Regulatory Impact Statement for the Proposed Amendment to 23 NYCRR 1

1. Statutory Authority: Financial Services Law (or "FSL") §§ 102, 201, 202, 301, 302, and 408.

FSL § 102 sets forth the purpose and goals of the Financial Services Law including, as relevant, to "establish a modern system of regulation, rule making and adjudication," to "ensure . . . the prudent conduct of the providers of financial products and services, through responsible regulation and supervision," and to "promote the reduction and elimination of fraud, criminal abuse and unethical conduct by, and with respect to, banking, insurance and other financial services institutions and their customers."

FSL § 201 sets forth a declaration of policy for the New York State Department of Financial Services ("Department") and states, as relevant, that the "Superintendent shall take such actions as the Superintendent believes necessary to . . . encourage high standards of honesty, transparency, fair business practices and public responsibility," and "eliminate financial fraud, other criminal abuse and unethical conduct in the industry."

FSL § 202 provides the Superintendent of Financial Services ("Superintendent") with broad "rights, powers, duties in connection with financial services and protection."

FSL § 301 sets forth the powers of the Superintendent under relevant law.

FSL § 302 provides that the Superintendent may prescribe, withdraw or amend rules and regulations involving financial products and services that effectuate and interpret the provisions of the Financial Services Law.

FSL § 408 provides that "the superintendent may, after notice and hearing, levy a civil penalty . . . for . . . any violation of state or federal fair debt collection practices or federal or state fair lending laws."

2. Legislative Objectives: The proposed amendment is intended to help ensure consumers pay only debts they owe and pay them only once, by improving consumers' access to information about alleged debts and mitigating opportunity for predatory debt collection activity through changes that address specific actors and documented harms.

3. Needs and Benefits: When the New York State Legislature created the Department, it granted the agency authority to regulate financial products and services offered or sold to consumers (with some exceptions) for the purposes of eliminating financial fraud, abuse and unethical conduct and to educate and protect users of financial products and services. The Legislature specifically empowered the Department to address violations of State and federal fair debt collection laws, including, but not limited to, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA").

As the Department noted when it first promulgated Part 1, debt collection is inextricable from consumer credit. Debt collectors collect on debts from credit cards, mortgages, and consumer loans, among other common transactions. The Department continues to find that debt collectors operating in New York engage in abusive and misleading collection practices, including pursuing consumers for debts they do not owe or for incorrect debt amounts, with broad effects on the population. According to the Urban Institute, approximately 22% of New Yorkers have at least one debt in collection, in a median amount of $1,734. https://apps.urban.org/features/debt-interactive-map/?type=overall&variable=pct_debt_collections&state=36.

The Department hears regularly from consumer advocates and legal service providers about debt collection abuses and is currently investigating multiple cases of abusive practices. Moreover, according to the Federal Trade Commission ("FTC"), which accepts consumer complaints, in 2020, New York was ninth in complaints per capita among states. Debt collection was the seventh-most complained about topic by New Yorkers to the FTC, ahead of auto, credit card, and healthcare. FTC, Consumer Sentinel Network Data Book 2020, 20, 54 (February 2021) (https://www.ftc.gov/reports/consumer-sentinel-network-data-book-2020). In 2020, the second-most common topic of complaints from New Yorkers to the Consumer Financial Protection Bureau ("CFPB") was debt collection, after credit reporting. CFPB, Consumer Response Annual Report, January 1–December 31, 2020 ("CFPB 2020 Report"), Table II (March 2021) (https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf).

