

Federal Reserve Bank of San Francisco
OVERVIEW OF THE PROPOSED AMENDMENTS

This summary is for informational purposes only and is not intended as legal advice.

I. The General Provisions of the Check 21 Act in the Proposed Reg. CC amendments.

Check 21 facilitates the broader use of electronic check processing without mandating that any bank change its current check collection practices by authorizing the use of a new negotiable instrument called a substitute check.

A substitute check (defined in 229.2(zz)) is a paper reproduction of an original check that contains an image of the front and back of the original check and is suitable for automated processing in the same manner as the original check.

A bank that for consideration transfers (both defined in 229.2(bbb)), presents, or returns a substitute check (or another paper or electronic representation of a substitute check) warrants that (1) the substitute check contains an accurate image of the front and back of the original check and a legend stating that it is the legal equivalent of the original check, and (2) no depository bank, drawee, drawer, or indorser will be asked to pay a check that it already has paid (warranties are contained in 229.52(a)).

The warranties are intended to flow forward to all persons, including the paying bank, that received a substitute check or any paper or electronic representation of a substitute check, but not backward to persons that handled only the original check or some representation of the original check that was not derived from a substitute check (229.52(b)).

A substitute check for which a bank has made these warranties is the legal equivalent of the original check for all purposes and all persons (225.51(a)).

Check 21 does not require any bank to use electronic check processing, receive electronic presentment, or create substitute checks, nor would Check 21 make electronic check images or electronic check information the legal equivalent of original checks. However, after Check 21 becomes effective, any bank or other person that requires an original check must accept a legally equivalent substitute check in satisfaction of that requirement. Characteristics of a substitute check are such that a bank that receives a substitute check would be able to process that substitute check as it would process the original check. As a result, for the most part, banks would not be required to change their check processing equipment or practices because of Check 21, and there would be no need for a bank to sort original checks and substitute checks separately during the check collection process.¹

Certain provisions of Check 21 will affect all banks, even those that do not choose to create substitute checks. For example, a bank that received a substitute check created by another bank, or a paper or electronic representation of a substitute check, would make the substitute check warranties when it delivered that item for presentment, collection, return or provided that item to its customer (229.52(a)). Any bank that receives consideration for a substitute check, or a representation of a substitute check that it transfers, presents, or returns also is responsible for indemnifying any person that suffers a loss due to the receipt of a substitute check instead of the

¹ However, as described in more detail in the section-by-section analysis, a bank must place a “5” in position 44 of the magnetic ink character recognition (MICR) line of a qualified returned substitute check, as opposed to a “2” that is required in that position for a qualified returned original check.

original check (229.53(a)). A bank that provides a substitute check to a consumer might be required to provide an expedited recredit to the consumer if the consumer incurred a loss due to receipt of the substitute check rather than the original check (229.54). Finally, a bank must provide a disclosure that describes substitute checks and substitute check rights to consumers who receive paid checks with their periodic account statements and consumers who receive substitute checks on a case-by-case basis (225.57).

Although the foregoing provisions of Check 21 apply to all banks, the law is designed so that losses associated with a substitute check ultimately would be borne by the party that caused the problem with the substitute check. In many cases this would be the first bank to transfer the substitute check (the reconverting bank defined in §229.2(yy)). A reconverting bank is (1) the bank that creates a substitute checks or (2) the first bank that receives a substitute check created by a person that is not a bank and transfers either that substitute check or a paper or electronic representation of that substitute check.

A bank that paid a warranty claim or provided an indemnity or expedited recredit for a substitute check that it received from another bank therefore could, in turn, bring a warranty, indemnity, or interbank expedited recredit claim against the bank that transferred the substitute check to it and thereby pass the associated loss back to the responsible party.²

Check 21 imposes additional duties on reconverting banks (229.51(b)). A reconverting bank must identify itself as such on a substitute check and must preserve the indorsements of parties that previously handled the check in any form. The reconverting bank will be the first bank to provide the substitute check warranties and the first bank in the chain of indemnifying banks, and thus ultimately should bear any loss traceable to a problem that existed as of the time the substitute check was created.

