



Legal Department

June 3, 2011

Via electronic delivery

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20th St. and Constitution Ave., N.W.  
Washington, D.C. 20551  
Attention: Comments

Re: Docket No. R-1409: Regulation CC Revisions

Dear Ms. Johnston:

Bank of America appreciates the opportunity to comment on the proposed changes to Regulation CC issued by the Board of Governors of the Federal Reserve System ("Board"). Bank of America is one of the world's largest financial institutions, serving individual consumers, small- and middle-market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk management products and services. Bank of America provides unmatched convenience in the United States, serving approximately 57 million consumer and small business relationships with approximately 5,900 retail banking offices and approximately 18,000 ATMs and award-winning online banking with 29 million active users.

We use the breadth and depth of our deposit products, services and customer base to create and deliver greater efficiencies in funds availability and check processing on behalf of both our customers and the industry.

At Bank of America, our goal is to improve our customers' funds availability while also trying to reduce the risks, both to the bank and to our customers, associated with returned checks and fraud loss. To innovate and improve our end-to-end funds availability processes, we routinely collect customer feedback and monitor key operating metrics. Through this customer-based and targeted approach, we've already made significant improvements in our processes which benefit our customers, including: leveraging real-time customer and industry data to reduce the number of deposit holds placed at the teller line; enhancing our ATMs to print hold notices at the time of deposit; providing images of deposited checks in Online Banking; and bringing greater clarity and consistency to deposit hold information through our hold notices and Online Banking account screens. Our hold notices currently include the total amount of the deposit, amount being held, reason for the hold, and day and time the funds will be made available.

Additionally, Bank of America has been among those leading the industry in the move from processing paper checks to electronically processing check images. We present and accept forward collection and return items in electronic files from a wide range of financial institutions. We have agreements with many financial institutions for direct exchange, meet others at electronic clearinghouses, belong to networks where we exchange check images with others, and have agreements with aggregators, who serve large numbers of smaller institutions. In addition, we send to and receive electronic files from the Federal Reserve Banks.

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Bank of America, NC1-027-20-05  
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Since October 2004 when the first images under the Check Clearing for the 21st Century Act ("Check 21") were sent to Federal Reserve Bank, Bank of America has been actively involved in creating electronic items to help modernize the paper check collection and return process. We were among the first to offer image products to our customers, truncate items for check conversion, enable receipt of electronic items as the paying bank, enable image receipt of specialized products, and enable an electronic return environment.

Through our leadership and participation in industry trade groups such as ECCHO, The Clearing House, The Check Image Collaborative, i3G and Accredited Standards Committee X9, we have advocated for expansion of exchange of electronic items, helped create standardized industry rules, and helped create best practices for modeling the exchange of items between financial institutions. This has helped us connect electronically with others in the industry: we successfully exchange and settle 65% of our image collection volume and 46.84% of our outgoing returns to more than 6,500 paying banks, either directly or through image networks. The remainder of our volume is sent electronically to the Federal Reserve Bank. As a result, the Federal Reserve Banks handle 35% of the items deposited with us that we send for forward presentment and 63% of the items that we, as a paying bank, return. In large part, this is so that those items can be routed to banks with which we do not have image exchange agreements. Some of those banks are not equipped to accept images at all. The Federal Reserve Banks continue to play a large part in the end-to-end electronic check presentment and return process, especially to banks that are not image-enabled.

By exchanging images electronically directly with paying and depository banks, as well as with collecting banks (including Federal Reserve Banks) that process items electronically, we are able to clear 99.84% of our total check collection items as images. We note that the fact that we are able to send or receive this high percentage of items electronically does not mean that all of those items travel the entire presentment and return path electronically. When other banks are not equipped to receive electronic items, either for presentment or return, the items must be sent to a collecting bank that can reconvert the images into substitute checks before being transferred. This delays the collection process.

As the paying bank, we receive 99.76% of items drawn on us as images. On the return side, we send 100% of outgoing returns as images. As a depository bank, we receive 95.34% of our returns as images. Still, despite these high percentages, we receive more than 43,000 items each month that are returned as paper items. Because our processes are built around handling electronic images, these paper items must be converted to images at the Bank and loaded into our applications, so that they can be processed as images. Even though Bank of America's processes are built on electronic processing, we still must make allowances for paper items that we continue to receive from other banks, which again slow down the collection process.

We agree with the Board that changes to Regulation CC will encourage further adoption of electronic items. The barrier to converting the remaining checks to electronic items have been late adopters of image technology, exception items (those items which are mutilated or otherwise unable to be captured as image), and the lack of a mandate for check electronication in Check 21. Our industry leading experience in converting checks to electronic items makes us well positioned to advocate for the changes recommended by the Board and to raise appropriate concerns where proposed changes will create unnecessary risk or burden to the industry or our customers. To highlight Bank of America's share of the payment industry today, based on ECCHO's reported 15 billion electronic items processed by paying banks in 2010, Bank of America paid 1.8 billion electronic items or 12% of the industry volume. We also presented 3.8 billion electronic items or 25% of the total industry volume.