Communications from debt collectors to consumers are of particular concern. The FTC's Do Not Call Data Book for 2020 noted that for New Yorkers, debt-related calls were the second-most complained about call type, and approximately 7% of the CFPB's 2020 complaints about debt collection were about communication tactics. FTC, Do Not Call Data Book 2020, 42 (October 2020) (https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2020). CFPB 2020 Report at 29. According to a 2018 analysis by the National Consumer Law Center, 56% of debt collection law violations reported by New Yorkers involved collectors calling repeatedly or continuing to call after consumers instructed the collector to stop calling. *Id.* at 32, 86; https://www.nclc.org/images/pdf/debt_collection/fact-sheets/NewYork.pdf. Additionally, as debt collectors adopt methods beyond phone and mail to reach consumers, risk of unlawful third-party disclosure and that the intended consumer will not receive important communications may increase. *See* National Consumer Law Center et al., Comments to the Consumer Financial Protection Bureau on its Proposed Debt Collection Rule, 71-72, 127 (Sept. 18, 2019) (https://www.nclc.org/images/pdf/debt_collection/comments-debt-collection-sept2019.pdf). Furthermore, the CFPB found increased consumer reports of receiving text messages regarding purported debts in 2020, and that those consumers who contacted the CFPB frequently were concerned that the text message they received was part of a scam. CFPB 2020 Report at 32.

The CFPB's analysis of its 2020 complaints also revealed that complaints about debt collectors pursuing a debt not owed are the most common type, as has been the case since the CFPB began taking complaints in 2013, and complaints of this type increased substantially in 2020. *Id.* at 30. Consumers reported attempts to collect debts they do not recognize, debts of another person, or debts for services or products they did not buy. *Id.*

Also, as the Department noted when it first promulgated Part 1, consumers may have difficulty responding to allegations of debts owed. They typically do not have legal representation and may not understand their rights. Consumers may respond to threats of a lawsuit without knowing that the statute of limitations on the claim has expired, may not understand how to assert a defense, and may not know that responding to an allegation is necessary. This makes consumers especially vulnerable to abusive and deceptive tactics.

The proposed amendment modifies and clarifies current Part 1 to address specific problematic collection tactics and consumer harms, primarily by (1) enhancing disclosure and substantiation requirements so that the consumer can more readily identify a debt or dispute it and to reduce the possibility that debt collectors attempt to collect debts they do not own and debts not owed, (2) reducing the possibility of consumer harassment by limiting the number of phone calls a debt collector may make to a consumer per week, (3) ensuring consumers receive important communications from debt collectors by regulating the use of electronic communication, (4) requiring improved, plain-English explanation of time-barred debt and modifications consistent with the CFPB's recently promulgated changes to Regulation F (12 C.F.R. § 1006.26(b), *see* 12 C.F.R. Part 1006 CFPB Final Rule, Official Interpretation, Dec. 18, 2020, 48) (suing or threatening to sue on a time-barred debt is a strict liability violation), and (5) clarifying that fair debt collection practices must be followed when enforcing a judgment.

4. Costs: Costs of compliance will vary depending on a debt collector's business. The Department has proposed disclosure requirements mirroring those of Regulation F, with slight modifications. This should allow debt collectors to rely on the model validation notice provided in 12 C.F.R. Part 1006, Appendix B, with the inclusion of some New York-specific elements, limiting potential expenses associated with modifying documents and updating policies. Debt collectors may incur new costs when collecting supporting documentation and performing internal analysis to validate debts and determine, in certain circumstances, whether the statute of limitations on debts have expired, though the regulation already required debt collectors to "maintain reasonable procedures for determining the statutes of limitations applicable to a debt it is collecting and whether such statute of limitations has expired." Enhanced disclosure may offer cost savings for debt collectors by mitigating the likelihood of consumer disputes of debts actually owed. Use of alternatives to

calling consumers or reducing calls to consumers may produce savings. Implementation or modification of systems to ensure compliance with call limits may have one-time costs. This amendment to Part 1 will not impose additional costs on the Department.

5. Local Government Mandates: The rule imposes no mandates on any county, city, town, village, school district, fire district or other special district. Further, new Section 1.7 of Part 1 states that the regulation does not preempt local laws or local programs to license debt collectors or otherwise provide consumer protections to debtors.

6. Paperwork: Debt collectors may need to modify paperwork they already produce to comply with Part 1 and Regulation F. Revisions to Section 1.2 will require certain disclosures to a consumer at the initiation of the collection of a debt in addition to those mandated by Regulation F, including optional disclosures under Regulation F. Section 1.4 will also require a debt collector to provide documents sufficient to establish the complete chain of title in addition to a statement describing the chain of title, if requested by the consumer.

