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Check Re-Presentation

July 24, 2003

Dishonored checks may be presented to financial institutions, physically or by re-presentation, no more than a combination of three times. For example, if a check is dishonored after the first presentment, it may be re-presented electronically up to two additional times. Only the face amount of the check can be re-presented and collected. The collection fee/service fee **cannot** be added to the initial check amount when that check is re-presented; it must be a separate entry to the check writer's account and in Wyoming, the check writer must receive written notice of the collection fee.

If a person chooses to electronically collect the dishonored check collection fee, it must adhere to:

1. W.S. 33-11-101 through 116 (Wyoming Collection Agencies Act),
2. W.S. 1-1-115 (Wyoming Civil Liability for Unpaid Checks),
3. Fair Debt Collection Practices Act,
4. Regulation E of the Federal Reserve System, and
5. NACHA Operating Rules

1. **W.S. 33-11-101 through 33-11-116 Wyoming Collection Agencies Act.**

Collection agency, as defined in W.S. 33-11-101, includes "any person who:

- (A) Engages in any business, the purpose of which is the collection of any debts for Wyoming creditors;
- (B) Regularly collects or attempts to collect for Wyoming creditors, directly or indirectly, debts owed or due or asserted to be owed or due another;" ...
- "(E) Uses a fictitious name or any name other than their own name in the collection of their own accounts receivable;"

If a person (W.S. 8-1-102(a)(vi) - individual, partnership, corporation, joint stock company or any other association or entity, public or private) is collecting the dishonored check collection fee on behalf of a Wyoming creditor or for its own business but under a different name, that person **must be licensed as a collection agency.**

2. **Civil liability for unpaid checks – W.S. 1-1-115.**

This statute allows a person to collect a collection fee for a dishonored check. The collection is to be initiated by a **written demand** mailed to the drawer of the check by U.S. postal service certificate of mailing at the address shown on the check or his last known address or personally served pursuant to the Wyoming Rules of Civil Procedure. The demand shall state that the drawer is required to pay the value of the check and the collection fee demanded and shall state the collection fee provided for in 1-1-115.

3. **Fair Debt Collection Practices Act**

Unfair Practices 1692f(1). Debt collectors cannot collect any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is **expressly authorized by the agreement creating the debt or permitted by law.**

Federal Trade Commission (FTC) Official Staff Commentary for Unfair Practices 1692f(1)

Kinds of amounts covered.

For purposes of this section, “amount” includes not only the debt, but also any incidental charges, such as collection charges, interest, service charges, late fees, and bad check handling charges.

Legality of charges.

A debt collector may attempt to collect a fee or charge in addition to the debt if either:

- a. the charge is expressly provided for in the contract creating the debt and the charge is not prohibited by state law, or
- b. the contract is silent but the charge is otherwise expressly permitted by state law.

Conversely, a debt collector may not collect an additional amount if either:

- a. state law expressly prohibits collection of the amount, or
- b. the contract does not provide for collection of the amount and state law is silent.

Legality of fee under state law.

If state law permits collection of reasonable fees, the reasonableness (and consequential legality) of these fees is determined by state law.

Agreement not in writing.

A debt collector may establish an “agreement” without a written contract. For example, he may collect a service charge on a dishonored check based on a posted sign on the merchant’s premises allowing such a charge, **if he can demonstrate that the consumer knew of the charge.**

4. **Federal Reserve System Regulation E (Electronic Fund Transfers)**

Regulation E provides a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems. Regulation E does not govern re-presented check transactions, which are governed by check law, but does govern consumer ACH transactions, including fees related to the re-presented entries, i.e., dishonored check collection fees. Regulation E does not require written authorization for a one-time electronic fund transfer.

5. **National Automated Clearing House Association (NACHA)**

(NACHA) – May 15, 2001 Operations Bulletin

The NACHA Operating Rules require a written authorization for most one-time ACH debit entries, including collection fees.

NACHA – Request for Comment for “Authorization to Collect Service Fees Related to RCK Entries” (comments were due by December 5, 2002)

NACHA was proposing a March 14, 2003 implementation date for the rule amendment; however, the rule has not yet been implemented. In its April 25, 2003 Active Rules Work Group Status Report, NACHA reported that. “because of a heightened focus on risk management issues related to unauthorized transactions, the NACHA Board of Directors recommended to the Rules & Operations Committee that relaxing these authorization requirements at this time requires careful thought from a risk management perspective. The Rules & Operations Committee agreed with this recommendation and sent these issues to the Risk Management Task Force to discuss the associated strategic risk management issues.”

