Consolidated Regulatory Impact Statement for the Revised 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).


FSL § 202 establishes the office of the Superintendent of Financial Services (“Superintendent”). FSL § 302 and Insurance Law § 301, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the FSL, IL, or any other law, and to prescribe regulations interpreting the IL.

IL § 2307(b) prohibits a policy form from being delivered or issued for delivery unless it has been filed with the Superintendent and either the Superintendent has approved it or 30 days has elapsed and the Superintendent has not disapproved it as misleading or violative of public policy. However, § 2307(c) permits the Superintendent, by regulation, to waive the policy form prior approval requirements if the rates for that insurance are not subject to prior approval under IL § 2305(a).

IL § 2314 prohibits an authorized insurer and any employee or other representative of an authorized insurer from knowingly charging or demanding a rate or receiving a premium that departs from the rates, rating plans, classifications, schedules, rules and standards in effect on behalf of the insurer and from issuing or making any policy or contract involving a violation thereof.

IL Article 68 sets forth provisions governing the licensing of bail agents and the doing of a bail business by an insurer and charitable bail organization (“CBO”).

2. Legislative objectives: The providing of bail is an integral part of the criminal justice system in New York State and the Legislature has long been concerned with abuses in providing bail bonds. The Legislature has strictly regulated who may deposit money as bail or execute as surety any bail bond. IL Article 68 provides the statutory requirements applicable to the regulation of bail insurers, CBOs, and bail agents. 11 NYCRR 28
(Insurance Regulation 42), which was first promulgated in 1964, implements the Legislative intent in regulating the business and posting of bail as a vocation in New York. IL § 2307 requires a policy form to be filed with the Superintendent unless the Superintendent waives the prior approval requirement by regulation and IL § 2314 prohibits an authorized insurer and any employee or other representative of an authorized insurer from knowingly deviating from the filed rate.

The amendments accord with the public policy objectives of more effectively regulating the bail industry and protecting consumers that the Legislature sought to advance in IL §§ 2307 and 2314 and Article 68 by: amending 11 NYCRR 28, which implements IL Article 68, and 11 NYCRR 33 (Insurance Regulation 120), which governs managing general agents, to establish similar provisions and requirements that are applicable to other insurance producers; amending 11 NYCRR 66 (Insurance Regulation 76) to require that bail bond forms be filed with the Superintendent for prior approval; and establishing requirements to prevent abuses that are particular to bail.

3. Needs and benefits: Since 2005, there has been an increase in the number of complaints made to the Department of Financial Services (“DFS”) against licensed bail agents, including allegations of misuse of collateral pledged with bail agents, the charging of impermissible fees, fraud, and the illegal retention of premium. For example, DFS received a complaint alleging, among other things, that a bail agent refused to return over $30,000 in premium that an indemnitor had paid for a bail bond to secure the release of a principal after the court rejected the bond at a bail sufficiency hearing and the principal was not released from custody. While handling that complaint, DFS learned that the U.S. Circuit Court of Appeals for the Second Circuit had certified the following question to the New York Court of Appeals involving the IL and analogous facts to those at issue in the DFS complaint: “Whether an entity engaged in the ‘bail business,’ as defined in NYIL § 6804(a)(1), may retain its ‘premium or compensation,’ where a bond posted pursuant to NYCPL § 520.20 is denied at a bail
sufficiency hearing conducted pursuant to NYCPL § 520.30, and the criminal defendant that is the subject of the bond is never admitted to bail.”

In June 2017, the New York Court of Appeals issued its opinion in Gevorkyan v. Judelson, 29 N.Y.3d 452 (2017), in which DFS filed an amicus curiae brief. According to the Court’s analysis of the statute, and as argued in DFS’s amicus brief, an insurer is entitled to the premium only upon “giving bail bond” under IL § 6804(a), and the bail bond “has not been given if the court refuses to accept the bond after the bail source hearing.” Id. at 458. The Court noted that its determination was further supported by the IL principle that premium follows risk: “The question before us ultimately turns on when a ‘premium’ is earned.” Id. at 461. As the Court explained, “[t]he use of the word ‘premium’ in section 6804(a) is significant because that term connotes a consideration paid to an insurer for assuming a risk. Risk, when used “with reference to insurance, describes the liability assumed as specified on the face of the policy.” (Emphasis in original.) Id. In the Court’s view, the insurer does not incur risk if the criminal defendant is not released and has no opportunity to abscond. “If the court disapproves the bail bond, the surety never runs the risk it contracted to insure.” Id. at 462. On August 29, 2017, DFS issued Insurance Circular Letter No. 13 (2017) to advise insurers and licensed bail agents that they must strictly comply with the Gevorkyan decision.