In the past seven years, the development of private sector rules and exchange networks has helped to transform the collection process and has allowed the industry to process many checks as electronic items. However, as noted above, the Federal Reserve Banks themselves continue to be the primary connect points for a vast majority of paying banks -- more than 10,000 are accessible electronically only through products offered by them. Therefore, the services and products offered by the Federal Reserve Banks are integral to facilitating the movement of electronic checks between collecting banks and paying banks.

## **Summary of Bank of America's Comments**

Bank of America supports the Board's efforts to provide incentives for banks to send and receive electronic items for both forward presentment and returns. However, we believe that it will take quite some time before those incentives take hold and help speed up collection and return of items. Since we continue to see a delay in the return of a significant portion of items until five (5) business days or more after deposit, we strongly support the industry's position, set out in ECCHO's letter, that §229.13(h) provide for a safe harbor of at least a total of five (5) business days. Additionally, we believe that when placing deposit holds, we should be allowed to use all relevant information, including information about repeated attempted overdrafts from any type of transaction, which helps banks both reduce the total number of deposit holds and focus on items at highest risk of return and loss.

The Board proposes several changes to both policy disclosures and notices for exception holds, focusing on their content, format, and paper size. We agree some policy disclosure formats might be easier for customers to read than others as the policy disclosures are currently quite lengthy and text heavy. We support the Board's proposal to require as part of the deposit hold notice the total amount of the deposit, the amount of the deposit that is held, and the day the funds will be available on exception hold notices. Bank of America already provides this information to its customers. However, with respect to the proposed hold notice table format, paper size, and customer name changes -- based on our experience, feedback from customers, and equipment limitations -- we don't see these changes as beneficial to customers or practical for banks to apply across all of their deposit channels. These requirements would have the practical effect of slowing or delaying notification to the customer. We have found the timing of the notices is much more important to customers than the currently proposed changes in notice format, paper size, or customer name.

We have focused on providing customers with clear and easy-to-read hold notices. We have enhanced our teller and ATM systems to provide hold notices when they are most meaningful to our customers, at the time of transaction. This has resulted in greater customer satisfaction as well as significantly fewer delayed holds and notices handled in our back office. Based on our experience and customer feedback, we believe it is not necessary to change our notice process or format at this time. Furthermore, we want to stress that it is not practical to provide notices in the format or size prescribed by the proposed rules at the teller window and at ATMs. We are concerned that the detailed formatting approach described in the proposed rules may be to the detriment of customers. Therefore, we urge the Board to clarify that proposed formatting techniques are suggestions and that banks retain flexibility both in the format and size of the notice when delivering hold notices at the time deposits are made.

We are also concerned about the proposed requirement to send electronic hold notices to customers in certain circumstances. We are concerned about electronically sending the notice itself, as a hold notice may contain too much information for some mobile devices and might present security issues for customers on their mobile devices or computers, particularly if they are accessed by third parties. This type of electronic notification could be misconstrued by the customer as a phishing communication, creating undue worry. We also have reason to believe that an electronic notice would not be very effective. We recently reviewed the possibility of sending an electronic notice and our analysis indicated that an electronic hold notice for holds placed by the back office would only reach 10% of our customer base.

Here again we recommend a flexible approach. There are several potential ways that banks could accelerate customer notification of funds availability for holds placed by the back office. Two possible options include: 1) An automated outbound telephone service call or 2) An electronic email alert. This alert would notify the customer that a funds availability message had been posted to a secure site (such as secured online banking) for them to review. We believe hold notification improvements should be evaluated by each bank based on factors such as the volume of their back office holds, the effective customer reach of each option, the security issues related to each option, the amount of information that could be effectively conveyed, and cost. These inputs are unique to each bank and one mandated approach may not have the customer reach or impact desired by the Federal Reserve. For example, based on our customer analysis, automated outbound calling could reach 60% of our customers receiving holds placed by our back office. In contrast, the proposed solution would only reach 10% of these same customers. Permitting a more flexible approach would allow banks to customize notification solutions that are responsive to customer needs.

Bank of America strongly opposes the elimination of the use of "Refer to Maker" as a valid return reason. While that reason code is used on less than 7% of returned items, it is appropriate in certain cases, including where fraud is suspected but not verified, there is a mismatch with a drawer's positive pay file, accord and settlement language has been added to an indorsement, or where government-issued warrants are presented outside their allotted window of time for presentment. We are not aware of current problems involving the use of "Refer to Maker" as return reason code that would merit singling it out as the only such prohibited reason. Replacing the code may involve a long and expensive development process by the Accredited Standards Committee X9.

