

GUIDANCE DOCUMENT

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**Delayed Deposit Services Frequently Asked Questions (“FAQ”)
Nebraska Department of Banking and Finance**

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LICENSING

Q: Who needs to be licensed as a Delayed Deposit Services provider?

A: Any individual, proprietorship, association, joint venture, joint stock company, partnership, limited partnership, limited liability company, business organization, nonprofit corporation, or any group of individuals however organized, who for a fee (a) accepts a check dated subsequent to the date it was written on or (b) accepts a check dated on the date it was written and holds the check for a period of days prior to deposit or presentment pursuant to an agreement with or any representation made to the maker of the check, whether express or implied.

Q: Does a licensee need to have a physical presence in the State of Nebraska?

A: Yes. Delayed Deposit Services licensees are licensed based on the county in Nebraska that they are physically located in. A separate license is required for each county that a licensee does business in.

Q: What is the fee for a Delayed Deposit Services business license?

A: The application fee is \$500.00. This amount is nonrefundable.

Q: Are there additional costs surrounding an application besides the fee?

A: Yes. The applicant must submit a surety bond in the sum of \$50,000.00 with the application. The applicant must pay for a criminal history check for each of its officers, directors, shareholders, partners or members. Currently the cost for each criminal history check performed by the Nebraska State Patrol is \$15.00. Additionally, the applicant must pay the costs of publication of notice of the application and costs associated with the hearing that is held on a new application.

Q: Does an applicant have to maintain a minimum asset level?

A: Yes. The applicant has to have assets of at least \$25,000.00 available for operating the DDS business at all times.

Q: Does each branch have to have its own license?

A: Each branch within each county must submit a branch application and a fee of \$150.00. A one-time publication is made in association with each branch application. The costs of this publication must be paid by the licensee.

Q: Does a DDS license expire?

A: Each DDS license expires annually on May 1st, unless earlier canceled, suspended, or revoked by the Director, or surrendered by the licensee. If a licensee wishes to maintain a current license, it needs to renew annually. The fee for annual renewal is currently \$500.00 for the main office and each branch location.

Q: Is there always a public hearing on a license application?

A: No. The Director of the Department may waive the hearing requirement if the applicant has held and operated under another DDS license in Nebraska for at least 3 calendar years immediately prior to the filing of the new application; no protests are filed after publication; and in the judgment of the Director, the experience, character, and general fitness of the applicant warrant the belief that the applicant will comply with the Act.

Q: Once licensed, what notifications are required to be made to the Department?

A: Pursuant to Section 45-912 a licensee is required to notify the Director in writing within 30 days of **any material development** including, but not limited to:

- (1) Bankruptcy or corporate reorganization;
- (2) Business reorganization;
- (3) Institution of license revocation procedures by any other state or jurisdiction;
- (4) The filing of a criminal indictment or complaint against the licensee or any of its officers, directors, shareholders, partners, members, employees, or agents;
- (5) A felony conviction against the licensee or any of the licensee's officers, directors, shareholders, partners, members, employees, or agents; or
- (6) The termination of employment or association with the licensee of any of the licensee's officers, directors, shareholders, partners, members, employees, or agents for violations or suspected violations of the Act, any rule, regulation, or order thereunder, or any state or federal law applicable to the licensee.

A licensee must also notify the Department at least 30 days prior to conducting any other business at the same location as the DDS business. A form for making this notification is available on the Department's website.

Q: Once licensed, are there other annual requirements that the licensee must meet?

A: DDS licensees are examined by the Department on an annual basis. The costs of this examination shall be paid by the licensee. The current hourly rate for DDS examinations is \$125.00 an hour.

Q: What information will Department Examiners request in association with an examination?

A: Pursuant to Neb. Rev. Stat. § 45-915.01(1), each licensee shall keep or make available the books and records relating to transactions made under the Act as are necessary to enable the Department to determine whether the licensee is complying with the Act. For a current list of the information required to be submitted to the Department in advance of each examination, contact dob.consumerfinance@nebraska.gov.

