

March 12, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Regulation CC; Docket No. R-1176
Availability of Funds and Collection of Checks

Dear Ms. Johnson:

As a leader in the financial services industry (“the industry”), Fifth Third Bancorp¹ (“Fifth Third”) welcomes the opportunity to comment on the Board of Governors of the Federal Reserve System (“Board”) proposed regulation to amend Regulation CC to implement the Check Clearing for the 21st Century Act (the “Check 21 Act”).

Fifth Third recognizes and supports the many opportunities offered by the Check 21 Act. However, we are concerned that the proposed rules would have a few unintended consequences that would negatively affect the financial services industry.

Substitute Check

Fifth Third is concerned about the additional warranties applied to substitute checks, purportedly designed to ensure adherence and acceptance of this legislation. While Fifth Third agrees that haphazard substitute check quality will create unease within consumer and commercial market segments, the proposed substitute check MICR line standards exceed current industry check processing requirements. As noted in section § 229.51, a substitute check must accurately represent the MICR line of the original check, at the time of truncation, with the exception of the addition of either a “4” or “5” in position 44. Current industry check clearing practices only necessitate banks to add a MICR strip containing the paying bank’s routing number and the correct amount of the check beneath the original MICR line. This practice is noted in the proposal as follows:

¹ Fifth Third Bancorp provides banking, investment and electronic payment processing services to 5.7 million customers through 17 affiliates in Ohio, Kentucky, Indiana, Michigan, Illinois, West Virginia, Tennessee and Florida. With \$91 billion in assets, Fifth Third is among the top 15 largest bank holding companies in the nation and among the ten largest in market capitalization.

It is a generally applicable industry practice for a bank that detects an encoding error in the amount field of the original check (including omission of the amount) to correct that error by repairing the MICR line, by placing an additional MICR strip containing the paying bank's routing number and the correct amount of the check beneath the original MICR line.

To facilitate the expeditious correction of amount encoding errors within current check processing practices, the proposal continues:

In accordance with the generally applicable MICR-line repair practice for original checks and to facilitate processing of substitute checks in the same manner as original checks, a bank that creates a substitute check from an original check with a misencoded or unencoded amount or a bank that handles a substitute check that reproduces an amount encoding error that appeared on the original check may correct the amount encoding error that the bank detects. Such a repair will not change the item's status as a substitute check under subpart D.

A paper reproduction of an original check that reproduced an uncorrected amount encoding error that appeared on the original check would, assuming all other requirements of the substitute check definition were met, be a valid substitute check that could be transferred, collected, or returned. However, subsequent banks that handled that substitute check and the drawer might have a claim for breach of an encoding warranty (see U.C.C. § 4-209 and § 229.34(c) of Regulation CC).

Fifth Third supports this section of the regulation acknowledging that encoding errors will occur on both substitute checks and original checks concurrently and that such treatment complements current industry practices.

However, Fifth Third would like to address MICR- line errors specifically. The proposal states that this type of check would not carry the legal equivalence of the original check, as follows:

A paper reproduction of an original check that contains a MICR-read error but that purports to be a substitute check, such as by containing the legal equivalence legend or by being delivered when an original check is required, would be a substitute check for purposes of § 229.52 through § 229.57 of the Regulation, as proposed, but would not be the legal equivalent of the original check.

It is current industry practice to forward original checks with MICR strips containing only the paying bank's routing number and the amount of the check. As such, current industry MICR-line correction practices and the proposed MICR-line error correction requirements for substitute checks are divergent. Fifth Third is concerned the variation of repair requirements between original and substitute checks will create additional processing control points, system requirements, and customer education for the industry. Fifth Third is also concerned that the industry, with diligence in ensuring the accuracy of substitute check MICR lines will, out of necessity to meet deadlines, reduce the MICR-line error correction of original checks, thereby reducing the quality of original check clearing.

As such, Fifth Third recommends the MICR-line error requirements and associated warranties be delayed, for a specified period of time, from the date of enactment to review the actual requirements and impact to the industry. Fifth Third also recommends a substitute check containing a MICR-line error is considered for purposes of this regulation as both a valid substitute check and the legal equivalent of the original item. Fifth Third does not believe a MICR-line error negates the legal equivalency of a substitute check, as current industry practice does not require full MICR-line error correction for an original check.

