Recent Changes to Federal Reserve Regulation CC and Official Staff Commentary

Summary: The Federal Reserve Board has recently adopted changes to its Regulation CC implementing the Expedited Funds Availability Act and its accompanying Official Staff Commentary.

For Further Information Contact: Your District Office or Compliance Programs, Office of Thrift Supervision, Washington, D.C.

Thrift Bulletin 9-2

The Federal Reserve Board has recently adopted amendments to its Regulation CC, Availability of Funds and Collection of Checks. The regulation requires depository institutions to make funds available to their customers within specified times, to disclose their funds availability policies to their customers, and to handle returned checks expeditiously.

The amendments attached as part of this transmission include changes to the model forms and other technical and clarifying modifications to the regulation and its Official Staff Commentary. The amendments to Section 229.13(h)(4) and its Commentary are effective September 1, 1990. The amendment to the Commentary to Section 229.36(e) is effective February 1, 1991. All other amendments are effective May 22, 1990.

Attachment

Jonathan L. Flechter
Principal Senior Deputy Director
FEDERAL RESERVE SYSTEM

12 CFR Part 229

(Reg. CC; Docket No. R-0470)

RIN 7100-AB01

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board has adopted amendments to its Regulation CC—Availability of Funds and Collection of Checks. The regulation requires banks to make funds available to their customers within specified times, to disclose their funds availability policies to their customers, and to handle returned checks expeditiously. The final amendments include changes to the model forms to reflect the permanent schedule and other technical and clarifying modifications to the regulation and its Official Commentary (appendix E to the regulation). The Board has determined not to adopt the proposed amendment that would shorten the time requirements for giving notice of nonpayment.

EFFECTIVE DATES: The amendments to § 229.13(b)(4) and its Commentary are effective September 1, 1990. The amendment to the Commentary to § 229.20(e) is effective February 1, 1991. All other amendments are effective May 22, 1990.

FOR FURTHER INFORMATION CONTACT: Louise L. Roseman, Assistant Director (202/452-3874) or Gayle Brett, Manager (202/452-2034), Division of Federal Reserve Bank Operations, Oliver Ireland, Associate General Counsel (202/452-3805), or Stephanie Martin, Attorney (202/452-3198), Legal Division. For information regarding modifications to disclosures or appendices C, contact Thomas J. Nola, Staff Attorney (202/452-3695), or Jane E. Abene, Staff Attorney (202/452-3695), Division of Consumer and Community Affairs. For the hearing impaired only: Telecommunications Device for the Deaf, Earnestine Hill or Dorothea Thompson (202/452-3594).

SUPPLEMENTARY INFORMATION: On May 13, 1989, the Board adopted Regulation CC to carry out the provisions of the Expedited Funds Availability Act ("Act") (12 U.S.C. 4601-4616). The regulation requires banks to make

1 The regulation defines "bank" to include all depository institutions, including commercial banks.
funds available to their customers for withdrawal within specified time frames, to disclose their funds availability policies to their customers, and to handle returned checks expeditiously. Section 229.3(f) of the regulation currently requires a paying bank to provide notice of nonpayment of any returned check in the amount of $2,500 or more. This notice must be received by the depositary bank by 4 p.m. (local time) on the second business day following the banking day on which the check was presented to the paying bank. This requirement generally ensures that the depositary bank would receive the notice prior to the time it must make funds available for withdrawal under the temporary availability schedule.

Some banks have expressed concern that, with the permanent availability schedule, which becomes effective September 1, 1989, depositary banks often would not receive notice of nonpayment of large-dollar returned checks prior to the time that funds must be made available for withdrawal. Therefore, in December 1988 (Docket No. R-0679, 54 FR 51455, December 15, 1989), the Board requested comment on alternatives to shorten the current time requirements for giving notice of nonpayment. In response to various questions that have been raised by banks regarding the regulation, the Board also issued a comment proposing technical and clarifying amendments. The Board received 124 comments on the proposed amendments to Regulation CC. Commenters comprised:

- Commercial Banks
- Bank Holding Companies
- Corporations
- Savings and Loan Institutions
- Trade Associations
- Credit Unions
- Clearing Houses
- Federal Credit Unions

As discussed below, commenters were divided on whether and by how much the period for notice of nonpayment should be shortened. After reviewing the comments, the Board has determined that, on balance, the operational difficulties associated with shortening the time for notice of nonpayment outweigh the risks resulting from the current requirement. Therefore, the Board has not adopted an amendment to the notice of nonpayment provision. In addition, the Board issued proposed revisions to the deposit availability policy. The Federal Reserve notice of nonpayment service that would take effect if the time requirements for notice of nonpayment were to be shortened (Docket No. R-0680, 54 FR 51455, December 15, 1989). Thirty-four commenters discussed the proposed service changes and indicated how the Federal Reserve Banks’ service should be modified if specific regulatory changes were adopted. Because the Board has not amended the notice of nonpayment provision, it has not adopted changes to the Federal Reserve notice of nonpayment service.

The final amendments and substantive comments are summarized below.

Section 229.2(f) Definition of “check.” The Board was requested to clarify the status of ACH debit transfers under Regulation CC. The Board proposed a revision to the Commentary to the definition of “check” to state explicitly that an ACH debit transfer is not a check. The Board received fourteen comments, all in support of this proposal. The Board has adopted the amendment as proposed.

