Assessment of Public Comments on the Proposed Amendment to 3 NYCRR 400.11

The New York State Department of Financial Services ("Department") received comments from licensed check cashers, their employees, customers, affiliated professionals, legislators, trade groups, consumer groups, advocates, and academics concerning the proposed amendment

Comment: Comments received from licensed check cashers, their employees, affiliated professionals and trade groups all expressed opposition to the proposed amendment while the comments received from consumer groups, advocates and academics all supported the proposed amendment. The comments submitted by legislators split, with nine legislators expressing opposition, or at least concern, over the proposed amendment and six supporting the proposal. The approximately 82,000 one-page statements submitted to the Department were drafted by a trade association that represents licensed check cashers (the "Trade Association"), signed by purported customers of the industry, and reiterate the industry's talking points on the proposed regulation.

The comments submitted in opposition to the proposed amendment expressed concern over the impact the proposed decrease in the maximum check cashing fee, (1) from 2.27% to 1.5% for all government monetary assistance, Social Security, unemployment compensation, retirement, veteran's benefits, emergency relief or housing assistance, or tax refund checks, and (2) from 2.27% to 2.2% for all other retail checks, would have on the viability of licensed check cashers. In general, almost all of the comments in opposition mirror the comment from the Trade Association that check cashers provide critical "financial services in areas where liquidity and access to traditional banking institutions are otherwise often hard to come by: in low- and moderate-income immigrant and minority communities, and areas with high poverty rates." Commenters believe the people who use check cashers prefer their services over those offered by banks because of the personalized and additional services, such as bill payments, money orders, and electronic cash transfers, they receive. A number of commenters also highlighted that licensed check cashers provide employment to women and minorities from the neighborhoods they serve.

These commenters generally state that the check cashing industry is already struggling due to several structural, long-term economic trends. In particular, these commenters state that check cashers are already operating in an environment of declining revenue due to the combined impact of the COVID-19 pandemic and increased competition from direct deposit, online bill pay and prepaid cards services. At the same time, like for most businesses, their costs are increasing more quickly than the Consumer Price Index ("CPI") due to changes in the minimum wage law and inflation, particularly for wages, rent, insurance, and other fees. This is particularly felt in the New York City metropolitan area. Most licensed check cashers operate in the New York City metropolitan area. To meet these pressures, check cashers have already had to trim costs, and some have closed less profitable stores.

These commenters all express concern that the proposed change to the maximum fee would negatively impact the industry. At a minimum, the commenters state, licensed check cashers would have to further trim costs, potentially limiting services and the ability of check cashers to provide raises to their employees. Other commenters state that check cashers will be forced to close locations with lower volumes or without other sources of income, depriving people in those communities of local services and eliminating jobs.

An accounting firm retained by the Trade Association wrote a report concluding that the industry needs a substantial increase in the maximum fees to maintain its historical rate of return. This report was attached to the Trade Association's comment letter.

An attorney representing money transmitters believed his clients would lose valuable agents if check cashers chose to close multiple branches. Accountants, a banker and an insurance broker who serve the industry also feared some loss of revenue. An attorney for a bank believed many check cashers might default on their lines of credit under the proposed rates.

The comments in support of the proposed amendment generally focused on the importance of recognizing the interests of the people served by the check cashing industry in setting the maximum fee check cashing fee. These comments point to the fact that the check cashing industry typically serves low to moderate income communities. In support of this assertion, they point to a study, conducted by the Federal Deposit Insurance Corporation in 2021, that found that "90% of money order, bill payment and check cashing users had incomes of less tha[n] $75,000" with 30% of that number having an income of less than $15,000 and another 25% having an income between $15,000 and $25,000. The study also found that approximately 18% of New York households use money order, bill payment and check cashing services, indicating that roughly 1.3 million New York households rely on these services.

Another study, conducted by the New York City Department of Consumer and Worker Protection in 2017, found that 354,000 households in the city do not have bank accounts and that another 690,000 households that do have bank accounts continue to use check cashing and prepaid card services. Together, the data indicates that the check cashing industry generally serves a segment of the population that is struggling to meet the high cost of living in New York, with an estimated four in ten New York households unable to afford the costs of their basic needs.

The commenters supporting the proposed amendment further note that inflation has a greater impact on the people who generally use check services because households who are already struggling to pay for basic needs do not have the option to cut back discretionary spending to offset rising costs. These commenters support removing the automatic increase based on CPI because it is not necessarily an accurate measure of the costs of operating a check cashing business and because it fails to account for the disproportionate impact CPI has on the consumers of check cashing services and their resulting ability to pay for those services.