We ask for clarification of the sections relating to Same Day Settlement and ask that the final rule on Same Day Settlement preserve the ability of a presenting bank to present items to a paying bank without being charged a fee, consistent with the current Same Day Settlement rule. We ask the Board to clarify that any agreement for electronic exchange that entitles a depository bank to expeditious return must apply to the checks being exchanged. This would recognize that such agreements can be limited to checks drawn on certain routing numbers. And we ask the Board to remove all references to email addresses in electronic indorsement records, since current standards do not support their inclusion.

Finally, Bank of America generally supports the Board's approach to electronic collection items and electronic returns and the warranties that would accompany them under the proposed new rules, although some of the items that would be covered are not currently in use. We believe a more urgent and practical issue facing the industry is the potential use of "paperless remotely created checks," and we urge the Board to expand the definition of "original check" to include "paperless remotely created checks."

#### **Bank of America supports Comments Submitted by ECCHO, The Clearing House and the American Bankers Association**

Bank of America participated in the process described in the comment letter submitted by the Electronic Check Clearing House Association ("ECCHO"), The Clearing House ("TCH"), The Independent Community Bankers of America ("ICBA") and BITS referred to herein as the "ECCHO letter." The positions stated in the ECCHO letter are those developed by many industry participants who are involved in the electronic exchange of check images. Bank of America agrees with the great majority of the positions set out in the ECCHO letter. Rather than restating those positions in this letter, we focus on those areas where we take a different position from ECCHO, submit additional information to supplement ECCHO's comments, or comment on portions of the proposed changes on which ECCHO did not comment. Unless contradicted by any position that we take in this letter, Bank of America endorses and incorporates by reference the ECCHO letter, and urges the Board to give it the weight it deserves, as the consensus of a wide cross-section of financial institutions, clearing houses, and others with experience with the electronic presentment of checks.

Additionally, we support the comments included in separate comment letters submitted by TCH and the American Bankers Association ("ABA"), to the extent they are not contradicted by any position taken in this letter.

#### **Amendments Related to the Elimination of Nonlocal Checks; Subpart B Changes**

##### **Section 229.13(d) – Repeated Overdrafts**

The Board proposes to add a new paragraph clarifying that the repeated overdraft exception does not apply to attempted debit card transactions for which the depository bank declined the authorization request because there was no transaction. Although we do not currently use declined debit card transactions in making hold decisions, we believe that repeated attempts to conduct debit card transactions against insufficient funds is an indication of risk that banks should be allowed to consider.

We believe the Board's proposal would be appropriate for customers who do not make further attempts to use their debit card upon being declined for insufficient funds, until they take some action to add funds to their account. However, customers who make repeated attempts to use their debit card after being declined due to insufficient funds demonstrate a behavior substantially similar to writing checks against insufficient funds. The ability to use all relevant risk information helps

banks reduce the overall number of holds placed on deposits, which benefits most customers and improves overall funds availability. This approach also enables banks to focus their deposit holds on items with the highest risk of return and loss. We believe that banks should be permitted to consider a repeated pattern of overdrafts, or attempted overdrafts, from any type of transaction.

#### Section 229.13(g) – Notice of exception

The Board proposes several changes to Section 229.13(g). Specifically, the Board would require a notice of an exception hold to contain the total amount of the deposit, in addition to the amount of the deposit being held. The notice would have to specify the day the funds will be made available for withdrawal, instead of the time period within which the funds will be available for withdrawal. If the customer has agreed to receive electronic notices, the notice would have to be sent electronically.

Our hold notices today meet the new proposed requirements for the total amount of the deposit, the amount of the deposit that is held, and the day the funds will be available. In addition, we recently updated our hold notices at the teller, ATM, and back office to make the hold reason content more consistent and clear to customers. We have also simplified our hold notices by creating additional white space and highlighting the deposit amount immediately available for customer use. We believe the total amount of the deposit, the amount of the deposit held, and the truncated account information helps our customers remember and identify the deposit transaction at issue and can also help us identify the transaction if the customer calls with questions. We are not aware, however, of any significant customer issues with our current hold notice format or the current hold notice requirements.

*Electronic hold notices.* The proposal explains that the Board believes it is desirable for a customer to learn of a hold before the funds would otherwise become available under the bank's general availability policy. To address this issue, the Board proposes that banks provide an electronic notice and requests comment on whether this is practical.