Q: Some states refer to a Delayed Deposit Transaction as a "Payday Loan." Can a licensee use the term "loan" in Nebraska?

A: It depends. See DDS Interpretative Opinion No. 8.

Q: A licensee wants to move one of its offices to a different location. What notification is required to the Department?

A: A licensee may change the location of an office with the prior written approval of the Director. The licensee must submit a \$150.00 fee with such a request. The licensee will also be billed the cost of a notice of publication of the request.

Q: A licensee is undergoing a change of control. What notification is required to the Department?

A: Section 45-914 provides that prior written approval of the Director shall be required whenever a change in control is proposed. Control in the case of a corporation shall mean (1) direct or indirect ownership or the right to control 10 percent or more of the voting shares of the corporation or (2) the ability of a person or group acting in concert to elect a majority of the directors or otherwise effect a change in policy. Control in the case of any other entity shall mean any change in the principals of the organization, whether active or passive. The Director may require such information as he or she deems necessary to determine whether a new application is required. The costs of investigating a change of control shall be paid by the person or persons requesting such approval.

Q: A licensee has decided it no longer wishes to do business. What procedures need to be followed to surrender the license?

A: A licensee may surrender a license by delivering written notice to the Department that the license is surrendered, and enclosing the current license. The licensee must inform the Department where the company's records will be kept for the next 3 years. Before surrender, a licensee should ensure that it has allowed adequate time to complete any outstanding transactions with current customers and should set a date to stop accepting any new transactions.

Surrender of a license does not affect the licensee's civil or criminal liability for acts committed prior to such surrender, affect the liability for any fines which may be levied against the licensee or any of its officers, directors, shareholders, partners, or members for acts committed before the surrender, affect the liability of the surety on the bond, or entitle such licensee to a return of any portion of the annual license fee(s).

INTERPRETATIVE OPINIONS

Q: Interpretative Opinion No. 2 says that the term "any one maker" means any signatory on a personal account. How does this apply to a joint account?

A: The Department does not require a licensee to aggregate delayed deposits of joint accountholders. However, the licensee must ensure that transactions are separately signed and authorized by separate accountholders. Absent other authorizations, one joint account holder may not sign a check or transaction agreement for the other joint account holder on their joint account.

Q: If an individual holds a power of attorney for a customer and signs checks/enters into transactions using that power of attorney, what type of documentation should a licensee retain?

A: The licensee must maintain a copy of the power of attorney form in that customer's file to avoid aggregation questions.

Q: Can a licensee charge a penalty fee for an item that is returned unpaid?

A: A licensee can charge a fee up to \$15.00 for a returned unpaid item, but only if the fact that this fee could be assessed is disclosed at the time of the initial transaction and the licensee retains proof that the item was deposited on the initial due date, as noted in the original contract.

Q: Is there an instance where a licensee could collect more than the \$15.00 fee for an unpaid item?

A: Yes. If a licensee chooses to collect the item through small claims court, the fees and costs awarded by the court may be added to the advance and collected. Under Section 45-915.01, all fees associated with the court proceedings must be notated in the customer's collection file. See also Interpretative Opinion No. 7.

Q: If a licensee requires a customer to write 2 checks in association with 1 transaction, can the licensee then charge 2 penalty fees if both checks are returned unpaid?

A: No. Section 45-917(1)(c) provides that if the licensee required the maker to give 2 checks for 1 delayed deposit transaction, the licensee shall charge only 1 penalty in the event both checks are not negotiable on the date agreed upon.

Q: Interpretative Opinion No. 3 says that fees and penalties for all services provided must be disclosed at the time of a delayed deposit services transaction. Does a licensee have to charge a penalty fee?

A: No, there is no requirement that a licensee must charge a penalty fee if a check is not negotiable on the date agreed upon.

Q: If a licensee doesn't charge a fee, does it have to provide a disclosure?

A: If a licensee does not charge a penalty fee, no disclosure is necessary.

Q: Section 45-918 says that no licensee may charge as a fee a total amount in excess of \$15.00 per \$100.00 as the face amount of the check. Does a licensee have to charge this much?

