

February 7, 2019

By electronic delivery to:
<http://www.federalreserve.gov>

Ann E. Misback	Comment Intake
Secretary	Bureau of Consumer Financial Protection
Board of Governors of the Federal Reserve System	1700 G Street, NW
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Washington, DC 20551	

**Re: Board Docket No. R-1637; RIN 71
Bureau Docket No. CFPB-2018-0035; RIN3170-AA31
Joint Request for Comment
Regulation CC (Expedited Funds Availability Act)
83 Federal Register 63431 (December 10, 2018)**

Dear Ladies and Gentlemen,

The American Bankers Association¹ (ABA) is pleased to submit our comments to the Board of Governors of the Federal Reserve System (Board) and the Bureau of Consumer Financial Protection (Bureau) regarding [proposed amendments to Regulation CC](#),² which implements the Expedited Funds Availability Act (EFA Act). The Board and Bureau (Agencies) are —

1. Requesting comment on a proposed calculation methodology for implementing a statutory requirement to adjust the dollar amounts in the EFA Act every five years by the aggregate annual percentage increase in the Consumer Price Index for Wage Earners and Clerical Workers (CPI-W), rounded to the nearest multiple of \$25;³
2. Requesting comment on the implementation of a provision in the Economic Growth, Regulatory Relief, and Consumer Protection Act that amends the EFA Act to extend coverage to American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam; and
3. Reopening the comment period on the Board's [proposed amendments](#) to Regulation CC⁴ published in the Federal Register on March 24, 2011.⁵

¹ The American Bankers Association (ABA) is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² Availability of Funds and Collection of Checks (Regulation CC), 83 Fed. Reg. 63,431 (Dec. 10, 2018).

³ Section 1086(f) of the Dodd-Frank Act added Section 607(f) to the EFA Act.

⁴ Availability of Funds and Collection of Checks, 76 Fed. Reg. 16,862 (Mar. 25, 2011).

⁵ Section 1086(d) of the Dodd-Frank Act amended Section 609(a) the EFA Act to provide that the Board and Bureau should jointly prescribe regulations to carry out the provisions of the EFA Act, to prevent the circumvention or evasion of such provisions, and to facilitate compliance with such provisions.

Our comments will focus on the proposed inflation adjustments and the 2011 proposed amendments to Regulation CC.

INFLATION ADJUSTMENTS

As noted, the Agencies are proposing a calculation methodology for implementing the statutory requirement to adjust the dollar amounts in the EFA Act. The Agencies propose to release adjusted amounts in the first quarter of 2019 with an effective date of April 1, 2020, to provide appropriate time after issuance for implementation. Subsequent adjustments would be made every five years. The Agencies propose to use the July CPI-W, which is released by the Bureau of Labor Statistics in August. The proposal takes into account negative movements in the CPI-W on a year-to-year basis, but the dollar amount adjustments would always be zero or positive. In addition, the periodic adjustments would be based on the initial “base” year so as to reflect the changes in inflation from the date of the provision’s enactment.

The chart below describes the proposed changes:

Category & Section	Description of category	Amount changes
Large-dollar §229.13(b)	The threshold for using the exception to the funds-availability schedules for large deposits.	\$5,000 to \$5,525
Minimum next day availability §229.10(c)(1)(vii)	The minimum amount of deposited funds that banks must make available for withdrawal by opening of business on the next day for certain check deposits.	\$200 to \$225
New account §229.13(a)	The amount of funds deposited by certain checks in a new account that are subject to next-day availability.	\$5,000 to \$5,525
Cash withdrawal §229.12(d)	The amount banks must make available when using the EFA Act’s permissive adjustment to the funds-availability rules for withdrawals by cash.	\$400 to \$450
Repeatedly overdrawn §229.13(d)	The threshold for determining whether an account has been repeatedly overdrawn and subject to an exception to the funds availability schedules.	\$5,000 to \$5,525
Civil liability §229.21(a)	Penalties for failing to comply with the EFA Act’s requirements.	\$100 unchanged Other civil liability amounts: \$1,000 to \$1,100 \$500,000 to \$552,500

ABA appreciates the Agencies’ acknowledgement of the challenges to institutions if changes to regulatory requirements are too frequent or abrupt and the need to provide sufficient time after issuance of a final rule for implementation. Allowing at least a year to implement the inflation adjustments, as proposed, is necessary to review the changes, retrieve old forms and notices, revise and distribute new forms and notices, adjust technological systems and websites, revise training materials, train staff, and manage budgets. Accordingly, if final inflation adjustments are not released as

anticipated, (e.g., the first quarter of 2019), the Agencies should extend the mandatory effective date so that the period for implementation is at least one year.

