation to the matters in the regulation, and is not violative of any provision of the state or federal constitutions. Further, no portion of the regulation is in conflict with, or otherwise preempted, by federal law. To the extent necessary, the Department has made clarifications in the final regulation that make this fact even more clear. The regulation has been promulgated in complete compliance with all statutory requirements and the provisions of the regulation are in accord with all requirements of state law.