A: No, the \$15.00 amount is the maximum amount that a licensee may charge a customer per \$100.00 check. Nothing in the Act prohibits any licensee from charging less than this amount.

Q: Can a licensee enter into transactions with service members and their dependents?

A: The Department of Defense issued regulations concerning the relationship between Delayed Deposit Services businesses and service members and their dependents, effective October 1, 2007. While the actual regulations reference "payday loans," these regulations apply to Delayed Deposit Services licensees in Nebraska. The regulations established a maximum military annual percentage rate ("MAPR") of 36 percent for service members and their dependents. The MAPR is the cost of the consumer credit transaction expressed as an annual rate. If a licensee continues to enter into transactions with persons covered by these regulations after October 1, 2007, they can charge no more than the MAPR.

Q: Is there any way for a licensee to determine whether an individual is a service member or dependent?

A: The Department of Defense offers access to an online database where businesses may search by social security number to determine if a consumer is a "covered borrower." A covered borrower is an individual serving on Active Guard or Reserve duty or the spouse, child, or any individual provided more than one half of support by an Active Guard or Reserve duty member. The database (available at <https://www.dmdc.osd.mil/appj/mla/>), includes the status of covered borrowers and can be used to resolve questions about the status of any consumer who may be covered by the regulation.

Q: Are there any “safe harbors” for licensees to use regarding the Department of Defense regulations?

A: The regulations do contain a safe harbor provision, based on representations by the consumer that he/she is not a service member or dependent. Prior to entering into a transaction, the consumer should be provided a “covered borrower identification statement” which allows the consumer to indicate whether or not the consumer is a “covered borrower.”

Q: Does the Department require a licensee to use the “safe harbor” language in contracts with customers?

A: The Department does not require a licensee to use the “safe harbor” language. However, for that language to be effective it must contain the substantial elements found in the regulation. Licensees are encouraged to engage in their own risk assessment regarding whether or not they will include the “safe harbor” language with their contracts and/or perform checks on customers in the Department of Defense database.

Q: Can the due date of a customer’s transaction be extended beyond the date agreed upon at the time the transaction is entered into?

A: This depends on the amount of time that the transaction initially covered and is at the licensee’s discretion. Section 45-919(1)(c) provides that a licensee shall not hold or agree to hold a check for more than 34 days. If the initial transaction was for less than 34 days, and an extension is requested by the customer, the licensee may agree to hold the check up to 34 days total. However, the licensee must meet a number of requirements in granting this extension as outlined by Section 45-919(1)(f), including keeping written or electronic documentation showing that the extension was at the request of the customer and that no additional fees were charged for allowing the extension. The licensee must still allow enough time to complete the transaction within the 34-day time period.

Q: Can a licensee charge an additional fee for holding a check longer than the initial time period agreed upon?

A: No. No additional fee may be charged for an extension of time on a delayed deposit services transaction.

Q: Can a licensee accept partial payments from a customer whose check has not yet been presented?

A: No. If a licensee has accepted partial payments from a customer and later deposits the check, the licensee will be in violation of the Act for having collected more than the face amount of the check. If a licensee wishes to offer customers the option of making installment payments on an obligation, it may want to explore alternative license options under the Nebraska Installment Loan Act.

Q: How does a licensee retain proof that a check was presented on the initial due date to the customer’s financial institution if the check is presented over the counter rather than deposited into a licensee’s account?

A: The licensee should have the financial institution stamp and date the check if presented over the counter and payment is refused by the financial institution.

Q: Does a licensee have to hold a check for 34 days?

A: No. A licensee may have internal policies as to how long transactions with customers may be. Nothing in the Act requires that checks be held for the maximum 34 days.

Q: If a customer enters into a transaction and indicates that they will pick up their check, but then doesn't show up at the licensee's place of business what problems could this cause?

A: Depending on the length of the transaction, the licensee may violate the requirement that a check not be held more than 34 days. A licensee must allow itself enough time to present or deposit the check to a financial institution within the 34-day limit.

Q: Can a licensee deposit a check in its financial institution's night depository?