Image Quality

Fifth Third suggests image usability as a failure point in the adoption of substitute checks. Image usability is derived from the quality of the source document of the check. Current industry practice is silent regarding the accepted design for checks to promote image. The proposal states the following:

The information that must be accurately represented includes:

- (1) The information identifying the drawer and the paying bank that is preprinted on the check, including the MICR line;*
- (2) The payment instructions placed on the check by, or as authorized by, the drawer, such as the amount of the check, the payee, and the drawer's signature; and*
- (3) Other information placed on the check prior to truncation, such as any required identification information written on the front of the check and any endorsements applied to the back of the check.*
- (4) A substitute check need not capture other characteristics of the check, such as watermarks, micro printing, or other physical security features that cannot survive the imaging process, or decorative images, in order to meet the accuracy requirement.*
- (5) Conversely, some security features that are latent on the original check might become visible as a result of the check imaging process.*
 - (a) For example, the original check might have a faint representation of the word "void" that will appear more clearly on a photocopied or electronic image of the check.*
 - (b) Provided the inclusion of the clearer version of the word on the image used to create a substitute check did not obscure the required information listed above, a substitute check that contained such information could be the legal equivalent of an original check under § 229.51(a).*

Fifth Third is concerned about ambiguous language regarding the usability and quality of images and a lack of industry enforced check design requirements could lead to unwarranted and trivial breach of warranty claims. Additionally, without industry accepted, recommended, and enforced image survivable check security features, the industry will be quickly mired in breach of warranty and/or indemnity claims as noted in the commentary. The proposal states the following:

The indemnity would not, however, cover a loss that was not ultimately traceable to the receipt of a substitute check instead of the original check.

Examples. A paying bank makes payment based on a substitute check that was derived from a fraudulent original cashier's check. The amount and other characteristics of the original cashier's check are such that, had the original check been presented instead, the paying bank would have inspected the original check for security features and likely would have detected the fraud and returned the original check before its midnight deadline. The security features that the bank would have inspected were security features that did not survive the imaging process (see the commentary to § 229.51(a)). Under these circumstances, the paying bank could assert an indemnity claim against the bank that presented the substitute check.

Fifth Third strongly recommends the establishment and enforcement of check design standards, including MICR-line and "imagability". Fifth Third is concerned that if specific standards are not enforced, then consumers and businesses will use check designs specifically to prevent the introduction of substitute checks, thereby forcing the forward collection of original checks.

Consumer Education

Fifth Third is concerned that the burden to educate and communicate with customers falls solely on the banking community. As we agree that we are obligated to communicate with our customers, we strongly urge the Federal Reserve to take a more active role in educating the public similar to their new currency conversion. Additionally, we feel the Federal Reserve should work closely with all federal service industries, including law enforcement agencies due to the current reliance on original checks for both criminal and civil investigations.

Delivery of notice at the time of consumer request for copy of check

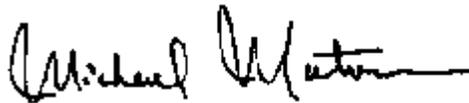
In the Proposal, the Federal Reserve requested comment on two alternatives for a financial institution to meet the obligation to deliver the consumer education document when a financial institution is delivering a substitute check to a consumer after the consumer requests a copy of the check. See Section 229.57(b)(2). The two alternatives in the proposal are: (1) at time of request for original or copy of check, or (2) at the time the bank provides the substitute check. Fifth Third proposes that the disclosure mailing is sent at the time the bank provides substitute check.

Conclusion

Fifth Third applauds the Board for its efforts in implementing the Check 21 Act, yet urges that revisions be made to eliminate the unintended consequences of the issues identified herein.

We appreciate the opportunity to comment on this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Matossian", with a long horizontal flourish extending to the right.

Michael Matossian
Chief Compliance Officer
Fifth Third

cc: Malcolm Griggs, Chief Risk Officer
Paul Reynolds, General Counsel