Section 229.2(f) Definition of “local check.” The Board adopted a proposal regarding the issuance of bank payable through checks in July 1988 (54 FR 32035, August 4, 1989). Under the new rules, effective February 1, 1991, bank payable through checks are required to contain, in a conspicuous place such as the title of the words “payable through” followed by the name of the payable bank and the first four digits of the nine-digit routing number of the bank on which the check is written. Two sentences in the Commentary to the definition of “local check” refer to bank payable through checks that do not contain a designation of the payable bank. The Board proposed to delete those sentences and to revise the Commentary to indicate that, in the case of bank payable through checks, the depositary bank may rely on the first four digits of the nine-digit routing number of the paying bank that is printed on the face of the check to determine whether the check is local or nonlocal. The Board received 16 comments on this proposal. Ten commenters supported the proposal with no specific comment. Four commenters requested that the Board clarify whether the proposed language refers to the first four digits located in the check’s Magnetic Inde Character Recognition (MICR) line or located elsewhere on the check. Three commenters noted that any nonautomated means of identifying the paying bank is inefficient and burdensome to the depositary bank.

The Board has revised the proposed language to clarify that the Commentary relates to the four-digit number printed near the name of the paying bank in the title plate, not the first four digits of the routing number in the MICR line. In addition, instead of making the proposed deletions, the Board has revised the existing Commentary language to explain that, until February 1, 1991 transition date, when paying banks will be liable for payable through checks issued by their customers that do not name the payable bank through bank, such payable through checks may continue to be issued and depositary banks cannot rely on the routing number to determine whether these checks are local or nonlocal.

Section 229.2(f) Definition of “noncash item.” The Board proposed a revision to the Commentary to “noncash item” to clarify that if a bank handles an item in the same manner as it would handle a cash item, the item does not qualify as a noncash item. The Board received fourteen comments on this proposal. Six commenters supported the proposal without specific comment, and seven commented that the Board should be allowed to collect noncash items as quickly as possible without compounding the items or giving up noncash item defenses. Two commenters asked that the Board clarify the problem this amendment is intended to address.

The Board has added the phrase “by the depositary bank” to the final amendment to clarify that a depositary bank accepts a check as a noncash item it must forward the check as a noncash item (for example, with special payment instructions attached) and not in the same manner it normally handles checks for forward collection. The purpose of this provision is to prevent a depositary bank from evading the availability and notice requirements of the regulation by accepting a check for deposit as a noncash item, yet collecting the check in the same manner as it would collect a cash item. Banks generally handle noncash items outside of the normal check collection process because they do not qualify for automated handling. A depositary bank should accept checks as noncash items...
only in limited circumstances, such as when its customer is concerned about whether the check will be paid and requests that the check be accompanied by a special notice or payment instructions.

One commenter stated that a depository bank should be able to attach a MICR strip to an un-MICR’d item and collect it as a cash item. A depository bank may add a MICR strip to an un-MICR’d item, but the item must then be treated as a check and not a noncash item.

One commenter asked whether a noncash item mistakenly accepted as a cash item by a teller must be given cash item availability. If a depository bank accepts a noncash item as a cash item inadvertently, it must either provide availability according to the regulation or return the item to the customer.

Section 229.13(a) Enforcement agencies. As part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Congress amended the Expedited Funds Availability Act regarding the enforcement agency for savings associations. The Board proposed a conforming amendment to Regulation CC to provide that the Director of the Office of Thrift Supervision has authority to enforce compliance with Regulation CC with respect to savings associations. The Board received eight comments on this amendment, seven in support and one objecting to allowing the Office of Thrift Supervision to oversee compliance. Because this amendment is statutorily mandated, the Board has adopted it as proposed.

Section 229.13(b)(4) Availability of deposits subject to exceptions. The regulation provides that if a bank invokes an exception hold under §229.13 (b) through (f), it may extend the availability schedule by a reasonable period of time. Currently, the regulation provides that a four-business-day extension is a reasonable period and that a longer extension may also be reasonable, but the bank has the burden of so establishing. The four-day period is designed to provide adequate time for the depository bank to learn of the nonpayment of virtually all checks that are returned. Thus, under the temporary schedule, a bank invoking an exception hold under §229.13 may normally hold local checks until the seventh business day after deposit and nonlocal checks until the eleventh business day after deposit. When the permanent schedule becomes effective on September 1, 1990, these periods would have been shortened to six and nine business days, respectively.

Because there will be no further significant payments system improvements applicable to the return of checks before the permanent schedule becomes effective, it would be the responsibility of the depository bank to learn of the return of checks subject to a §229.13 exception faster than they do today. Therefore, the Board requested comment on a proposal to extend the reasonable hold period from four days to five days for local checks and from four days to six days for nonlocal checks, thereby retaining the existing exception hold periods of seven and eleven days, respectively. The Board requested comment on whether such a change would obviate the need to revise disclosures and the need to extend the reasonable hold period, based on current returned check experience.

The Board received 51 comments on this proposal, all favoring the amendment. The commenters agreed that there have been no substantial improvements to the check collection system since the changes accompanying implementation of the temporary schedules and that the amendment would help reduce risk to depository banks. Twelve commenters stated that this amendment, if adopted, would be the need to revise disclosures, and eight stated that they would need to revise disclosures for the permanent schedule in any event. The Board has adopted the amendment as proposed.

Section 229.18(e) Changes in policy. The Board proposed to revise the Commentary to §229.18(e) to clarify how institutions could disclose the changes in policy due to the implementation of the permanent schedule. Any necessary notice must be provided by October 1, 1990. Eighteen commenters addressed this proposal and were generally supportive. The Board has adopted the proposed amendments, with a revision to provide guidance to banks that reserve the right to impose the cash withdrawal limitation in §229.13(d) when invoking a case-by-case hold.

