Regulatory Impact Statement for the Proposed Amendment to Section 400.11 of the Superintendent's Regulations of 3 NYCRR 400.11

1. Statutory Authority: Financial Services Law Sections 202 and 302 and Banking Law Sections 10, 14, 371 and 372.

Financial Services Law Section 202 establishes the office of the Superintendent of Financial Services ("Superintendent").

Financial Services Law Section 302 authorizes the Superintendent to prescribe regulations interpreting the Banking Law and to effectuate any power granted to the Superintendent in the Banking Law, Financial Services Law, and any other law.

Pursuant to Banking Law Section 372, licensed cashers of checks may only charge a fee for cashing checks for retail consumers that does not exceed the maximum fee established by the Superintendent of Financial Services by regulation. Pursuant to that authority, the Department of Financial Services ("Department") sets the maximum fee, and a process for increasing the maximum fee, in Section 400.11 of Title 3 of the NYCRR. Additional authority for setting the fee is provided by Banking Law Sections 10, 14, and 371.

2. Legislative Objectives: By requiring the Department to establish the maximum fee that may be charged by licensed cashers of checks for cashing checks for retail consumers, the Legislature intended for the Department to balance the interests of consumers in paying a reasonable fee to cash their checks and the needs of licensees to conduct their business.

3. Needs and benefits: Pursuant to Section 372 of the Banking Law, the Superintendent of Financial Services is required, by regulation, to "establish the maximum fees which may be charged by licensees for cashing a check, draft, or money order." The maximum check cashing fee is established by Section 400.11. As of 2005, that section was amended to include a mechanism by which the maximum check cashing fee increased

every year “based upon an increase in the consumer price index for the New York - Newark - Jersey City, NY - NJ - PA area for all urban consumers” (“CPI”).

In light of the prolonged adverse economic impact on New York consumers, particularly on those that utilize the services of the check cashing industry, the Department became concerned about the adequacy of the automatic fee increase process established by Section 400.11. In particular, the Department was concerned that CPI is not an appropriate basis upon which to calculate an increase to the maximum check cashing fee. CPI is a broad regional measure of the cost of living for a variety of consumers, based on changes in prices of a host of consumer goods and services, such as food, energy, transportation, and medical care. It is a measure of the prices that consumers pay to buy goods and services for their day-to-day living; it is not intended to reflect the costs of operating a business generally, or a check cashing business, specifically.

To the extent that wages and other payments rise with inflation, the dollar value of checks also increases. As a result, using CPI as the basis to increase the maximum check cashing fee results in double increase for check cashers—with check cashers able to charge a higher fee against higher value checks.

Accordingly, in February of this year, the Department issued an emergency regulation halting the automatic fee increase and maintaining the current maximum fee of 2.27%. At the time, the Department announced that it would reassess the methodology it uses to determine the maximum fee. Since then, the Department has reexamined the methodology set out in Section 400.11 and developed a new approach that the Department believes more adequately balances the need of New Yorkers to have ready access to affordable check cashing services and the ability of licensed check cashers to remain competitive in a changing landscape.

Before deciding on the methodology being proposed, the Department undertook a comprehensive review of the industry and the competitive landscape, and it sought input from various stakeholders. Among other things, the Department reviewed the approach that other states that regulate check cashing fees take to setting a maximum rate; hosted a series of stakeholder roundtables and meetings with the check cashing industry stakeholders, consumer advocates, and academic experts; examined available check cashing alternatives available in New York; and reviewed data from check cashing licensees from 2014 to 2021, looking at trends in volume of checks cashed, check amounts, check casher expenses, typical fees charged, expenses, and business models.

Based on this review, the Department found that:

(1) CPI is an imprecise proxy for measuring the changing costs of operating a check cashing business;

(2) CPI is an imprecise measure of inflation over time;

(3) Average check sizes have grown over the years, increasing the per-check revenue earned by check cashers, so that using CPI as a metric to increase check cashing fees every year has effectively increased revenue for check cashers twice under the automatic fee increase;

(4) A number of states set a lower rate for governmental benefit checks or tax refund checks, in light of the lower risk those checks pose and the need of consumers to have ready access to such funds;

(5) New Jersey appears to be the only other state whose regulator is authorized to increase the maximum fee that may be charged to cash a check, and New Jersey has not raised its maximum fee rate since 2010, leaving New York's annual automatic fee increase an outlier; and

(6) The data indicates that New York State check cashers do not, on average, charge the maximum check cashing fee allowed by law, with the average rate being around 2.19%.

