Delayed Deposit Services Interpretative Opinions

Nebraska Department of Banking and Finance

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INTERPRETATIVE OPINION NO. 1 - DETERMINING MAXIMUM SERVICE FEE THAT CAN BE CHARGED BY DELAYED DEPOSIT LICENSEES

The Nebraska Department of Banking and Finance ("Department") hereby issues this Interpretative Opinion regarding service fees charged by licensees under the Delayed Deposit Services Licensing Act.

Neb. Rev. Stat. § 45-918 states that no licensee may charge a fee that totals a dollar amount in excess of fifteen dollars per one hundred dollars or pro rata for any part thereof on the face amount of the check.

The Department interprets this to mean that a maker who writes a check for $100 must receive at a minimum $85. A maker who writes a check for $117.65 must receive $100 at a minimum. In short, the maximum fee that can be taken by a licensee is fifteen dollars for every one hundred dollars shown and a pro rata amount for any dollar amount in excess of a hundred dollars.

Refer to the DDS Rate Chart , effective **October 1, 1994.** If the fee is to be included in the amount of the check, divide the amount the maker wishes to receive by .85 to arrive at the amount of the check to be written.

EFFECTIVE DATE: July 15, 2006
Revised December 15, 2000
Originally issued October 1, 1994.

INTERPRETATIVE OPINION NO. 2 - DEFINITION OF "MAKER"

The Nebraska Department of Banking and Finance ("Department") hereby issues this Interpretative Opinion regarding joint accountholders under the Delayed Deposit Services Licensing Act.

Neb. Rev. Stat. § 45-919 sets forth a number of restrictions on a licensee, including the number of checks which can be held at any one time, the aggregate dollar amount of such checks, and the method of payment of deferred deposit checks. The statute uses the term "any one maker" in connection with these restrictions.

The Department interprets the term "any one maker" to mean any signatory on a personal account. As such, the statute does not require a licensee to aggregate delayed deposits of joint accountholders. For example, assume A and B are signatories (makers) on one account. The licensee may hold two checks aggregating $500 from A and two checks aggregating $500 from B, without being in violation of the statute. However, the licensee must ensure that transactions are separately signed and authorized by separate accountholders. For example, absent other authorizations, one spouse may not sign a check or transaction agreement for the other spouse on their joint account. While a licensee may set an internal policy restricting the aggregate amount outstanding on a joint account, it cannot cite the statute as justification for such a policy.

EFFECTIVE DATE: July 15, 2006
Revised August 1, 2002
Originally issued October 1, 1994.

INTERPRETATIVE OPINION NO. 3 - PENALTY CHARGES

The Nebraska Department of Banking and Finance ("Department") hereby issues this Interpretative Opinion regarding the charging of a penalty for a non-negotiable check under the Delayed Deposit Services Licensing Act.

Neb. Rev. Stat. § 45-917 provides that at the time of any delayed deposit services transaction, a licensee must provide to the maker of the check a written notice in plain English disclosing the fees and penalties for all services provided. A licensee must specifically disclose to customers the date on which a check is to be deposited or presented for negotiation, and any penalty which will be charged if a check is not negotiable on the date agreed on. A licensee must also disclose that additional fees may be allowed by court order or required in association with collection efforts performed by a county attorney in accordance with Neb. Rev. Stat. § 28-611.

Neb. Rev. Stat. § 45-917(1)(c) allows a licensee to charge a penalty not to exceed fifteen dollars if the check is not negotiable on the date agreed upon. Thus, the licensee is allowed to charge the fee allowed by the statute only if the check is presented by the licensee on the date negotiated between the licensee and the customer. If presentment does not occur on that date, a penalty may not be charged, unless presentment is delayed because the licensee has agreed to allow the customer to pick up the check at a later date within the thirty-four day maximum time period and the customer fails to do so, or the licensee has agreed to extend the date of presentment to a later date within the thirty-four day maximum time period. Extensions of time beyond the date originally negotiated between the licensee and the customer may be done only at the customer's request, must be documented in the customer's file, and may not exceed the thirty-four day maximum time period. No additional fees may be charged by the licensee for allowing the customer to extend the date of presentment.

The Department interprets this section to mean that a licensee must either deposit or physically present a check at the institution on which it is written, and the check must have been returned to the licensee as not negotiable. The returned item must carry a stamp or notation by the rejecting institution that it was not negotiable when deposited or presented. If there is no stamp or notation that the check was not negotiable, a licensee is not authorized to charge or collect any penalty. A licensee may not initially present a check as an electronic Automated Clearing House ("ACH") transaction instead of depositing or physically presenting a check to the institution on which it is written.

For the purposes of Interpretative Opinion No. 3, the term "deposit" shall include back office capture for Check 21 purposes only, provided that the following items are complied with:

- A licensee has a copy of any agreement with its financial institution regarding Check 21 for examiner review on file at each store location utilizing Check 21.