One commenter asked whether an institution could disclose current and future policies on one disclosure form. This approach is permitted under the regulation provided the period during which each policy is applicable is clearly set forth. Another commenter asked whether banks could use existing stock of forms supplemented with an attachment indicating the permanent schedule changes. This is permitted under the regulation.

Section 229.18(f) When funds are considered deposited. Under §229.18(a)(5)(i), funds deposited at an ATM or off-premise facility after the depository bank’s cut-off hour of 12 noon or later are considered deposited on the next banking day. The Board was asked whether this would be effective, as determined by the local time of the ATM or off-premise facility or the local time of the branch or other location at which the account is maintained (the “account-holding branch”).

The Board proposed to clarify that the depository bank could establish a cut-off hour for deposits at ATMs or other off-premise facilities of no earlier than 12 noon local time of the account-holding branch. The Board specifically requested comment on the operational and customer service implications of this proposal, and whether the cut-off hour should be determined by the local time of the ATM rather than the local time of the account-holding branch.

The Board received 34 comments on the proposal: Nineteen commenters supported the proposed rule that ATM cut-off hours should be determined by local time of the account-holding branch. Twelve commenters opposed or noted operational problems with the proposal. Three commenters did not voice a preference for either alternative: one asked whether commenters might request that the Board study the issue further and republish the proposal for comment. Considering the Board’s response to one of these commenters requested that the Board study the issue further and republish the proposal for comment. The Board proposed to extend the reasonable hold period from four days to five days for local checks and from four days to six days for nonlocal checks, thereby retaining the existing exception hold periods of seven and eleven days, respectively. The Board requested comment on whether such a change would obviate the need to revise disclosures and the need to extend the reasonable hold period, based on current returned check experience.

The Board received 51 comments on this proposal, all favoring the amendment. The commenters agreed that there have been no substantial improvements to the check collection system since the changes accompanying implementation of the temporary schedules and that the amendment would help reduce risk to depository banks. Twelve commenters stated that this amendment, if adopted, would be the need to revise disclosures, and eight stated that they would need to revise disclosures for the permanent schedule in any event. The Board has adopted the amendment as proposed.

Section 229.18(e) Changes in policy. The Board proposed to revise the Commentary to §229.18(e) to clarify how institutions could disclose the changes in policy due to the implementation of the permanent schedule. Any necessary notice must be provided by October 1, 1990. Eighteen commenters addressed this proposal and were generally supportive. The Board has adopted the proposed amendments, with a revision to provide guidance to banks that reserve the right to impose the cash withdrawal limitation in §229.13(d) when invoking a case-by-case hold.

One commenter asked whether an institution could disclose current and future policies on one disclosure form. This approach is permitted under the regulation provided the period during which each policy is applicable is clearly set forth. Another commenter asked whether banks could use existing stock of forms supplemented with an attachment indicating the permanent schedule changes. This is permitted under the regulation.

Section 229.18(f) When funds are considered deposited. Under §229.18(a)(5)(i), funds deposited at an ATM or off-premise facility after the depository bank’s cut-off hour of 12 noon or later are considered deposited on the next banking day. The Board was asked whether this would be effective, as determined by the local time of the ATM or off-premise facility or the local time of the branch or other location at which the account is maintained (the “account-holding branch”).

The Board proposed to clarify that the depository bank could establish a cut-off hour for deposits at ATMs or other off-premise facilities of no earlier than 12 noon local time of the account-holding branch. The Board specifically requested comment on the operational and customer service implications of this proposal, and whether the cut-off hour should be determined by the local time of the ATM rather than the local time of the account-holding branch.

The Board received 34 comments on the proposal: Nineteen commenters supported the proposed rule that ATM cut-off hours should be determined by local time of the account-holding branch. Twelve commenters opposed or noted operational problems with the proposal. Three commenters did not voice a preference for either alternative: one asked whether commenters might request that the Board study the issue further and republish the proposal for comment. Considering the Board’s response to one of these commenters requested that the Board study the issue further and republish the proposal for comment. The Board proposed to extend the reasonable hold period from four days to five days for local checks and from four days to six days for nonlocal checks, thereby retaining the existing exception hold periods of seven and eleven days, respectively. The Board requested comment on whether such a change would obviate the need to revise disclosures and the need to extend the reasonable hold period, based on current returned check experience.

The Board received 51 comments on this proposal, all favoring the amendment. The commenters agreed that there have been no substantial improvements to the check collection system since the changes accompanying implementation of the temporary schedules and that the amendment would help reduce risk to depository banks. Twelve commenters stated that this amendment, if adopted, would be the need to revise disclosures, and eight stated that they would need to revise disclosures for the permanent schedule in any event. The Board has adopted the amendment as proposed.

Section 229.18(e) Changes in policy. The Board proposed to revise the Commentary to §229.18(e) to clarify how institutions could disclose the changes in policy due to the implementation of the permanent schedule. Any necessary notice must be provided by October 1, 1990. Eighteen commenters addressed this proposal and were generally supportive. The Board has adopted the proposed amendments, with a revision to provide guidance to banks that reserve the right to impose the cash withdrawal limitation in §229.13(d) when invoking a case-by-case hold.

One commenter asked whether an institution could disclose current and future policies on one disclosure form. This approach is permitted under the regulation provided the period during which each policy is applicable is clearly set forth. Another commenter asked whether banks could use existing stock of forms supplemented with an attachment indicating the permanent schedule changes. This is permitted under the regulation.
accounting and processing systems are currently based on local time of the account-holding branch. These commentators noted that customers understand their current cut-offs based on the local time at the account-holding branch and that this rule is consistent with other provisions of Regulation CC.