An electronic hold notice might work in some limited situations, but we do not believe that this is a generally effective method of communication for a hold notice. We believe that consumers get the most benefit from a hold notice when they receive the notice at the time of the transaction. For this reason, we have updated our systems so that we can deliver the vast majority of hold notices at the time of the deposit itself – whether at the teller or ATM.

An electronic hold notice also seems a one-size-fits-all approach and banks need flexibility to develop appropriate notification solutions for their respective customers. Hold notification improvements should be evaluated by each bank based on the volume of their back office holds, customer reach of each option, cost, etc. These inputs are unique to each bank and one mandated approach may not have the customer reach or impact desired. There are several ways that banks could provide a timely and secure hold message to their customers. Banks could either mail the hold notice or post the hold notice in the customer's secure online email message center and supplement that process by allowing customers to choose to receive a short message by email, text message, or telephone. We list telephone messages here because we think that an automated telephone message or posting the notice to an electronic site is often the timeliest form of communication and would be welcomed by most customers. For example, through our analysis, electronic notification of holds would only reach 10% of our customer base, whereas automated outbound calling could reach 60% of customers receiving holds placed by our back office. This flexible approach would give the customer more options about how they want to receive the message and provide greater security for the hold notice itself. It would also provide enough flexibility to allow banks to develop additional solutions for customers as technology progresses. The regulation should promote a flexible response to allow banks to innovate and not lock in a specific hold notification type.

We strongly support early notification of holds and have worked to find communication formats that are compliant with current Regulation CC requirements and other applicable laws. We have focused on giving deposit hold notices to our customers at the time of the transaction. This is what customers have told us they prefer and we listened. We enhanced our teller and ATM systems to deliver the hold notice at the time of the transaction, whenever possible. We also updated our hold notices so the format and content of notices delivered at the time of the transaction is consistent regardless of where a customer makes his/her deposit. This effort significantly reduced customer hold questions and calls, helped increase customer confidence in our ATMs, and helped lead to greater and more frequent deposit usage at the ATM. This effort also enabled us to substantially reduce the number of back office holds that we place.

#### Section 229.13(h)

Bank of America supports the Board's efforts to provide incentives for banks to send and receive electronic items for both forward presentment and returns. We believe that it will take time before those incentives take hold and speed up collection and return of items. Since we continue to see a delay in the return of a significant portion of items until five (5) business days after deposit, we strongly support the industry's position, set out in ECCHO's letter, that §229.13(h) provide for a safe harbor of at least a total of five(5) business days.

#### Section 229.16(c) (2) – Longer delays on a case-by-case basis

The Board requests comment on whether banks still find case-by-case holds useful. The great majority of the holds we place are case-by-case holds and we strongly support continuation of the case-by-case hold option. We are able to use case-by-case holds as an option to help us effectively manage the risk of loss and also provide earlier availability of funds for customers.

We place a hold when there is some aspect of the deposit transaction that leads us to conclude a hold is necessary. In many cases where we currently place case-by-case holds, the circumstances are present that would allow us to place an extended hold. In these cases, the option for us to use a case-by-case hold, instead of an extended hold, benefits the customer with both a shorter hold period and faster availability of funds, while still enabling us to help manage risk.

#### Section 229.16(c) (2) (ii) – Timing of Notice for Case-by-Case Delay

We have the same comments here regarding electronic notice as we have in our comments on section 229.13(g) above. We support a flexible approach for electronic or telephonic notification.

#### Section 229.15(a) – Form of Disclosures and Notices. Also, Appendix C - Model Availability – Policy Disclosures, Clauses and Notices

The proposed Model Policy Disclosures that are provided at account opening generally use shorter language and use a mostly tabular form, instead of the current mostly narrative form. Many of the proposed Model Notices use new language and a tabular form.

The proposed new comment to Appendix C provides that the policy disclosures and notices are designed to be provided on 8 ½ by 11 inch paper, in tabular format, with readable font and font size, with sufficient spacing between lines and paragraphs, with sufficient white space and margins all around the text, and with sufficient contrast between text and paper color (such as, black text on white paper). The proposed commentary then notes that while banks are not required to use these formatting techniques, they are encouraged to use them. The discussion of this comment in the Supplementary Information notes that the disclosures were designed for 8 ½ by 11 inch paper and banks that use too small a font may not be in compliance with the clear and conspicuous requirement.

Since we believe that customers receive much greater benefit from timely notice, we request that the commentary clarify that these proposed formatting techniques with respect to paper size and tabular format are not required. They should be described as suggestions for the initial policy disclosures and notices sent after the time of the transaction. While banks can generally use these formatting techniques for preprinted documents, such as the policy disclosures, these techniques would create substantial issues for notices printed at the time of a transaction. Banks should have flexibility to deliver the hold notices at the time of the transaction in other paper sizes and formats.

