

August 1, 2017

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

Re: Docket No. R-1564:
Regulation CC – Availability of Funds and Collection of Checks –
The Expedited Funds Availability Act
Proposed Rule; Request for Comment
[82 Federal Register 25539](#) (June 2, 2017)

Dear Ms. Misback:

The undersigned financial services organizations (the “Commenters”) are pleased to submit this joint comment letter to the Federal Reserve Board (“Board”) regarding its proposed revision to Regulation CC which seeks to create a presumption of alteration for any dispute over whether the dollar amount or the payee on a substitute check or electronic check has been altered or whether the substitute check or electronic check is derived from an original check that is a forgery (the “Proposed Rule”). Additional information regarding these six (6) organizations is included at the end of this letter.

The Commenters support the addition of a presumption of alteration to Regulation CC and support the adoption of a final rule implementing the Proposed Rule. The Commenters submit the following comments for the Board’s consideration regarding certain aspects of the Proposed Rule.

Support for Adoption of the Presumption of Alteration Rule

The Commenters support a presumption of alteration in Regulation CC as preferable to a presumption of forgery. We believe that alteration of a legitimate check is the more common type of check fraud today in which disputes arise between banks, and therefore a presumption of alteration in those disputes where the evidence is lacking is appropriate. For these reasons, ECCHO has had a presumption of alteration, as opposed to a presumption of forgery, in its check image exchange rules for over five years. ECCHO has not identified any issues or problems with this approach.

The presumption rule within Regulation CC also would appropriately reflect that check collection in the U.S. has virtually fully migrated to an electronic check image exchange environment. While the electronic check image exchange environment has improved the speed and efficiency of check collection, it has also increased the likelihood of situations in which the original check may not be available for a detailed review of the check stock and ink quality to determine if the item is altered or forged. In such an all-electronic exchange environment, a presumption of alteration of a check is preferable to having no presumption at all for disputes where evidence is lacking, as it avoids a debate of whether the item is altered or forged, and

promotes predictable results. A presumption of alteration in Regulation CC also will provide for a national, uniform presumption rule and avoid, as the Board has noted, variation in law caused by different federal appeals court decisions.

Application of the Presumption to Altered Date Fields

In the request for comment on the Proposed Rule, the Board sought public comment on whether the presumption of alteration should extend to the date field on a check. The Commenters are not opposed to the application of the presumption of alteration to the date field of an electronic check or a substitute check. However, based on an informal survey of participating financial institutions, the Commenters lack sufficient information on which to conclude that there is a strong legal or business need to include the date field in the presumption. In particular, the Commenters could not identify a clear example of an interbank claim/loss that has arisen solely from an alteration of the date on a check. Rather, participating financial institutions reported that any check dispute involving an allegation of date alteration is almost always accompanied by an allegation that the dollar amount or the payee has been altered.

The only examples Commenters identified where a date alteration alone would be alleged are: (1) where the date of a post-dated check is altered (or allegedly altered) to make the check currently payable, and, as a result, the paying bank pays the check when presented and incurs a loss to its customer which would not have resulted had the paying bank paid the check upon or following the date on the check as issued by the customer; and (2) where the date is altered to a more recent date in order to convey holder-in-due-course status on the depositor or to otherwise avoid a “stale-date” rejection by the paying bank.

One option to address this question in the final rule is to allow the presumption to apply to any alteration of a check that comes within the definition of “alteration” under Section 3-407 of the Uniform Commercial Code (“UCC”). The UCC defines “alteration” as (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party. (See UCC Section 3-407(a)). This UCC definition of alteration could include an alteration of the date which modifies the obligations of the parties. The use of a cross reference to the UCC definition of alteration also would allow the scope of the Regulation CC presumption to better align with potential claims arising under the UCC check transfer and presentment warranties that the check has not been altered.

Application of Presumption of Alteration to the Paying Bank

The Board seeks comment on the question of whether the presumption of alteration should apply when the bank claiming the presumption received and destroyed the original check.

With respect to banks other than the paying bank, the Commenters believe that the presumption of alteration should be available in situations where a bank (other than the paying bank) claiming the presumption received and destroyed the original check. To promote check electronification, Regulation CC should encourage truncation of the original check and therefore

should not establish a legal detriment to the destruction of the check by such banks. Any such legal detriment might have the unintended consequence of incenting these depository or collecting banks to retain the original check, increasing the cost of check collection and creating a risk of the original check being subsequently redeposited.