In addition, it is important to tie the mandatory effective date of the inflation adjustments to any other disclosure changes. Going forward, depository institutions will have to change disclosures, systems, and policies every five years due to the inflation adjustments and should not have to change them in between those years. Any non-inflation adjustment changes to the disclosures should be effective at the same time as the inflation adjustments to avoid unnecessary costs and burdens.

2011 PROPOSED AMENDMENTS

Except as indicated below, our views have not changed since submission of [our comment letter](#)⁶ to the 2011 proposal.

§ 229.13 – Exceptions

(g) Notice of Exceptions

Electronic notices. The 2011 proposal, in effect, would require depository institutions to provide hold notices electronically if the hold notice is not provided in person and the customer has agreed to accept notices electronically. We continue to object to this provision. While we agree it is important to alert customers as soon as possible that a hold has been placed on their deposit, mandating electronic notices in these circumstances continues to present technical and practical issues for the reasons explained in our 2011 comment letter. Banks are unable to provide electronically many non-pre-programmable notices. Hold notices cannot be programmed in advance because hold decisions are manual rather than automated and made at different points in the collection process. In addition, hold notices cannot be programmed in advance because they must contain event-specific information rather than a general notice applicable to all recipients.

Even if a system of providing hold notices electronically were practical or feasible, it would not be cost-effective given the low volume of notices that are sent. The requirement would only apply to a relatively small number of notices because: (1) the number of holds represents a small percentage of the total number of deposits; and (2) the electronic delivery requirement would only apply to those not receiving a notice in person, and of those, only those who have agreed to accept notices electronically. Moreover, it would require maintaining dual systems for a relatively low volume of notices, which, again, is not cost-effective given the limited benefits. We have not been able to identify any bank that sends hold notices electronically.

(h) Availability of Deposits Subject to Exceptions

Previously, ABA objected to the proposed reduction from seven to four days of the hold period presumed to be reasonable for exception holds (extended hold period). We recommended it be at least five days. We now believe that the Agencies should *not shorten the current seven-day hold period as proposed*. The Agencies should retain the current extended hold period because (1) consumers and banks are suffering increased harm due to check fraud that is directly linked to rules that require banks to provide funds from check deposits before the banks can learn that the check is not good; and (2) in

⁶ Letter from Nessa Feddis, Sr. Vice President & Deputy Chief Counsel for Consumer Protection and Payments, ABA, to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (June 3, 2011), https://www.aba.com/archive/Comment_Letter_Archive/Comment%20Letter%20Archive/cl-RegCCExpFundsAvail2011June.pdf.

practice, banks judiciously use extended holds to ensure bank customers (both consumer and business) currently have prompt access to virtually all of their deposits.

As discussed in our 2011 letter, consumers and businesses are harmed by fraudsters who take advantage of, and rely on, requirements and policies that allow bank customers to withdraw funds from their deposits before the bank can know that the check is not payable. These fraudsters send fake checks with instructions to victims to deposit them and withdraw the money as soon as it is available. They are then directed to send the cash to the fraudsters, by wire, gift card, or money order. The consumers and businesses suffer the loss when the check is returned unpayable. Banks suffer the loss when the customers are unable to pay.

Despite significant efforts by the banking industry, law enforcement and other government agencies, and consumer advocacy groups, these check fraud scams have continued to grow, as described in the October 2018 Better Business Bureau's report, "Don't Cash That Check: BBB Study Shows How Fake Check Scams Bait Consumers." "Fake check fraud is a huge problem, with complaints to government agencies and consumer advocacy groups doubling over the last three years. Millions of fake checks worth billions of dollars circulate every year."⁷ While the scams harm people of all ages, those between 20 and 29 years old are most likely to be victims according to the Federal Trade Commission's Consumer Sentinel complaint database.⁸

The fraudsters rely on the fact that banks must make funds available before they can learn that the check is bad. Moreover, fraudsters are constantly seeking and experimenting to find ways to delay the processing of their fake checks so that they are returned to the depository bank after virtually all valid checks are returned. Shortening the extended hold period as proposed will *increase* the likelihood that funds will be withdrawn before the check is returned, giving criminals additional tools and opportunities. For example, shorter extended holds will embolden criminals to send fake checks in larger amounts, knowing that they may not be returned within the shortened extended hold period.

Moreover, retaining the current extended hold period will have limited impact on bank customers. They currently have quick access to most deposits. Indeed, banks strive to make funds available as soon as possible to serve and please their customers. Of 15 banks responding to a recent informal ABA survey,

- Nine reported that customers received next day availability on 97 percent or more of their check deposits;
- Seven provided second day or earlier availability on 99 percent or more of check deposits;
- Ten provided second day or earlier availability on 97 percent or more of check deposits;
- Seven provided extended holds on one percent or less of check deposits;
- Twelve placed extended holds on five percent or less of check deposits; and
- Thirteen placed extended holds on less than eight percent of check deposits (the remaining two placed holds on 13 percent and 15 percent of check deposits).

