Assessment of public comments on the proposed Fourth Amendment to 11 NYCRR 28 (Insurance Regulation 42), Third Amendment to 11 NYCRR 33 (Insurance Regulation 120), and Third Amendment to 11 NYCRR 66 (Insurance Regulation 76).

The New York State Department of Financial Services (“DFS”) received comments from an association of bail agents (agents’ association); an association of bail insurers (insurers’ association); an insurer authorized to write fidelity and surety insurance; a New York City agency (“city agency”); a New York City elected official (“elected official”); a coalition of advocate organizations (“advocate coalition”); a racial justice organization (“advocate organization”); and individual New York consumers (“consumers”).

I. New York City

Comment: A city agency commented that the New York City Administrative Code requirements pertaining to bail agents do not entirely align with the rule and requested that DFS either “carve-out” New York City bail agents from the rule, substitute compliance with the code for compliance with the rule, or amend the rule to match the code.

Response: DFS amended the rule in certain sections to more closely align with the code, such as clarifying that all bail agents doing a bail business at that location or office must display their licenses. However, to the extent there continues to be any duplication, bail agents will need to comply with this rule and the code. To the extent the code conflicts with this rule, this rule preempts the code. DFS will neither “carve-out” New York City bail agents or substitute compliance with the code for compliance with this rule because the New York State Legislature has made DFS the primary regulator of bail agents and insurers and therefore has the knowledge and expertise, and is in the best position, to regulate them state-wide.
II. Introduction

Comment: The agents’ association stated that the provision about organized crime in section 28.0 is inflammatory and has no basis in fact. They oppose the language that states that failure to comply with the requirements of the rule may be considered evidence of misconduct, malfeasance, and untrustworthiness “in the absence of a satisfactory explanation” and state that the standard of review should be “clear and convincing evidence.”

Response: The language with which the agents take issue is the existing language of the rule that has been in effect for years. The organized crime language reflects concerns about the bail bond industry at the time of promulgation of the original regulation in 1964. Nonetheless, DFS deleted the organized crime language in the amended rule and replaced it with language to reflect that DFS’s primary concern today is consumer protection and standards of integrity in the bail business. DFS deleted the “in the absence of a satisfactory explanation” language in response to comments. The deletion of this language does not change the right of licensees to explain their conduct to DFS.

III. Definitions

Comment: The agents’ association requested that the section be renamed “definitions” and that DFS amend the language in the definition of “build-up fund” to remove “to offset the bail agent’s outstanding liabilities to the insurer” because the build-up fund should be clearly separate from the collateral account.

Response: DFS had renamed the section “definitions” in the proposed amendment. The brackets in the proposed amendment indicate a deletion and the underlined text is new language. DFS
deleted the definition of “build-up fund” and all corresponding references thereto in the rule because after further consideration, the build-up fund need not be addressed in this rule.

Comment: The agents’ association requested that DFS strike from the definition of “collateral” any property pledged “as a guarantee for the” issuance of a bail bond and replace it with “to secure bond obligations entered via an indemnity agreement in conjunction with the.” They did not provide an explanation for this request.

Response: DFS believes the current proposed language is correct and since the agent’s association did explain why the change is necessary, DFS did not make the requested change.

Comment: The agents’ association commented that the definition of “compensation” reflects an ongoing dispute between the “pattern and practice of the bail bond industry” and DFS’s position on the collection of premiums, payment plans and rebating. The agents’ association asserts that other forms of insurance permit payment plans, most bail agents allow payment plans, and that most bail agents did not charge interest. The agents’ association states that courts have ruled that such payment plans are not rebating and that bail agents need a definition that permits the continuation of these practices.

Response: The definition of “compensation” is identical to the definition contained in 11 NYCRR 30 (Insurance Regulation 194), which pertains to insurance producer compensation. Insurers may offer premium installment payment plans through licensed premium finance agencies. However, bail agents may not lawfully conduct their own financing and make loans to clients because it would constitute an inducement in violation of Insurance Law section 2324(a) and may constitute engaging in the business of a premium finance agency in violation of the Banking Law. See OGC Opinion 07-06-10 (June 12, 2007). In addition, DFS is not aware of any New York State case
Comment: The agents’ association commented that the definition of “forfeiture” fails to account for how forfeiture and remission work. Much of the comment is devoted to how the practice of forfeiture and remission should work in the courts, specifically that agents and indemnitors should be allowed a grace period of 120-180 days to return the principal before an order of forfeiture is entered to avoid costly and unnecessary remission motion practice. The agents’ association also stated that DFS should recognize that the return of the principal to court and the cost and expense of a forfeiture is an expense ultimately borne by the consumer.

Response: The process of forfeiture and remission is governed by the Criminal Procedure Law. DFS amended the definition of “forfeiture” to better reflect the Criminal Procedure Law. In addition, DFS amended section 28.8 to provide that out-of-pocket costs for the apprehension and surrender of the principal following a court-ordered warrant, apprehension and surrender of the principal following the documented request of the indemnitor, and the application for the remission of forfeiture, are not considered premium or compensation within the meaning of Insurance Law section 6804(a).

Comment: The agents’ association commented that “headquarters location” as used in the definition of “satellite office” is not defined in the Insurance Law and the satellite office filing is regulated by 11 NYCRR 34 (Insurance Regulation 125) and Insurance Law section 2129. Additionally, agents’ association commented that in the definition of “supervising person”, “headquarters” is not defined and that Insurance Law section 2122(b) refers to a principal office. The agents’ association proposed adding the words “under control and used” before
“by a bail agent” in the definition of “place of business” because bail agents travel to homes, jails, and even use wrapped vans to conduct bail business. The agents’ association also note that this term is already defined in Insurance Regulation 125 and Insurance Law section 2129 and should be the same for consistency.

Response: The definitions of “headquarters location,” “place of business,” “satellite office” and “supervising person” are derived from section 34.5 of Insurance Regulation 125, which sets forth requirements pertaining to the location of an insurance agent or broker at each place of insurance business. Insurance Law section 2129 does not contain any definitions. As a result, DFS did not make any changes to address these comments.

Comment: The agents’ association proposed amending the definition of “indemnitor” to mean a person who “accepts the obligations and conditions of a bail indemnity agreement”.

Response: The comment does not explain why this change would be necessary. In fact, making the requested change would narrow the number of consumers protected by the rule. Therefore, DFS did not make any changes in response to this comment.

Comment: The agents’ association requested that “bail agent” be added after “the insurer” in the definition of “indemnity agreement” and that “or expense incurred in connection with execution of the bond” or “before arising from” be added before “against loss” to be consistent with sections relating to collateral and forfeiture in bail contracts between a bail agent and indemnitor.

Response: DFS accepts the suggestion to add bail agent as a party to the indemnity agreement. DFS will not add “or expense incurred in connection with execution of the bond” or “before arising from” because generally fees, costs, or reimbursements in excess of the statutory premium are not permitted under Insurance Law section 6804, regardless of whether those expenses are
included in an agreement between an indemnotor and bail agent. See Ins. Law section 6804(b); OGC Opinion No. 01-09-13 (Sept. 25, 2001) and OGC Opinion No. 02-10-16 (Oct. 15, 2002). See also McKinnon v. International Fidelity Insurance Company et al., 182 Misc.2d 517, 704 N.Y.S.2d 774 (Sup. Ct. N.Y. Co. 1999) (stating that [s]ections 6804(a) and (b)(1) clearly provide that the “premium or compensation” may not “directly or indirectly” be greater than the maximum premium permitted by statute and making clear that Insurance Law section 2119 does not include bail bondsmen within its ambit). Additionally, Insurance Law section 2314 provides that no authorized insurer or representative thereof “shall knowingly, charge or demand a rate or receive a premium that departs from the rates, rating plans, classifications, schedules, rules and standards in effect on behalf of the insurer or shall issue or make any policy or contract involving a violation thereof.”