However, the Commenters believe that the presumption of alteration under Regulation CC should *not* be available to the paying bank in any situation in which the paying bank received the original check, regardless of the reasons it cannot produce the original check in a subsequent dispute. In today's fully electronic exchange environment, it is very rare for a paying bank to receive the original check. However, paying banks do occasionally receive original checks by way of presentment, delivery in a collection letter, or delivery in the context of a dispute investigation. If a paying bank has received the original check, it likely means that the original check is uniquely important for determining the rights of the respective parties to that check. For example, a depository bank may present the original check to the paying bank if it is a very high dollar check or the depository bank has concerns with certain aspects of the check (such as unclear terms or smudged signatures). Alternatively, the paying bank may, after receiving the check image in a presentment, request and receive the original check from another bank in the context of a dispute about the check image.

Receipt of an original check outside of the standard electronic check collection process puts a paying bank on notice of the possible importance of the original check. If the paying bank then destroys or loses the original check or the original check becomes otherwise unavailable while in the possession of the paying bank, the paying bank should not have the benefit of the evidentiary presumption of alteration under Regulation CC. The paying bank is in the best position to preserve the check in these circumstances where the check is likely to be an important one and to manage the risk if the paying bank chooses not to preserve it. Accordingly, a paying bank that has received the original check should bear the risk if the original check is unavailable in a subsequent dispute involving an electronic image created from such original check.

For these reasons, the Commenters request that the Board state in the final rule that the presumption is not available to a paying bank in situations in which a paying bank previously received the original check and the original check is no longer available to the paying bank regardless of the reason (e.g., lost or destroyed). Under this approach, the final rule also would provide that this presumption is available to all other banks, other than the paying bank, including cases where such bank has destroyed the original check.

Alteration of the Check Image Itself

The Commenters request that the Board clarify in the final rule that the presumption of alteration also applies to the alteration of the electronic check image itself, and not just to alteration of the original check. As currently drafted, the Proposed Rule is unclear as to whether the presumption applies to an allegation of alteration of the electronic check image itself, or whether the presumption only applies to an allegation of alteration of the original check. A plain reading of the Proposed Rule suggests that as written, it may apply to the alteration of the electronic check image. In particular, the Proposed Rule states that it applies to a dispute

involving whether or not “the dollar amount or the payee on a substitute check or electronic check has been altered”. [*Emphasis added.*] However, the example of alteration in the Supplementary Information only references alteration of the original check.

The Commenters are not aware of widespread alteration of check images after truncation and believe that alteration of check images within the banking system is very rare, given the controls around bank record systems. However, prior to the deposit of the electronic check to the depository bank, it is technically possible for a fraudster to alter the check image. With the increase in the use of remote deposit capture by customers and their banks, the Commenters believe that there is the potential for alteration of the check image itself to increase in frequency in the future.

As a technological and evidentiary matter, the Commenters believe that it will be difficult for banks involved in disputes to determine if the check image was altered or if the paper original check was altered prior to truncation. Given this evidentiary uncertainty as to where (paper original check or check image) the alteration occurred, the Proposed Rule should apply broadly to any type of alleged alteration of the check or electronic check. If the original check is available in a particular dispute alleging the alteration of the check image, the presumption would not apply, and instead, the paying bank could make a warranty claim to the presenting bank that the check image did not accurately reflect the information from the original check at the time of truncation.

Given the importance of broad coverage of the presumption, the Commenters request that the Board clarify in the final rule that the presumption applies to disputes where there is an allegation that the electronic check image was altered. This clarification could also be included in an example in the Commentary.

Scope of Presumption - Type of Covered Disputes

The Commenters request that the Board provide additional clarification in the final rule as to the types of disputes which would be subject to the presumption. As drafted, the Proposed Rule states that the presumption applies to “*any dispute*” arising under federal or state law. (*Emphasis added.*) This reference to “any dispute” would clearly cover disputes relating to loss allocation under the UCC and Regulation CC warranties and the paying bank’s legal responsibility for determining the drawer’s authorized signature on a check. These types of disputes are directly related to the collection and exchange of checks and within the general type of issues addressed under Regulation CC which contains the presumption rule.

However, the Commenters are uncertain whether the presumption also applies to disputes where the loss allocation rules for bank and non-bank parties are established under private contract or by laws other than Regulation CC and the UCC. The Commenters have identified two examples of potential disputes in which laws other than the UCC and Regulation CC may apply:

- A money order is issued by a private non-bank company which establishes contractual terms or rules between the issuer company and the presenting bank which govern the

acceptance and presentment of the money orders for payment. These rules are enforced in state contract law disputes.