⁷ BETTER BUSINESS BUREAU, DON'T CASH THAT CHECK: BBB STUDY SHOWS HOW FAKE CHECK SCAMS BAIT CONSUMERS 1 (2018), https://www.bbb.org/globalassets/local-bbbs/st-louis-mo-142/st_louis_mo_142/studies/bbb-study-dont-cash-that-check-how-fake-check-scams-bait-consumers-steve-baker.pdf.

⁸ *Id.* at 3.

Most holds relate to large dollar deposits and deposits into new accounts, items associated with increased risk of fraud and loss and that generally pose less inconvenience for customers. For example, people who have a hold placed on a large paper paycheck still have quick access to the first \$5,000 (\$5,525, once the large dollar threshold amount is adjusted for inflation).

Banks use their discretion to place holds rarely and carefully both in order to maximize customers' quick access to deposits and, when needed, to try to protect customers and banks from fraud. The current extended hold period presents minimal inconvenience to customers but provides critical flexibility and opportunity for banks to prevent check fraud and protect their customers. For these reasons, we strongly recommend that the Agencies retain the current extended check hold period.

Appendix C

Model availability policy disclosures, clauses, and notices

The 2011 proposal incorporated into model funds availability policies the statement, "If you withdraw funds from a check deposit, and the check is later returned unpaid, we may charge the check back to your account." For the reasons discussed above and in our 2011 letter, we reiterate our support for incorporating into the model policies warnings that checks may be returned after funds have been made available. Further, we revise our 2011 recommended modifications to strengthen and clarify the message and suggest that it state, "Even if money from a deposited check is made available to you, or you understand that the check has 'cleared,' that check may not be good. If the check is returned to us unpaid, your account will be charged for the amount of the check."

It is our understanding that many victims of check fraud scams equate funds being available with the check having "cleared," which they believe means the check was paid by the paying bank and is not subject to return or charge back — a notion, promoted by the criminals, that gives consumers false confidence in the validity of the check. For that reason, we believe it is important to use the term "cleared" in the warning and equate it with funds being available, not with payment by the paying bank. The 2011 proposal only incorporated the statement into the model funds availability policies. We agreed, but we now also recommend that the warning be included not only in the model policies, but also in the model exception hold notices as well as notices at locations where employees accept consumer deposits.⁹ Adding the warning to notices customers are likely to see and read *at the time of deposit* will increase the chances of thwarting a particular fraud event and also increase customer awareness generally.¹⁰

DEPOSIT DISCREPANCIES

ABA recommends that the Agencies include in any upcoming Regulation CC amendments a clarification about the application of Regulation CC to certain deposit discrepancy reconciliation practices, in light of the May 2016 "Interagency Guidance Regarding Deposit Reconciliation Practices," which suggests that Regulation CC might be "relevant" to those practices.¹¹

⁹ We are not recommending that the language be included in model deposit slip notices, given their space constraints.

¹⁰ Even if the extended hold reduces the likelihood that that a particular check will be returned after funds have been released, consumers reading the warning on a hold notice may be forewarned about a subsequent check.

¹¹ BUREAU OF CONSUMER FIN. PROTECTION, INTERAGENCY GUIDANCE REGARDING DEPOSIT RECONCILIATION PRACTICES (May 18, 2016), https://files.consumerfinance.gov/f/documents/201605_cfpb_interagency-guidance-regarding-deposit-reconciliation-practices.pdf.

Customers occasionally misstate the total amount of deposits on their deposit slips. In such cases, banks generally correct the misstatement and credit or debit the account appropriately. However, historically, banks may not have made the correction (which may favor the customer or the bank) if the discrepancy is *de minimis* and the customer has agreed. Commercial customers, especially those dealing with cash, often prefer not to be informed for various reasons, for example, because the costs and resources associated with a minor correction are not worth the benefit, even when the correction is in their favor. In addition, banks may not be able to verify that large amounts of cash (including coins) match the amount of cash stated on the deposit slip before they must make funds available.

We do not believe that it is a violation of Regulation CC to make funds available or accrue interest or dividends, where applicable, based on the customer's statement of the deposit amount. Indeed, in the 28 years between adoption of Regulation CC and the May 2016 Interagency Guidance, we are unaware of any interpretation or suggestion that the long-established, common practice of not reconciling *de minimis* deposit discrepancies pursuant to the customer's agreement violates Regulation CC. The lack of opportunity for public comment on the consequences of this interpretation meant that the agencies did not consider the technical challenges and practical implications of such an interpretation, especially for commercial customers and cash deposits, nor the potential civil liability. We suggest that the Agencies clarify that businesses may elect to agree to a threshold amount for adjusting deposit discrepancies.

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We appreciate the opportunity to comment on these important matters and are happy to provide any additional information.

Sincerely



Nessa Eileen Feddis