Regulation CC currently provides that policy disclosures and notices must be clear and conspicuous, in writing and in a form the customer can keep. We continue to support that requirement. We believe this standard, together with the templates provided by the current Model notices, provides sufficient guidance and flexibility to enable banks to innovate and present

better solutions to customers. We are concerned that the detailed formatting approach described in the proposed new comment to Appendix C may stifle innovation to the detriment of customers.

We agree that the large paper size and tabular format are good guidelines in some situations such as when hold notices are mailed to consumers from the back office. We can follow these guidelines for hold notices we send after the time of the transaction and when the customer is no longer present, from the back office. We have the systems capability in our back office to use 8 ½ by 11 inch paper and a tabular format.

However, we are most concerned about the suggestion that all policy disclosures and notices be presented on 8 ½ by 11 inch paper and in tabular format. The paper and formatting requirements are not practical when we provide hold notices at the time the customer makes a deposit with a teller or at an ATM. Customers have told us they prefer to get a hold notice at the time of the transaction, while they are present. We believe that timeliness is much more important to customers than any specific paper size or format of the notice. To this end, we have enhanced our teller and ATM systems so that when we determine at the time of deposit that a hold is necessary, we are able to print and immediately deliver the hold notice at the ATM and at the teller station. The suggestion that banks should use a large size paper and the tabular format at the teller station and ATM would undo this work because we are not able to follow these suggestions at the ATM or the teller station.

Our ATMs are designed to deliver standard-sized ATM receipts. We print the hold notice on standard-sized ATM receipt paper. It is white paper with black type. The type is perfectly legible. The format is not tabular, but is clear and understandable. Our customers have told us that they value this timely notice. Our ability to provide the hold notice through the ATM has resulted in a greater number of deposits made at the ATM and a significant reduction in questions from customers about holds at our banking and call centers. Since it is not possible to deliver a notice printed on 8 ½ by 11 paper at our ATMs in a tabular format, we are concerned that this comment, together with the comment in the Supplementary Information may adversely impact our ability to provide the hold notice through the ATM at the time of the transaction.

We are also concerned about this issue for our teller stations. Our teller stations have printers that are designed to handle standard form deposit receipts and cannot practically be adapted to print notices on large paper in a tabular format.

We believe that a notice at the time of the transaction, while the customer is present, provides major benefits to both the bank and the customer. Since the customer is there, the teller can explain the hold. If the customer is not sure about the hold period or what the hold means, the customer has the opportunity to ask questions and consider possible alternatives right there at the time of the transaction. The customer gets a similar benefit at the ATM. The customer at that time can go into the banking center to discuss the hold or the customer can call our telephone service representatives to discuss the hold. This helps remove any uncertainty for the customer. In addition, when the customer gets notice at the time of the transaction, the customer is better able to arrange their finances to help avoid fees. We believe these benefits support allowing flexibility in the format of hold notices.

#### Model Policy Disclosures - Appendix C-1 through C-5

The current policy disclosures that are given at account opening are quite lengthy. We generally support the proposed shorter disclosure language because we think the shorter language will help customers reach a better understanding of the disclosures. We recognize the difficulties presented by trying to explain a complex set of rules in concise language. We think that the simpler language generally works, and while not accurate in all cases (consider the description of "new account"), is accurate in the majority of cases and would be easier for customers to understand than the current model disclosures. We include our policy disclosure in our deposit agreement with other required disclosures (including those required by Regulations E and DD) so they are conveniently located in a single booklet. Due to the length of the booklet, the paper size is 7 by 8 inches. We use this size paper because it is the largest paper size that we can use and still have the booklet fit into a standard mailing envelope.

#### Model Hold Notices

We are very concerned about the suggestion that hold notices should be printed on large paper and in tabular format. We are also a bit puzzled about why there might be a perceived need for such a major change. The current Model hold notices are both short and clear. The information provided on a hold notice is very brief, even in the case of an extended hold. The

current notice requirement for an extended hold is to provide: a number or code that identifies the customer's account; the date of the deposit; the amount of the deposit that is being delayed; the reason the exception was invoked; and the time period within which the funds will be available for withdrawal. Some customers may prefer one formatting style. Other customers may prefer another. However, we believe that the relevant point should be whether customers understand the current hold notices, not whether they prefer one approach over another. Our experience with customers supports the conclusion that the required information is sufficiently limited that any reasonable formatting style will be clear and understandable to customers. Since that is the case, we do not understand why banks would need to go to the very significant expense and effort of revising forms that work well now.

The current Model hold notices allow banks to preprint a list of reasons and check the reason or reasons that apply. We do not use that approach, but it seems perfectly clear. We enter a code in the space for the hold reason and print an explanation of each code on the reverse. We believe that our customers understand this approach based on input we received during a series of focus group discussions conducted with our customers to determine how to best format our notices.