However, DFS amended the premium and compensation section of the rule to clarify that DFS does not consider the out-of-pocket costs of the apprehension and surrender of the principal following a court-ordered warrant; the apprehension and surrender of the principal following the documented request of the indemnotor; and application for the remission of forfeiture to be part of premium or compensation within the meaning of Insurance Law section 6804(a).

IV. Pre-arrest agreements prohibited

Comment: The agents’ association asked DFS to delete in section 28.2(a) the language that references a “person, firm or corporation of officer, employee or agent thereof, licensed under Section 6802 of the Insurance Law (hereinafter referred to as a ‘bail bond agent’)”. The agents’ association suggested that the section include anyone bailed out under Insurance Law section 6805 because people frequently go to bail agents pre-arrest or pre-
surrender to make arrangements for bail. They state that this commonly occurs with bail posted for celebrities.

Response: The proposed amendment already deletes the language the agents reference. The current rule only prohibits those pre-arrest or pre-surrender bail arrangements made “on a continuing basis” with someone other than the person who will be arrested on criminal charges. The original intent was to prevent criminal organizations from making ongoing bail arrangements for their members. The current language would not prohibit a person who will be arrested from making bail arrangements pre-arrest or pre-surrender. As a result, DFS did not make any changes in response to this comment.

Comment: The agents’ association requested deletion of existing language that references “in the absence of a satisfactory explanation” in section 28.2(b) because they allege that it is an impossible standard of proof that allows arbitrary determinations by DFS. They further objected to the remainder of the language in that subdivision asserting that it is common for a principal’s family member to use the same property as collateral for several principals in a case when multiple people are arrested together, such as a search warrant arrest.

Response: The language on which the agents’ commented is existing language in the rule and has been in place for years. This section prohibits the same indemnitor from using the same collateral in more than two criminal cases not arising out of the same transaction. Thus, it would not prohibit a family member from using the same collateral to bail out multiple people arrested together in the same transaction, such as a search warrant arrest. As a result, DFS did not make any changes to address this comment. DFS deleted the “in the absence of a satisfactory explanation” language in response to comments. The deletion of this language does not change the right of licensees to explain their conduct to DFS.
Comment: The agents’ association requested deletion of “records” in the title of section 28.3.
Response: The proposed amendment already deletes that term. The brackets in the proposed amendment indicate a deletion and the underlined text is new language.

V. Use of unauthorized name

Comment: An insurer requested details regarding the process for approval of a “doing business as” (“DBA”) or fictitious name pursuant to section 28.4.
Response: Information about how to obtain approval for a DBA or fictitious name is available on the DFS website. Therefore, DFS did not make any changes to the rule in response to this comment.

VI. Bail agent notifications

Comment: The agents’ association requested the addition of “is required by local court rule to be” registered after “bail agent” in section 28.5(a)(1). The agents’ association explained that for bail agents who post bonds in all of New York State, this would mean 62 notifications at a minimum just for the county and local courts. They asserted that this seems redundant and excessive. The agents’ association suggested that the rule only require that they update contact information annually or semi-annually. The agents’ association also commented that section 28.5(a)(2) implies that a bail agent must provide a change in the bail agent’s personal information rather than just business information and states that there is no basis in the Insurance Law for a bail agent to provide any personal information.
Response: DFS amended this section to require updates to the court when required by court rule to be registered. DFS did not change the reporting requirement to annually or semi-annually because it is vital that DFS and the courts have up-to-date contact information for agents so DFS, courts, and consumers know how to contact the agents. DFS requires the personal information of its licensees in order to facilitate background investigations and ensure compliance, particularly
for those bail agents who operate out of their homes. It also may serve as contact information for bail agents who maintain a license but may not be working.

Comment: The agents’ association proposed adding language to section 28.5(b)(1) that agents report to the Superintendent any administrative action taken against the agent in another jurisdiction when “explicitly known” and to remove the reference that they report actions taken against sublicensees and employees. Agents questioned how they could know of all actions against employees given there is no place where all such actions are not reported in any particular register. The agents’ association also referenced Insurance Law section 2101(k) and asserted the distinction between that statute and this section is that the agent who is the subject of the proceeding must report, not his or her employer. The agents’ association asked what the distinction is between a bail agent and individually licensed agent or sublicensee in this context.

Response: As licensees, each bail agent has a duty to report to DFS any conduct that might inform DFS of the agent’s, sublicensee’s or employee’s competence and trustworthiness. As such, bail agents must maintain policies and procedures so that they are notified about an administrative action taken against a sublicensee or employee. In addition, the rule requires reporting 30 days following a final disposition of the matter and at that point, a bail agent will know about any action taken against the bail agent. With regard to the distinction in this case between a bail agent who is individually licensed and one who is a sublicensee, a sublicensee is the person through whom a business entity bail agent operates and may not be individually licensed. That person is responsible for the acts of the business entity. Bail agents also may be individually licensed and may not be the sublicensee of the bail agent.

Comment: The agents’ association stated the requirement in section 28.5(b)(2) to report any
criminal prosecution against the bail agent taken in any jurisdiction impinges on agents’ Fifth Amendment rights and that bail agents should not have to make any statements about the matter until its conclusion. They also commented that while a bail agent could be compelled to turn over a complaint as it is usually a public record, requiring “any other relevant legal documents” is far too broad.

Response: Neither informing DFS of a criminal prosecution nor providing the relevant legal documents to DFS implicates a bail agent’s Fifth Amendment right against self-incrimination. Such protection is not relevant in the licensing context and merely informing DFS of charges would in no way constitute an admission as contemplated by the Fifth Amendment. Thus, DFS did not make changes to the rule in light of this comment.

VII. Bail agent offices

Comment: The agents’ association requested that the signs required by section 28.6(c)(2) that state that any complaint against the bail agent, insurer, or charitable bail organization may be filed with DFS be made available on the DFS website and noted that complaints can be made on the DFS website. An insurer requested the appropriate mailing address, web address, and consumer hotline number that should be included in the sign.

Response: DFS will make available signs for downloading on its website and the signs will contain the appropriate DFS mailing address, web address, and consumer hotline number. As a result, DFS did not make any changes to the rule to address this comment.

VIII. Prohibition against payment of compensation to unlicensed bail agents

Comment: The agents’ association commented that managing general agents (“MGAs”) should be added to the prohibition against payment of compensation to unlicensed bail agents set forth in section 28.7 because they are also licensed by DFS. An insurer asked
whether the recipient bail agent must be appointed by the same insurer as the agent making such payment.

Response: The standard applies to all licensed bail agents and because all MGAs doing a bail business must be licensed as a bail agent there is no reason to specify a particular standard for MGAs. A recipient bail agent must be appointed by the same insurer as the agent making the payment. See OGC Opinion 03-01-08 (January 6, 2003).

IX. Premium and compensation

Comment: The agents’ association commented that they need to charge indemnitors for fees and reimbursement in excess of the statutory premium, such as fees for lien filings, cut slips, release orders, and courier services. They argue that such services are conveniences for the consumer and incur a cost to the bail agent that should be passed on to the consumer or that DFS should set prices for these services. The agents’ association stated that the most prudent way to avoid all this would be to have an electronic system to transmit release orders.