RCK = Re-Presented Check

The NACHA Operating Rules prohibit the addition of any service fee to the amount of the RCK entry. To collect such a fee, Originators must obtain the consumer’s explicit authorization for the debit and must initiate a separate debit entry to the consumer’s account. Because they are using the ACH Network to electronically re-present a returned check, many Originators of RCK entries also wish to use the ACH Network to collect a service fee from the writer of the returned item. The NACHA Operating Rules require an ODFI/Originator agreement in which the Originator acknowledges that entries may not be initiated that violate the laws of the United States. The legality and amount of returned check service fees are governed by state law. Many state laws are more strict than these proposed rules. Further, collection activities may also be subject to the provisions of Federal legislation such as the Fair Debt Collections Practices Act.

On March 13, 2001, the Board of Governors of the Federal Reserve System issued revisions to the Official Staff Commentary for Regulation E. The revisions included clarification that:

Reg E coverage includes transactions where a merchant or biller uses a Receiver’s blank, partially completed, or fully completed and signed check to obtain information for initiating a one-time ACH debit from the Receiver’s account. Reg E does not govern RCK transactions, which are governed by check law, but does govern consumer ACH debits, including fees related to RCK entries.

Reg E does not require a written authorization for one-time EFT transactions. This is not a change to Reg E but is, instead, a clarification that the written authorization requirements of Reg E do not apply to one-time EFT’s.

A service fee related to an RCK entry collected electronically is a separate ACH transaction from the re-presentation of the check itself and the electronic service fee transaction falls under the jurisdiction of Reg E. Also, the written authorization is not required under Reg E for a one-time electronic fund transfer.

The NACHA proposal recommends expanding authorization options for collecting the service fee related to an RCK entry through the ACH Network. It does not propose to alter the authorization requirements for collecting fees related to other types of returned ACH entries.

The Rules Work Group is recommending the following modification to the NACHA Operating Rules governing the authorization and origination of debit entries to collect service fees related to RCK entries:

The addition of the following two-step notification process to serve as the consumer's authorization in lieu of the consumer's written authorization:

1. A notice (i.e., displayed at the point of sale or on a billing statement) must be provided to the consumer in advance of receiving the consumer's check stating clearly and conspicuously that a service fee related to an RCK entry may be collected electronically; and
2. A second notice must be provided to the check writer, at least ten banking days before the intended date of the debit to the check writer's account, that
 - a. advises the Receiver of the Originator's intent to collect the service fee electronically, and
 - b. provides the consumer with specific information related to the debit entry to be initiated to his account.

Proposed New Environment:

Legal Framework:

Service fees collected using the ACH Network are subject to the requirements of the NACHA Operating Rules, the Electronic Fund Transfer Act, and the Federal Reserve Board's Regulation E.

Authorization Requirement:

The Request for Comment proposes that the NACHA Operating Rules be modified to allow notice provided by the merchant, stating the Originator's intent to collect a service fee related to a returned check, and the provision of the consumer's check to the merchant to be deemed authorization for an ACH debit to collect such a fee. A notice-equals-authorization approach to this type of transaction means that the Originator must provide a notice to the Receiver that clearly and conspicuously states that the receipt of the check will authorize an ACH debit to the Receiver's account.

To consider notice equal to the consumer's authorization for service fees related to RCK entries, the Originator must comply with the following steps:

1. A notice displayed at the point of sale or on a billing statement must be provided to the consumer in advance of receiving the consumer's check stating clearly and conspicuously that a service fee related to an RCK entry may be collected electronically; and
2. A written notice must be provided to the check writer, at least ten banking days before the intended date of the debit to the check writer's account, that
 - a. advises the Receiver of the Originator's intent to collect the service fee electronically, and
 - b. provides the consumer with the following specific information related to the debit entry to collect a service fee related to an RCK entry:
 - 1) the serial number of the item to which the service fee relates;
 - 2) the amount of the item to which the service fee relates;

- 3) an identification of the payee of the item;
- 4) the Receiver's truncated account number;
- 5) the Receiver's financial institution routing number;
- 6) the amount of the debit entry to collect the service fee related to an RCK entry;
- 7) the scheduled date of the debit entry to collect the service fee related to an RCK entry;
- 8) the reason for the imposition of the service fee;
- 9) other methods by which the customer may pay the service fee; and
- 10) a telephone number to call if the check writer has questions related to the transaction or other fee-related questions.

Sequence of Payments:

The underlying obligation must be paid prior to collecting the service fee.