The proposal seems to suggest that the hold notice should only list a single reason. We find that multiple reasons frequently apply and print these on a single hold notice today. We believe that the proposed approach might lead to having to provide customers with multiple hold notices for a single transaction. We request clarification on this issue as we believe multiple hold notices will confuse customers and make it more difficult for both our customer to understand and for our associates to clearly explain the hold reason(s). We also believe an unintended consequence of this proposal would be longer deposit times at both the teller and ATM. Here is a common example as to when we place multiple holds on a deposit and use these two hold types to improve customer funds availability and manage risk. When a deposit risk scores for a large deposit hold of greater than \$5,000, we place a case-by-case hold on the amount less than \$5,000 (less any immediate or next business day credit that we provide) and then an exception hold for the amount greater than \$5,000. Today, on our hold notices, we indicate that both of these holds have been placed on the deposit. We have not received any negative customer or associate feedback due to this practice.

The new Model hold notices include a space labeled "account holder: *name*." We are very concerned about this suggestion. This change, combined with the other proposed format changes, would be both complicated and expensive to implement. We believe that the addition of the account holder's name does not provide a benefit to the customer and adds an unnecessary privacy risk for the customer. A customer can easily identify the account listed in the hold notice by reference to the code or truncated account number for the account, which is a current requirement. The addition of the customer's name to the notice would benefit a fraud artist by providing that additional piece of information, but would not provide a benefit to the customer and could expose customers to risk.

### **Amendments to Encourage Electronic Check Clearing and Check Return; Subpart C Changes**

Bank of America agrees with the Board that electronic check-clearing and check-return methods improve the efficiency of the check system. Our experience supports the Board's conclusions that electronic methods are faster, more resilient, less costly, and less error prone. We support those of the Board's proposals that we believe will, in fact, provide incentives for banks to send and receive electronic items for both forward presentment and returns. However, we have particular concerns around the proposed new Same Day Settlement Rules, and whether, as proposed, they will continue to provide presenting banks with a low-cost method for quick settlement, or whether they will perpetuate the holdout problems that some banks encounter today.

We also note that, throughout the proposed regulation, the language refers to agreements for exchange between banks and seems to assume that when banks agree to electronic exchange, they do so for all their items. However, it is common for banks to determine which items they will accept electronically on the basis of individual routing numbers. Banks may accept electronic presentment and/or return on certain designated routing numbers, but not on others. The rules should clarify that the agreement to accept electronic presentment or return must apply to the checks at issue, and would not be satisfied by an agreement between the same two banks to electronically exchange other items.



§229.30(d) - Elimination of "Refer to Maker" as a Permissible Return Reason.

We support the proposed rule and commentary for the placement of the return reason on a returned item. However, we are strongly opposed to the commentary that would delete "Refer to Maker" as a permissible return reason in appropriate cases. We question what has prompted the Board to change the rule at this time, after the provision was added to the Commentary years ago to protect banks that used that reason. Bank of America is not aware that any significant problems associated with the use of "Refer to Maker". In fact, we have determined that the use of this reason has declined in recent years. That reason appears on approximately 6.2% of returned items that are sent or received by Bank of America.

There are times when the use of "Refer to Maker" is an appropriate reason for return. These include situations where fraud has been reported or is suspected, but has not been verified. In such cases, banks often use "Refer to Maker" to avoid alleging the commission of fraud or criminal activity, which could possibly result in criminal action being taken on unverified facts. "Refer to Maker" is commonly used for a variety of reasons that range from situations where the name of the payee differs slightly from the account name to those where the payee has attempted to include settlement or accord and satisfaction language in the indorsement. There may be a mismatch between the information on the check and the record of issuance that the maker provided to its bank as part of a Positive Pay service, raising questions about whether the check was altered or if a mistake was made in the maker's records. In some cases, makers specifically request that their banks return items to be stamped "Refer to Maker," so that they can attempt to resolve issues directly with payees. The "Refer to Maker" return reason code is used for the return of certain Registered Warrants, issued by a State Controller's Office. Registered Warrants may be negotiable only during a very limited time period. If a Registered Warrant is presented before or after the redemption date stated on the instrument, the paying bank can return the item unpaid, marking the item "Refer to Maker," since there is no return reason code for such a limited circumstance, and the payee may have other remedies to assert against the maker.

Regulation CC does not contain a list of permissible return reason codes, so it is somewhat inappropriate that the Board would single out one code, which it previously approved, as being unacceptable. If banks cannot use "Refer to Maker" as a permissible code in the situations enumerated above, for example, banks will spend a great deal of time and effort reprogramming their systems and may develop and use another return reason code that may not provide payees with much more additional information. If banks cannot use an existing code, they will have to redirect resources to develop, test, and implement new return reason code(s). We have not heard of problems with the current use of "Refer to Maker" that would warrant such development and believe that "Refer to Maker" is an appropriate return reason in certain circumstances.