An insurer asked whether an agent may charge for actual out-of-pocket expenses and costs if they do not exceed the statutory premium and if so, requests list of acceptable expenses. Advocate coalition commented that agents are charging impermissible fees and requested clarification of what DFS means by out-of-pocket costs for “special bail conditions” imposed by the court.

Response: As stated above, generally fees, costs, or reimbursements in excess of the statutory premium are not permitted under Insurance Law section 6408. The cost of securing liens, cut slips, release orders, and courier services, for example, are part of the premium the indemnitor pays. As such, the bail agent must provide these services at no additional cost to the indemnitor. However, DFS amended this section to provide that out-of-pocket costs for the apprehension and
surrender of the principal following a court-ordered warrant, apprehension and surrender of the principal following the documented request of the indemnitor, and the application for the remission of forfeiture, are not considered premium or compensation within the meaning of Insurance Law section 6804(a).

DFS also removed the reference to “actual documented out-of-pocket costs of special bail conditions imposed by the court,” as such costs are impermissible under the new bail law passed as part of the 2019 state budget.

Comment: Agents’ association suggested amending section 28.8(c) to state that the duration of a bail bond shall be “until the bond is exonerated by the court or by operation of law, statute or regulation” to reflect the recognized end of a bail transaction. An insurer asked if the language in section 28.8(c) is meant to prohibit renewal premiums and asked when a criminal proceeding ends, explaining that bail bonds typically do not continue after conviction because of the increased risk post-conviction. The insurers’ association recommended adding “or until the bail bond is exonerated per the terms of the bond.”

Response: DFS renumbered this provision as section 28.8(b) and amended the language to state that the duration of the bail bond shall be until there is exoneration and no insurer or bail agent shall charge, collect, or receive a renewal premium for a bail bond.

X. Return of premium

Comment: The agents’ association proposed adding “or other party” after “indemnitor” in section 28.9 without explanation. The agents’ association also requested that “from the custody of the jurisdiction the bond was posted in unless the indemnitor specifically requests the bond be posted knowing that the defendant will be not be released from custody” be added. The agents’ association stated that released from custody is a term of art that needs
to be defined. The agents’ association posited that the bond is a contractual obligation to a specific court in a specific case, so that once they have bailed a defendant out of the custody of one county their obligation is fulfilled, even if that defendant remains incarcerated due to a U.S. Immigration and Customs Enforcement (“ICE”) hold, parole hold, warrant from another jurisdiction or bail source hearing. The agents’ association argued that the New York Court of Appeals decision in Gevorkyan v. Judelson, 29 N.Y.3d 452 (2017) is limited to cases where the defendant remains incarcerated following a failed bail source hearing. The agents’ association requested that DFS add to the rule that proof that the defendant was taken into custody by another entity would automatically exonerate the bond.

An insurer asked under what circumstances insurers must return the full premium, noting that insurers only receive a portion of the premium and that the bail agents retain the rest. The agent’s association and insurer asked DFS to clarify the meaning of “compensation”. The insurer provided examples of expenses incurred for a bail source hearing, including the cost of real estate appraisals, confessions of judgment, legal fees for document preparation and other materials or reports for consideration by the court, and asked if a bail agent may retain part of the premium for these expenses if the defendant is not released following a bail source hearing.

The advocate coalition noted that there is no time provided for return of premium and requested that the rule include a time period.

Response: DFS did not add “or other party” after “indemnitor” because the parties to the bail transaction are just the bail agent, insurer, indemnitor, and principal. DFS did not amend the rule to state that no refund will be provided when indemnitors were aware that the defendant would not be released due to an ICE hold, parole hold, warrant from another jurisdiction or bail
source hearing and chose to pay for the bail bond anyway. Posting bail when the principal will not be released is contrary to the foundational principle of insurance that premium follows risk. No premium is earned in the absence of risk and there is no risk of failure to appear when the principal remains incarcerated. In all instances in which the principal is not released from custody, premium has not been earned and any premium collected must be returned. DFS does not have the authority to regulate the conduct of the courts with regards to exoneration. Both insurers and bail agents are responsible for the full return of premium when the principal remains in custody. Expenses incurred in connection with a bail source hearing are the cost of customer acquisition or underwriting and premium may not be retained to pay for these expenses. DFS amended the rule to require return of premium within 14 days of receipt of notice that the principal was not released.

XI. Build-up funds

Comment: The agents’ association commented that as written, section 28.10 could conflict with existing contracts and pertains to the agent-insurer relationship. The agents’ association suggested adding “controlled” on the first line, “expenses” on the second line, and “subject to an executed bail agent agreement” on the third line to modify the responsibilities under this section. An insurer commented that the language “for the bail agent” is imprecise and does not reflect the purpose of the build-up funds as the funds are held by the insurer as escrow agent for the bail agent and as security for bail agent performance under their producer underwriting agreement.

Response: DFS amended the rule to delete this section.

XII. Release of principal

Comment: The advocate coalition and advocate organization requested that the rule require
bail agents to post a bond within 12 hours following the execution of a contract or the receipt of premium or collateral. They further requested that the rule require a bail agent to return 25% of both premium and collateral for every 24-hour period following the execution of the contract or the receipt of any premium or collateral without release. A citywide elected official requested that bail agents be required to promptly post bail.

Response: DFS amended the rule to add a new section 28.10 entitled “release of principal.” This section requires that a bail agent obtain the prompt release of a principal following execution of an indemnity agreement or bail agreement. Prompt release includes securing a release order from the court and effectuating a principal’s actual release from custody. However, DFS did not include a time-frame within which a principal must be released because many aspects of release are not within the control of the bail agent. Many parts of this process are under purview of other city and state agencies, and vary across New York State, so it is impractical to prescribe a specific timeline for release.

XIII. Collateral

Comment: The agents’ association requested that DFS add at the end of the sentence of section 28.11(a) “upon receipt of proof of exoneration from the court, this section shall not be applicable in the event of a forfeiture.” They assert that the language assumes that no forfeiture has occurred and explain that a bond may be exonerated, but the forfeiture often remains in place until a remission motion is successful. They state that the current language would require the return of collateral even when the bond is forfeited. An insurer asked if, when the agent receives collateral, the insurer is also liable for its return and suggested language conditioning return of the collateral by an insurer to the extent the bail agent remits collateral to the insurer.
Response: DFS amended the rule to require return of collateral following the exoneration of bail unless there is a forfeiture that is not discharged pursuant to the Criminal Procedure Law. As for the insurer’s question, bail agents, insurers, and charitable bail organizations (“CBOs”) are responsible for the return of collateral. DFS amended the rule to clarify that a bail agent must receive and hold any non-cash collateral in the insurer’s or CBO’s name and any cash accepted as collateral must be promptly remitted to and held by the insurer or CBO.

Comment: The agents’ association questioned what is meant in section 28.11(b)(1) by “reasonable in relation to the amount of the bail”. They state that there are numerous factors that go into the determination of the amount of collateral, collateral is subject to the business judgment rule, all bonds are 100% collateralized by the insurer guarantee of payment, and collateralization only serves to reduce risk to the insurer in event of loss. The agents’ association also states that the language subjects a bail agent to arbitrary review by DFS. The advocate organization stated that it is unclear what will happen if there is a failure to return collateral. The advocate coalition and advocate organization requested that DFS specify that reasonable collateral should not exceed 10% of the bond amount when cash is posted as collateral and requested written justification of any departure from that percentage. A citywide elected official recommends that DFS define with greater specificity what constitutes reasonable collateral.

