

Good And Bad News For Hawaii Merchants

by David Rair

Beginning on January 1, 2007, Hawaii merchants will need to be in compliance with new federal rules which will require merchants to provide consumers with new disclosures when merchants electronically submit checks for payment they receive from consumers. However, merchants did receive some relief when the Hawaii legislature amended a state law to allow merchants to charge higher fees for checks returned for insufficient funds.

On January 10, 2006 and August 30, 2006, the Federal Reserve Board adopted a final rule and an interim final rule which amended Regulation E to cover merchants and other payees who engage in electronic check conversion or "ECK" transactions. Regulation E implements the Electronic Funds Transfer Act and regulates electronic funds transactions or "EFTs" which include electronic debits from consumer deposit accounts. In an ECK transaction, a consumer provides a merchant or other payee with a check for goods or services or as payment on an account, and information from the check is captured to initiate a one-time EFT from the consumer's checking account. The ECK transaction can be made if the check is blank, partially completed, or fully completed and signed, and can be initiated either at the point of sale or when a consumer makes a payment by check which is later converted to an ECK transaction. The merchant may also initiate a later ECK transaction to collect a fee for insufficient funds or a "NSF" fee from the consumer's checking account if the account did not contain sufficient funds to cover the check provided to the merchant.

Although ECK transactions were previously covered by Regulation E, merchants were not required to provide any disclosures or obtain the consumer's consent prior to initiating the ECK. Starting on January 1, 2007, Hawaii merchants will now need to obtain consumers' authorizations before initiating ECK transactions. For ECK transactions initiated at the point of sale, the consumer's authorization can be obtained by providing a notice posted in a prominent and conspicuous location that the check will or may be converted to an EFT and the consumer goes ahead with the transaction. If the merchant may charge an NSF fee by an ECK, the merchant must also disclose that fact and the amount of the fee. A copy of the notice must also be provided to the consumer at the time of the ECK transaction, such as on a receipt for the purchase if the transaction occurs at the point of sale. For three years merchants will also be requested to disclose that when a check is provided as payment and converted to an ECK transaction, the funds may be withdrawn from the consumer's account the same day the payment is made or received, and the check may not be returned by the consumer's financial institution.

A more positive development occurred when the Hawaii legislature passed Act 206 which amended Article 3 of the Hawaii Uniform Commercial Code ("UCC") to allow merchants to charge higher NSF fees. In 1999, the Hawaii Legislature added a non-uniform section to Article 3 of the UCC to limit the maximum amount of NSF fees a merchant may



charge to \$20. Act 206 raises the maximum amount of the NSF fees to not greater than \$30. However, merchants need to be aware that the applicable section of the UCC continues to state that a payee or holder may assess "a reasonable service charge of not more than \$30." This may leave the door open to challenges that the NSF fees charged by particular merchants may be unreasonable penalties if the fees are not reasonably related to the merchants' costs of collection on a returned check. Therefore, merchants need to make sure that the fee they charge is reasonable. Finally, it is unclear whether the UCC limitation on NSF fees applies to an NSF fee charged when a consumer's check is converted to an ECK transaction which is reversed for insufficient funds, since Article 3 of the UCC generally

only applies to payments made by checks and other negotiable instruments.

About the Author

David K. Rair is a partner at
Chun Rair Yoshimoto LLP.

You can contact him at:

David K. Rair
Chun Rair & Yoshimoto LLP
1000 Bishop Street, Suite 1000
Honolulu, Hawaii 96813
(808) 528-4200
drair@chunrair.com

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