An academic commenter also pointed out that using CPI to increase the maximum check cashing fee risks a "double adjustment" because checks may be increasing in line with inflation. This means that as wages and other payments rise with inflation, the dollar value of checks also increases, resulting in two fee increases for the check cashing industry – one based on the increased check amount and another based on the CPI adjustment mechanism. As a result, using CPI as the basis to increase the maximum check cashing fee results in double increase for check cashers.

Response: The proposed amendment seeks to redress long-standing flaws in the mechanism established by 3 NYCRR 400.11 to adjust the maximum fee for cashing checks and aligns New York with every other state that regulates fees charged by check cashers. Specifically, since the existing mechanism was established in 2005, New York has been the only state to grant annual, automatic increases to the maximum check cashing fee based on increases in CPI. This mechanism presumes that an annual increase is always warranted, without any consideration of the needs of the industry or the ability of the consumers who use check cashing services to absorb those increased costs, and it bases those increases on CPI, a broad measure of increases in the cost of living for consumers.

The fact that the existing mechanism ignores the interests of the consumers is particularly egregious as check cashers typically serve diverse neighborhoods where the poverty rate is higher and there is often limited access to financial services. According to a report submitted on behalf of the Trade Association in opposition to the proposed amendment, "61% of New York check cashing centers are located in a neighborhood that is at least 60% non-white" and "most check cashing centers (67%) are located in neighborhoods with poverty rates above the national average," while 62% are located "in neighborhoods with poverty rates above the New York average." This means that check cashers are frequently the only way that many struggling New Yorkers can access the financial system to cash their wage or benefit checks. Yet the existing mechanism provides no consideration for the impact that annual, automatic fee increases will have on struggling New Yorkers who rely on these services to access their cash. Accordingly, while studies show that the pandemic had a greater impact on low to moderate income communities,[1] the check cashing fee was increased three times in the lead up to and through the height of the pandemic. The existing mechanism bases these annual, automatic fee increases on increases in CPI – a broad regional measure of the cost of living for a variety of consumers – that bears no clear relationship to the costs of running a check cashing business. New York is the only state that uses CPI as a basis for increasing the maximum fee a check casher can charge. Based on the Department's analysis, which is supported by comments received on the proposed amendment, CPI is not a reliable indicator of the costs of operating a check casher.

Instead, CPI captures the cost-of-living increases that consumers, including those who use check cashing services experience. In this regard, the use of CPI to calculate increases to maximum check cashing fees is punitive to consumers of check cashing services, with studies showing, and commenters supporting the proposed amendment stating, CPI increases are more burdensome for consumers who are living on marginal or fixed incomes. One article, published

[1] COVID-19 Impacts Finances of American Families | Pew Research Center

by the Minneapolis Federal Reserve Bank, noted that one study "found households with annual incomes below $20,000 experienced a median inflation rate 0.6 percentage points higher than households making more than $100,000."[2] In other words, CPI already disproportionally impacts the people who typically use check cashing services. Therefore, since 2005, the mechanism for increasing the maximum check cashing fee has imposed a constant increase on the cost of financial services to populations who have limited alternatives and tied this increase to inflation, which disproportionality impacts these same communities.

The Department's concern with the automatic nature of the increase process and the underlying methodology, which ignores the impact on the consumers who use check cashing services, and relies on a measure of consumer costs as a stand-in for industry expenses prompted the Department to review 3 NYCRR 400.11 at the beginning of 2022. Based on the obvious flaws in fee-setting mechanism, the Department suspended the maximum fee increase for this year by an emergency regulation, collected data from the industry, met with interested parties (including industry representatives, consumer and community advocates, and academics), and proposed the amended to 3 NYCRR 400.11.

The goal of the proposed amendment is to better balance the interests of the industry with those of the people it serves. The amendment accomplishes this goal by: (1) eliminating the annual automatic increase based on increases in CPI in favor of a process by which the industry can seek fee increases based on relevant business conditions; and (2) slightly adjusting the maximum fee for most checks following serial increases going back more than 15 years including three times in nearly a year from December 2019 through March 2021 during the lead up to and height of the pandemic, and (3) reducing the rate on benefit checks in recognition of

[2] https://www.minneapolisfed.org/article/2022/the-widely-varied-pain-of-inflation.

the reduced risk of loss on such checks and the needs of New Yorkers receiving public assistance, in keeping with check casher fees in most other states.