- A licensee develops a policy regarding destruction of the original check once a substitute check has been created. Such policy shall include the time frame for destruction of the original check which shall be no later than 90 days after the substitute check has been created. Such policy shall also include the licensee's risk management assessment regarding liability if the original check is re-presented. The policy shall be kept on file for examiner review at each store location utilizing Check 21.

Check 21 is a federal law that went into effect on October 28, 2004 through the Check Clearing for the 21st Century Act. The law enables financial institutions to process checks electronically by capturing a picture of the front and back of the check along with the associated payment information and transmitting this information electronically. Licensees are reminded that in utilizing Check 21 a substitute check is created which is the legal equivalent of the original check for all purposes. Licensees should not confuse this process with Automated Clearing House or other Electronic Funds Transfers which are not permitted under the Delayed Deposit Services Licensing Act.

EFFECTIVE DATE: October 1, 2008
Revised July 15, 2006.
Revised August 1, 2003
Revised July 2, 2003
Revised May 8, 2000
Originally Issued October 1, 1994

INTERPRETATIVE OPINION NO. 4 - METHOD OF PAYMENT

The Nebraska Department of Banking and Finance ("Department") hereby issues this Interpretative Opinion regarding the method of payment to a maker of a deferred check under the Delayed Deposit Services Licensing Act.

Neb. Rev. Stat. § 45-919(1)(d) prohibits a licensee from requiring ". . . the maker to receive payment by a method which causes the maker to pay additional or further fees and charges to the licensee or other person".

It is the opinion of the Department that it is permissible for a licensee to issue a money order as payment of a deferred check only if all of the following conditions are met:

1) the maker of the check requests in writing that a money order be issued;

2) each money order must be separately requested; blanket requests are not permissible;

3) the money order is mailed;

4) the recipient/addressee of the money order is a financial institution;

5) no charge is imposed for the issuance of the money order or the mailing of the money order;

6) the licensee maintains a record of each and every money order transaction, including the written request, date of mailing, and financial institution recipient/addressee; and

7) the licensee does not, directly or indirectly, receive any fees, money, or other remuneration from the maker of the check as a result of, or in connection with, the issuance of a money order, except for the fee permitted by Neb. Rev. Stat. § 45-918 .

All records relating to money order transactions will be reviewed during the Department's examination of a licensee. Failure to comply with all of the above provisions will be considered a violation of Section 45-919(1)(d).

The circumstances under which a money order may be issued as payment of a deferred check are accordingly very limited. Every other transaction will continue to require a cash payment to the maker of the check. Payment via Automated Clearing House (ACH) transactions is not permitted.

EFFECTIVE DATE: July 15, 2006
Revised August 1, 2002
Revised September 25, 2000
Originally issued August 1, 1997.

INTERPRETATIVE OPINION NO. 5 - HOLDING OF CHECKS

The Nebraska Department of Banking and Finance ("Department") hereby issues this Interpretative Opinion regarding the holding of a delayed deposit check under the Delayed Deposit Services Licensing Act.

Neb. Rev. Stat. § 45-919(1)(c) prohibits a licensee from holding or agreeing to hold a check for more than thirty-four days. A check which is in the process of collection because it was not negotiable on the day agreed upon is not considered as being held in excess of that thirty-four day period.

It is the opinion of the Department that the term "in the process of collection" means that a licensee must first have physically presented, attempted to present, deposited, or attempted to deposit the check. A telephone call to the financial institution to determine if funds are available is not sufficient. A check may not be presented by electronic Automated Clearing House (ACH) transaction. Presentment must initially occur on the date negotiated between the licensee and the customer. Should this date be before the expiration of the thirty-four day maximum holding period prescribed by Neb. Rev. Stat. § 45-919(1)(c), the licensee may choose to attempt to present the check more than once, but no additional fees may be charged to the customer. [See Interpretative Opinion No. 3] Any checks being held for presentment are not in the process of collection.

If the financial institution refuses to allow presentment, or if the deposited check is returned unpaid because of insufficient funds or for any other reason, and the licensee does not intend to and does not attempt presentment again before the expiration of the thirty-four day maximum holding period as shown by a written notation to the customer file, then the check is considered non-negotiable and any actions taken by the licensee after that time are considered to be part of the check collection process.

For those licensees who allow a customer to bring cash into the office and pick up a check rather than the licensee depositing the check, it is important to know that if the customer does not pick up the check on the agreed upon date, the thirty-four day period does not stop running at that time. Rather, the licensee must take the additional step of presenting, attempting to present, depositing, or attempting to deposit the check in order for the check to be determined as non-negotiable. Thus, if the customer is required to pick up the check on day thirty-four, and fails to do so, the licensee must leave itself enough time to present, attempt to present, deposit, or attempt to deposit the check to the financial institution prior to the end of that same day in order to determine if the check is negotiable.

The Department is also of the opinion that an additional exception exists with respect to the thirty-four day holding period limit. This exception occurs when the licensee has received notification that the maker of the check has filed for bankruptcy. This notification can be from any source, including the maker of the check, the maker's representative, a Bankruptcy Court, or a trustee in bankruptcy. Upon receipt of such notification, the licensee has no authority to present, deposit, or attempt to present or deposit a check for negotiation, nor does it have the authority to collect the check. As such, the licensee is not deemed to be holding or agreeing to hold the check in violation of section 45-919(1)(c).