Supporters of the proposal asserted that if they were required to base cut-offs on local time of the ATM, processing costs would increase, resulting in decreased services and/or increased fees to customers. One commenter, with ATMs locations from the East Coast to Hawaii, strongly supported the proposal, citing servicing and processing cost savings. One trade association offered support to the proposal, requesting that the Board monitor the ATM situation to protect depositors from an increasing number of interstate banks that may seek to take advantage of this rule in order to delay availability of ATM deposits by an extra day.

Many of the commentators opposed to the proposal were members of nationwide shared ATM networks. One supporter suggested that a bank be able to set its own cut-off hour consistent with its processing procedures, provided the operator of a shared ATM network should be able to set the cut-off hour no earlier than noon local time of the ATM. Commentators noted that it would be impractical for the ATM operator to keep track of the local times of all the account-holding branches whose customers use the shared ATM and that the proposal may require several internal work-arounds and manual processing.

Commentators who opposed the proposal argued that it would benefit more from a cut-off time based on local time at the ATM because it is easier to understand and disclose. One commentator suggested that, if the ATM is in a locale where the depositary bank has a branch, the cut-off hour should be determined by the local time of that branch, otherwise the bank would use local time at the account-holding branch. A Hawaii bank indicated that Hawaii banks with East Coast ATMs would be put at an extreme disadvantage by the proposal.

The Board wishes to avoid disruption in current ATM and off-premise facility operations that would increase costs to both depositary banks and customers. The responses of the commentators indicate that if either alternative is adopted, some banks will experience significant operating difficulties, depending on the extent of their ATM network and on the relative locations of the account-holding branch and the ATM or off-premise facility. Therefore, the Board has revised the Commentary to allow the depositary bank to set a cut-off hour for ATMs and off-premise facilities at either 12 noon local time of the account-holding branch or 12 noon local time of the ATM or off-premise facility. The Board believes that this flexibility will enable banks to offer ATM deposit services to their customers over broad geographic areas, without incurring significant costs due to this provision of the Commentary. A bank must apply the cut-off hour for ATMs and off-premise facilities on a uniform basis for all locations and all customers.

The choice of cut-off hour must be reflected in the bank's internal procedures, and the bank must inform its customers of the cut-off hour upon request.

Commentators also suggested other related clarifications. The Commentary to the definitions of "business day" and "banking day" stages that the day of deposit for funds received at an ATM is determined by the banking day at the account-holding branch at the time the funds are received at the ATM. One commentator requested that the Board require that the commentator provide the Board with a list of ATMs and off-premise facilities at which deposits are made open untill 5 p.m. deposits to an ATM are not necessarily considered received on that banking day if made between 12 noon and 5 p.m. The Board has revised the Commentary to "business day" and "banking day" to reflect the cut-off rule for ATMs and off-premise facilities to clarify how to determine the day of deposit to such locations.

The commentators asked that the Board clarify whether the proposal would apply to both proprietary and nonproprietary ATMs. The Board believes this clarification is not necessary because § 229.13(c) does not distinguish between proprietary and nonproprietary ATMs. Another commentator asked that the Board clarify "account-holding branch." Consistent with the Commentary to § 229.13(b), the revised Commentary refers to "the branch or other location at which the account is maintained." For example, the account-holding branch may be the branch that opened the account and acts as the primary office serving the customer. It maintains signature cards on the account or other customer information, or that is credited for the customer's deposits on the books of the bank.

The Board proposed a revision to the Commentary to § 229.13(c) to clarify the relationship between the availability schedules and the depositary bank's right to charge back the depositary bank's costs for returned checks. The proposed language stated explicitly that the depositary bank may nevertheless back its customer's account upon receipt of a returned check or notice of nonpayment, even if the check or notice is received after the time by which the proceeds of the check must otherwise be made available for withdrawal under the provisions of the regulation.

The Board revised 21 comments on this proposal, all in support. Two commented that the Board also allow placement of a hold upon receipt of a notice of nonpayment until the returned check is received, rather than immediately charging back the depositor's account. Under the regulation, a depositary bank that receives a notice of nonpayment may place a hold under the reasonable cause exception of § 229.13(e), but this hold may not be unlimited; the depositary bank has the burden of establishing the reasonableness of an extension of the regulation's availability schedule of funds for nonbusiness days for local checks and six business days for nonlocal checks.

Another commentator suggested amending the proposed language to state that the "regulation should not be interpreted as precluding the right" of the depositary bank to charge back a customer's account based on receipt of a returned check for notice of nonpayment. The Board recommended that the proposed language be essentially equivalent to the commentator's suggested language and that bank adopting the amendment as proposed.

Section 229.30(c) — Extension of deadline. Increasingly, banks are providing banking services to the public on Saturdays and/or Sundays. These days are not regarded as banking days under Regulation CC, because Saturdays and Sundays are not "business days," but they may be regarded as banking days for the purposes of the Uniform Commercial Code ("UCC"). Banks that are open on Saturday may not have couriers leaving on Saturday to deliver returned checks, and even if they did, the returning or depositary banks to which the returned checks were sent might not be prepared to receive or process checks until Monday night or Monday morning. Prior to the implementation of Regulation CC, some banks could meet a UCC Saturday midnight deadline for checks presented on Friday by...
mailing their returned checks on Saturday. Since the implementation of Regulation CC, however, these banks have been subject to expeditious return requirements that generally may not be met by mailing returned checks. For checks presented on Fridays, these banks cannot meet both a UCC Saturday midnight deadline and the expeditious return requirements of Regulation CC without establishing special courier runs on Saturday evening to deliver returned checks to returning or depositary banks. Such runs would often be in addition to runs during the day on Sunday delivering forward collection checks to the same banks in their capacity as collecting or paying banks in the forward collection process.