The Department understands the industry's concern with the proposed amendment and its potential impact. However, before proposing to amend the maximum fee and the process by which it is adjusted, the Department sought, received and reviewed a substantial amount of data from the industry and other stakeholders. The Department's review indicated that check cashers do not, on average, charge the maximum check cashing fee allowed by law, with the average rate being approximately 2.19%. That means that while the industry is currently authorized to charge 2.27% as the maximum fee for cashing a check, and claims it needs the fee to be increased to approximately 2.5%, the industry is generally charging below the amount it is authorized to charge. Accordingly, while a number of the comments in opposition to the proposed amendment describe the condition of the industry and the potential impact of the amendment in dire terms, the Department views the decrease as being consistent with current industry practice.

Similarly, while the industry depicts the proposed amendment as enacting a major change to the fee structure, labeling the decrease in the general maximum fee from 2.27% to 2.2% (.07 basis) as being "drastic" or "severe" for the industry in the comments opposing the proposed amendment. But it is important to underscore that these are generally insignificant, with the decrease from 2.27% to 2.2% equaling less than one-tenth of one percent. To put this in perspective, the industry portrays the larger increase in the maximum fee that the industry calculates would have occurred if the Department did not freeze the rate this year, from 2.27% to 2.37% (.1 basis), as being "negligible" for consumers.

Comment: The Trade Association submitted a report, prepared by a retained accounting firm, analyzing the licensed check cashing industry in New York and making projections as to the impact of the proposed amendment. The key findings of the report are as follows:

- The check cashing industry saw continuous declines between 2010 and 2019, with a 21% decrease in the number of licensed locations, 30% decrease in total volume of checks, and a 16% decrease in total revenue over that time. Although revenue and volume from commercial check cashing has increased over that same time, it has not offset the declines in retail check cashing volume.

- Volume and revenue declines continued during the COVID-19 pandemic and were only partially offset by COVID-related stimulus checks.

- Although average retail check values have increased since 2010, that increase has not offset the decrease in the total volume of retail checks.

- In the three years preceding the pandemic, the average annual growth rate in wages at check cashers was over 11%.

- The industry's return on equity, as compared to the average return on equity from 2017 through 2019, was -2.0% in 2020, 1.8% in 2021, and -1.15% in 2022.

- The average return on equity for New York check cashers is below the industry benchmark for the northeast region while the operating expense ratio is higher.

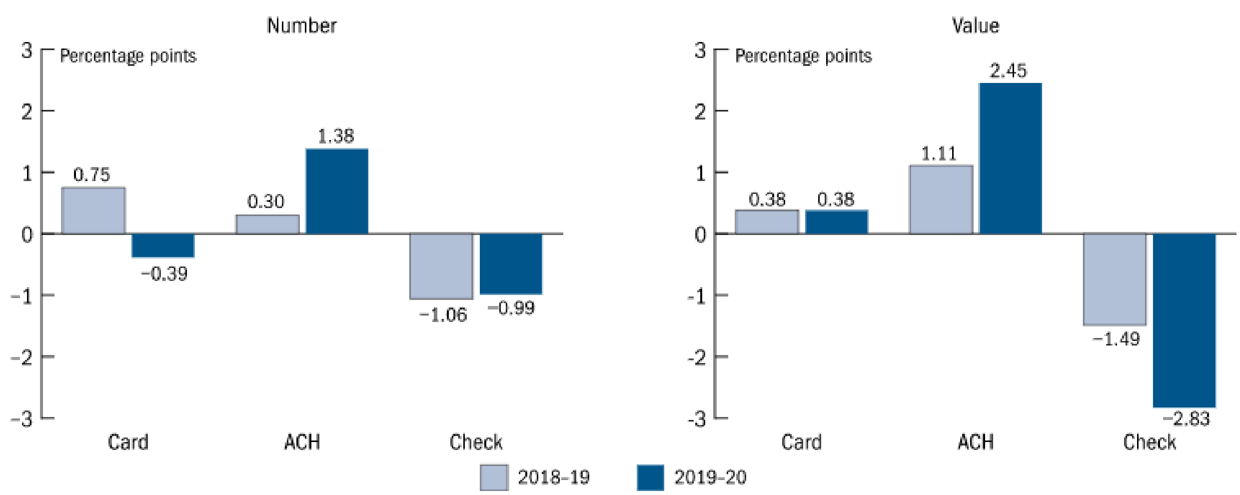
- At the current maximum fee, check casher return on equity is estimated to be -1.15% compared to the 2017-2019 historical average of 2.89%. As such, the existing methodology of increasing the maximum check cashing fee in line with the consumer price index has failed to maintain the historical return on equity.

