



## Winget, Spadafora & Schwartzberg, LLP - Client Alert

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### The NY Department of Financial Services Revises its Proposed Cybersecurity Rules

January 11, 2017

On October 14, 2016, we issued a Client Alert discussing the sweeping and largely unprecedented requirements proposed by the New York Department of Financial Services ("NYDFS") for regulated banking, insurance, and financial entities in New York State ("Covered Entities"). For that Client Alert, please [click here](#).

After receiving extensive comments, most of them critical, the NYDFS now has proposed certain changes to the requirements. Although many changes seek to soften or relax compliance burdens, the reality is that the stringent and draconian requirements remain, and Covered Entities will have to implement comprehensive cybersecurity risk-reduction measures in order to comply. It also is likely that class-action plaintiffs will use these requirements as ammunition to support their claims against Covered Entities for failing to adequately protect data.

Below is a summary of the principal proposed changes. The deadline to submit comments is January 27, 2017, and the proposed effective date is March 1, 2017.

- **Risk Assessments:** While the initial rules already required Covered Entities to undertake Risk Assessments, the revised rules treat Risk Assessments as the benchmarks for determining compliance with various other rules. Cybersecurity policies and programs, for example, "shall be based on the Covered Entities' Risk Assessment." Moreover, Risk Assessments must be individually tailored to Covered Entities' risk profiles, and "shall be updated as reasonably necessary to address changes to the Covered Entity's Information Systems, Nonpublic Information or business operations."
- Cybersecurity programs no longer must be "designed to ensure the confidentiality, integrity and availability of the Covered Entity's Information Systems." Rather, the programs must be "designed to protect" those systems. This change softens the rigorous - indeed, arguably

unachievable - standard requiring Covered Entities to "ensure" that their systems would not be breached or hacked.

- While the initial rules made encryption mandatory, the new rules would allow Covered Entities to employ "alternative compensating controls reviewed and approved by the Covered Entity's CISO," to the extent that encryption is "infeasible." CISOs, however, need to undertake an annual review regarding "the feasibility of encryption and effectiveness of the compensating controls."
- The new rules permit the outsourcing of various information-technology roles or functions, including those assumed by the CISO, who now may be employed by an affiliate or third party.
- The new rules require notifications of material breaches or incidents only if: (a) notice is legally required, and (b) the events "have a reasonable likelihood of materially harming any material part of the normal operation(s) of the Covered Entity." The prior version required notice for any event "that affects Nonpublic Information."
- Covered Entities are exempt from these requirements if they have fewer than 10 employees, including independent contractors. Also exempt are employees, agents, representatives, or designees who themselves are Covered Entities.

Winget, Spadafora & Schwartzberg, LLP is closely monitoring these developments. If you would like to discuss the implications of the proposed requirements on your pre-breach preparations, policies, and procedures, please do not hesitate to contact Dianna McCarthy at (212) 221-6900 ([mccarthy.d@wssllp.com](mailto:mccarthy.d@wssllp.com)) or Hillard Sterling at (312) 985-5600 ([sterling.h@wssllp.com](mailto:sterling.h@wssllp.com)).

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