To address this problem, the Board proposed to extend the Saturday night midnight deadline if the returned checks reach the receiving bank by a cut-off hour (usually on Sunday night or Monday morning) that permits processing during the receiving bank's next processing cycle for returned checks following the Saturday midnight deadline. The Board also proposed the proposed amendments with minor revisions.

The Board received 19 comments on this proposal. Twelve supported the amendment as proposed. One commenter noted that the proposal would require banks that wish to make returns directly to depositary banks to know the cut-off hours for each of the depositary banks' processing cycles and therefore would effectively force returns to be made through the Federal Reserve. The Board did not intend this result and has amended the final Commentary language to clarify that the return must be made by the cut-off hour for the returning bank's next processing cycle or for the depositary bank's next banking day after midnight Saturday night.

One commenter asked that the extension apply to all instances when a bank is open on any non-business day, such as a mid-week holiday. Two commenters requested that the Board extend the midnight deadline even further (one suggested Monday night, the other Monday morning) to accommodate weekend presentments that are not reviewed until Monday or Tuesday.

Another commenter suggested that the Board eliminate the problem by having the Regulation CC definition of "banking day" on Tuesday night be midnight Tuesday night. The Board recognizes that nonstandard banking days create difficulties for the check clearing system as well as other payments operations. Issues relating to a midnight deadline other than the Saturday night deadline were not clearly raised by the proposal. Resolution of these issues will require additional data on banking practices. The Board will continue to study problems under the expeditious return rule that may arise from nonstandard banking days and may consider further modifications in the future.

Section 239.2(k) Notice of Nonpayment. This section requires a paying bank to provide notice of nonpayment of any returned check in the amount of $2,500 or more. Currently, this notice must be received by the depositary bank by 4 p.m. (local time) on the second business day following the banking day on which the check was presented to the paying bank. This requirement generally ensures that the depositary bank would receive the notice prior to the time it must make funds available for withdrawal under the temporary schedule. However, under the permanent schedule, which becomes effective September 1, 1990, a depositary bank may not receive notice of nonpayment of large-dollar returned checks being returned by local paying banks before the depositary bank must make the first $5,000 of these funds available to its customer.

In order to reduce the potential for increased risk resulting from the permanent availability schedule, some bankers suggested shortening the time within which notice of nonpayment must be provided to the depositary bank. The Board requested a comment on whether the risk inherent in the requirement that funds be made available to the customer for withdrawal prior to the time the depositary bank has an opportunity to learn of the return of large-dollar local checks is sufficient to warrant accelerating the time within which notice of nonpayment must be provided to the depositary bank.

The Board received 107 comments on whether the time within which a paying bank must provide notice to the depositary bank of a large-dollar returned check should be shortened. Forty-four commenters opposed shortening the notice of nonpayment deadline. These commenters stated that the additional burden an earlier notice deadline would place on paying banks outweigh the marginal benefits that would be derived by depositary banks. Some commenters noted that several categories of nonpayable checks would have particular problems complying with an earlier notice deadline, including banks that use payable through banks or intercept processors, as well as banks, which have a shorter time frame within which to provide notice to East Coast depositary banks due to the time zone differences.

Many commenters also believed that an earlier notice of nonpayment deadline would result in an increased number of returned checks, because banks would have a shorter time frame within which to make the decision of which checks to return. Accelerating the return decision would lessen the time available for management review of checks that are candidates for return, and would limit the ability of the paying bank to allow customers to deposit funds to cover a check on the day following presentment. This may result in customer service problems and an increased number of consumer complaints. Some commenters also indicated that most banks currently make funds available for withdrawal within the time frames required in the permanent schedule, and that no loss experience has been demonstrated to justify a shorter notice requirement.

Among the commenters opposed to shortening the time within which notice of nonpayment must be provided was the largest private sector notice of nonpayment service provider. This commenter indicated that such a move to modify its services to meet shorter time requirements, it was opposed to any change because it would reduce or eliminate bank officer involvement in making the return decision, increase the number of customer complaints, and increase returned check charges to banks.

Six commenters supported an earlier notice of nonpayment deadline and an additional 57 commenters conditioned their support for accelerating the notice requirement on the adoption of a particular new recommended deadline. Of the 57 conditional responses, 27 commenters recommended that the required time be shortened to the first business day following deposit, with 13 commenting that a 4 p.m. deadline and 14 commenters recommending various times after 4 p.m.

Thirty commenters recommended that the notice requirement be accelerated to an earlier time on the second day following presentment, with 24 of those commenters indicating that the time should be before 10 a.m.

