

Check 21 Final Regulations

Frequently Asked Questions

Q: *When do I have to provide the general consumer awareness disclosure required by § 229.57 of Regulation CC?*

A: There are three occasions when a bank must provide the § 229.57 disclosure:

1. To all consumer customers who receive original checks with their statements. This must be provided no later than the first regularly scheduled communication with the consumer after October 28, 2004 and for each consumer who becomes a customer after that date.
2. When a consumer customer receives a returned substitute check, that is a deposited check that is returned unpaid in the form of a substitute check. .
3. When the bank provides a consumer customer a substitute check upon request.

Q: *Do I have to provide notices to business customers?*

A: No. The notice provisions only apply to consumer customers.

Q: *Does the bank have to provide the disclosure required by § 229.57 to all of its consumer customers if it does not return original paid checks, but its image statement contains images of substitute checks?*

A: No. Under Section 229.57, the bank is only required to provide the disclosure to consumers who actually receive a substitute check that meets the Regulation's definition. The Commentary to that section specifically provides, "For example, this requirement would not apply if a bank provided with the account statement only a document that contained multiple check images per page." No disclosure is required even if the image statement contains images of substitute checks. However, to avoid confusion and unnecessary inquiries, the bank could consider stamping "copy" on those images or otherwise indicating that images of substitute checks are not actually substitute checks. The bank is responsible for the disclosure if it later provides a substitute check, either in response to a request or as an item returned unpaid.

Q: *Must the bank provide the notice each time it provides a substitute check upon request or a returned substitute check?*

A: Yes, the bank must provide the disclosure described in § 229.57 each time it provides a returned check in the form of a substitute check or provides a substitute check in response to a consumer's request. Comment 1 to Section 229.57(a) specifically states: "A bank must provide the disclosure each time it provides a substitute check to a consumer on an occasional basis, regardless of whether the bank previously provided the disclosure to that consumer." Presumably, the Federal Reserve was concerned that even if consumers read a one-time notice, there could be a significant time gap between the notice and actual receipt of the occasional substitute check so that consumers would have forgotten the earlier explanation.

Q: *Can the required notice be included with the usual notice that goes with an item that was deposited and returned?*

A: Yes, so long as it is clear what a substitute check is and when it applies. Unlike some other regulations, there is no requirement to segregate disclosures. In fact, the Commentary provides: "A bank also may include in its disclosure additional information relating to substitute checks that is not required by this section." Also, the preamble to the final rule notes that banks are permitted to combine the substitute check information with other information.

Q: *Do the recredit provisions have any application for a returned item, that is, a check deposited in the consumer's account and returned unpaid, that is in the form of a substitute check? In other words, if a legal substitute check is returned to a depositor, does the depositor have the same expedited recrediting rights with a returned item as the drawer does during forward collection?*

A: Yes. It is expected that most expedited recredit claims will arise with respect to checks drawn on a consumer's account and then later provided to the consumer in the form of a substitute check (such as a substitute check provided with a monthly account statement or upon the consumer's specific request). However, a consumer also could receive a substitute check if the consumer deposited a check into his or her account, the paying bank returned that check unpaid, and the unpaid check was returned to the consumer in the form of a substitute check. In that case, the consumer could use the expedited recredit procedure to resolve an error related to the substitute check if the bank charged the consumer's account for the substitute check (such as by debiting the consumer's account for the amount of the returned check) and if the consumer suffered a loss relating to the substitute check. The consumer would suffer a loss, for example, if the bank debited the consumer's account for the wrong amount or because a defect with the substitute check interfered with the consumer's ability to redeposit the check. It is expected that use of the

expedited recredit procedure for a substitute check returned unpaid to the consumer will be rare.

Q: *Could a bank ever receive an expedited recredit claim if it only provides image statements and never provides substitute checks upon request?*

A: Yes. A bank could receive an expedited recredit claim if the bank provided to the consumer a substitute check representing a check that the consumer deposited in his or her account and the paying bank returned unpaid.

Q: *Does the expedited recredit provision apply to images of substitute checks contained in image statements?*

No. The consumer expedited recredit provisions apply only if the bank provides a substitute check to the consumer. Copies of substitute checks, such as those contained in image statements, are not substitute checks that give rise to the expedited recredit right.

Q: *Does the Check 21 Act or Regulation CC require the truncating bank to retain originals for a certain period?*

A: No. Neither the Check 21 Act nor Regulation CC imposes any requirement for banks that truncate checks to retain the original checks. Truncating banks will determine individually when and for how long to retain the original checks. They will make their own risk assessment based on potential liability, amount of the check, ability to retrieve, costs of retention, etc. However, other regulations may require record retention.

Q: *Who bears the risk associated with the fact that a check has been truncated and converted into a substitute check?*

A: The Check 21 Act is designed basically to put the liability and losses associated with a substitute check on the bank that creates the substitute check or is the first to transfer a substitute check created by a nonbank. However, we would expect that banks that create substitute checks from electronic files they receive from other banks or from their customers (or that transfer substitute checks created by their nonbank customers) would further allocate losses by agreement with their transferor.

Q: *If for example, a check contained a security feature that did not survive image and the paying bank would have checked for the security feature, detected the fraud, and returned the check within the midnight deadline if it had received the original check, can the paying bank make an indemnity claim?*

A: The indemnity covers losses that were incurred by any recipient of a substitute check as a result of receipt of a substitute check instead of the original check. In this case, the paying bank could make an indemnity claim if it could show that, had it instead received the original check, its fraud detection procedures would have detected the fraudulent item in time for the bank to return the item in a timely manner.

Q: *Is it correct that the reconverting bank has no indemnity claim against the truncating bank?*

A: The reconverting bank does not receive the Check 21 warranties and indemnity from the truncating bank. However, we expect that reconverting banks will allocate losses they incur under Check 21 through agreements with the truncating bank or other transferor.

Q: *Can foreign checks and other foreign items be converted to substitute checks?*

A: No. Only items that satisfy the definition of “check” in Regulation CC (see § 229.2(k)) can be reconverted to substitute check form. Items that are not drawn on a U.S. depository institution or that are not payable in U.S. money are not “checks” under this definition and therefore cannot be used to create substitute checks.

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