In August 2017, in light of the Gevorkyan case, DFS sent a letter to insurers writing bail bonds asking for information related to various aspects of their bail business in New York State, including complaints received by the insurer regarding its or its bail agents’ failure to return premiums or fees after the principal was not released from custody; copies of the insurers’ most recent versions of all forms provided to indemnitors and principals in New York State; and written guidelines and manuals that the insurer provides to bail agents that discuss earning and retention of premium and collateral.

DFS also met with advocates and learned that bail agents are not posting their names and licenses in their offices, making it difficult for indemnitors to know who they are dealing with and whether that person is properly
licensed as a bail agent. Advocates also noted that bail agents are requiring indemnitors to sign contracts whereby they agree to pay impermissible fees for things such as missed phone calls, couriers, and notaries; are not providing indemnitors and principals with copies of agreements they signed; are making it difficult to obtain return of collateral or are not returning collateral; and are taking advantage of indemnitors who may be undocumented persons by asking them for more money.

In June 2018, DFS sent a letter to licensed bail agents asking them to submit information about themselves and how they operate their businesses, including a description of how premium and collateral are received and maintained; a list of fees that they charge other than bail bond premium; and the circumstances under which they would rearrest or return a principal to custody.

Furthermore, DFS, with the Department of State and the Division of Criminal Justice Services, held listening sessions in New York City, Buffalo, and Syracuse in June 2018 to gather input from communities, advocates, and licensees concerning practices and how to combat abuses in the bail industry.

After reviewing testimony and comments from the listening sessions, considering complaints and surveying other states’ bail laws and regulations, DFS drafted amendments that would correct deficiencies and clarify certain issues. The amendments would require, among other things: a bail agent to maintain a bail register; a bail agent to issue a receipt upon collecting and, if applicable, returning the premium and collateral; an insurer, CBO, and bail agent to be liable for the return of all collateral received; an insurer and CBO to file, for the Superintendent’s approval, all contracts and other forms that are signed by or provided to the indemnitor or principal; a bail agent to prominently display in a headquarters location and each satellite office the license of the bail agent and any supervising person responsible for the place of business and a sign that states that a complaint may be filed with DFS; and a bail agent to provide certain disclosures to a potential indemnitor before the indemnitor signs any agreement. The amendments also codify the Gevorkyan decision that the full premium paid for a bail bond must be returned if the principal is not released from custody.
The amendments also would include in the definition of “managing general agent” under 11 NYCRR 33 any person or business entity that supervises or manages, on behalf of an insurer, bail agents appointed by the insurer, other than a person who is a full-time employee or officer of the insurer.

On September 5, 2018, DFS published the proposed amendments in the State Register and received extensive comments from insurers, bail agents, consumer advocates, and individual New York residents. DFS reviewed the comments and made changes to the proposed amendments in response thereto.

4. Costs: Insurers, CBOs, and bail agents will incur costs to implement and continue compliance with the amendments because they will need to make filings with DFS, issue receipts, expend printing and copying costs for written disclosures made available by DFS, and keep additional detailed records. These costs may vary based upon the size of the regulated entity and thus DFS cannot currently estimate the costs. The filing of policy forms and contracts by insurers should not be significant because insurers already make rate filings with DFS and provide forms to their bail agents. Many of the recordkeeping and other requirements in the proposed amendments are identical to requirements applicable to insurance producers.

These amendments may impose compliance costs on DFS because DFS will need to review contracts and policy forms submitted to DFS for approval. However, any additional costs incurred by DFS should be limited since there are not many insurers writing bail bonds and the terms of the bonds should generally be the same. As such, the costs to DFS should be minimal and DFS expects to absorb the costs in its ordinary budget.

The amendments do not impose compliance costs on local governments.

5. Local government mandates: This rule does not impose any program, service, duty, or responsibility upon a county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The amendments will require insurers and CBOs to make filings with DFS and will require bail agents to issue receipts, provide written disclosures, and keep additional detailed records.
7. Duplication: This rule does not duplicate, overlap, or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: DFS considered requiring collateral to be maintained in an interest-bearing account in a financial institution located in New York State that is insured by the Federal Deposit Insurance Corporation or National Credit Union Administration but determined that such a requirement was unnecessary.

DFS further considered requiring that build-up funds be held in a trust account but removed that section of the rule in response to comments it received from the bail industry.

DFS also considered maintaining the exemption for an insurer from filing bail bond forms with the DFS for DFS’s approval but decide to remove that exemption to better protect consumers because bail agents are using forms that often include language and terms that impose unreasonable, punitive, or predatory conditions on principals and indemnitors.

9. Federal standards: The rule does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: An insurer, CBO, and bail agent must comply with the rule within 120 days after publication of the notice of adoption in the State Register.
Consolidated Regulatory Flexibility Analysis for Small Businesses and Local Governments for the Revised 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).

1. Effect of rule: These amendments to the regulations apply to insurers in New York State that are authorized to write bail bonds; certified charitable bail organizations (“CBOs”); and bail agents.