Response: The business judgment rule does not apply in this instance. It is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings. It does not apply to DFS establishing rules to regulate its licensees. DFS amended the rule to provide that collateral equal to or less than 10% of the bail amount will be presumed to be reasonable. It is DFS’s understanding that the current industry practice is to
require 10% of the bail amount, which is also the amount mandated by the Criminal Procedure Law for a partially secured bond. In the event of a failure to return collateral, the indemnitor will have recourse first to the insurer and then may make a complaint to DFS if the collateral is not returned. Nothing in this rule limits any private right of action an indemnitor may have against a bail agent or insurer.

Comment: The agents’ association requested removal of the requirement set forth in section 28.11(b)(2) that collateral shall be returned “in the same condition as received” because it suggests that cash collateral would have to be returned as cash. Agents also commented that the prohibition against using collateral for personal benefit or gain is too loose and questioned whether using collateral to pay a forfeiture is for “personal benefit.” The agents’ association further commented that DFS should have no position on how much cash collateral a bail agent chooses to accept. An insurer stated that this section appears to indicate that bail agents may only accept cash collateral “equal to or in excess of $5,000” and that agents currently accept cash collateral of lesser amounts. The insurer requested that all collateral equal to or in excess of $2,500, rather than $5,000, be remitted to the insurer since the insurer will be responsible for returning the cash collateral.

Response: DFS deleted the language that collateral be returned “in the same condition as received”. However, DFS still expects that a bail agent will return the collateral in the same form it was received to the extent possible. The prohibition against using collateral for personal benefit or gain is intended to mean the use of collateral for any non-bail related purpose, such as a bail agent driving around a vehicle pledged as collateral. The purpose of the collateral is to pay for a forfeiture in the event of failure to appear. A bail agent may NOT deduct from collateral any “expenses.” DFS amended the rule to the delete the $5,000 cash threshold and to require that any
cash accepted as collateral must be promptly remitted to and held by the insurer or CBO.

Comment: The agents’ association commented that with regard to section 28.11(c), which requires a bail agent to receive and hold collateral in the insurer’s or CBO’s name, many insurers are outside New York so the bank accounts that hold collateral are generally joint and the agent has no writing power. Agents stated that if not held jointly, the bail agent would have to mail the collateral to the insurer’s home state for the insurer to deposit it. Agents also stated that Insurance Law section 2120 and 11 NYCRR § 20.3 already cover this issue.

An insurer commented that bail agents could not hold cash collateral in the name of the insurer unless a joint account were opened. The insurer suggested that all non-cash collateral be held in the name of the surety alone and cash collateral of $2,500 or less be held by the agent if segregated and held by the agent in a separate bank account

Response: Insurance Law section 2120 and 11 NYCRR § 20.3 apply to insurance agents, title insurance agents, insurance brokers, and reinsurance intermediaries, not bail agents. That is why language regarding the handling of collateral has been added to this rule. DFS amended the rule to clarify that a bail agent must receive and hold non-cash collateral in the insurer’s or CBO’s name and that any cash accepted as collateral must be promptly remitted and held by the insurer or CBO pursuant to section 28.12 of the rule.

Comment: The agents’ association proposed additional language in section 28.11(d)(1) to permit bail agents to deduct from collateral to be returned any expenses, unpaid premium, losses or fees. They requested DFS amend the rule to require return of collateral no later than 30 business days from receipt of notice of exoneration of the bail from the indemnitor, except where the collateral needs to be liquidated to settle unpaid amounts due from the
indemnitor. In that case, excess collateral would be returned within 30 days of the liquidating event. The agents’ association also commented that they opposed the inclusion of language requiring that a bail agent assist the indemnitor with obtaining exoneration because courts upstate may be further away than they are in the New York metro area. An insurer suggested changing “after receipt of notice” to “upon receipt of notice” to reflect that the bail agent must receive the notice to trigger the 30 days. The insurers’ association requested that DFS revise the section to permit a bail agent to retain collateral equal to the amount of unpaid premiums and expenses because if an agent is not able to secure the payment of premium, the agent may be less willing to provide bonds to certain applicants.

Response: As explained above, outstanding expenses, unpaid premium, and fees may not be deducted from collateral. These costs are all included in the premium as the cost of doing business. Collateral is not the source of premium payments and to the extent any premium payment is outstanding, collateral funds may not be used for premium payments. Costs associated with a court-ordered warrant and forfeiture are the responsibility of the indemnitor.

DFS amended the rule to require a bail agent to return the collateral to the indemnitor no later than 45 days after receipt of notice of exoneration or from discharge of forfeiture under the Criminal Procedure Law to grant sufficient time to bail agents and insurers to return collateral. DFS did not change “after receipt of notice” to “upon receipt of notice” because it is clear already that the relevant time begins with receipt of notice.

DFS did not delete the last sentence of the paragraph because assisting with obtaining an order of exoneration is part of a bail agent’s duties to return collateral when it is no longer needed to secure a bond. While the process of obtaining an order of exoneration is a simple task for the bail agent, it is time-consuming and confusing for consumers who do not regularly work in the
Comment: The agents’ association questioned how collateral is valued and who pays for determining that value in the return process. They noted that this section seems to create the potential for endless litigation on value because the value of non-cash collateral is not automatically equivalent to the value of the bond. They also stated that that the 60-day requirement sets up a chance for fraud to be perpetrated on the consumer and that this paragraph should only be available for items that are actually lost and not just returned late. The agents’ association also commented that there should be a provision about insurance coverage as an offset. An insurer suggested changing this section to trigger the insurer’s obligation to return collateral 60 days from the date of notice of the failure to return collateral because the insurer will not know whether the bail agent has failed to return collateral unless the insurer receives notice from the indemnitor.

Response: DFS did not make any changes to the rule in response to the agents’ association’s comments about the valuation of collateral. Bail agents and insurers must return either the actual collateral or monetary value thereof. It is part of the bail agent’s responsibilities to accurately value collateral involved in the transaction. They are required to establish and record the value of the collateral in sections 28.16(i), 28.16(j), 28.17(a)(7), 28.17(a)(8) and 28.17(b)(8) of the rule. It is unclear what the agents’ association meant by including a provision about insurance coverage as an offset so DFS did not revise the rule in response thereto. However, DFS amended the rule to tie the 60-day requirement to receipt by the insurer of notification from the bail agent or indemnitor of the bail agent’s failure to comply with section 28.11(d)(1).

Comment: The agents’ association questioned why section 28.11(e)(1) requires them to provide at least 30 days’ written notice to the indemnitor and principal prior to conversion
of collateral to cash to satisfy the forfeiture and asked whether the 30-day period commences from the warrant date ordered by the court or the judgement date. An insurer commented that 30 days it too long to convert collateral and pay the courts and suggested changing it to 10 days as is required in other states, such as Florida.

Response: DFS wants to ensure timely and formal notification of conversion to ensure that indemnitors and principals have time to pay any forfeiture before their property, such as a home or car, is sold to satisfy the judgement and thus the regulation requires written notification of the specific intent to sell the indemnitor’s pledged property. Indemnitors and principals need more than 10 days’ notice of intent to convert collateral and, based on DFS’s investigation, court orders of forfeiture are rarely, if ever, paid in such a timely and abrupt manner. Therefore, DFS did not make any changes to the rule in response to these comments.