- Under the current proposed amendment, the return on equity would be further in the negative as compared to the 2017-2019 historical average of 2.89% and the industry would be unprofitable. The report estimates that, under the proposed amendment, the return on equity for the industry would be -3.28%. The report concludes that a maximum fee of 2.53% would be required to retain the 2017-2019 historical average return on equity of 2.89%.

Check cashing centers are predominantly located in diverse neighborhoods and neighborhoods with higher rates of poverty than the average New York neighborhood. They also predominantly hire minorities and women.

Response: The Department is aware of declines in the number of check cashing locations and the volume of checks cashed in New York. This is due to a variety of systemic economic factors and changing consumer preferences, but a primary factor is a long-term evolution in how consumers receive funds and make payments. The Federal Reserve has reported a steady decline in the use of paper checks for over ten years in its 2020 Payments Study.[3] The study notes a continued decline in the use of checks as card and ACH-based payment systems increase in use. This overall trend is further exacerbated by the rise of Peer-to-Peer and fintech payment systems. The pandemic then accelerated the movement away from physical checks towards digital options. At the same time, many government agencies have moved away from using checks to pay public benefits or assistance. As noted above, New York State unemployment insurance, Supplemental Nutrition Assistance Program and federal benefits, including Social Security, Veteran's benefits and Supplemental Security Income, are all paid through direct deposit or debit card. The result, as demonstrated in the following graph from the 2020 Payments Study is a steady decline in the use of paper checks.

Changes in the Shares of Noncash Payments, 2018-2019 and 2019-2020



[3] This report is available online at https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm#:~:text=Key%20Findings,by%20both%20number%20and%20value.

The Fed - Developments in Noncash Payments for 2019 and 2020: Findings from the Federal Reserve

This indicates a systemic, long-term shift in the way people are paid and pay for goods and services and all indications are that the move away from paper checks is likely to continue. The solution to changing consumer preferences can not be that the maximum check cashing fee will increase exponentially, primarily for low-income consumers, to offset declining check cashing volume.

In light of the declining use of paper checks, the comments in opposition assert the Department should leave the current mechanism in place to ensure that the industry continues to earn a fixed rate of return . This proposed approach, however, is impractical and inconsistent with the legislative intent evident in Banking Law Section 372. The requirement in that section that the maximum check cashing fee be limited in accordance with regulations established by the superintendent indicates a clear legislative intent to protect consumers who use check cashing services against overcharge. Increasing fees automatically, to ensure the industry maintains consistent profit margin, is contrary to this intent. Rather, the law requires a balancing of the interests of the industry and the people who use the services of the industry, which is what the proposed amendment aims to accomplish.

There is nothing in the legislation indicating that the Department must continue to increase the fee to guarantee the industry a particular return on equity or level of profitability without considering consumer protection, and that approach is not a viable solution. Given the decline in the use of paper checks, continuously increasing the maximum fee to maintain a particular rate of return puts low-income consumers on the hook for maintaining profit margins of the industry and will eventually price the industry out of competition.

It is the Department's responsibility to support the industry by maintaining the safety and soundness of its regulated institutions and protecting consumers. It is not the responsibility of the Department to maintain the check cashing industry's exact return on equity. The Department reviewed the data provided by the industry and found that, on average, the industry charges below the current authorized maximum fee. The fee authorized under the proposed regulation already captures what the industry is generally charging. Accordingly, the Department does not view the regulation as posing a threat to the financial condition of the industry.

The report commissioned by the check cashing industry conflates the Department's role in maintaining safety and soundness, with industry owners and managers' profit goals. Systemic trends in consumer preferences are impacting industry profits. But the Department's role in addressing these changes is by supporting the industry's transition to new forms of payments and services, rather than creating excessive fees on a paper check cashing service.

As the proposal is implemented, the Department will continue to monitor the industry, as it currently does, through the annual financial reports submitted to the Department and as part of the examination process. The Department will assess the impact of the proposed amendment and take any action it considers appropriate to facilitate the ability of the industry to provide affordable services to consumers. As part of the Department's review and consideration of the overall health of the industry, the Department will look for opportunities to support the transition to new forms of payments and services, rather than creating excessive fees on a paper check cashing service. It is not the responsibility of the Department to maintain the check cashing industry's exact return on equity. The Department will support the industry in maintaining safety and soundness, and consumer protection, while exploring innovation opportunities.