Although most insurers are not small businesses, industry has asserted previously that certain insurers subject to the regulations are small businesses but has not provided the Department of Financial Services (“DFS”) with specific insurers or the number of such entities.

There are approximately 282 licensed bail agents in New York State, individual, corporate or otherwise. Although DFS does not have any specific statistics, DFS believes that many, if not most, of those bail agents are independently owned and operated and employ 100 or fewer individuals, Therefore, they are small businesses under the definition in State Administrative Procedure Act (“SAPA”) § 102(8).

There are nine certified CBOs currently in New York State. All of these CBOs are not-for-profit entities. DFS does not have information regarding their size but believes that most, if not all, are small businesses under SAPA § 102(8).

These amendments do not apply to local governments.

2. Compliance requirements: The amendments will require insurers and CBOs that are small businesses, to make filings with DFS and will require bail agents that are small businesses to issue receipts, provide written disclosures, and keep additional detailed records.

No local government will have to undertake any reporting, recordkeeping, or other affirmative acts to comply with the amendments because they do not apply to a local government.

3. Professional services: It is not anticipated that any small business affected by these amendments will need to retain professional services, such as lawyers or auditors, to comply with the amendments. No local
government will need professional services to comply with these amendments because they do not apply to any local government.

4. Compliance costs: Insurers, CBOs, and bail agents that are small businesses will incur costs for the implementation and continued compliance with the amendments because they will need to make filings with DFS, issue receipts, expend printing and copying costs for written disclosures made available by DFS, and keep additional detailed records. These costs may vary based upon the size of the regulated entity and thus DFS cannot currently estimate the costs. The filing of policy and other forms for insurers or certain forms for CBOs should not be significant. Insurers already make rate filings and provide forms to their appointed bail agents. Many of the recordkeeping and other requirements for bail agents in the proposed amendments are identical to those requirements applicable to insurance producers.

No local government will incur any costs to comply with these amendments because they do not apply to any local government.

5. Economic and technological feasibility: No insurer, CBO, or bail agent that is a small business affected by these amendments should experience any economic or technological impact because of the amendments. These amendments not apply to any local government; therefore, no local government should experience any economic or technological impact as a result of the amendments.

6. Minimizing adverse impact: There will not be an adverse impact on a local government since these amendments to the regulations do not apply to a local government. There may be an adverse impact on insurers, CBOs, and bail agents that may be small businesses but any adverse impact should be minimal. DFS considered the approaches suggested in SAPA § 202-b(1) for minimizing adverse impacts but did not find them applicable and concluded that the consumer protections afforded by these amendments are critical.

7. Small business and local government participation: DFS, with the Department of State and the Division of Criminal Justice Services, held listening sessions in New York City, Buffalo, and Syracuse in June 2018 to
gather input from communities, advocates, and licensees concerning practices and how to combat abuses in the
bail industry.

After reviewing testimony and comments from the listening sessions it received, considering complaints,
and surveying other states’ bail laws and regulations, DFS drafted amendments that would correct deficiencies and clarify certain issues.

On September 5, 2018, DFS published the proposed amendments in the State Register and posted the proposed amendments on DFS’ website. DFS received extensive comments from insurers and bail agents that are small businesses and made changes to the proposed amendments in response thereto.
Consolidated Statement Setting Forth the Basis for the Finding that the Revised 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) Will Not Impose Any Adverse Impact on Rural Areas.

These amendments do not impose any additional burden on persons located in rural areas, and will not have an adverse impact on rural areas.

The amendments would amend 11 NYCRR 28 (Insurance Regulation 42) to require, among other things: a bail agent to maintain a bail register; a bail agent to issue a receipt upon collecting and, if applicable, returning the premium and collateral from the indemnitor; an insurer, charitable bail organization (“CBO”), and bail agent to be liable for the return of all collateral received; a bail agent to prominently display in a headquarters location and each satellite office the license of the bail agent and any supervising person responsible for the place of business and a sign that states that a complaint may be filed with the Department of Financial Services; and a bail agent to provide certain disclosures to a potential indemnitor before the indemnitor signs any agreement. The amendments also codify the holding of Gevorkyan v. Judelson, 29 N.Y.3d 452 (2017), that the full premium paid for a bail bond must be returned if the principal is not released from custody.

The amendments further would include in the definition of “managing general agent” under 11 NYCRR 33 (Insurance Regulation 120) any person or business entity that supervises or manages, on behalf of an insurer, bail agents appointed by the insurer, other than a person who is a full-time employee or officer of the insurer and would amend 11 NYCRR 66 (Insurance Regulation 76) to require bail bond insurers and CBOs to file, for the Superintendent’s approval, all contracts and other forms that are signed by or provided to the indemnitor or principal, including the bail bond form.

These amendments apply uniformly to regulated parties that do business in both rural and non-rural areas of New York State. The amendments will not impose any additional costs on rural areas.