II. New Subpart D and Associated Amendments to Subpart A.

The proposed new subpart D would incorporate into Reg. CC the requirements of Check 21 that affect banks that create or receive substitute checks or paper or electronic representations of substitute checks. Subpart D contains provisions concerning requirements a substitute check must meet to be the legal equivalent of an original check, reconverting bank duties, the warranties and indemnity associated with substitute checks, expedited recredit procedures for consumers and banks, liability for violations of subpart D, the interaction between subpart D and existing federal and state laws, and the consumer awareness disclosure and other notices regarding substitute checks.

The proposed amendments to implement Check 21 also affect some existing provisions of Reg. CC and its commentary. The Board proposes to amend the authority and scope section, 229.1, to acknowledge Check 21 as an authority source and to describe subpart D. The Board also proposes to supplement some existing defined terms in 229.2 for which Check 21 has slightly different definitions and to define several new terms used in subpart D. The Board also proposes to amend the magnetic ink character recognition (MICR) line requirements for qualified returned checks to allow for differences to facilitate the processing of substitute checks and to amend 229.35 and appendix D to include indorsement and identification standards for substitute checks.

² Banks may further allocate liability amongst themselves as part of their agreements to handle checks electronically. A reconverting bank therefore could, by agreement, pass back some or all of its loss associated with paying a warranty or indemnity to the bank that sent the check to it electronically.

III. Other Amendments to Existing Provisions.

The Board also proposes revisions to several other provisions of Reg. CC and its commentary. These changes generally either respond to inquiries that Board staff has received or respond to changed circumstances affecting the relevant provision. For example, the Board proposes amending the commentary to clarify that a returned check notice need not be written, clarify the application of the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) to consumer disclosures required by Regulation CC, and clarify the time by which a paying bank may extend the return or notice of nonpayment deadline.

SELECTED PROVISION OF REG. CC

I. Definitions. (229.2)

A. The terms not defined have the meanings set forth in the Uniform Commercial Code (UCC).

B. **Account:** Expands 229.2(a) for purposes of subpart D.

C. **Bank:** Expands 229.2(e) for purposes of subpart D: includes Treasury and Postal Service to the extent they act as paying banks.

D. **Original check: 229.2(ww)** The first paper check issued with respect to a particular payment transaction.

E. **Reconverting bank: (229.2(yy))**

- 1) The bank that creates a substitute check, or
- 2) With respect to a substitute check that was created by a person, not a bank, the first bank that receives substitute check and transfers, presents, or returns that substitute check or, in lieu thereof, the first paper or electronic representation of that substitute check.
- 3) **Commentary.**
 - a) Substitute check is created when and where a paper reproduction of an original check meeting 229.2(zz) is physically printed.

F. **Substitute check: 229.2(zz)** a paper reproduction of an original check that:

- 1) Contains an image of the front and back of the original check;
- 2) Bears a MICR line containing all the information appearing on the MICR line of the original check, except as provided under generally applicable industry standards for substitute checks to facilitate the processing of substitute checks;
- 3) Conforms in paper stock, dimension, and otherwise with generally applicable industry standards for substitute checks; and
- 4) Is suitable for automated processing in the same manner as the original check.
- 5) **Commentary.**
 - a) Clarifies that electronic check file or electronic check image that has not been printed is not a substitute check.
 - b) Explains impact of encoding error in amount field.
 - c) Explains impact of check imaging equipment errors/failures to MICR line.

G. **Sufficient copy. 229.2(aaa)** A copy of an original check that accurately represents all of the information on the front and back of that check as of the time it was truncated or that otherwise is sufficient to determine the validity of the relevant claim.