Comment: Several commenters criticized the proposed decrease of the maximum fee to 1.5% for all government monetary assistance, Social Security, unemployment compensation, retirement, veteran's benefits, emergency relief or housing assistance, or tax refund checks, for several reasons. They claim that the proposed maximum fee is a significant reduction and results in a fee that is insufficient to cover the risk of loss on those items. These commenters state that the risk of loss on government benefit checks is generally incurred as a result of duplicate deposits or forged endorsements, meaning that the inability to recover the checks is generally due to the payee, not the payor. One commenter amplified this point, stating that the overall losses on checks for one licensee is $0.06 per $100 of checks cashed in the aggregate while the losses for government checks is $0.04 per $100. The two-cent difference, this commenter asserts, is not significant enough to justify the proposed roughly 30% fee decrease. Most of the cost of cashing a check comes from basic operating expenses, such as rent and labor, not the default rate on a particular category of check.

Response: The Department disagrees that the proposed reduction of the maximum fee that may be charged to cash public assistance checks results in a material reduction in fee income for the check cashing industry or results in a fee that is insufficient to cover the costs of cashing such checks. The Department understands that public benefit payments are now generally sent to recipients through direct deposit or a debit card, resulting in a lower volume of public assistance checks that can be presented at a check cashing location. For example, New York State unemployment insurance is paid through one of those two methods. *See* https://dol.ny.gov/unemployment-insurance-payment-options. Similarly, Supplemental Nutrition Assistance Program and Temporary Assistance payments are provided on debit cards. *See* https://otda.ny.gov/workingfamilies/ebt/. The same is true of federal benefits, with Social

Security, Veteran's benefits and Supplemental Security Income all paid through direct deposit or debit card. *See* https://www.fiscal.treasury.gov/directexpress. With the declining use of paper checks to pay public benefits, the impact of the fee reduction is expected to be limited.

Moreover, the unsubstantiated claim that the risk of loss on government benefit checks is due to forgery and fraud does a disservice to the consumers who receive these benefits, and to the government programs which have significant barriers and disincentives to this activity. Commenters acknowledge the lower cost for cashing these kinds of checks. In recognition of this fact, most other states across the country have a lower check cashing fee cap for government checks.

As discussed herein, the Department is committed to monitoring the health of the check cashing industry and assist in reducing operating expenses where possible. The Department will continue to monitor the impact of the proposed regulation and adjust the maximum fee as appropriate.

Comment: Several commenters challenge the estimated cost of complying with the proposed regulation, stating that the cost to reprogram their check cashing systems to account for a different rate for cashing government checks would cost each firm a six-figure sum of money.

Response: The cost of incorporating a different maximum fee for public benefit checks should be minimal for anyone using off-the-shelf software and, even if a licensee is not using such software, they are already offering a multi-tier fee structure in New York. While the Department acknowledges the challenge of reprogramming systems generally, off-the-shelf check cashing programs exist and are used by a number of licensed check cashers. As this software is designed to be used nationwide, it already incorporates the functionality to account for multiple check cashing fee structures in recognition of the varying maximum fees established by different states. The cost of incorporating a different rate for anyone using established software should be minimal. As several check cashers operating in New York have national operations, they already operate systems to track different maximum fees and should be familiar with that type of accounting.

Moreover, many check cashers already maintain multi-tiered pricing. For check cashers that engage in both retail and commercial check cashing activity, the maximum fee that can be charged for consumer checks is established by the Department while no comparable limit is placed on the amount that can be charged for cashing a commercial check. In short, check cashers engaged in both lines of business are already accounting for multiple maximum fees in New York. The Department's review of the data provided by check cashers indicated that many check cashers used different fees for different retail customers as well. Accordingly, for example, check cashers often accept a fee below the maximum for certain preferred clients. In short, the Department understands that the industry already uses multiple fee structures in New York, indicating that it has the capacity to recognize and process multi-tier maximum fee structure.

Comment: Several commenters challenge the proposed regulation stating that it does not provide sufficient guidance on what constitutes government monetary assistance, Social Security, unemployment compensation, retirement, veteran's benefits, emergency relief or housing assistance, or tax refund checks.