Commenters in favor of shortening the time within which the paying bank must...
provide notice of nonpayment believed that an earlier notice deadline was important to protect depositary banks from the increased risks arising from the shorter permanent availability schedule. Although they generally agreed that an earlier deadline would not eliminate these risks, they believed that the burdens that would be imposed on paying banks. The Board has not adopted a change to the notice of nonpayment requirement. The Board does not believe that the benefits of an earlier notice deadline to depositary banks would outweigh the burdens that would be imposed on paying banks. They appear to be an inverse relationship between the benefits of prompter notice to deter the risk of forgery and the burdens and disruptions to the operations of paying banks. Notices received after the day on which the depositary bank would be required to be received after the funds must be made available for local checks under the permanent schedule. Although earlier notice, such as receipt on the business day following presentment, would help to protect some depositary banks that make available for permanent schedule for local checks, the Board believes that this earlier notice of nonpayment receipt date would increase the number of checks that are returned. This increase would be inconsistent with the objectives of the Act. If a paying bank were required to provide notice of nonpayment by the day following presentment, the paying bank's midnight deadline for returning checks under the Uniform Commercial Code would effectively be shortened, because a paying bank that provides a notice of nonpayment warrants to the depositary bank that it has or will return the check for payment. Moreover, the Board believes that requiring that notices of nonpayment be provided earlier than they are today would increase paying banks' costs of returning checks. In many cases, paying banks currently notify depositary banks of the return of large-dollar checks prior to the regulation's notice of nonpayment deadline, where it is operationally practical to do so. The Federal Reserve recently reviewed sample notices of nonpayment processed by the Federal Reserve Banks; almost one-half of the notices surveyed were received by the depositary bank on the second business day after the check was deposited (which generally would be the next business day following presentment). Some check clearinghouses have instituted new returned check exchanges to facilitate expedient return of the physical checks prior to the notice deadline. The Board encourages initiatives of paying banks to notify depositary banks of large-dollar returned checks prior to the notice deadline. One trade association recommended that the Board eliminate the notice of nonpayment requirement altogether and instead lower the large-dollar safeguard exception to $2,500. The Act provides that the large-dollar exception may not be invoked for aggregate daily deposits of less than $5,000: therefore, the Board does not have the authority to reduce the large-dollar exception from $5,000 to $2,500.

Section 229.34(a) Warranty of returned check. The regulation provides that a paying or returning bank that transmits returned checks receives settlement of a notice in lieu of return warrants that the original check has not and will not be returned. The Board has been asked to clarify that the paying or returning bank is warranting that the original check has not and will not be returned for payment, as opposed to being returned to the depositary bank for other purposes, such as to provide evidence of the return, that do not call for payment of the returned check under § 229.32. The Board proposed to amend the commentary accordingly.

The Board received six comments on the proposal, all in support. One commenter suggested that the Board change the word "payment" to "reimbursement" in the first sentence of the commentary. Such a change would not be appropriate under subpart C, which provides that returned checks are subject to payment, not reimbursement. The Board has adopted the amendment as proposed.

Section 229.33(c) Indorsement standards. Since September 1988, when Regulation CC became effective, the quality of indorsements has varied widely. In some cases, banks that handle returned checks have found indorsements to be illegible, even though the indorsements may meet the informational requirements of the regulation. There are several reasons indorsements may be unclear, such as very small type size or poor imprinting mechanisms, which may result in faint or indistinct indorsements. Currently under § 229.33 appendix D, the duty of an in endorsing bank to apply a legible indorsement to a negotiable instrument is not explicit. The Board believes that an indorsing bank should be responsible for ensuring that its indorsement is legible and proposed to make this duty explicit in the regulation and the commentary. The Board received 13 comments on this proposal. Only one commenter opposed the proposal on the grounds that depositary banks should not be held responsible for the inability of indorsement machine vendors to meet Regulation CC's standards. Seventeen producers of one-write (carbon-band) checks commented in favor of legible indorsements. These commenters expressed support for eye-readable indorsements because they believe machine-readable indorsements are not feasible in the immediate future. Several respondents commented on the liability for not meeting a legibility standard. One commenter suggested that the Board allow recourse against the last identifiable processor or indorser. Another commenter suggested that all late returns should be excused when the indorsement is illegible. Under the current provisions of the regulation, if the depositary bank released the indorsement from its indorsing bank to a previous indorser in the forward chain, the bank that is responsible for the illegible indorsement is liable for damages due to a late return. The Board believes that this scheme most effectively places liability for late returns due to poor indorsement on the indorsing bank. One commenter asked that the Board adopt a mechanism to enforce the legibility standard. Another commenter asked that the Board clarify that the ordinary care standards of § 229.30 would apply. Section 229.38 clearly states that it applies to all the requirements of subpart C, and thus the duty of ordinary care will apply to all indorsing banks and will serve as an enforcement mechanism. One commenter stated that customers who apply the depositary bank indorsement under agreement should be able to accept the liability. The regulation already allows such an agreement under § 229.37. One commenter suggested disallowing the punching of holes in the MICR line, indicating that this practice not only prevents the check from being machine-readable, but also may render...
endorsements on the back of the check illegible. Because this suggestion was not subject to the notice and comment period, the Board has not made such an amendment at this time, but may consider it in the future.

One commenter suggested the Board enlarge the space available for the payee and depositary bank endorsements. The Board believes that it would be inappropriate to change the size of the depositary bank endorsement area because of potential problems the change would create for payee and collecting bank endorsers and because this change was not subject to notice and public comment.

Other suggestions included minimum size requirements for endorsement information and establishment of legibility guidelines. The Board believes that banks should be subject to the requirement to endorse legibly but that it would be costly and burdensome to establish rigid standards such as specific type size and other guidelines.

Another commenter asked that depositary banks be allowed to wait to upgrade their equipment until a major repair or replacement of current equipment is necessary. The Board believes that the regulation should not mitigate the consequences of an illegible endorsement until current equipment is replaced. Such an action would be inequitable to a paying bank or returning bank that delays a returned check due to the illegible endorsement.