Comment: The agents’ association requested that section 28.11(e)(2) be amended to require a return of collateral to the indemnitor that is in excess of “debt owed under the indemnity agreement” rather than “face value of the bail.” The agents’ association also requested to change the requirement that the insurer or CBO pay to the indemnitor the value of any “collateral received for the bail” to value of any “excess collateral retained under the indemnity agreement.” The agents’ association further commented that this paragraph needs to address the cost and expense of a remission motion.

An insurer suggested adding “bail agent” to the list of parties responsible for paying the value of any collateral received for bail if there is a remission of forfeiture. The insurer asked that there be a deduction from collateral for expenses associated with remission of forfeiture. The insurer also suggested that if partial remission is granted by the court, then only the net difference between the value of the collateral and the amount paid to the court
should be returned.

Response: As explained above, expenses and fees may not be deducted from collateral.

The indemnitor’s obligation is limited to the face value of the bond and costs associated with conversion are covered in the premium; all amounts in excess of the face value of the bond or the actual amount of forfeiture in remission remain the indemnitor’s and must be returned. However, DFS amended the rule to provide that in the event that the amount ordered to be paid to the court in a final order of forfeiture is less than the value of the collateral, the remaining collateral must be returned to the indemnitor pursuant to section 28.11(d) and (e). This would thus include a bail agent in the list of parties responsible for remission of bail. The bail agent may seek reimbursement for the out-of-pocket costs of pursuing remission pursuant to section 28.8 of the revised rule.

XIV. Premium and collateral accounts

Comment: The agents’ association requested that DFS add a sentence that states “however, a bail agent may elect to not maintain a separate premium account provided all premium funds owed the insurer or charitable bail organizations are remitted with in [sic] 14 days of executing each bail bond.” They also commented that 11 NYCRR §§ 20.3 and 20.4, as referenced in section 28.12, do not apply to bail since premiums are earned on the posting and not the release of the defendant. They further commented that it is cumbersome to maintain records of premium and collateral. An insurer questioned whether a bail agent must maintain two separate accounts, one for premium and one for cash collateral. The insurer also asked whether a bail agent may deposit premium into a general operating account and then make a disbursement to the insurer.

Response: While 11 NYCRR §§ 20.3 and 20.4 do not currently apply to bail, this rule is incorporating the obligations set forth in those sections to ensure the proper oversight and
recording of funds. Maintenance of records of premium and collateral are a part of the bail agent’s duties under sections 28.16, 28.17, and 28.19 of this rule. As part of their fitness for licensing, agents must be able to maintain a record of the funds they receive from consumers and remit to the insurer. To comply with this section, a bail agent must maintain separate premium and collateral accounts. The bail agent may not deposit the premium into a general operating account and then make a disbursement to the insurer from that account. As a result, DFS did not make any changes in response to these comments.

XV. Use of forms

Comment: The agents’ association submitted a sample contract to be used as a model form. An insurer suggested that insurers, rather than bail agents, file proposed forms under section 28.13. Insurers’ association stated that surety bond forms should not be required to be filed because unlike an insurance policy, a surety bond form typically is not drafted by the insurer. Rather, it is drafted by party seeking protection under the bond, the obligee, which is the court in this case. The obligee can control what terms and conditions are included in the bond form and rather than requiring that all bonds be filed, the court can prescribe the form or contents of the form. A citywide elected official, advocate coalition, and advocate organization requested that DFS include more specificity regarding restrictions and terms in bail bond contracts.

Response: DFS amended the rule to clarify that insurers must submit proposed contracts and forms and that bail agents shall only use the forms submitted by the insurers and approved by DFS. Insurance Law section 2307(b) requires most property/casualty policy forms be filed and approved by DFS. Currently, 11 NYCRR § 66.1 waives that requirement for surety bond forms, including bail bond forms. According to 11 NYCRR § 66.0, the reason surety bond forms were
exempted from prior approval was because they “generally are specially prepared to meet the needs of individual insureds” and insurers “have little freedom in determining the markup of surety bond forms.” However, with regard to bail bond contracts and forms, DFS has found that they are being written by bail agents in a way that imposes predatory and other unfair requirements on indemnitors and principals, many of whom may be immigrants who do not speak English. These indemnitors and principals are not well-positioned to negotiate the terms of bail contracts and forms. As a result, DFS is eliminating the exemption for filing bail bond contracts and forms.

DFS did not amend the rule to exempt from prior approval contracts and forms drafted by a court because DFS believes all bail bond contract and forms, regardless of who drafts them, should be subject to review and approval by DFS since DFS regulates the insurers who issue them and has the insurance knowledge and expertise. However, DFS intends to promulgate a model bail bond contract and form that insurers may use. The model contract and form will set forth with more specificity the terms and conditions that DFS finds permissible.

XVI. Insurer and charitable bail organization supervision of bail agents

Comment: An insurer requested clarification about the scope of the insurer’s obligations for supervision of agents pursuant to section 28.14(a), asserting that bail agents are independent licensed contractors.

The advocate coalition and advocate organization asked DFS to strengthen and clarify this section, stating that it is unclear as to what such supervision would involve, how DFS would evaluate a “reasonably designed” system, or the consequences or liability to insurers of failing to do so. The advocate coalition proposed that violations by bail agents should trigger substantial financial penalties for insurers. The advocate coalition also proposed that
insurers create a restitution fund to make whole consumers who are owed money and are unable to collect from the bail agent or insurer, and that this fund provide restitution within 30 days of nonpayment by a bail agent.

Response: A bail agent is the agent of the insurer or CBO that writes the bond or places cash bail. As a result, the insurer or CBO is responsible for the actions of that agent and therefore must put procedures in place to properly supervise its agents. DFS did not make changes to the rule in response to these comments because DFS wants to give insurers the flexibility to design supervision systems that are appropriate for the nature and size of each insurer. DFS will determine whether a supervision system is “reasonably designed” for a particular insurer on case-by-case basis. Penalties for violations of the Insurance Law and regulations promulgated thereunder are already set forth in the Insurance Law and therefore do not need to be set forth in this rule. The Insurance Law does not give DFS the authority to require an insurer to create (and fund) a restitution fund.

Comment: The agents’ association proposed adding “or a managing general agent” after “licensed bail agent” in section 28.14(b)(2).

Response: DFS did not make any change to the rule to address this comment because MGAs supervising or managing bail agents must be licensed themselves as bail agents.

Comment: The agents’ association commented that the language in section 28.14(c) suggests that an MGA must report a breach of a bail agent’s responsibilities under 11 NYCRR § 33.5 (MGA required contract provisions) and that many of the provisions of 11 NYCRR § 33.5 do not apply to bail agents.

Response: Section 28.14(c) requires bail agents to report a breach of a bail agent’s responsibilities under Part 28, not Part 33. Therefore, DFS did not make any changes to address this comment.
XVII. **Termination of appointment of bail agents**

Comment: The agents’ association opposed requiring an insurer to disclose the basis for an terminating a bail agent’s appointment in section 28.15(a)(1) absent a violation of a specific regulation and note that this could jeopardize the agent if the split with the insurer was acrimonious.

Response: DFS must know the basis for an insurer or CBO terminating a bail agent’s appointment so DFS can determine if the agent violated any laws or there was other wrongdoing. DFS does not believe that disclosure to DFS of the basis would “jeopardize” an agent, as an agent still is entitled to due process if there is an allegation of a violation or other wrongdoing. Therefore, DFS did not make any changes in response to this comment.