Although the Board states that "'Refer to Maker' may be used in addition to the reason for return," this is not feasible in an electronic environment. Under ANS X9.100-187, the physical constructs of the return reason field limits the length of the return reason field to one character in length. This allows a returning bank to choose one of the standard return reason codes and insert the corresponding alphabetic code into the return reason field. Values other than what is specified in the standard could cause an institution to reject a file and/or return the items to the sender for correction.

We believe that the use of "Refer to Maker" is an appropriate reason in certain circumstances, is not overused (used for less than 7% of returned items), should not be prohibited and does not merit the development of a new return reason code. Development of new codes would require revision of ANSI documents, voting by ANSI subcommittee members, a public comment period, and revision and publication of new standards and then software development and testing by financial institutions and third party processors.

Use of Email Addresses in Indorsement Records.

We are concerned that the Commentary to §§ 229.2(u), 229.2(w), 229.32(a)(2) and 229.35(a) refer to a process that is not supported by current standards. In describing information about the location for returns that may be included in its indorsement on items, the Commentary indicates that a depository bank could include an e-mail address or other electronic address for delivery of electronic returns. These references should be deleted. The field for electronic indorsement on items, as set by industry standards, does not include sufficient space for a depository bank to include its email address. Bank of America is concerned that significant and expensive retooling of the returns processes in the industry would be necessary to allow email addresses to be included in, and extracted from, depository bank indorsements. We estimate that the

development of that capability could easily take two years. We are not aware of any depository bank that has sought to place its email address in an indorsement record or which had items returned to standard email addresses.

#### § 229.36 Same Day Settlement Rule

As explained in detail in ECCHO's letter, we believe that the Same Day Settlement provisions of the new rule in §§ 229.36 (d) (1) and (2) is subject to differing interpretations, and should be clarified concerning whether a presenting bank may present Same Day Settlement items in paper if it cannot reach an agreement to present items electronically to the paying bank, even if the paying bank has designated an electronic presentment point. As a paying bank, Bank of America is very supportive of electronic presentment, through Same Day Settlement or otherwise. Bank of America has entered into many image exchange agreements, allowing 99% of items drawn on us to be presented electronically. Some of these agreements are for Same Day Settlement. It is our desire to do away with paper presentment and have all items drawn on Bank of America presented electronically. We appreciate the Board's efforts to establish a rule that would not require a paying bank that is prepared to accept Same Day Settlement items electronically to have to accept paper presentment.

Nonetheless, we believe that the final rule on Same Day Settlement should preserve the ability of a presenting bank to present items to a paying bank without being charged a fee. This is the situation that exists with paper presentment of Same Day Settlement. It should continue to be an option for presentment in the electronic environment. We are concerned that some paying banks will not agree to enter into the agreements needed for image exchange, or they may agree to enter into only those agreements that designate a presentment point (such as at a clearinghouse or third-party provider) where fees are charged to the presenting bank. In such cases, we believe that the presenting bank should continue to have the option to present paper Same Day Settlement cash letters to the paying bank.

#### Electronic Items Not Derived From Checks

A significant change in the proposed regulation is the addition of new defined terms, "electronic collection item" and "electronic return" (sections §229.2(s) and §229.2(v)) and the addition of transfer and presentment warranties with respect to these new items. Bank of America agrees with this approach. It seems appropriate that the bank of first deposit, which allows items to be deposited and to enter the system to be processed as checks, be the party to provide warranties concerning those items. Additionally, we support having the Board make these electronically items subject to subpart C, as if they were checks. We believe that those items that are treated, for purposes of collection, as electronic images of checks should be treated as checks for all purposes of Subpart C. Not doing so can lead to the incongruous result of allowing a paying bank avoid responsibility for late returns, even when all parties handling the items intended to treat those items as checks.

As drafted, the definition of electronically created items is broad, and could cover a variety of items, including some not currently in use today, such as drawer-initiated paperless checks that are sent electronically to payees. Bank of America does not believe that there is an urgent need for development of a rule to cover payor-created electronically created items in Reg CC. The payment industry is in the midst of significant innovation. Many different options are being presented to payors, based on known and established electronic payment channels. We acknowledge that technology exists to create a check template for a payor to create a check-like payment instrument. However, we are concerned that allowing such electronically created items into the check payment stream is not an efficient way to process electronic payments and that it could lead to customer confusion. Nonetheless, if the technology supporting these instruments develops further and payors adopt the technology, indicating their desire that these payments be processed as checks, then we would support extending the proposed warranties to them and making them subject to Subpart C as if they were checks. The depository bank would then provide warranties concerning the items. We believe that this would help maintain the efficiency of the check collection process.