Finally, one commenter asked why the phrase "during temporarily closing" was omitted from the language was inadvertent. Accordingly, the Board has adopted the amendment and the Commentary as proposed, with the restoration of the inadvertently omitted language in the amendment.

Section 223.304 [Issuance of payable through checks. In July 1990, the Board amended Regulation CC to require certain information to be printed on checks payable by a bank and payable through another bank ("bank payable through checks") (55 FR 33295, August 4, 1990). Effective February 5, 1991, § 223.304(d) requires such checks to contain the name, address, and first four digits of the routing number of the bank by which the check is payable, and the phrase "payable through" followed by the name and address of the payable through bank. The Board has received inquiries as to whether it would be permissible for a bank that holds checking accounts and process checks at a central location but that has widely-dispersed branches to label all of its checks as "payable through" a single branch and include the name, address, and four-digit routing symbol of another branch. These checks would be payable by and through the same bank, and therefore the provisions of § 223.304(e) would not apply. If the Board were to allow such a practice, the result would be to lead depositors and depositary banks to believe mistakenly that the check is a bank payable through check for which availability must be assigned based on the location of the branch whose four-digit routing symbol appears on the check rather than on the location of the central office whose nine-digit routing number is encoded on the MICR line of the check.

The Board proposed an amendment to the regulation and the Commentary to provide that a bank is responsible for damages under § 223.36 to the extent that a check payable by it and not payable through another bank is labelled as provided in § 223.304. The Board received nine comments on the proposal, all in support. The Board has adopted the amendment with revisions to clarify the intent of the provision.

Appendix A to Regulation CC contains a routing number guide to aid banks in identifying next-day-availability checks and local checks. Since the publication of the proposed amendments to Regulation CC, the Federal Housing Finance Board, which oversees the Federal Home Loan Banks, has provided the Board with two additional Federal Home Loan Bank routing numbers. As a result, Appendix A to Regulation CC has been updated.

Section 223.304(d) makes clear that banks may rely on earlier versions of the forms though they are encouraged to update their forms as soon as are provided in the forms. Six comments addressed the proposed changes, which have been adopted as proposed. In addition, the Board is revising Form C-5 and the lobby notices in Forms C-15 and C-17A to reflect the permanent schedule. Corresponding changes have been made to the Commentary. Although the revisions to Appendix C, $402 cash withdrawal rules effective immediately, banks may continue to use disclosures that reflect the availability they provide under the temporary schedule until the permanent schedule takes effect.

Suggested Amendments to the Act. Several commenters asked the Board to request that Congress amend the Act to help ease compliance burdens. The suggestions included: Allowing all payable through checks to be considered local or nonlocal based on the payable through bank, deleting implementation of the permanent schedule, shortening the allowable holds for deposits to nonproprietary ATMs under the permanent schedule, allowing all exception holds to be applied to "next-day" checks, eliminating the need to give notice on every deposit when involving large-dollar and repeated overdraft exceptions, lowering the $5,000 large-dollar exception threshold to $2,500, permitting variations of availability schedules by agreement in the case of business customers, and extending the date for comments.

The Board recommends to Congress several amendments to the Act, including many of those suggested by the commenters. Specifically, the Board believes:

- Modify the permanent schedule for local checks;
- Treat nonproprietary ATM deposits under the permanent schedule in the same manner as they are treated under the temporary schedule;
- Remove the operational and disclosure difficulties concerning payable through checks;
- Expand the operational and disclosure difficulties concerning payable through checks;
- Limit the next-day requirement for Treasury checks and "non-checks to checks deposited at stated teller facilities;
- Provide greater flexibility in the manner of giving notice to the depositor that an exception has been invoked;
- Cease the Board authority to establish rules regarding losses and liabilities to customers of either their depository institutions; and
- Provide for direct review of regulations adopted by the Board in the U.S. Court of Appeals.

The Board's legislative recommendations are contained in its 1990 Report to Congress Under the Exempted Funds Availability Act (March 1990).
For the reasons set out in the preamble, 12 CFR part 229 is amended as follows:

**PART 229—AMENDED**

1. The authority citation for part 229 continues to read as follows:


2. In § 229.3, paragraph (a)(2) is revised to read as follows:

§ 229.3 Administrative enforcement. 
(a) Enforcement agencies.
(2) Section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision in the case of saving associations the deposits of which are insured by the Federal Deposit Insurance Corporation.

3. In § 229.13, paragraph (h)(4) is revised to read as follows:

§ 229.13 Exceptions.
(h) Availability of deposits subject to exceptions.

(4) For the purposes of paragraphs (h)(1), (h)(2), and (h)(3) of this section, an extension of up to five business days for local checks and six business days for nonlocal checks is a reasonable period. A longer extension may be reasonable, but the bank has the burden of so establishing.

4. In § 229.30, paragraph (c) is revised to read as follows:

§ 229.30 Paying bank's responsibility for return of checks.

(c) Extension of deadline. The deadline for return or notice of nonpayment under the UCC or Regulation J (12 CFR part 210) is extended:

(1) If a paying bank, in an effort to expedite delivery of a returned check to a bank, uses a means of delivery that would ordinarily result in the returned check being received by the bank to which it is sent prior to the cut-off hour for the next processing cycle, in the case of a returning bank, or on the next banking day, in the case of a depository bank, after midnight Saturday night.

5. In § 229.35, paragraph (a) is revised to read as follows:

§ 229.35 Indorsements.

(a) Indorsement standards. A bank (other than a paying bank) that handles a check during forward collection or a returned check shall legibly indorse the check in accordance with the indorsement standard set forth in appendix D to this part.