Comment: An insurer requested specifics as to the required notice of termination pursuant to section 28.15(a)(2).

Response: DFS is not prescribing a specific written notice so the insurer or CBO is free to structure the written notice as it chooses. A written letter to the court or sheriff would be acceptable. Thus, DFS did not make any changes in response to this comment.

Comment: The agents’ association commented that section 28.15(a)(3) is impermissible and a violation of the law. The agents’ association claims that the authority of a bail agent to apprehend the principal is based on the agent’s agency relationship with the insurer and appointment. If the agent’s appointment is terminated, then the agent’s power to act on the bond without either a bounty hunter license or a private investigator license is prohibited by law.

Response: This section allows an insurer or CBO to grant an agent a limited continuation of authority to act on the insurer’s behalf in continuing to attempt the arrest and surrender of a...
principal for whom the bail has been placed by the agent prior to termination and to seek discharge of forfeiture and judgments. DFS does not agree that this would be prohibited by law and therefore did not make any changes to the rule in response to this comment.

Comment: The agents’ association asked how designation of another bail agent under section 28.15(b) would be accomplished and further questioned what happens if there is more than one agent to supervise the existing bonds. The agents’ association also asked whether they must designate a bail agent every time or whether the bail agents may designate one agent to cover all instances.

Response: It is an insurer or CBO that designates another licensed and appointed bail agent to administer the bail, not the bail agent who is no longer licensed and the insurer or CBO will notify the new agent of the designation. Therefore, DFS did not make any changes to the rule to address this comment.

XVIII. Bail register

Comment: The agents’ association stated that production of the data required in section 28.16 would require a specific program to capture the information in a report and that although most bail software programs keep this data, it will be cost-prohibitive to make the necessary software changes. The agents’ association also commented that DFS should delete language that the proposed rule was already deleting in the lead-in language.

An insurer suggested that information be maintained in an electronic database and noted that information required by this rule is duplicative of information bail agents are currently capturing on their forms and in their databases. The insurer also requested that records retention run from exoneration and not the date the collateral is returned because certain bonds do not have collateral.
Response: Current section 28.2 of the rule already requires a bail agent to maintain records that show the name, address, occupation, and other pertinent information regarding the person who requested bail. It also requires the records to show the origin of each request that results in a bail bond being posted and requires a bail agent to maintain a copy of any receipt for all premiums paid and all collateral posted. Thus, bail agents already are required to maintain much of this information and this rule merely fleshes out some of these requirements. Therefore, agents should not need to make a lot of changes to any existing software. Also, while DFS welcomes use of electronic software, it is not required, and less costly record-keeping methods will satisfy the requirements of this subsection. Therefore, DFS did not make any changes to the rule in response to these comments.

However, DFS amended the rule to require that an agent maintain the records at least six years from the date of exoneration or final order of forfeiture.

XIX. Receipts and records to be provided to indemnitor and principal

Comment: The agents’ association commented that in section 28.17, the receipt issued when the indemnitor pays the premium and collateral and the receipt issued when the bail agent returns the premium and collateral should have matching numbers. The agent’s association also commented that language in the rule should be deleted or added when the rule already deletes or adds the language.

In section 28.17(a) and (b), the agents’ association proposed adding “pledging collateral” before “indemnitor” and “pledging” after “one.” The agents’ association also commented that the current rule already requires premium and collateral receipts and that this section and the additional receipts are duplicative.
An insurer suggested deleting the requirement in section 28.17(b)(8) that the receipt include a description of collateral “required” because the “required” collateral may not be actually received or “collected.”

Response: DFS amended the rule to require that the initial and return receipts bear corresponding numbers. While current section 28.2(b) requires a bail agent to issue numbered receipts for all premiums paid and all collateral posted, the proposed rule fleshes out what information a bail agent must include in the receipts in relation to premiums and collateral to ensure that an indemnitor has a written record of all the pertinent information and so that both the agent and indemnitor are clear on what was required and what has been paid.

DFS did not delete the requirement in section 28.17(b)(8) because it should be clear to both parties how much collateral is actually required and then how much collateral is actually collected so there is no discrepancy between the two.

Comment: The agents’ association expressed a concern about producing multiple original documents pursuant to section 28.17(c). The agents’ association also stated that suggesting that more than one original document should be produced or executed will only lead to consumer fraud and unnecessary litigation and cost. It also commented that based on the way this section is written, if collateral is not claimed, the records would need to be kept indefinitely.

Response: The language that references “original copy” is the language currently set forth in section 28.2(b). However, recognizing “original copy” is an oxymoron, DFS amended the rule to just require that a receipt be given rather than an original copy of the receipt. DFS also amended the rule to require that a bail agent maintain the receipt for at least six years from the date of exoneration or final order of forfeiture.
Comment: The agents’ association asserted that the additional requirements set forth in section 28.17(d) will place an undue burden on agents to produce an enormous amount of paperwork that may not now be available under existing bail bond programs. The agents’ association state that except for the requirements set forth in section 28.17(d)(5) and (6), all the required information is usually included in a standard bail bond contract and that this information should be included in the new approved contract and not be included in a separate document. The agents’ association is concerned that these documents could be potentially precluded under the parol evidence rule in litigation.

In section 28.17(d)(6), the agents’ association requested that DFS add after “is not released from” language that states “the custody of the jurisdiction that the bond was posted in in [sic] unless the indemnitor specifically requested the bond be posted knowing that the defendant would not be released from custody.”

Response: The parol evidence rule governs the extent to which parties to a case may introduce into court evidence of a prior or contemporaneous agreement in order to modify, explain, or supplement the contract at issue. That rule is not relevant here for the purposes of the regulation requiring a bail agent to provide certain information to the principal and the indemnitor. The information required by this section serves to ensure that the rights guaranteed under this rule are clearly laid out for consumers.

DFS did not amend section 28.17(d)(6) as suggested because as explained above, posting bail when the principal will not be released is contrary to the foundational principle of insurance that premium follows risk. No premium is earned in the absence of risk. In all instances in which the principal is not released from custody, premium has not been earned and any premium collected must be returned.
XX. Record retention

Comment: An insurer requested that DFS confirm that “durable medium” in section 28.18 includes an electronic medium.

Response: “Durable medium” is already defined in section 28.1 to include electronic media and that definition applies to the term as used in section 28.18. Therefore, DFS did not make any changes in response to this comment.

Comment: The agents’ association commented that it is unclear if the language in section 28.18(b) is referencing electronic communications like telephone calls, emails, and text messages and if so, then the rule should so state. The insurers’ association requested that DFS amend the rule to clearly specify the duration that records must be retained in section 28.18(e). The agents’ association requested that DFS revise the rule to require a nonresident bail agent to make available records in New York State within ten business days upon request rather than just ten days.

Response: The language in section 28.18(b) of the rules comes from 11 NYCRR § 243.3(a)(2), which sets forth standards of records retention by insurers. This section is referring to anything other than paper, which would include electronic communications. However, DFS did not make any changes in response to this comment because it does not believe it is necessary. DFS amended the rule to clarify that records must be retained for six years from the date of exoneration or final order of forfeiture.

DFS did not change ten days to ten business days because DFS believes ten calendar days is sufficient.

XXI. Disclosure
Comment: The agents’ association commented that an indemnitor does not execute a bail bond and asked if “prior to a potential indemnitor executing a bail bond” in section 28.19(a) means prior to the execution of the indemnity agreement. The agents’ association also asked what the legal status is of the required written document and that if it is not part of the contract, then it raises significant issues regarding the parol evidence rule.