Based on its review and findings, the Department is proposing revisions to Section 400.11 that will propose a maximum fee of 1.5% of the check amount for cashing a check issued by a federal or State government agency for the payment of federal or State monetary assistance, Social Security, unemployment compensation, retirement, veteran's benefits, emergency relief or housing assistance, or a tax refund. The Department is proposing a maximum fee of 2.2% of the check amount for all other checks. Instead of the automatic annual increases, the proposed revision to Section 400.11 provides that check cashing licensees may request an increase in the maximum fee that may be charged for cashing a check only once every five years. Any such request must be supported by information detailing the financial condition of check cashing licensees, including their costs, expenses and revenues.

In settling on the proposed revisions to Section 400.11, the Department believes that a maximum fee of 1.5% on governmental benefit checks is reasonable and appropriate, given the reduced risk that these checks present and the particular importance of making these funds available to consumers. Further, the Department believes that setting the maximum fee at 2.2% for all other checks suitably balances the interests of consumers in paying a reasonable fee to cash their checks and the needs of licensees to conduct their business. This is particularly the case as 2.2% is above the average rate that licensees currently charges.

The ability to request an increase to the maximum fee every five years maintains the potential for subsequent increases in the maximum fees allowed, in line with the current version of Section 400.11. The proposed revisions would permit an increase less frequently than under the current regime, however, and only upon evidence from licensees that an increase is warranted, rather than on an automatic basis. By extending the frequency of the potential increase from one to five years, the proposed amendment allows the Department to receive more information, consider trends, measure the impact of inflation over time rather than narrowly looking at its impact at a particular point in time, and make a more informed determination on whether to increase the maximum check cashing fee consistent with the public interest.

The proposal also abandons the use of CPI as basis for increasing the maximum check cashing fee. Instead of relying on a broad measure of consumer costs, the proposed methodology focuses on factors that specifically inform the financial condition of licensed check cashers, including revenues, costs, various practices of licensees and external factors. With the benefit of that information, the Department can consider the actual condition of licensed check cashers and—potentially with input from other stakeholders—balance the needs of licensees against those of consumers who use the services of check cashers.

4. Costs: The new regulation does not increase the costs imposed on regulated industries or anyone else.

5. Local government mandates: The proposed amendment does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Check cashers will only need to provide additional paperwork if they choose to submit requests for fee increases in the future. Otherwise, there are no new record keeping or filing requirements.

7. Duplication: The regulation does not duplicate, overlap or conflict with any other regulations.

8. Alternatives: The Department weighed a number of alternative structures and methodologies. Among other things, the Department considered (i) allowing the existing fee increase mechanism provided by Section 400.11 to continue in effect, (ii) using alternative inflation metrics, including the Personal Consumption Expenditures price index, and (iii) implementing a flat-dollar fee. The Department concluded that the existing methodology, for the reasons stated above, was insufficient. While the Department considered a flat-dollar fee as an option, the Department ultimately concluded that a maximum fee percentage is better, because it is consistent with the existing mechanism and will result in an automatic fee adjustment over time, as check casher income will rise naturally as government benefits and paychecks increase with inflation. Moreover, a flat-dollar amount would be regressive on smaller checks, causing consumers with smaller-value checks to lose a greater percentage of their income to fees.

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. Seventy-one of 75 regulated check cashers qualify as small businesses. The Department received four comments from check cashers and their industry representatives.

The comments generally predicted that the proposed regulation would lead to financial distress and store closures in the industry, resulting in projected potential job losses. Three comments predicted that banks and credit unions would not fill the gaps caused by these potential closures.

The commenters questioned the analysis done by the Department, asserting that analysis provided by the industry in 2017 and accepted in part by the Department in 2019 is still valid today. With respect to industry costs, some commenters assert that industry costs for rent and labor are increasing at a rate that exceeds the CPI. They also contend that the maximum rate must be adjusted more frequently than every five years.

The Department stands by its proposal. Based on the data received from the industry, the Department does not believe the new maximum check cashing fee will cause store closures, reduction of services or job losses in the industry. The Department will monitor the industry and services closely after it adopts an amended regulation. In this regard, even though the proposed regulation limits the industry to asking for an increase to the maximum check cashing fee once every five years, the Superintendent retains the discretion to increase the maximum fee if the financial condition of check cashers deteriorate.

One commenter asserts that the rule making process underlying the proposed regulation was deficient and flawed, claiming the industry was not consulted sufficiently. However, the Department consulted with the industry before proposing the amendment to Section 400.11 and solicited, received and analyzed data from the industry as part of the process of developing the proposal.

