State of Wisconsin
Department of Financial Institutions

Tony Evers, **Governor** Kathy Blumenfeld, **Secretary**

October 9, 2020

VIA EMAIL

[redacted]

Dear Attorney [redacted]:

The Wisconsin Consumer Act (WCA) authorizes creditors to charge a $15 fee "for each check presented for payment to a creditor which is returned unsatisfied because the drawer does not have an account with the drawee, does not have sufficient funds in his or her account or does not have sufficient credit with the drawee." Wis. Stat. s. 422.202(1)(d). You have asked whether this agency construes the word "check" in this statute to include checking-account payments made through the automated clearing house (ACH) network, or whether the $15 fee is allowable only in instances where payment is presented by traditional paper check. For the reasons that follow, DFI construes the term "check" to include ACH transactions.

ANALYSIS

As its plain language indicates, Wis. Stat. s. 422.202(1)(d) authorizes merchants to collect up to $15 to offset the administrative burdens incurred when a customer's check is denied for nonsufficient funds (NSF). While the term "check" in Wis. Stat. s. 422.202(1)(d) is undefined, the Legislature has provided broad definitions of "check" in other statutes governing financial services and transactions. See Wis. Stats. ss. 217.02(2) (defining "check" to include "any check, draft, money order, traveler's check, personal money order or other instrument for the transmission or payment of money"), 403.104(6) (defining check to include an instrument that is "payable on demand and drawn on a bank," even if "it is described on its face by another term, such as money order"). Although these definitions are not dispositive when construing "check" in s. 422.202(1)(d), they provide important guidance as to how the Legislature has applied that term in the context of regulation of financial transactions.

Courts recognize that "automated clearinghouse ('ACH') drafts [are] essentially checks," *White v. Keely*, 814 F.3d 883, 885 (7th Cir. 2016), and s. 422.202(1)(d) makes no distinction between paper checks processed by traditional means and checking account transactions processed through the ACH. Nor would it be logical to make such a distinction. Traditional paper checks and ACH transactions are functional equivalents, in that both commence a process leading to a deduction from a depository account. Indeed, in many cases paper checks can be processed as ACH transactions.[1] When that processing fails due to NSF, it tends to create

[1] For example, by using a certain type of electronic funds transfer (EFT), a merchant may transform the paper check into an electronic "debit," which is then paid from the payee's checking account. Another

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administrative burdens for the merchant regardless of whether the payment was processed by ACH or traditional means. Those burdens—not the fact that the check was presented on paper versus ACH—are the reason for allowing merchants to collect small NSF fees by statute.

Based on these considerations, the Department interprets "check" in Wis. Stat. s. 422.202(1)(d) to include both traditional paper checks and ACH transactions.

Sincerely,

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type of EFT allows a merchant or credit card company to use the ACH network to change the paper check into an electronic payment. And some EFT processes enable a paper check to be turned into an ACH transaction by the merchant while the customer is standing at the cash register – the clerk scans the check, stamps it "void" and hands it back to the customer, while sending the payment information through the ACH system. *See generally* OFFICE OF THE COMPTROLLER OF CURRENCY, *Checking Accounts: Understanding Your Rights*, available at https://www.occ.gov/topics/consumers-and-communities/consumer-protection/depository-services/checking-accounts.html.