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Comments:

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Proposal: Regulation CC - Availability of Funds and Collection of Checks
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The following comments address technical issues that the proposed amendment raises and are submitted on my own behalf as a professor of law who teaches and writes in the area. I. Funds availability and remote deposit capture The basic rule in proposed 229.12(a) is that a depository bank shall make funds deposited by check available on the 2nd business day after the banking day of deposit. Hypo: Will that apply to checks that are imaged through remote deposit capture where all the first bank receives is the image files from its customer? 1. Assume that the electronic information forwarded to the bank through remote deposit capture meets the proposed definition of electronic collection item. 2. The definition of depository bank does not include a bank to which an electronic collection item is transmitted. It includes only a bank to which a check is transferred. 3. A check as defined does not include an electronic collection item. 4. Proposed 229.33 does not cure the problem as it is limited to the use of the terms "check" and "returned check" in Subpart C. Thus, the two operative definitions regarding funds availability, "depository bank" and "check," do not seem to include remote deposit capture even if the information provided through that process meets the definition of electronic collection item. The same issue arises in proposed 229.10(c)(vi). Thus, on a plain reading of the proposed amendments, deposits made through remote deposit capture would not be subject to the funds availability rules. Are these results intended? If yes, then the commentary should make clear that the funds availability rules do not apply to remote deposit capture items, even if they meet the definition of electronic collection item. If not, then the basic rules regarding funds availability, including the amount available for cash withdrawal, the exceptions to the availability rules, the notices required, and the time at which the funds are considered deposited need to be revised to take account of the new definition of electronic collection items that may be created through remote deposit capture. The definition of depository bank should be amended to include accepting for deposit or collection an electronic

collection item. In addition, consider whether the definition of check should be amended to include electronic collection item, or alternatively, the term electronic collection item be used where appropriate in the funds availability rules in Subpart B in any rule where the word check is used. If an electronic collection item created through remote deposit capture is intended to be covered by the funds availability rules, is it intended that, if the electronic information transmitted to the first bank through remote deposit capture does not meet the definition of electronic collection item (assume the item started as a paper check), that the funds availability rules would not apply to the deposit? II. Definitions. A. Definition of depository bank. Is there an attempt to exclude from this definition the circumstance where the first bank does not accept the check (or electronic collection item) for deposit, but merely accepts it for collection, in the circumstance where the check would qualify for collection as a cash item? The new language that deals with the bank rejecting the item for deposit may mean that the bank is not a depository bank as defined if it rejects it for deposit but accepts it for collection as a cash item. See proposed § 229.19(e)(2) as amended which contemplates that the bank will indeed be a depository bank if it cashes a check (not for deposit) and the check is not drawn on the bank. B. Definitions related to Subpart C

1. Forward collection, collecting bank, paying bank, returning bank, depository bank for purposes of subpart C. These definitions are keyed to taking "checks" or "returned checks." Query whether § 229.33 as proposed cures the definitional problem given that it is limited to the use of the terms check or returned check in Subpart C. The definitions of the operative actors are not part of Subpart C. This presents at least the following issues: If a bank receives an otherwise qualifying electronic collection item through remote deposit capture, is it a depository bank that is subject to § 229.32? If a bank is presented an electronic collection item for payment, is that a paying bank that is subject to § 229.30? If a bank is handling an electronic return, is that bank a returning bank subject to § 229.31? If a bank handled an electronic collection item, is that bank engaged in forward collection within the meaning of the term in § 229.30 and § 229.31? Is a bank that handles an electronic collection item or an electronic return, a collecting bank, a returning bank or a depository bank for purposes of warranties in § 229.34? 2. Definition of transfer and consideration. Transfer and consideration have the meanings accorded them in the UCC, except as provided for Subpart D. That means that for purposes of Subpart C, where those terms are used (§ 229.34), the UCC definitions would apply. Consideration and transfer are defined for negotiable instruments (U.C.C. § 3-203, § 3-303), but not for electronic records such as would be encompassed within electronic collection item or electronic return. Particularly, the definition of transfer in the UCC in relation to a negotiable instrument depends upon voluntary transfer of possession of the instrument. U.C.C. § 1-201(b)(15). The definitions of transfer and consideration in Reg. CC should be amended to explicitly cover electronic collection items and electronic returns. 3. Definition of truncate. This definition is used in § 229.34. While the definition could be read to include remote deposit capture items and other manners of creating electronic collection items and electronic return items, it would be better to explicitly refer to those new definitions in the definition of truncate. III. Subpart C of Regulation CC A. Application of § 229.33. The application of the terms electronic collection item and electronic return each time "check" or "returned check" are used creates additional ambiguities. This rule is subject to an exception "unless otherwise provided in this subpart." In the warranty provision, § 229.34, the drafting creates an ambiguity as to whether the words "check" or "returned check" should include the electronic collection item or electronic return item or whether it was intended that the words not include

the electronic versions. For example, in proposed §229.34(a)(1)(ii), the warranty of no double payment lists the terms electronic collection item and electronic return in a series with original check, but later on in that paragraph, the word "check" is used, standing alone. Should the inference be that the first use of the word "check" does not include the electronic versions, but the last use of the word "check" should be read to include the electronic versions? A court could easily come to the opposite conclusion under traditional methods of statutory construction and hold that the no-double-payment warranty does not apply where two electronic collection items are presented.

B. Intersection with the UCC Article 4. Proposed § 229.34(c) provides that a bank may use U.C.C. § 4-406 as a defense as to a warranty, as applicable. U.C.C. § 4-406 does not apply of its own force to electronic collection items as defined, being limited to items (written) within the meaning of the Article 4 (absent an agreement for electronic presentment, UCC 4-110). The Article 4 midnight deadline U.C.C. rule (§ 4-301) does not apply of its own force to electronic collection items, but may be applicable through system rules, or parties' agreement. U.C.C. § 4-103. The warranty in § 229.34(d) is a warranty of timely return under the U.C.C. and based upon proposed § 229.33, would apply to electronic collection items. The rules on same day settlement, proposed § 229.36(d), similarly rely on Article 4 regarding preservation of the right to return as to electronic collection items. There may be other examples. Is the intent of the proposal to broaden the application of U.C.C. Article 4 to apply to electronic collection items and electronic returns even if Article 4 does not apply to those electronic items on its own terms, by parties' agreement, or by applicable system rules?

IV. Subpart D While some parts of Subpart D (warranties and indemnity) apply to electronic representations of substitute checks (which could qualify as electronic collection items or electronic returns), the expedited recredit rights in § 229.54 and § 229.55 appear to not apply to electronic collection items that are representations of substitute checks. Is that intended? Thank you for considering these comments.