6. In § 229.30, a new sentence is added to the end of paragraph (e) concluding text to read as follows:

§ 229.36 Presentment and issuance of checks.

(e) Issuance of payable through checks.

A bank is responsible for damages under § 229.36 if the bank, in an effort to expedite delivery of a returned check by the paying bank, processes the check in accordance with the indorsement standard set forth in appendix D to this part in an effort to expedite delivery of the check to the depositor.

Appendix A—[Amended]

7. In appendix A, two new number are added, in numerical order, to the list of numbers under the subheading “Federal Home Loan Banks” as follows:

Federal Home Loan Banks

| 0646 0348 0 |
| 1110 1083 7 |

Appendix C—[Amended]

8. Appendix C is amended as set forth below:

a. In model forms C-1, C-2, and C-3, the first paragraph is revised to read as follows:

**YOUR ABILITY TO WITHDRAW FUNDS**

at [bank name and location]

Our policy is to make funds from your deposit available to you on the first business day after the day you receive your deposit. Electronic direct deposits will be available on the day we receive the deposit. Once they are available, you can withdraw the funds in cash and we will use the funds to pay checks that you have written.

b. In model form C-3, the heading is revised, and under the subheading "Longer Delays May Apply," the second sentence of the first paragraph is revised
to read as follows: C-3. Next-day availability. case-by-case holds to statutory limits. and § 228.13 exceptions (permanent schedule).

* * *

Longer Delays May Apply

* * *

Depending on the type of check that you deposit, funds may not be available until the fifth business day after the day of your deposit. * * *

.....

- In model forms C-4, C-5, C-6, and C-7, a new paragraph and a subheading is added immediately preceding the subheading "Next-Day Availability," and the first sentence under the subheading "Next-Day Availability" is revised to read as follows:

Same-Day Availability

Funds from electronic direct deposits to your account will be available on the day we receive the deposit.

Next-Day Availability

Funds from the following deposits are available on the first business day after the day of your deposit.

- U.S. Treasury checks that are payable to you.

Wire transfers.

Checks drawn on (bank name) (failures (any limitations related to branches in different states or check-processing regions)).

Debit cards from forms C-8 and C-7, the second paragraph under the subheading "Other Check Deposits" is revised to read as follows:

* * *

Other Check Deposits

* * *

If the first four digits of the routing number (1124 in the examples above) are (local numbers), then the check is a local check. Otherwise, the check is a nonlocal check.

Some checks are marked "payable through" and have a four or nine-digit number nearby. For these checks, use the four-digit number (or the first four digits of the nine-digit number), not the routing number on the bottom of the check, to determine if these checks are local or nonlocal.

* * *

f. In model form C-6, in the chart under the subheading "Other Check Deposits," the second and fourth entries are revised to read as follows:

First four digits from the routing number are available:

When funds are available if a deposit is made on a

Monday of the following week, Monday of the fifth business day after the day of your deposit, Wednesday of the first business day after the day of your deposit.

* * *

g. In forms C-2, C-3, C-4, C-5, and C-6, under the subheading "Special Rules for New Accounts," the second paragraph is deleted, and the third paragraph is revised to read as follows:

Special Rules for New Accounts

Funds from electronic direct deposits to your account will be available on the day we receive the deposit. Funds from deposits of cash, wire transfers, and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and federal, state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you (and you may have to use a special deposit slip). The excess over $5,000 will be available on the ninth business day after the day of your deposit. If your deposit of these checks (other than a U.S. Treasury check) is not made in person to one of our employees, the first $5,000 will not be available until the second business day after the day of your deposit.

* * *

h. In form C-7, under the subheading "Special Rules for New Accounts," the second, third, and fourth sentences of the first paragraph are deleted and the second paragraph is revised to read as follows:

Special Rules for New Accounts

* * *

Funds from electronic direct deposits to your account will be available on the day we receive the deposit. Funds from deposits of cash, wire transfers, and the first $5,000 of a day's total deposits of cashier's, certified, teller's, traveler's, and federal, state and local government checks will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you (and you may have to use a special deposit slip). The excess over $5,000 will be available on the ninth business day after the day of your deposit.

* * *

i. In model clause C-8, the last sentence is deleted.

j. In model form C-15, the heading is revised, a new entry to be the first entry in the chart is added, and the third and fourth entries are revised to read as follows: C-15. Notice at locations where employees accept consumer deposits (permanent schedule)

FUND AVAILABILITY POLICY

Description of deposit When funds can be withdrawn by check or cash

Direct deposits The day we receive the deposit

Local checks The second business day after the day of deposit.

Nonlocal checks The fifth business day after the day of deposit.

k. In model form C-15A, the heading is revised, a new sentence is added after the first sentence of the paragraph, and the last sentence of the paragraph is revised to read as follows: C-15A. Notice at locations where employees accept consumer deposits (case-by-case holds) (permanent schedule)

Funds Availability Policy

* * *

Funds from electronic direct deposits will be available on the day we receive the deposit. * * *

Then, the funds will generally be available by the fifth business day after the day of deposit.

1. Model clauses C-19 and C-19A are deleted.

Appendix E—(Amended)

9. Appendix E is amended as set forth below:

a. In the Commentary to § 228.2, the last four sentences of the third paragraph of paragraphs (f) and (g) are removed and four new identical sentences are added to the end of both paragraphs (f) and (g). The first sentence of the last paragraph of paragraph (f) is revised, the next to last sentence of paragraph (g) is revised and a new sentence is added to the end, and a new sentence is added in the end of the first paragraph of paragraph (g) to read as follows:

* * *