Response: DFS amended the rule to reference “at or prior to the execution of an indemnity agreement or bail agreement.” As stated above, the parol evidence rule is not relevant here for the purposes of the regulation requiring a bail agent to provide certain information to an indemnitor. The information required by this section serves to ensure that the rights guaranteed under this regulation are clearly laid out for consumers.

Comment: The agents’ association stated that “forfeiture”, as used in section 28.19(a)(3), is a term of art and questioned whether DFS means court-ordered forfeiture or whether that terms means a failure to return all or part of the collateral because of a violation of the contract terms and conditions.

Response: The rule defines “forfeiture” in section 28.1 as a court order that the bail must be paid due to the failure of the principal to appear before the court, without sufficient excuse, when required or failure to render himself or herself amenable to the orders and processes of the court when the bail has been posted. This definition applies to the term as used in this section. Therefore, DFS did not make any changes in response to this comment.

Comment: The agents’ association commented that is unclear how “released from custody” and “prompt” are defined in section 28.19(a)(4) and (5). The agents’ association asked that DFS add “and the indemnitor has provided a court order of exoneration” at the end of section 28.19(a)(5).
Response: Release from custody has its plain meaning. It means when the principal is no longer incarcerated. As stated above, release to another jurisdiction does not constitute release from custody under this rule. DFS amended the rule to define prompt return as 14 days of receipt of notice.

DFS did not amend the rule to add “indemnitor has provided a court order of exoneration” because it is part of the bail agent’s duties to assist the indemnitor in obtaining the order of exoneration as explained above.

Comment: The agents’ association commented that the requirement in section 28.19(a)(6) that a bail agent disclose that the indemnitor or principal may make any complaint against the bail agent, insurer, or CBO by filing with DFS is untenable and questioned what other entity is required to provide this in a disclosure statement. The agents’ association also commented that New York City now has its own laws that conflict with this provision.

Response: This kind of disclosure statement is common in insurance regulations and appropriate in this context. For example, section 216.6(h) of 11 NYCRR 216 (Insurance Regulation 64) requires any notice rejecting any element of a claim involving personal property insurance to provide a similar disclosure. To the extent New York City law conflicts with this rule, the city law is preempted. As a result, DFS did not make any changes in response to this comment.

Comment: The agents’ association asked whether “execution” of the bond means posting of the bond in section 28.19(b).

Response: DFS amended the rule to clarify that the information required by this section must be provided to the indemnitor and principal at the time of the execution of an indemnity agreement or bail agreement.
Comment: The agents’ association reiterated the same concerns with the language in section 28.19(b)(1) through (6) that they had regarding the language in section 28.19(a) and stated that this appears to be a redundant exercise. The agents’ association stated that the information required to be disclosed in this section is virtually identical to the information that is to be disclosed before executing the bond.

Response: Subdivision (a) requires that the bail agent tell the potential indemnitor that he or she is entitled to certain information. Subdivision (b) then requires the bail agent to provide the principal and indemnitor with copies of the information. Thus, these subsections are not redundant. Nonetheless, DFS amended this section to make the requirements clearer.

Comment: The agents’ association questioned how they are supposed to affirm that the disclosure forms required by section 28.19(c) that are in a foreign language are understood by the signatory.

Response: DFS revised the rule to require the bail agent to provide the forms in the principal language used in the discussions with the indemnitor or potential indemnitor and principal, if the Superintendent has promulgated forms in that language. If the Superintendent has not promulgated forms in that language, then the bail agent must provide the forms in English. The rule does not require a bail agent to make an affirmation.

Comment: The agents’ association raised concerns that the requirement in section 28.19(a)(6) regarding filing a complaint with DFS conflicts with the requirement imposed by New York City law and requested that DFS intervene. The advocate coalition asked DFS to adopt the disclosure standards set forth in New York City law and to require that bail agents provide these disclosures in commonly spoken languages. The advocate coalition also
requested that such forms include limits on premium and to list the obligations of the principal and indemnitors.

The agents’ association also raised concerns with the language in section 28.19(d) that requires them to provide indemnitors and principals with original disclosure forms and for having to maintain a copy of the disclosure forms for at least six years from the date of return of the last collateral to any indemnitor because the collateral may never be picked up by the indemnitor.

An insurer asked if forms may be customized and if the agent may use electronic signatures. Response: DFS is the primary regulator of insurers and bail agents pursuant to state laws and is in the best position to make rules for its regulated entities. While the city-mandated disclosures and those contained in the proposed amendment are very similar, DFS will amend the rule to reflect two additional disclosures, including language to clarify that all agents’ licenses must be posted and include the name, address and contact information for the bail agent and surety on the section 28.17 receipts as mandated by the city law. To the extent the disclosures required by city law conflict with this rule, they are preempted. If there is any overlap, bail agents must comply with both.

DFS has received industry’s input on its proposed disclosure form and will take it into consideration when finalizing the forms. DFS disagrees that there is any issue with providing an indemnitor or principal with the original disclosure form since the disclosure form is intended for these parties. However, DFS revised the rule to require a bail agent to maintain the disclosure forms for at least six years from the date of exoneration or final order of forfeiture.
A bail agent or insurer may not customize the disclosure forms as they must use the forms promulgated by the Superintendent. An agent may use electronic signatures if the person signing consents.

Comment: Consumers commented that the regulation is inadequate and relies too heavily on adding disclosures, rather than limiting abusive terms. They are concerned that individuals receiving documents from bail agents will still have no ability or expertise to decode them, time to review them, nor power to negotiate or reject terms. Consumers assert that disclosure does nothing to shift power dynamics and ensure justice.

The advocate coalition stated that disclosure of terms is not enough to protect against abuse, and asks that DFS place clear limits on the kinds of restrictions that bail agents may impose on a principal’s liberty.

Response: The proposed rule addresses abusive terms in multiple ways. First, the rule clarifies that certain industry practices, such as charging fees other than premium and the failure to return collateral, generally are prohibited. Second, requiring DFS approval of all bail bond forms will allow DFS to prohibit abusive terms in contracts, including terms allowing overly-intrusive agent monitoring not sufficiently connected to the production of the principal for court appearances or unjustified surrender. It also prohibits individual agents from creating their own forms, contracts and terms. Third, additional reporting regarding surrenders and agent-insurer relationships will provide DFS with additional data to better monitor and supervise the bail industry. Therefore, DFS did not make any changes in response to these comments.

XXII. Surrender of principal

Comment: The agents’ association stated that section 28.20 violates existing statutes and that bail agents are not required to state any purpose for surrender of a principal because it is
part of the business judgment rule. An insurer asked whether DFS would provide a form for providing to the court an explanation in writing of the reason for each surrender.

The advocate coalition requested that DFS “restrict to the greatest possible extent the ability of bond agents to surrender principals.” The advocate coalition requested strong, explicit limits on surrender, review and tracking of all notified surrenders, and the imposition of fines and restitution for improperly incarcerating principals. The advocate coalition further requested that agents provide principals with advance notice of risk of surrender at least 48 hours prior to surrender. Specifically, the advocate coalition requested that DFS require that agents who surrender principals submit the reason in a sworn affidavit within 24 hours and if the affidavits fail to sufficiently justify a surrender, that DFS suspend the agent’s license for six months. The advocate coalition requested that agents swear an affidavit listing the numbers of surrenders at license renewal and that any agent surrendering more than two principals within a year be investigated by DFS. Additionally, the advocate coalition requested that an agent surrendering two principals without good cause within one year have their license suspended for a year and that agents surrendering three principals without good cause within one year have their license suspended for two years. The advocate coalition recommended that aggravating circumstances should lead to revocation of an agent’s license. The advocate coalition recommended that DFS fine agents for improper surrenders and those funds should provide restitution to principals and indemnitors who have been defrauded by bail agents.

