People's Intermountain Bank

February 7, 2019

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Availability of Funds and Collection of Checks (Regulation CC)
Docket No. R-1637; RIN 7100 AF-28

Ms. Misback:

We are pleased to participate in this proposal process by commenting on both the 2018 Proposal and the 2011 Funds Availability Proposal ("the 2011 Proposal") (collectively "the Proposals"), issued together by the Board of Governors of the Federal Reserve System and the Bureau of Consumer Financial Protection[1] (collectively "the Agencies"). Thank you for taking the time to thoughtfully consider the comments set forth herein. This comment letter is broken into two main parts: first, we set forth a contextual backdrop which serves as the foundation of our general opposition to the Proposals; and second, we address specific provisions of the Proposals.

I. Contextual Backdrop for Our Response to the Proposals

To understand the Bank's general opposition to the Proposals, some context is helpful. As detailed below, we first provide a general overview of the growing threat of check fraud, and then, briefly summarize the harms and increased costs to consumers and banks that the Proposals will catalyze.

A. Check Fraud is a Growing Threat to Consumers

The Proposals come at a time when check fraud is a growing threat to consumers. According to a September 2018 study by the Better Business Bureau ("the BBB"), fake check fraud is a huge problem.[2] In the past three years alone, fake check fraud complaints to government agencies and consumer advocacy groups have doubled.[3] Among the most vulnerable are young people.[4]

In the study, the BBB identifies one reason check fraud continues to work:

> "Victims believe that they are protected because they think they have been provided with money in advance of the actions they are being requested to take. By reinforcing this

[1] We recognize that the Bureau did not issue the 2011 Proposal but has since joined the Board with relevant rulemaking authority, and hereby joins the Board in re-opening the 2011 Proposal for comment.
[2] Better Business Bureau. (2018, October 4). Don't Cash That Check: BBB Study Shows How Fake Check Scams Bait Consumers, Better Business Bureau. Retrieved February 5, 2019, from https://www.bbb.org/article/news-releases/18367-dont-cash-that-check-bbb-study-shows-how-fake-check-scams-bait-consumers.
[3] *Id.*
[4] *Id.*

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belief, scammers build trust and alleviate concerns that the deal might be a fraud. And once consumers confirm that there is money in their account, they are far more willing to proceed."[5]

But it's not just industry players noticing the rise. Governmental agencies are aware of the growing threat and are taking action with industry players to combat it. For example, the Federal Trade Commission ("the FTC") recently noted not only the growing number of complaints in this area but also the steady increase of dollars lost to this type of scam.[6] Further, the FTC recently joined the American Bankers Association to create an infographic designed to help consumers.[7] That infographic explains that "Banks have to make deposited funds available quickly… But the bank may not learn for days that the check was bad. By then, the scammer has your money. And you have to repay the bank."

Thus, the very fact that funds are available gives consumers a false sense of security in dealing with those committing fraud against them. During a period of growing check fraud, the Proposals, if adopted, would only aggravate the problem by making higher amounts available to consumers in a shorter period of time.

B. Increased Harm and Costs to Consumers and Banks

Unfortunately, at its core, making more funds available to consumers in less time, which the Proposals would do, will ultimately end up harming and costing consumers as well as banks:

i. First, because higher dollar amounts will be available more immediately, the Proposals will result in increased costs to consumers. When a check is returned unpaid, whether from fraud or simply a bad check, and the "available funds" have been used, banks look to their customers for reimbursement. However, consumers often do not, and in some instances cannot, repay the funds they have used. Thus, an increase in losses to a bank, which the Proposals will certainly facilitate, will negatively impact a bank's earnings. As with any business operating in a competitive market, as costs become more recognizable and impactful, they will inevitably be passed on to consumers in the form of increased costs for products and services.
ii. Second, in the context of fraud perpetrated directly against consumers, consumers themselves will bear the cost of larger dollar amounts being more readily available. Consumer victims, generally the vulnerable, often unwittingly assist perpetrators of check fraud by depositing a check into the consumer victim's account and then, seeing the funds available, the consumer victim delivers the funds directly to the perpetrator. Several days later, the check is returned unpaid and the consumer is on the hook for the funds that were made available but were delivered to the fraudster. With the adoption of

[5] Better Business Bureau. (September 2018). Don't Cash That Check: BBB Study Shows How Fake Check Scams Bait Consumers. Retrieved February 5, 2019, from 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 (emphasis added).

[6] Colleen Tressler. (2018, September 5). *Anatomy of a Fake Check Scam.* Retrieved February 6, 2019, from https://www.consumer.ftc.gov/blog/2018/09/anatomy-fake-check-scam.

[7] *Id.*

the Proposals, fewer checks will be returned unpaid within the permitted hold time and the dollar amount of the losses will be higher. As the BBB study discussed above illustrates, victims of check fraud scams have a false sense of security when the funds from deposited checks are made available, even though the actual checks may still be returned unpaid.

iii. Finally, checks that are returned unpaid can be particularly damaging to those who do not have much in savings or the capacity to repay such. In this context, consumers are *not* intending to become indebted to a bank and may struggle in such a capacity. As discussed, if the check comes back unpaid, the consumer may very possibly have already spent the "available funds" and will be indebted to the bank for the full amount of the bad check plus fees potentially. This is an especially acute problem for those in the lower economic spectrum who might desire quicker access to the funds because they do not have a savings on hand and may be less able to come up with the funds to pay the bank back. This issue is further exacerbated by the impact that unpaid accounts may have on the consumer's credit and future ability to obtain affordable credit on favorable terms.