9. Federal Standards:  Federal law does not govern the maximum fee that check cashers may charge for cashing retail consumer checks.

10. Compliance Schedule:  The proposed amendment will take effect after the adopted rule is published in the State Register; however, the new subdivision 400.11(d) specifies that the new maximum fees stated in subdivision 400.11(a) only go into effect on January 1, 2023.

Regulatory Flexibility Analysis for Small Businesses and Local Governments for the Proposed Amendment to Section 400.11 of the Superintendent's Regulations of 3 NYCRR.

1. Effect of the Rule: The amendment does not have any impact on local governments. Seventy-one of 75 of the Department of Financial Services's licensed check cashers qualify as small businesses that employ less than 100 employees. The amendment reduces the maximum fees that may be charged by licensees to a retail consumer for cashing a check, draft or money order.

2. Compliance Requirements: The regulation does not change existing compliance requirements. Pursuant to Banking Law Section 372 and Part 400.11, the maximum fee that may be charged for cashing a check is already regulated by the Department. Following a review of the financial condition of the industry and various alternative maximum fee structures, the amendments set lower maximum fees than are currently allowed. Those lower maximum fees go into effect on January 1, 2023.

3. Professional Services: Regulated entities will not be required to use or employ any additional professional services as a result of this rule.

4. Compliance Costs: No additional compliance costs are expected as a result of the amendment.

5. Economic and Technological Feasibility: No additional economic or technological burden on regulated entities which are small businesses are expected.

6. Minimizing Adverse Impacts: No adverse impacts are expected. The Department intends to continue to monitor the industry to assess the impact of the new maximum fees.

7. Small Business and Local Government Participation: This regulation does not impact local governments.

Before deciding on the new methodology being proposed, the Department undertook a comprehensive review of the industry and the competitive landscape, and it sought input from various stakeholders. Among other things, the Department hosted a series of stakeholder roundtables and meetings with the check cashing industry stakeholders, consumer advocates, and academic experts; examined available check cashing alternatives available in New York; and reviewed data from check cashing licensees from 2014 to 2021, looking at trends in volume of checks cashed, check amounts, check casher expenses, typical fees charged, expenses, and business models.

The Department complied with SAPA Section 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 section 202-b(6) by publishing the proposed amendment in the State Register and posting the proposed amendment on its website again.

Rural Area Flexibility Analysis for the Proposed Amendment to Section 400.11 of the Superintendent's Regulations of 3 NYCRR

1. Types and Estimated Numbers of Rural Areas: There are entities regulated by the New York State Department of Financial Services ("Department") located in all areas of the State, including rural areas. Six of the 75 check cashers licensed by the Department do business in rural areas of the State. The proposed amendment is not expected to impose any additional costs on these regulated entities. Rather, the amendment changes the maximum fees that may be charged for cashing government checks and retail consumer checks. The amendment eliminates automatic annual increases in the maximum permissible fee based upon inflation.

2. Reporting, recordkeeping, and other compliance requirements; and professional services: The amendment does not create any new reporting or recordkeeping requirements. Check cashers will need to conform to the new maximum fees set forth in the amendment once it is effective. No entity subject to the regulation should need to retain professional services, such as lawyers or auditors, to comply with this amendment.

3. Costs: The amendment will not increase costs for regulated entities.

4. Minimizing Adverse Impacts: The regulation establishes new maximum fees that the Department believes suitably balances the interests of consumers in paying a reasonable fee to cash their checks and the needs of licensees to conduct their business. The Department believes this can only be accomplished by removing the existing inflation adjustment provision in the regulation.

5. Rural Area Participation: On May 6, 2022, the Department posted the amendment on its website for informal outreach and comments, in compliance with State Administrative Procedures Act Section 202-b(6). Regulated entities in rural areas also will have another opportunity to participate in the rulemaking process when the amendment is published in the State Register and again posted on the Department's website.

Statement Setting Forth the Basis for the Finding that the Proposed Amendment to Section 400.11 of the Superintendent's Regulations of 3 NYCRR Will Not Have a Substantial Adverse Impact on Jobs and Employment Opportunities

This amendment eliminates automatic increases in the maximum allowable check cashing fee based on Consumer Price Index. It sets fixed amounts by regulation for government benefits checks and all other checks. These new maximum fees are lower than the current maximum in effect.

This amendment should not adversely impact jobs or employment opportunities in New York State. In reaching this conclusion, the Department of Financial Services conducted a review of rates currently charged by check cashers and found that 2.2% is above the average rate that licensees currently charge.

For these reasons, the proposed new maximum fee limits should not unduly affect the businesses of check cashers.