A: While nothing prohibits this, again the licensee must allow itself enough time to present or deposit the check within the 34-day limit. When verifying that the 34-day time limit has been met, the Department will ask the licensee to provide proof in the form of date and time stamped deposit slips generated by the financial institution. Deposits in a night depository are generally credited the next banking business day. If the deposit is made after the bank's cut off time for the day, or delayed because of a weekend or holiday, the licensee may be in violation of the Act because it exceeded the 34-day limit.

Q: Can a licensee deposit a check using Check 21 procedures?

A: A licensee may deposit checks in collection using back office capture under Check 21, provided that the following items are complied with:

- A licensee has a copy of any agreement with its financial institution regarding back office capture for Examiner review on file at each store location utilizing back office capture.
- 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 back office capture.

Licensees should not confuse the back office capture process with Automated Clearing House or other Electronic Funds Transfers which are not permitted under the Delayed Deposit Services Licensing Act.

Q: Are there any exceptions to the 34-day limit for holding checks?

A: Checks that are held as part of a licensee's collection inventory, for which proof is retained that presentment or deposit has been attempted on or before the 34th day, are not held in violation of the Act. Additionally, checks held from a maker for which notification has been received that the maker of the check has filed for bankruptcy are not in violation of the Act.

Q: What steps should a licensee take when notification is received that a maker of a check has filed for bankruptcy?

A: Upon receipt of written notification from any source, including the maker of a check, the maker's representative, a Bankruptcy Court, or a trustee in bankruptcy, 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. Any action taken after notification should be discussed with a licensee's private attorney.

Q: Can a licensee enter into a new transaction with a customer on the same day that a previous transaction is paid?

A: Yes, if certain conditions are met. Section 45-919(1)(g) provides that a licensee may not enter into another delayed deposit transaction with the same maker on the same business day as the completion of a delayed deposit transaction unless prior to entering into the transaction the maker and the licensee verify on a form prescribed by the Department that completion of the prior delayed deposit transaction has occurred. The form for such a transaction is available on the Department website.

Q: What does the phrase “completion of a delayed deposit transaction” mean?

A: According to Section 45-919(2) completion of a delayed deposit transaction means that the licensee has presented a maker’s check for payment to a financial institution or the maker redeemed the check by paying the full amount of the check in cash to the licensee.

Q: What types of records does a licensee have to retain?

A: Section 45-915.01(2) provides that a licensee shall, at a minimum, include in its books and records copies of all application materials relating to makers, disclosure agreements, checks, payment receipts, and proofs of compliance required by Section 45-919.

Q: How long does a licensee have to retain records?

A: Section 45-915.01(3) provides that these books and records shall be kept for 3 years from the date of the inception of the transaction, or 2 years from the date a final entry is made thereon, including any applicable collection effort, whichever is later.

Q: Why does a licensee need to retain records?

A: A licensee’s records must be available to allow the Department to determine whether the licensee is complying with the Act. The books and records shall be maintained in a manner consistent with accepted accounting practices.

Q: Where must records be kept?

A: Section 45-915.01(4) provides that the licensee shall maintain its books, accounts, and records, whether in physical or electronic form, at its designated principal place of business, except that books, accounts, and records which are older than 2 years may be maintained at any other place within this state as long as such records are available for inspection by the Department.

Q: What type of collection records does the licensee need to maintain?

A: It depends on whether the licensee is maintaining its own collection efforts, has turned over a check to a collection agency, or has sold a check to a collection agency.

If a licensee conducts its own collection efforts or turns over a check to a collection agency, any payments made on a customer’s check need to be accurately reflected in that customer’s file. The licensee must keep copies of any court orders authorizing any additional fees, if applicable. Once payments are accepted on a check, that check should not be re-presented to a financial institution for payment.

If a licensee turns over a check to a collection agency, the licensee must keep copies of court orders authorizing any additional fees that were assessed by the collection agency. In addition, the collection agency should submit updated information regarding the collection

accounts to the licensee on at least a monthly basis. The monthly reports should include information such as: customer name; check number(s); check amount(s); NSF penalty fee; court authorized fees; partial payments; amount due; date paid in full; status of paid in full check (sent back or destroyed).

