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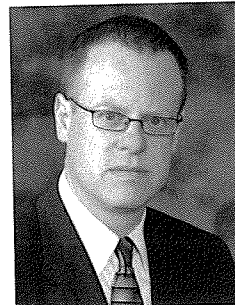
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Leveling the Playing Field: Remote Deposit Capture Agreements

Patrick S. Murphy, Godfrey & Kahn, S.C.

Sometimes referred to as a “land grab” or “gold rush,” remote deposit capture (RDC), has now gained momentum in the banking industry. Among other benefits, RDC allows merchant customers of banks to scan the checks they receive into a piece of equipment roughly the size of a breadbox and then transmit those deposits electronically to their bank. Merchant benefits include expedited access to the deposited funds and the time saved from not having to physically deposit the items.



The advantages to your institution include solidifying existing customer relationships by providing efficient deposit solutions and forging new relationships by eliminating geographic barriers. While many financial institutions already have implemented some form of RDC solution, others are now looking to jump on the bandwagon. This article highlights a few of the issues to focus on when drafting RDC agreements with your customers.

Determining Liability

RDC was made possible by the Check Clearing for the 21st Century Act, or Check 21. Keep in mind, however, that since the bank's customers are not themselves financial institutions, they are not subject to the warranty and indemnification provisions of Check 21. In order to properly protect your institution, the bank must appropriately shift liability back to its RDC customer through a carefully drafted agreement. Key provisions to include:

Image Quality – There are a number of hardware and software solutions in the marketplace that produce varying degrees of image quality of deposited items. To date, the industry has not settled upon one set of standards dealing with the quality of images transmitted via RDC. Any institution in the clearing process can return an item due to unacceptable image quality. Accordingly, your customer agreement should clearly address image quality requirements, as well as disclaim any liability for items returned due to non-conforming image quality. You can also help to ensure that image quality standards are met by directing the customer to purchase its check scanning equipment from certain dedicated vendors who you know will satisfy such standards.

Duplicate Deposits – Unlike in a paper-based environment, where the bank retains control over the original item upon deposit into the customer's account, in a RDC environment the roles get reversed. The customer is responsible for retaining (and later destroying or defacing) the original item after scanning an image of that item and transmitting it to the bank. Accordingly, additional responsibilities should be

imposed upon the customer that should be addressed in your RDC agreement. Most notably, the customer should warrant that it will properly safekeep items deposited through the RDC system and restrict access to such items to certain responsible employees. It is also important that your institution disclaim any liability and seek indemnity from the customer for any claims or damages resulting from your customer's failure to safekeep and/or destroy or deface such items.

Funds Availability – Pursuant to Regulation CC, the availability of funds deposited is dictated by whether the items deposited are “local” or “non-local,” as defined by the regulation. Because, in RDC, the funds are not considered to have been deposited in any particular location, they are not subject to the availability requirements of the regulation. Accordingly, your institution should detail in its RDC agreement its policy with respect to funds availability.

Item Destruction – Your institution must weigh the risk of multiple presentment of items deposited via RDC against risks associated with the destruction of

such items. Clearly you may limit liability associated with multiple presentments by requiring that the customer destroy or deface the items at some point after it receives confirmation that the deposit was received and accepted. There is a competing risk, however, that if the merchant sustains a loss because it cannot produce the original item and the customer is thereby not required to honor it, the merchant will probably look for reimbursement from the bank that instructed it to destroy the item in the first instance. Accordingly, if you elect to include item destruction language in your RDC agreement, you should instruct the merchant not to destroy items prior to a certain period of time after deposit to allow time for any disputes between the merchant and its customers to arise.

Operational Provisions – In addition to the above, your institution may wish to address certain operational aspects of the relationship in the RDC agreement, for example:

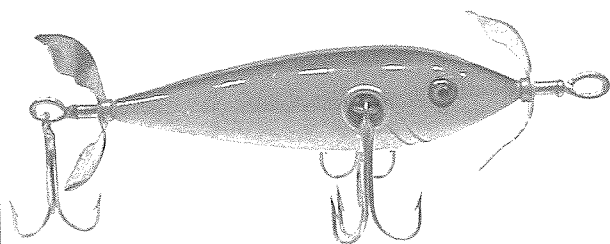
- Types of items that it will accept for deposit through RDC (e.g. only checks drawn on United States financial institutions);

- Dollar limit of items that may be deposited through RDC in any given business day; and

- Deposit cut-off times.

Since the RDC agreement operates in tandem with your institution's depository agreement, you should ensure that these two agreements “mesh” and do not contain contradictory liability or other provisions.

If properly implemented, RDC can be a valuable tool for your institution to maintain its existing deposit customer base and attract new customers. The law in this area is still evolving and is largely untested to date. As always, while a thorough due diligence review of your customers is your best protection from unforeseen liabilities, a tightly drafted RDC agreement that clearly covers and allocates liability for certain risks inherent in RDC agreements is your next best line of defense. Be sure to contact your legal advisor to assist in preparing this important document if you are considering offering RDC services. 🐾



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