II. Specific Provisions in the Proposals

The Bank addresses the following specific provisions:

A. 2018 Proposal

The calculation methodology proposed by the Agencies appears to reasonably implement the clear congressional intent set forth in Section 1086(f) of the Dodd Frank Act. However, the Bank fundamentally disagrees with the need to make inflationary adjustments for purposes of funds availability. As discussed above, check fraud remains a constant and ever evolving threat, and the Proposals, if adopted, will ultimately end up hurting consumers and banks.

B. 2011 Proposal

Proposed §§ 229.12(a) through (c). The Bank supports the changes recommended to current §§ 229.12(a) through (c). The changes would eliminate any remaining confusion arising from the outdated distinction between local and non-local checks. Further, the proposed § 229.12(a) would be helpful by clearly setting forth the general funds-availability rule for check deposits.

Proposed § 229.13(g). The Bank disagrees with the proposed changes to the delivery timing of the exception hold notice when the notice is not given at the time of deposit and the customer has given consent to receive notices electronically. Although the Agencies correctly note that it has become more feasible for banks to provide notices electronically, the underlying processes and the technologies that support and make electronic delivery feasible vary greatly and are much more complex than a simple flip-the-switch solution may suggest. Electronic delivery of these notices may already be occurring by some banks pursuant to the Electronic Signatures in Global and National Commerce Act. However, technological solutions at banks are far from uniform and vary widely. What may be an easy implementation process for one bank could be a mountain in both time and cost for many other banks. Electronic notices should always be permitted but never mandated.

Proposed § 229.13(h). The Bank disagrees with the proposed changes that would shorten the length of time a bank may hold checks under one of the exceptions set forth in § 229.13(h) for at least the following two reasons:

i. Shortening the extended exception-hold period from an effective seven-business-day hold to an effective four-business-day hold does not provide a sufficient period of time for banks to adequately protect themselves, and often their customers, against bad or fraudulent checks. Four days may generally be sufficient, however, with the increasing growth of check fraud, we believe reducing the extended hold may be exploited by check fraud perpetrators to the detriment of consumers. Very often, banks need more time, not less, to ensure the legitimacy of checks subject to the exception hold timeframes outlined in § 229.13. Shortening the exception-hold extension period fails to strike a fair balance between protecting a bank's legitimate business interests in countering fraud and a consumers interest in having funds more readily available. Banks cannot be deprived of the ability to protect themselves against fraud without it impacting consumers across the board in the form of higher-priced products and services. Shortening the number of days a bank can place a check on hold, under an exception hold, would divest banks of their ability to adequately protect themselves from check fraud.

ii. When a bank places an extended hold on a check, under a § 229.13 exception, it must have a good business reason to do so. Indeed, regardless of what Regulation CC dictates with respect to a bank's funds-availability policies, banks have a business incentive to make funds available as soon as possible, and will do so whenever reasonably practical. To compete in today's highly competitive marketplace of banking services, they must do this. Very few banks, if any, would arbitrarily seek to inconvenience their customers. Such a practice would be counter to a legitimate business model. Thus, only in those unusual circumstances where a good business reason exists to hold funds and where Regulation CC's requirements are satisfied, will a bank do so. In such instances, the bank should be given sufficient time for which to hold the funds in order to satisfy the concern.

Proposed § 229.16(c). The Bank opposes the contemplated deletion of the regulation's provision for case-by-case holds set forth in § 229.16(c). Although not a commonly invoked reason to hold funds, this provision nonetheless is utilized as a last resort when no other exception applies but the Bank has concerns about a certain deposit. For all the reasons set forth above, the Bank urges the Agencies not only to not delete this provision, but rather to contemplate extending the period of time for which case-by-case holds may be placed on deposited funds and thereby make it a more meaningful tool for banks to protect their customers as well as themselves against bad checks.

Conclusion

As noted in the 2018 Proposal, "the EFA Act's legislative history shows that one intent of the Act was to 'provide a fairer balance between the banks' interest in avoiding fraud and consumers' interests in having speedy access to their funds."[8] The provisions of the 2011 Proposal, if adopted, are, on their face, heavily tilted in favor of the consumer, but as discussed above, will harm many consumers and banks. If adopted, perpetrators of check fraud will take advantage of both the increase in funds that must be made available sooner and the shorter time period within which banks can place funds on hold. Thus, even though there is a consumer benefit to obtaining more immediate access to funds, it also comes with a cost to those same consumers. Finally, the Proposals certainly do not provide any countervailing benefit to banks, and thus they fail to maintain Congress' intended "fairer balance."

Respectfully,

Matt Messina
Compliance Officer
People's Intermountain Bank

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[8] 83 FR 63433, Footnote 13.