7. Duplication: This amendment will not cause Part 1 to duplicate any existing State rule.

8. Alternatives: The Department has determined that there are no viable alternatives to this rule.

The Department posted a draft text of this regulation on its website for 10 days to solicit comment from small businesses that might be affected. During the comment period, the Department received comments from 23 entities, including 20 small businesses and three industry associations. After the conclusion of the comment period, the Department received additional comments from three small businesses and one industry association. Comments specific to the potential impact of the rule on small businesses are addressed herein.

Comment: One of the most frequent subjects of the comments from small businesses was the difference between the draft regulation’s validation notice requirements and Regulation F’s validation notice requirements. Commenters were concerned that it would be difficult and expensive for them to comply with the New York and federal rules simultaneously.

Department Response: In this case, revisions that could ease compliance may benefit both debt collectors and consumers by streamlining the validation notice. The proposed regulation relies on Regulation F's validation notice requirements while requiring disclosure of certain additional information that should improve consumers' ability to identify the debt alleged to be owed. Under Regulation F, debt collectors are permitted but not required to provide most of this additional material.

Comment: Several commenters objected to the call frequency limits. They asserted that because of their business model, these limits will severely hinder their ability to do business and incentivize litigation.

Department Response: The Department's proposed rule permits one completed call per seven-day period per account and limits call attempts to three per seven-day period per account. Regulation F sets a rebuttable presumption that no more than one completed call to a person within a seven-day period per account and no more than seven attempted calls within a seven-day period per account are not violative of the FDCPA's and Regulation F's prohibitions on calling meant to annoy, abuse, or harass a person. No commenters responding to the Department's draft rule offered data on the number of attempted and completed calls that are typically required to achieve their business goals; nor did any commenter suggest a limit that would accommodate reasonable business practices. One debt collector told the Department that because debt collectors often do not start out with reliable contact information for consumers, it may take many phone calls initially to reach the consumer, but once the debt collector does reach the right party, it usually takes only one call to make a payment plan arrangement, and after that, a completed call every seven days would be more frequent than average. The proposed regulation would allow debt collectors to call a person more frequently if the person requests more frequent calls.

Debt collectors did not offer data to support the claim that a limit of three attempted calls per seven-day period compared to seven attempted calls per account per seven-day period would incentivize litigation. No commenters provided data on the time it takes for a debt collector to make enough calls to find the right party and the amount of time typically remaining on a statute of limitations period for debts when they first begin attempts to initiate communication with a consumer.

Comment: The Department received comments expressing concern that the draft rule's definition of "debt" might inadvertently subject small businesses that bill consumers later or permit payment over time to the rule when they pursue payment.

Department Response: The Department does not consider this reading accurate. The definition of "debt collector" now found in Section 1.1(g) of the proposed rule (and which is the same as the draft rule's definition) maintains the existing provisions that a debt collector is "any person engaged in a business the principal purpose of which is the collection of any debts, or any person who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," and a debt collector is not "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor," These elements of the definition, among others, establish that businesses that extend credit directly to consumers are not acting as debt collectors when they pursue payment in their own name.

9. Federal standards: The FDCPA sets minimum debt collection standards and allows for states to expand upon these requirements. The CFPB recently promulgated amendments to its FDCPA regulation, Regulation F, which took effect November 30, 2021.

10. Compliance Schedule: The proposed amendment will become effective 180 days after publication of the Notice of Adoption in the State Register. This should allow for covered businesses to adjust any written materials and make necessary updates to policies, systems, and procedures relating to the form in and frequency with which they communicate with consumers.