H. **Copy** of an original check means any paper reproduction of an original check, including a paper printout of an electronic image of the original check, a photocopy of the original check, or a substitute check.

1) Copy must be paper reproduction: electronic image not yet printed is not a copy or a sufficient copy.

I. **Transfer and consideration 229.2(bbb)** Supplements UCC's definition

1) The term "transfer" with respect to a substitute check or a paper or electronic representation of a substitute check means delivery of the substitute check or other representation of the substitute check by a bank to a person other than a bank; and

a) Except as provided in (bbb)(2)(ii), a bank that transfers a substitute check or paper or electronic representation of a substitute check directly to a person other than a bank has received consideration for the substitute check or other paper or electronic representation of the substitute check if it has charged, or has the right to charge, the person's account or otherwise has received value for the check.

b) A bank does not receive consideration when it transfers a substitute check or a paper or electronic representation of a substitute check solely in response to a person's warranty, indemnity, expedited recredit, or other claim with respect to the substitute check.

2) Impact on Warranties and Indemnities

a) Check 21 warranties (precondition for the legal equivalence of a substitute check) and the indemnity, are given when a substitute check or representation thereof, is transferred, presented, or returned for consideration. Under UCC, a bank that pays a substitute check that it later gives to the drawer or a bank that pays a check presented electronically and then creates a substitute check to give to the drawer would not be transferring the check to the drawer under UCC and arguably would not receive consideration for the substitute check from the drawer. However, Check 21 explicitly provides that a drawer receives the substitute check warranties if it receives a substitute check or a paper or electronic representation of a substitute check. Check 21 also provides that a drawer who suffers a loss due to receipt of a substitute check instead of the original receives an indemnity. These provisions indicate that the substitute check received by the drawer in the examples provided above is intended to be the legal equivalent of the original check and subject to the warranties and indemnity.

b) Therefore, for the limited purpose of making the warranty, indemnity, and legal equivalence sections work as intended, the proposed rule would expand the term transfer to include delivery of a substitute check (or a paper or electronic representation of a substitute check) by a bank to a person not a bank. The proposed rule also would expand the term consideration to include the bank's charging, having the right to charge, or otherwise receiving value for a substitute check (or paper or electronic representation of the substitute check) that the bank transfers. However, the proposed rule would explicitly exclude from the definition of consideration the transfer of a substitute check solely in response to a claim related to that substitute check.

2) **Commentary.** Examples provided.

J. **Truncate 229.2(ccc)** means to remove an original check from the forward collection or return process and send to a recipient, in lieu of such original check, a substitute check or, by agreement, information relating to the original check (including data taken from the MICR line of the original check or an electronic image of the original check), whether with or without the subsequent delivery of the original check.

1) **Commentary.** Truncation does not include removal of a substitute check from the check collection or return process.

K. *Truncating Bank 229.2(ddd)* Bank that truncates the original check or if another person other than a bank truncates the check, the first bank that transfers, presents, or returns the check in a form other than the original check.

II. *Encoding of Qualified Return Check. 229.31(a)(2)*

A. Deletes “The time for expeditious return under the forward-collection test, and the deadline for return under the UCC and Regulation J are extended by one business day if the returning bank converts a returned check to a qualified returned check.”

B. Adds “A qualified returned check must be encoded in magnetic ink with the routing number of the depository bank, the amount of the returned check, and a “2” or, in the case of a substitute check, a “5” in position 44 of the MICR line as a return identifier in accordance with generally applicable industry standards.

III. *Indorsement Standards. 229.35(a), 220.38(d) and Appendix D*

A. **223.35(a)** Bank, other than paying bank, handling a check during forward collection or a returned check shall indorse in accordance with indorsement standards in Appendix D.

B. When printing depository bank indorsement or a previously applied electronic indorsement of the depository bank onto a substitute check at the time the substitute check is created, reconverting bank shall place the indorsement on the back of the check between 1.95 and 2.55 inches from the leading edge of the check. **Appendix D(1)(iv)**.