If a licensee sells a check to a collection agency then no further information is needed to be kept in a customer's file once that notation is made.

Any questions about collection records should be directed to Department Examiners at dob.consumerfinance@nebraska.gov.

Q: May a licensee accept a charge card as a method of payment for an item in collection?

A: Yes. A licensee may accept a charge card as a method of repayment for an item in collections so long as the licensee does not add an additional fee such as a "convenience fee."

USE OF AUTOMATED CLEARING HOUSE ("ACH") TRANSACTIONS

Q: Can a licensee conduct Delayed Deposit Services business (fund and collect transactions) with customers solely over the internet?

A: No. In Nebraska, a physical place of business is required for each licensee. Further, only limited use of ACH is allowed in connection with Delayed Deposit Services transactions.

Q: Can a licensee use ACH to deposit funds into a customer's account?

A: No. Transactions may only be funded on a cash basis or via money order if requested in writing by the customer and no additional fee is imposed. See also Interpretative Opinion No. 4.

Q: Can a licensee use ACH to debit funds from a customer's account for initial presentment of a check?

A: No. Initial presentment of a check may only be made either over-the-counter to the customer's financial institution or by a deposit to the licensee's financial institution.

Q: Can a licensee use ACH transactions for collection purposes?

A: Yes, but only subject to certain guidelines and notifications to the consumer.

Q: Interpretative Opinion No. 6 says that a licensee shall comply with all National Automated Clearing House Association ("NACHA") rules. What are those rules?

A: If a licensee is thinking about utilizing ACH, they should discuss these requirements with their financial institution and/or ACH provider to ensure compliance.

Q: If a licensee intends to use ACH transactions for collection purposes, what notification to the customer is required?

A: The licensee must provide conspicuous notice at the time of the initial transaction that a returned check may be collected as an ACH transaction. Such notice must be included and highlighted in the customer contract or attached as a separate notice given to the customer and posted in each office of the licensee, including any branch office.

Q: What items does the “conspicuous notice” need to include?

A: The notice must include a statement describing an ACH transaction and what additional charges could be incurred from third parties if the licensee uses ACH to attempt to collect a returned check and the returned item fee. The notice must 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. The Department has drafted a sample notice which is available on the Department website.

Q: What does it mean that the licensee has to include a statement about additional charges incurred from third parties if the licensee uses ACH to attempt to collect a returned check and the returned item fee?

A: Since an ACH transaction may be presented to a customer’s financial institution more times than a physical check, the licensee should disclose that a customer could potentially incur additional fees from his/her own financial institution if funds are not available when both the amount of the returned check and the amount of the returned item fee are presented.

Q: What authorization must the customer give the licensee in order for the licensee to use ACH transactions to collect the returned item fee?

A: The customer must provide a separate authorization for this potential charge. Authorization may be given at the time of the original customer agreement.

Q: Can a licensee use ACH to debit a customer’s account for partial amounts of the total amount that a customer owes a licensee?

A: Not without a separate collection agreement. Electronic collection is permitted for the full collection of the check and the full amount of any penalty fee pursuant to NACHA rules. Separate debits must be initiated for the full amount of the returned check and the full amount of any penalty fee.

Q: What records must a licensee retain if using ACH for collection purposes?

A: The licensee must maintain at the office where the item originated a report which contains the items outlined in Item 4 of Interpretative Opinion No. 6. This report must be available for review at the time of examination.

Q: What should this collection report look like?

A: The additional items can be incorporated into the licensee’s current collection inventory report already generated for Examiner review. Any questions about what this report should contain should be directed to Department Examiners.

Q: When can a licensee allow installment payments on delayed deposit services checks held in the licensee’s collection inventory?

A: In order to accept installment payments, the licensee must enter into a separate, written contract with the customer for repayment authorizing an installment payment schedule.

Q: Can a licensee charge an additional fee to the customer for allowing an installment payment schedule for collection items?

A: No. No additional fees may be charged to the customer to enter into such a contract.