Response: DFS disagrees that section 28.20 violates existing statutes and as explained above, the business judgment rule is not relevant here. DFS will not provide a form for providing to the court
an explanation in writing of the reason for each surrender. Thus, the form is up to the insurer, CBO, or bail agent, and may be in the form of a letter.

With regard to the advocate coalition’s comments, limits on the surrender of a principal in a bail transaction must be accomplished through amendments to the Criminal Procedure Law. This rule cannot prevent bail agents from surrendering principals or courts from permitting surrender of principals. However, through the reporting and tracking of surrenders, DFS will be better equipped to prevent abuses.

Thus, DFS did not make any changes in response to these comments.

XXIII. MGA definition

Comment: The agents’ association commented that the amendment to 11 NYCRR § 33.2(c) changes the entire meaning and usage of MGA in the context of bail bonds. They assert it imposes strict contractual requirements that should actually be part of the business agreement between the insurer and agent. They also state that the $25,000 threshold in section 33.2(c)(1)(iii) would effectively make most bail agents who write for a smaller carrier an MGA. An insurer asked if the amendment requires the MGA to have a specific MGA license.

Response: The MGA regulation was promulgated to prevent abuses detrimental to insurers and insureds when agents act as de facto insurers by managing all or part of an insurer’s business. The same concerns about abuses apply with regard to bail agents who manage all or part of an insurer’s bail bond business. The MGA regulation will only apply to those bail agents who supervise or manage, on behalf of an insurer or CBO, bail agents appointed by the insurer or CBO, and does not include any person who is a full-time employee or officer of the insurer or CBO. The $25,000 threshold set forth in the definition of MGA does not apply to bail agents.
In order to be an MGA in the bail context, the MGA will need to have a bail agent license and the insurer must appoint the MGA as such by making a filing with DFS. There is no special MGA license.

As a result, DFS did not make any changes to address these comments.

XXIV. Filing of bail bond forms

Comment: The agents’ association stated that they welcome the use of contracts and forms approved by DFS and submitted a proposed bail bond contract and disclosure form.

Response: DFS will take the proposed contract and form under consideration and did not make any changes to the rule in response to this comment.

XXV. General comments

Comment: The advocate coalition, advocate organization, and consumers requested that the rule stipulate with specificity the steps DFS will take to identify bad actors through investigations and periodic audits. The advocate coalition also requested that the rule contain a robust enforcement mechanism and meaningful penalties, including restitution, and allow for license revocation.

The advocate coalition and consumers commented that the rule has no element of enforcement. They request that DFS commit to proactively auditing and ensuring compliance, vigorously investigating complaints, and using all the tools at its disposal to protect people and shut down violators. The advocate organization stated that more resources should be committed to bail bond industry supervision and that there should be robust oversight.

Response: DFS’s activity in this area demonstrates its commitment to continue to enforce the Insurance Law and the final rule to ensure compliance throughout the industry. While
investigation and enforcement techniques and plans utilized by DFS in this area are not amenable to restatement in a regulation because they necessarily depend on specific facts and circumstances, the amendments made by this rule will permit greater oversight of the bail industry. Insurance Law sections 6802(k) and 6802(l) provide for monetary penalties and license suspension and revocation.

Comment: The advocate coalition stated that DFS should make certain information public and searchable, including information about consumer complaints and enforcement actions against bail agents and the contact information for insurers that issue bail bonds. A citywide elected official requested annual reporting on the number of violations issued to bail agents, monetary penalties associated with those violations, number of licenses revoked and suspended, and consumer complaints and the disposition of those complaints.

Response: DFS currently makes available on its website summaries of enforcement actions taken against licensees, including bail agents. In addition, contact information for all authorized insurers, including insurers issuing bail bonds, is available on the DFS website. As a result, DFS did not make changes to the rule to address this comment.

Comment: Consumers requested that DFS commit additional resources and staff to monitoring the bail industry and note that large-scale efforts to expose and reign in the bail industry in states such as California, New Jersey and Minnesota have used administrative, civil and criminal jurisdiction.

Response: The amendments made by this rule will give DFS additional authority to regulate the bail industry and reflect DFS’s continuing commitment to effective regulation thereof. Since this comment does not directly pertain to the rule, DFS did not make any changes to the rule in response thereto.
Comment: The advocate coalition requested that DFS regularly collect records from insurers and bail agents to show they are complying with the rule. They stated that documentation of compliance should be mandatory to renew a bail agent license and failure to produce that documentation should result in license suspension or revocation or monetary penalties.

Response: Requiring that a bail agent self-certify that he or she is complying with the rule will not have any meaningful effect. DFS will continue to enforce the rule when it receives complaints or otherwise is made aware of violations of the Insurance Law or regulations promulgated thereunder. Therefore, DFS did not make any changes to the rule to address this comment.

Comment: The advocate coalition requested that DFS make available on its website insurer bail bond forms that were both approved and disapproved, with explanations of the defects in the latter.

Response: Rate, rule and form filings, including filings that DFS disapproved or that an insurer withdrew are already available online and may be found at https://filingaccess.serff.com/sfa/home/NY.

Comment: The advocate coalition asked DFS to ensure that disclosure requirements do not limit a consumer’s ability to bring a lawsuit against an agent or insurer when terms of contracts are abusive and to add language that the disclosures do not foreclose bringing claims of deception or unlawfulness, or that the form approval process is conclusive evidence that the contract terms are lawful.

Response: A bail agent’s compliance with the rule will not serve as a waiver of any private right of action that may be available. DFS does not believe it is necessary to amend the rule to add
such language because that kind of language is not elsewhere in the Insurance Law or regulations promulgated thereunder.

Comment: The advocate coalition requested at least annual meetings with DFS, advocates, community members, and industry to discuss the practical effects of the rule, including any shortcomings and additional opportunities to improve them.

Response: DFS is open to conversations with advocates, the community, and industry and welcomes feedback on the rule. Since this comment does not directly relate to the language of the rule, DFS did not make any changes to the rule in response thereto.

Comment: The advocate coalition noted issues found by other states regarding rampant exploitation and misconduct in the solicitation of principals and indemnitors by bail agents, including misleading sales practices, misuse of data and private information, and paying for in-jail referrals. The advocate coalition asked that the rule restrict misuse of information and explicitly restrict abusive solicitation practices and payments for referrals.

Response: DFS already has authority to take action against a bail agent, or anyone acting as an unlicensed bail agent, who engages in abusive solicitation practices. Insurance Law section 6802(a) prohibits a person from acting as an agent or solicitor of an insurer or CBO in soliciting, negotiating, or effectuating any deposit or bail bond without a license. Insurance Law section 6802(k) permits the Superintendent, upon notice and hearing, to revoke or suspend a bail agent’s license if the Superintendent determines, for example, that the agent violated any law, has been guilty of any fraudulent or dishonest practices or other misconduct or malfeasance, or has demonstrated incompetency or untrustworthiness. Therefore, DFS did not make any changes in response to this comment.