- Treasury checks and U.S. postal money orders, which are subject to separate federal regulations that govern all or certain aspects of a dispute involving the Treasury check or U.S. postal money order. For example, the Domestic Mail Manual of the U.S. Postal Service states that the Postmaster General has the right to demand refund from the presenting bank of the amount of a paid postal money order if, after payment, the money order is found to be stolen, or to have a forged or unauthorized endorsement, or to contain any material defect or alteration not discovered on examination. *See Section 12.4.4 (“Reclamation”) of the USPS Domestic Mail Manual.*

In both of the above examples, it is assumed that the private contract or federal rules do not have their own presumption rules contained within them, and therefore there is no variation of Regulation CC by agreement of the parties.

It is the Commenters’ view that the presumption should be broadly applied to all types of disputes involving checks and drafts, consistent with the authority of the parties to vary the presumption rule as discussed below. Such a presumption will add uniformity and predictability and minimize disputes with regard to these agreements, yet allow flexibility by permitting variance by agreement. Accordingly, we recommend that the final rule clarify in the Commentary that the Regulation CC presumption applies to disputes arising under private presentment arrangements and laws other than Regulation CC and the UCC.

Authority of Parties to Vary the Presumption Rule

The Commenters have considered that scenarios may arise in the future in which it may be necessary or helpful to modify, by agreement of the parties, certain aspects of the presumption rule in Regulation CC. These modifications by agreement could address unique or currently unknown scenarios that could develop in the future as the industry gains experience with the application of the presumption rule. Accordingly, the Commenters believe that parties should have the ability to vary the presumption to the maximum extent permitted under Section 229.37 of Regulation CC, which permits variation by agreement of the parties.

The Commenters support the proposed location of the presumption rule in Section 229.38 of Subpart C and recommend that the Commentary to Section 229.37 include examples of permissible variation of the presumption rule, specifically, the example of a presenting bank and paying bank agreeing to establish conditions (other than the production of the original check) under which the presumption of alteration of Section 229.38(i) may be rebutted by a particular type of evidence.

* * * *

The Commenters commend the Board for its efforts to make the check processing system more efficient and appreciate this opportunity to provide our comments to the Proposed Rule. If

you have any questions regarding this letter, please do not hesitate to contact one of the undersigned representatives of the Commenters.

American Bankers Association

Nessa Feddis
Senior Vice President and
Deputy Chief Counsel
Nfeddis@aba.com
202-663-5433

Credit Union National Association

Luke Martone
Senior Director of Advocacy & Counsel
lmartone@cuna.coop
202-508-6743

**Independent Community Bankers of
America**

L. Cary Whaley, III
First Vice President, Payments and
Technology Policy
Cary.Whaley@icba.org
800-422-8439

The Clearing House Payments Co., L.L.C.

Robert C. Hunter
Executive Managing Director and Deputy General
Counsel
Rob.Hunter@TheClearingHouse.org
336-769-5314

**Electronic Check Clearing House
Organization**

David Walker
President & CEO
dwalker@eccho.org
214-273-3201

**National Association of Federally-Insured Credit
Unions**

Alexander Monterrubio
Director of Regulatory Affairs
amonterrubio@nafcu.org
703-842-2244

Information Regarding The Commenting Organizations

American Bankers Association

The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

The Clearing House Payments Co., L.L.C.

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Payments Company L.L.C. owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system.

Credit Union National Association

Credit Union National Association (CUNA) is the only national association that advocates on behalf of all of America's credit unions, which are owned by 110 million consumer members. CUNA, along with its network of affiliated state credit union leagues, delivers unwavering advocacy, continuous professional growth and operational confidence to protect the best interests of all credit unions. For more information about CUNA, visit cuna.org.

Electronic Check Clearing House Organization (ECCHO)

ECCHO is a not-for-profit national check clearinghouse owned by its almost 3,000 member financial institutions dedicated to promoting electronic check collection and related payment system improvements. ECCHO is recognized across the U.S. as the national provider of private sector check image exchange rules. During 2016, ECCHO member financial institutions used check images to exchange under the ECCHO check clearinghouse rules approximately 7.5 billion transactions totaling \$18.3 trillion. See ECCHO's web page at www.ECCHO.org

Independent Community Bankers of America

The Independent Community Bankers of America®, the nation's voice for more than 5,800 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. For more information, visit ICBA's website at www.icba.org <<http://www.icba.org>>.

National Association of Federally-Insured Credit Unions

The National Association of Federally-Insured Credit Unions (NAFCU) is a direct membership association for federally insured credit unions. We are committed to representing, assisting, educating and informing our member credit unions to help them grow, and help grow the credit union industry.