Q: What items does the installment payment contract need to contain?

A: The contract should contain, at a minimum, the following items: the date and amount of each payment and (if applicable) that ACH will be used; 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 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.

Q: How specifically do the terms for the date and amount of each payment need to be stated in the contract?

A: If the contract is for ACH payments, the date and amount for each **must be exact**. If the contract is for cash payments, the contract could be written generally enough to say that the customer agrees to make payments of \$X or more on each specific due date until the balance is paid, with X being the minimum amount that the customer is able to pay or the licensee is willing to accept.

Q: Does a licensee have to offer an installment payment option for collection amounts?

A: No. However, there may be circumstances in which a licensee determines that it would be beneficial to allow the customer to make installment payments.

Q: If a licensee enters into an installment payment contract with a customer for cash payments and the customer never makes any payments pursuant to that contract, can the licensee re-present the check?

A: Yes, if the contract with the customer provides that this is a consequence of nonpayment.

Q: If a licensee enters into an installment payment contract with a customer, several payments are made and then the customer defaults, can the licensee re-present the check?

A: No. The licensee would not be able to re-present the check which was written for the full amount if it had already collected part of that amount from the customer.

Q: Can a licensee accept partial payments from a customer without a written contract?

A: Yes, unless the licensee requires the customer to make payments on a set schedule. If accepting payments without a contract, all payments should be accurately reflected in the customer's collection file and the licensee cannot attempt to re-present a check for which partial payments have already been collected. No partial payments are allowed to be collected via ACH without a written contract.

Q: Can a customer go to a different branch to make a payment?

A: Yes, as long as that payment is accurately reflected in the physical and electronic records of that customer's account.

Q: If a licensee turns a check over to a collection agency, is it necessary for the licensee to enter into a written agreement with the customer in order for the agency to accept partial payments in cash or via ACH?

A: No. Once a check is turned over to a collection agency, as long as the customer deals solely with the collection agency, no written agreement would be necessary.

EXAMINATIONS

Q: How often are DDS licensees examined by the Department?

A: Neb. Rev. Stat. § 45-920 provides that the Director shall examine the books, accounts, and records of each licensee no more often than annually, except as provided in Section 45-921. Section 45-921 provides that the Director may examine or investigate complaints about or reports of alleged violations of the Act, or any rule, regulation, or order of the Director thereunder.

Q: What is the cost to the licensee for such examinations?

A: The current examination rate is \$125.00 per hour. Department Examiners charge for examination related time spent off-site and on-site. Each licensee is not directly charged for any Examiner time or expenses incurred surrounding travel from the Examiner's home office to the licensed location.

Q: How is the licensee notified about a scheduled examination?

A: Department Examiners notify the licensee's designated pre-examination contact via secure email of the upcoming examination and request that certain types of information be submitted to the Department in electronic form in advance of that examination. For a current listing of the types of information requested, the acceptable formats, and general response timelines please send an inquiry to the Department Examiners at dob.consumerfinance@nebraska.gov.

Q: What happens if the requested information isn't submitted by the licensee or is in an unacceptable format?

A: Failure to respond to an Examiner email request will not delay the scheduled exam, but will increase licensee costs as Examiners will have to spend more billable time on-site waiting for the proper reports to be provided. Submissions of data in other than the prescribed format will result in increased examination costs due to the time necessary for the Department Examiners to convert to acceptable formats.

Q: How does the secure email process work?

A: Department Examiners send the initial requests via a secure email provided to the licensee. The licensee will need to login and create a password to retrieve the initial email. Requested information must be submitted via reply email, using the login process, in order for the returned information, including any attachments, to be encrypted and secure.

Q: Where should a licensee send notifications regarding changes to either its pre-examination or exam delivery contacts?

A: Notifications should include the licensee's license number for ease of tracking and should be sent via email to dob.consumerfinance@nebraska.gov.

Q: Will a licensee always be notified about an examination?

A: No. The Department reserves the right to conduct an unannounced examination, particularly if there is a complaint or suspected violation of the Delayed Deposit Services Act.