

February 8, 2019

Submitted via Regulations.gov
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, Federal Reserve System, 12 CFR Part 229, Regulation CC, Docket No. R-1637; Bureau of Consumer Financial Protection, 12 CFR Part 1030, Docket No. CFPB-2018-0035, RIN 3170-AA31

Dear Ms. Misback,

The National Consumer Law Center (NCLC), on behalf of its low income clients, and Americans for Financial Reform, Consumer Action, the National Association of Consumer Advocates, and National Consumers League file these comment on the proposed amendments to Regulation CC regarding the availability of funds and collection of checks. We support the calculation methodology for the inflation adjustments to Regulation CC proposed by the Federal Reserve System (FRB) and the Consumer Financial Protection Bureau (CFPB or Bureau). We also support the amendments proposed in the 2011 Funds Availability proposal,¹ and suggest additional actions that are essential that the agencies take to ensure that consumers have prompt access to deposited funds and to protect consumers from ongoing fraud perpetrated through the current banking and check clearing system.

I. 2018 Proposed Changes

We support the methodology and rules proposed in 2018 for inflation adjustments to Reg. CC. The proposal reflects an appropriate balancing between the needs of consumers for prompt access to a base amount of deposited funds that is not reduced by inflation with the banks' need for stable rules that do not require retooling every year. The proposed calculation methodology to be applied to the dollar amounts in the Reg. CC is a sensible means of dealing with the vicissitudes of inflation.

We believe that five years is the appropriate interval to consider inflationary adjustments. It avoids the need for constant yearly changes or analysis that would not always lead to changes. A longer period, however, would not be appropriate as it would risk inflation cutting down on consumers' effective access to funds.

We support the proposal to round inflation adjustments to the nearest \$25. Unusual amounts would be hard for consumers to understand or remember.

We especially support the proposal to analyze the period since the last adjustment, not simply in the prior five years, in the event that the previous five-year assessment did not result in a change due to negative inflation or rounding down to \$0. This approach ensures that the inflation

¹ 76 FR 16862-01, Proposed Rules, Federal Reserve System, 12 CFR Part 229 [Regulation CC; Docket No. R-1409], Availability of Funds and Collection of Checks, March 25, 2011. 76 FR 16862-01.

adjustments will remain accurate by not ignoring a series of periods in which the inflationary changes were just under \$12.50. We also agree that negative inflation should not result in decreased funds availability but should be taken into account in subsequent periods. That approach prevents confusion and unnecessary adjustments while ensuring that overall inflation adjustments remain accurate.

We have no comment on the changes to the definition of states and the technical amendments to the Bureau's Regulation DD.

II. Comments on the 2011 Funds Availability Proposal

We support the amendments proposed in 2011 to amend Regulation CC to:

- Reflect the elimination of nonlocal checks and to extend the local check available schedule to all checks in light of the single check processing region now in effect.
- Reduce the maximum hold period for nonproprietary ATM deposits.
- Exclude declined debit card transactions from the exception that allows banks to extend hold times for consumers who have had "repeated overdrafts."
- Reduce the reasonable hold extension period for non "on us" checks to two business days.
- Require warranties for "electronic items not derived from checks" to place the burden of loss on the originating institution. This is a good beginning to changing the dynamics of these instruments of fraud, but as discussed in subsection III *infra*, it is not sufficient to protect consumers from the losses that accompany allowing these instruments.

We reiterate the comments previously submitted in 2011 and in 2013 supporting these proposals.²

III. Additional Comments on Funds Availability and Check Fraud

The FRB and CFPB acknowledge that the 2018 proposed amendments do not address the longstanding need to address other issues in connection with funds availability. While the agencies have stated that they do not seek comments on those issues at this time, we would be remiss if we did not repeat, as we have since at least 2013, that the agencies must update Regulation CC to ensure that consumers have prompt access to funds deposited to prepaid accounts and via remote deposit capture. We attach and incorporate our 2013 comments on those issues.³ It is especially appropriate to address prepaid accounts at this time now that the CFPB has issued final rules defining those accounts, which will go into effect April 1, 2019.

We also repeat our 2013 request that the agencies address the persist problems posed by Nigerian check scams and other check or electronic deposit scams that exploit the confusion about

² Comments of Consumers Union, Consumer Federation of America re 12 CFR Part 229, Regulation CC; Docket No. R-1409 (June 1, 2011), attached hereto; Supplemental Comments of NCLC et al., 12 CFR Part 229, Regulation CC: Docket No. R-1409, 76 Fed. Reg. 16862 (Mar. 25, 2011), Remotely Created Items, Funds Availability Schedule for Prepaid Cards and Mobile Deposits (Sept. 18, 2013), https://www.nclc.org/images/pdf/rulemaking/comments-regulation_cc_rcc_efaa_9-18-2013.pdf and attached hereto ("2013 Comments").

³ 2013 Comments.

the difference between funds availability and settlement. The FRB and CFPB should consider establishing a definite time that consumers can understand after which the deposit is final and the bank may not exercise the right of chargeback. The agencies could also consider requiring hold times or special disclosures or alerts about the possibility of chargeback in the event of an unusually large deposit that the institution is giving the consumer access to prior to settlement. We addressed the problem of check scams in our 2013 comments.

We also repeat our prior comments urging the Bureau and the FRB to address the problems caused by remotely created checks (RCCs) and remotely created payment orders (RCPOs) (called “electronically-created items” or “electronic image and information” by the FRB) in consumer transactions. The CFPB and FRB should:

- Open a rulemaking to work towards the elimination of RCCs and RCPOs in consumer transactions;
- Clarify that RCPOs are covered by the protections of Regulation E;
- Improve monitoring of both RCCs and RCPOs;
- Treat remotely created items that bear a handwritten electronic “signature” in the same fashion as RCCs and RCPOs.

These issues are discussed in our 2013 comments.

Thank you for the opportunity to submit these comments. If you have questions, please contact Lauren Saunders, National Consumer Law Center, lsaunders@nclc.org, (202) 595-8745.

Respectfully submitted,

Americans for Financial Reform
Consumer Action
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Consumers League