Response: The proposed amendment reflects commonly used language that is generally understood by check cashers throughout the nation. Specifically, the proposed language specified that a maximum fee of "1.5 per centum of the amount of the check" could be charged on a check "issued by a federal or State government agency for the payment to the bearer of federal or State monetary assistance, Social Security, unemployment compensation, retirement, veteran's benefits, emergency relief or housing assistance, or a tax refund." This language was drafted, in part, based on language commonly used by other states to limit the fees that may be charged on various types of public benefit checks.

After receiving comments on this issue, the Department reviewed the language used by other states to define the types of public benefit checks that were subject to a different maximum fee a second time. To verify the Department's initial research underlying the proposed language, the Department used a chart provided by the check cashing trade association that summarizes the check cashing laws in other states and identifies the states that impose a reduced maximum fee for various types of checks drawn on state or federal government accounts.

According to this chart, twelve states set a different maximum fee for cashing public benefits checks.[4] Those states define public benefit checks that are subject to a lower maximum fee as follows:

- Connecticut – CT Gen Stat. § 36a-584 – "a check drawn by the state of Connecticut and payable within this state to a recipient of public assistance, as provided in section 36a-304." CT Gen Stat. § 36a-304 – "any check drawn by the state of Connecticut and payable within this state to a recipient of public assistance or state-administered general assistance or the refugee program."

- Florida – Fla. Stat. § 560.309(8)(b) – a check for "the payment of any kind of state public assistance or federal social security benefit payable to the bearer of the payment instrument."

- Georgia – GA Code § 7-1-707 – "such payment instrument is state public assistance or a federal social security benefit made payable to the bearer of such payment instrument."

[4] A number of other states limit fees that can be charged on any check drawn on a government account. By excluding government payroll checks or other non-benefit payments, the approach adopted by the Department results in a narrower reduction of the maximum fee.

- Hawaii – HIT Rev. Stat. § 480F-3 – "check is the payment of any kind of state public assistance or federal social security benefit payable to the bearer of the check."

- Illinois – Ill. Comp. Stat. 38 § 130.30 – "a public assistance check means a check issued by a federal or State government agency for payment of to a recipient of federal or State monetary assistance, Social Security, Unemployment Compensation, Railroad Retirement, veteran's benefits, or housing assistance."

- Louisiana – LA. Rev. Stat. § 6.1009 – "checks issued by or drawn upon the account of a public welfare or public assistance agency of the United States, the state of Louisiana, or any political subdivision of the state."

- Maine – Me. Rev. Stat. tit. 32 § 6138 – "payment instrument is the payment of any kind of state public assistance or federal social security benefit payable to the bearer of the payment instrument."

- New Jersey – N.J.S.A. § 17:15A-43 – a check payable to a recipient of "Temporary Assistance for Needy Families (TANF)," or "supplemental security income pursuant to Subchapter XVI of the Social Security Act, 42 U.S.C. s.1381 et seq.," or "old-age and survivors benefit payments pursuant to Subchapter II of the Social Security Act, 42 U.S.C. s.401 et seq." See also, N.J.A.C. 3:24-4.1.

- Pennsylvania – Check Casher Licensing Act – "government assistance check."

- Rhode Island – RI Gen. L. § 19-14.4-4 – "check is the payment of any kind of state public assistance or federal social security benefit."

- Tennessee – TN Code § 45-18-121 – "payment instrument is the payment of any kind of state public assistance or federal social security benefit payable to the bearer of the payment instrument."

- Vermont – Vt. Stat. Tit. 8 § 2519 – "payment of any kind of state public assistance or federal Social Security benefit, if the customer cashing the payment instrument is the named payee of such instrument."

The language proposed by the Department is consistent with the language adopted in other states. It is language that has been in effect for years and is commonly understood by the check cashing industry throughout the country, including many New York licensees who operate in other jurisdictions. Accordingly, the Department does not agree with the comment that the proposed language is vague. In fact, certain commenters use the proposed language to identify and count public benefit checks that they previously processed in formulating their comments on the proposed regulation. The industry's ability to identify checks that would be covered by the proposed regulation underscores that the industry understands the proposed list of public benefit checks that are subject to a different maximum fee.