All records relating to the holding of checks will continue to be reviewed during the Department's examination of a licensee. If the records show that the check was in the licensee's possession for more than thirty-four days, the licensee should have proof that it presented or deposited the check, or attempted to do so, or that it has received notice that the customer is in bankruptcy.

For the purposes of Interpretative Opinion No. 5, the term "deposit" shall include back office capture for Check 21 purposes only, provided that the following items are complied with:

- A licensee has a copy of any agreement with its financial institution regarding Check 21 for examiner review on file at each store location utilizing Check 21.

- A licensee develops a policy regarding destruction of the original check once a substitute check has been created. Such policy shall include the time frame for destruction of the original check which shall be no later than 90 days after the substitute check has been created. Such policy shall also include the licensee's risk management assessment regarding liability if the original check is re-presented. The policy shall be kept on file for examiner review at each store location utilizing Check 21.

Check 21 is a federal law that went into effect on October 28, 2004 through the Check Clearing for the 21st Century Act. The law enables financial institutions to process checks electronically by capturing a picture of the front and back of the check along with the associated payment information and transmitting this information electronically. Licensees are reminded that in utilizing Check 21 a substitute check is created which is the legal equivalent of the original check for all purposes. Licensees should not confuse this process with Automated Clearing House or other Electronic Funds Transfers which are not permitted under the Delayed Deposit Services Licensing Act.

EFFECTIVE DATE: October 1, 2008
Revised July 15, 2006
Revised August 1, 2003.
Revised July 2, 2003
Revised August 1, 2002
Originally issued September 25, 2000

INTERPRETATIVE OPINION NO. 6
COLLECTION OF RETURNED CHECKS; PARTIAL COLLECTION PAYMENTS

If any check is returned to a licensee as not negotiable following an initial presentment or deposit, a licensee may attempt to collect any such returned check as an electronic Automated Clearing House ("ACH") transaction, provided the following conditions are met.

1) The licensee shall comply with all National Automated Clearing House Association ("NACHA") rules.

2) Electronic collection efforts will be permitted for full collection of the check and full amount of any penalty fee only; partial debits will not be allowed unless the licensee has entered into a separate written contract with the consumer as outlined in paragraph 6, below. Separate debits must be initiated for the full amount of the returned check and the full amount of any penalty fee.

3) If the licensee intends to use ACH to collect the returned item fee allowable by Neb. Rev. Stat. § 45-917 (1)(c) , the customer must provide a separate authorization for this potential charge in the original customer agreement. In addition, the returned item fee must appear as a separate item for each customer on the report maintained as part of the collection files.

4) The licensee must maintain, as part of its collection files maintained at the office where the item originated for examiner review, a report which:

a) Contains each customer's name, checking account number, check number and amount of item;

b) Clearly differentiates between the date of the customer's contract, the initial physical presentment date, and the return date of each item;

c) Shows each date of ACH presentment for each item, the date the check was collected, the date the returned item fee was collected, if collected and/or each date the item was returned, with the reason for return, if applicable.

d) The report shall be maintained as either a physical copy in each customer's collection file or if maintained electronically, shall be easily accessible at the time of examination by the Department.

5) The licensee must provide conspicuous notice to the customer that a returned check may be collected as an ACH transaction.

a) Such notice must include a statement describing an ACH transaction and what additional charges could be incurred from third parties if the licensee attempts to collect a returned check and the returned item fee allowable by Neb. Rev. Stat. § 45-917(1)(c) as an ACH transaction.

b) Such notice shall also include a statement that if the customer has any concerns about the transaction, they should contact the Nebraska Department of Banking and Finance at (402) 471-2171.

c) Such notice must be included and highlighted in the customer contract or attached as a separate notice which is given to the customer at the time of each transaction. If a separate notice is used, the customer must sign and date the notice to acknowledge receipt and a copy must be maintained in the customer's file.

d) Such notice must be posted in each office of the licensee, including any branch office.

6) There may be circumstances in which the licensee determines that it would be beneficial to allow the customer to make installment payments on a returned check. After initial presentment or deposit, if the item is returned, the licensee may enter into a separate, written contract with the customer for repayment, authorizing a partial payment schedule either via ACH or by cash installments. The contract may be for the total amount of the returned check plus the returned item fee allowable by Neb. Rev. Stat. § 45-917(1)(c) . No additional fees may be charged to the customer to enter into such a contract. This contract shall contain, at a minimum, the following items:

a) The date and amount of each payment and that ACH will be used (if applicable);

b) A confirmation that the original check will not be re-presented and will be returned to the customer upon successful completion of the contract; and

c) If ACH is to be used, a disclosure that presentment of each payment via ACH may cause the customer to incur additional fees from the customer's financial institution if any payment is returned.

Should a licensee allow partial payments by written contract, such payments shall be accurately reflected in each customer's collection file.

EFFECTIVE DATE: July 15, 2006