Regulatory Flexibility Analysis for Small Businesses and Local Governments for the Proposed Amendment to 23 NYCRR 1

1. Effect of the Rule: State Administrative Procedure Act ("SAPA") § 102(8) defines a small business to mean "any business which is resident in this State, independently owned and operated, and employs one hundred or less individuals." This amendment is expected to affect all debt collectors, including those that are small businesses, equally. The existing Part 1 of 23 NYCRR sets forth standards for debt collection practices in New York, including establishing disclosure, validation, and substantiation requirements, payment procedures, and communication mandates and limitations relating to debt collection. The amendments to Part 1 clarify, modify, and update the provisions of Part 1 to ensure further that consumers who owe debts pay only what they owe and pay it only once, and, moreover, that all consumers alleged to owe debts, regardless of whether those allegations are eventually substantiated, are not subject to abusive or harassing debt collection practices, including being pursued for debts not owed.

All debt collectors operating in New York, whether or not they are small businesses, must already be familiar and compliant with the array of federal and state laws and regulations that apply to their business.

This rule does not affect local governments.

2. Compliance Requirements: The amendment will modify a record retention time period and may require debt collectors to adjust their compliance programs, including the content of their standard notices and methods of validating debts and substantiating allegations to consumers. The amendment also may affect debt collectors' modes and frequency of communication with consumers. Debt collectors may incur some additional costs to comply with the amended provisions of Part 1.

No local government will have to undertake any reporting, recordkeeping, or other affirmative acts to comply with this rule because the rule does not apply to any local government. The new Section 1.7 of Part 1 expressly states that the regulation does not preempt local laws or local programs to license debt collectors or otherwise provide consumer protections to debtors.

3. Professional Services: Debt collectors that are small businesses and are not law firms may see their need for legal services to comply with the requirements of this amendment increase somewhat.

No local government will need professional services to comply with this rule because the rule does not apply to any local government.

4. Compliance Costs: As noted above, new recordkeeping requirements may impose limited compliance costs on debt collectors if they must modify their standard notices or implement new policies.

No local government will incur any costs to comply with this amendment because the amendment does not apply to any local government.

5. Economic and technological feasibility: The rulemaking should not impose technological burdens on small businesses. Debt collectors already must comply with similar requirements. To a large extent, small businesses have already taken action to prepare for compliance with the recently adopted federal Regulation F, which also covers debt collectors. The proposed rule follows but also builds upon Regulation F and therefore may produce some compliance costs.

This rule does not apply to any local government; therefore, no local government should experience any economic or technological impact as a result of the rule.

6. Minimizing Adverse Impact: The Department has taken steps to ensure that debt collectors' preparation for compliance with Regulation F will be applicable to compliance with the proposed rule. No local government should be adversely impacted by this rule because the rule does not apply to any local government.

7. Small Business and Local Government Participation: The Department complied with SAPA § 202-b(6) by posting the proposed rule on its website for informal outreach and notifying trade organizations that represent the interests of small businesses that the proposed rule had been posted. The Department also will comply with

SAPA § 202-b(6) by publishing the proposed amendment in the State Register and posting the proposed amendment on its website again.

Statement Setting Forth the Basis for the Finding that a Rural Area Flexibility Analysis Is Not Required for the Proposed Amendment to 23 NYCRR 1

The Department of Financial Services ("Department") finds that the rule will not have any adverse impact on rural areas or impose new substantial reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in New York State. The rule does not impose any reporting requirements on debt collectors and does not change existing recordkeeping requirements to require the creation and maintenance of new records, though it does change the period of time for which records must be maintained. The rule applies to all debt collectors in the State, whether they operate in rural or non-rural areas and should not impact them differently based on location.

Statement Setting Forth the Basis for the Finding that the Amendment to 23 NYCRR Part 1 Will Not Have a Substantial Adverse Impact on Jobs and Employment Opportunities

The Department of Financial Services ("Department") does not expect compliance with amended Part 1 to have an adverse effect on jobs or employment opportunities in the debt collection and debt buying industry. The proposed amendment clarifies and modifies the rule that sets forth standards for debt collection practices in New York, including establishing disclosure and recordkeeping requirements with which debt collectors and debt buyers already must comply. Debt collectors and debt buyers currently are also subject to federal laws and regulations of a similar type.