The industry assertion that check cashers will be unable to distinguish between, for example, a payroll check that would be subject to the higher maximum fee and a public benefit check that would be subject to the lower maximum fee is contradicted by current practice. The check cashing industry already distinguishes between two different types of checks, retail and commercial checks, which are subject to different fees. To assess what fee applies, the industry verifies which type of check is being presented , charges the associated fee, and to documents its analysis. The Department verifies this analysis during the examination process. Adding a third type of check, i.e., a public benefit check, to this verification process is no different and should not present a meaningful burden, as has been proven by the industry's long-standing practices in at least twelve other states identified above.

Comment: One commenter challenged the methodology used by the Department to calculate that check cashers charge on average 2.19% in fees for cashing a retail check. The commenter states that the methodology does not factor in returned and redeposited items or money orders, resulting in a double counting of items, totaling approximately 1.8 million checks for this institution. Factoring in those items, for this institution, would yield an average fee of 2.26%.

Response: The Department's review was based on data provided by the check cashing industry. A core component of industry data reporting is the total number of retail checks cashed, the dollar amount of those retail checks, and the fees collected from those retail checks.

Returned or redeposited items are clearly delineated for reporting as a separate variable. If a check is returned and redeposited it should only be counted and reported once.

This comment posits that the Department's methodology is flawed because the industry misreported data on returned items. The Department has not seen evidence of any double counting in its supervisory reviews of financial reporting and has no reason to believe that the data it received was flawed or misreported so as to undermine the analysis supporting the proposed amendment. This conclusion is supported by the fact that only one commenter raised this inaccurate double counting claim.

Comment: Some commenters observed that five years is too long a period to wait if the industry needs a rate increase. One commenter challenged the proposed mechanism for determining future increases to the maximum fee, stating that it is "woefully vague" as to whether the requests have to be submitted and evaluated on an individual or industry-wide basis. Moreover, this commenter asserts, the regulation fails to set adequate standards guiding the decision on a request for a fee increase, stating that such matters are left to the Department's "absolute, standard-less discretion."

Response: The proposal is consistent with the broad grant of the authority the Legislature provided to the Department to establish a maximum fee for cashing retail checks. Specifically, Banking Law Section 372 simply states that the "superintendent shall, by regulation, establish the maximum fees which will be charged by licensees for cashing a check, draft, or money order." Until 2005, the Department did not need or use a rigid formula or review procedure to establish the maximum check cashing fee. Before the 2005 regulation was adopted, the Department established a flat fee and increased it in its own discretion with no prescribed methodology or predictability. Previously, the relevant fee language, set forth in 3 NYCRR

400.12, simply stated that a "licensee shall be permitted to collect or charge in fees for cashing a check, draft or money order a sum or sums not to exceed a (a) 1.4 percentum amount of the check, draft or money order, or (b) 60 cents, whichever is greater." The language provided nothing about how or when the fee would be increased or what information would be considered. Rather, the determination was, consistent with the Legislative intent, left to the discretion of the superintendent.

By specifying when the industry may apply for a fee increase, and what information should be submitted in support of the request, the current proposal is more specific, transparent, and predictable than the historical fee setting regulation and – as regulation is intended to do – provides more guidance than set forth in Banking Law Section 372. Specifically, it provides that any request for a fee increase "must be supported in writing by annual information, for each of the preceding five years, showing each licensee's costs and expenditures (including rent, wages, information technology and compliance costs), profitability (including all sources of revenue, such as those from other lines of business, as well as other conditions impacting each licensee's financial condition, such as capital needs, cost of capital and payments to owners or senior managers) and any other information the Department may request."

The request can be initiated by any one member of the industry – it does not require that the industry as a whole request an increase. If a request is filed, the Department may request data from other licensees to ensure a complete picture of the condition of the industry and whether a fee increase is warranted. The Department will consider the request and, if the request is approved, the maximum fee will be adjusted for the entire industry, not just for the licensees who initiated the request.

Regarding the concern that five years is too long to wait between fee increases, the Department notes that New York is the only state in which the check cashing industry has received annual increases to the maximum check cashing fee. In most states, the maximum fee is set by legislation and only changes infrequently.

Moreover, while the proposal limits when the industry can request an increase to the maximum fee, the Department retains the discretion to increase the fee at any time. The Department monitors the financial condition of check cashers, through review of annual reports, audit reports and periodic examinations, and can increase the maximum fee if it determines that an increase is necessary or appropriate.