A more pressing and practical issue exists currently in connection with paperless remotely created checks. The 2006 amendments to Regulation CC expressly defined and addressed Remotely Created Checks that are printed prior to their deposit with the depository bank ("Paper RCCs"). Increasingly, however, financial institution customers are using technological advances ushered in by Check 21 to deposit RCC images with the depository bank. When depository banks accept deposits of RCCs in image rather than in physical (paper) form ("Paperless RCCs"), it becomes very difficult, if not

impossible, for the depository bank to determine whether the image was derived from a Paper RCC or rather originated as a Paperless RCC. Paperless RCCs, while often indistinguishable from Paper RCCs to the depository bank and to any transferring, presenting or paying bank, have uncertain legal status because, as currently defined under Regulation CC, an RCC must be reduced to paper, if even for a moment, in order to achieve definitional status as a "check" under federal law. The uncertain legal status of Paperless RCCs is leading to increased market confusion as well as undue and unnecessary burden on depository banks.

We recommend that the Board extend the coverage of Subpart C and its warranties to Paperless RCCs. We advocate that the Board go even further, and clarify that Paperless RCCs are included in the definition of remotely created check and that the definition of "original check" in Section 229.2(ww) of Regulation CC be amended as follows:

Original check means the first paper check issued with respect to a particular payment transaction- or a remotely created check whether or not originated as paper.

Adopting the proposed amendment to the definition of "original check" to include RCCs "whether or not originated as paper" will accord Paperless RCCs status as valid "checks" under Regulation CC. Paperless RCCs would remain RCCs, subjecting the depository bank to the transfer and presentment warranties associated with such items. Moreover, amendment of the definition of "original check" to include RCCs "whether or not originated as paper" will bring paper reproductions of Paper RCCs and Paperless RCCs within the meaning of "substitute check" under Regulation CC, and thus bring such paper reproductions within the substitute check warranties and substitute check indemnity provisions of Regulation CC.

References to Industry Standards in §229.2(hh) - We suggest that the reference to industry standard ANS X9.100-187 include a reference to updates that may be made to that standard, or the surviving standard, should ANS X9.100-187 be replaced with a newer version. Furthermore, we note that there are nine instances of reference to ANS X9.13. ANS X9.13 has been replaced with ANSI X9.100-160 since 2004, so the reference should be changed to the more current standard.

## **Timing of Rules Implementation**

### **Implementation Timing for Sub Part B and Appendix C: Funds Availability, Clauses, Disclosures and Notices**

The Board has proposed that subparts B and Appendix C become effective twelve months following the publication of the final rule. Based on the extensive system and formatting changes in the proposed rule and commentary, we request 18 to 24 months to implement any proposed changes.

We cannot practically meet the Boards request for tabular format and 8 ½ by 11 inch notices at the teller and ATM. We request that the Board clarify that the proposed formatting techniques with respect to 8 ½ by 11 inch paper size and tabular format are not required. These changes should be described as suggestions for the initial disclosures and notices sent after the time of the transaction. Banks should have flexibility to deliver the hold notices at the time of the transaction in other paper sizes and formats.

### **Implementation Timing for Subpart C: Amendments to Encourage Electronic Check Clearing and Check Return**

The Board has proposed that that the amendments to subparts C and D become effective six months following publication of the final rule. Bank of America does not see a problem with this schedule, provided that the Board makes two recommended changes in the proposed rule and commentary: (1) remove the commentary to § 229.30(d) that would eliminate the use of Refer to Maker as a return reason code; and (2) remove all references to the inclusion of email addresses in indorsement records. As explained more fully in above and in ECCHO's letter, either of those provisions will take significant technological efforts to change current processes. If either of those provisions is not removed from the final rule, Bank of America asks that the amendments to subparts C and D not become effective until 24 months after publication of the final rule, to allow sufficient time to implement changes.

Bank of America appreciates the opportunity to comment on the Board's proposed changes to Regulation CC, and we thank you for your consideration of our comments. If you have any questions regarding our comments relating to Subpart B of the Regulation, please contact Paul DeKoster at 980.388.6657 or [paul.r.dekoster@bankofamerica.com](mailto:paul.r.dekoster@bankofamerica.com); for questions about our comments on other Subparts of the Regulation, contact Jeanette Blanco at 980.386.5526 or [jeanette.blanco@bankofamerica.com](mailto:jeanette.blanco@bankofamerica.com).

Sincerely,

  
Jeanette Hait Blanco  
Associate General Counsel

  
Paul DeKoster  
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