The Department is aware of declines in the number of check cashing locations and the volume of checks cashed in New York. This is due to a variety of systemic economic factors and changing consumer preferences, but a primary factor is a long-term evolution in how consumers receive funds and make payments. The Federal Reserve has reported a steady decline in the use of paper checks for over ten years in its 2020 Payments Study.[5] The study notes a continued decline in the use of checks as card and ACH-based payment systems increase in use. This overall trend is further exacerbated by the rise of Peer-to-Peer and fintech payment systems. The pandemic then accelerated the movement away from physical checks towards digital options. At the same time, many government agencies have moved away from using checks to pay public benefits or assistance. As noted above, New York State unemployment insurance, Supplemental Nutrition Assistance Program and federal benefits, including Social Security, Veteran's benefits and Supplemental Security Income, are all paid through direct deposit or debit card. The result,

[5] This report is available online at https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm#:~:text=Key%20Findings,by%20both%20number%20and%20value.

as demonstrated in the following graph from the 2020 Payments Study is a steady decline in the use of paper checks.

Comment: A law firm retained by certain licensed check cashers submitted a comment asserting that statements contained in reports of examination prepared by the Department are inconsistent with our stated rationale for the proposed amendment. The law firm argues: "statements (privately) urge the licensee to maintain, improve, or otherwise strive for profitability and/or increased revenues—a message that is flatly contravened by the Proposed Regulation's express intent to rein in what the agency (publicly) deems to be the excess revenues of licensed check cashers." The comment includes the following five quotes from reports of examination of four licensed check cashers:

- Management is encouraged to continue its efforts to reduce expenses and restore the licensee's profitability level to reverse the current decline of retained earnings and equity capital.

- Management is encouraged to continue its efforts to improve the licensee's check cashing revenues and profitability which were negatively impacted by the global pandemic during the examination period.

- Management has failed to maintain the required NLA [net liquid assets] and TNW [tangible net worth] on a regular basis as stipulated by the Superintendent regulations and Department's guidelines. . . . Prompt infusion of cash or drastic steps to manage expenses are needed if [Rite Check Cashing] is to remain a going concern.

- [T]he Licensee failed to maintain mandated liquidity levels . . . . Immediate corrective action is required from management to address all weaknesses[.]

- The licensee failed to meet the requirement to maintain adequate tangible net worth for 15 of the 18 months from October 2016 through March 2018.

Response: The statements quoted by the industry reflect feedback from the Department to check casher management on how to run their business. They do not mean, as the industry suggests, that the Department acts a backstop for management and must increase the maximum check cashing fee if the industry is unable to increase its revenue. It is not the job of the Department to ensure that any industry is profitable. The noted statements represent financial stability concerns identified during the examination process and are intended to ensure the safety and soundness of the licensees in accordance with the regulatory requirements and applicable standards.

These statements are fully consistent with the Department's mandate to require check cashers to have in place appropriate liquidity levels to maintain financial stability while also protecting consumers from excessive fees. Both are within the Department's mission and remit. It is not within the Department's remit to ensure the profitability of any industry. Commenters seek to conflate the need for appropriate liquidity levels sited in regulatory examinations as needed to protect consumer assets and keep businesses sound and stable, with guaranteed profit margins. The examination findings sited do not prescribe actions to address profit margins as this is the role of business owners not regulators. The industry can maintain profitability by conducting business and operations prudently with sufficient controls and governance in place to manage costs and mitigate risks of fraud and non-compliance with applicable laws and regulations. To support the industry in addressing systemic economic trends impacting their businesses, the Department is considering regulatory measures to reduce certain operating costs of the industry to the extent possible, such as square footage minimums in physical locations.

Comment: All of the commenters who expressed opposition to the proposed amendment suggested, in the alternative, that the Department either withdraw the proposal and revert to the prior version of the regulation, or that the Department engage in further conversations with the industry on a more appropriate fee structure.

Response: It has been determined by the Department that the previous version of this regulation is not reasonable or fair for consumers. The prior regulations tie check cashing fees to the CPI index which does not accurately reflect check cashing costs and creates excessive fee increases during high inflationary periods that are especially impactful for New York's poorest communities. New York is the only state in the country with annual fee increases. The Department collected data from the industry and consulted with representatives of the industry, academics and consumer groups to develop the new regulation. The industry was explicitly asked for alternative fee structures and the response was general in nature; encouraging the Department to capture all relevant costs and enable them to maintain profitability. Data received from the industry on cost has been inconsistent and generally vague and unsubstantiated. The regulation enables the industry to seek a fee increase after a five-year period and the Department retains the ability to alter the maximum fee in its discretion.