C. For indorsements of subsequent collecting bank or returning bank when bank is reconverting bank, asterisk must be at each end of the number to identify bank as reconverting bank. **Appendix D(2)**.

D. ***Reconverting banks, Appendix D(3)*** when creating a substitute check, must:

1 if depository bank, collecting bank, or returning bank, place its indorsement on back of check;

2) if paying bank, identify itself by placing its nine-digit routing number (without arrows) and asterisk at each end of the number, on back of check;

3) Place on front of check, between .25 and 2.10 inches from the trailing edge of the check and within .575 inches from the top of the check, its 9-digit routing number (without arrows) and an asterisk at each end of the number;

a) Place on front of the check, between 2.10 and 2.50 inches from the trailing edge of the check and within 2.6 inches from the top of the check, the truncating bank’s 9-digit routing number (without arrows) and a bracket at each end of the number.

E. All indorsements, including the depository bank indorsement, must be printed in black ink. (Current regulation requires dark ink or purple for depository bank indorsement, and any color other than purple for returning bank indorsement.). **Appendix D(4)**.

F. Indorsement locations would conform to ANS X9.90.

G. Reconverting bank bears the liability for any loss that results due to the shift in placement of the indorsement. **225.38(d)(1)**.

H. ***COMMENTS REQUESTED*** on what benefits, if any, there would be in providing returning banks with the flexibility to indorse on the front of checks and to include additional information in their indorsements.

SUBPART D – Substitute Checks.

IV. General Provisions. 229.51

A. Legal equivalence. 225.51(a)

- 1) Substitute check for which a bank has provided the warranties is the legal equivalent of an original check for all persons and all purposes, including any provision of federal or state law, if the substitute check:
 - a) Accurately represents all of the information on the front and back of the original check as of the time the original check was truncated; and
 - b) Bears the legend, “This is a legal copy of your check. You can use it the same way you would use the original check.”
- 2) Board believes that Check 21 requires a bank warranty as another prerequisite of legal equivalence.
- 3) **Commentary.**
 - a) Although a person still would be entitled to receive a paper check absent agreement to the contrary, that person would be required to accept legally equivalent substitute check.
 - b) A person that receives a substitute check cannot be assessed costs associated with the creation of the substitute check, absent agreement to the contrary.
 - c) Examples provided.
 - d) Bank may not vary the language of the legal equivalence legend.

B. Reconverting bank duties regarding Indorsements and Identifications. 229.51(b)

- 1) Reconverting bank shall ensure that a substitute check:
 - a) Bears all indorsements applied by parties that previously handled the check in any form for forward collection or return;
 - b) Identifies the reconverting bank in a manner that preserves any previous reconverting bank identifications, in accordance with industry standards and Appendix D); and
 - c) Identifies the bank that truncated the original check in accordance with industry standards and Appendix D.
- 2) **Commentary.**
 - a) If indorsements were applied electronically after original was truncated or were applied electronically after a substitute check was converted to electronic form, the reconverting bank must apply those indorsements physically to the substitute check.
 - b) A reconverting bank is not responsible for obtaining indorsements that persons that previously handled the check should have applied, but did not.
 - c) Reconverting bank must place the routing number of the truncating bank, surrounded by brackets, on the front of the substitute check in accordance with Appendix D.
 - d) Examples provided.

C. Legal Status of Item that Purports to be substitute checks. 229.51(c)

- 1) Recipient of an item that purports to be but is not a substitute check, because it failed to meet the substitute check definition, has warranty and indemnity rights, and, where applicable, recredit and consumer awareness disclosure rights under subpart D as though the item were a substitute check.
- 2) **COMMENTS REQUESTED** on whether an item that fails to meet any of the other substitute check requirements in 229.2(zz) also should be treated as though it were a substitute check for those limited purposes.

D. Applicable law. 229.51(d)

- 1) Substitute check meeting the legal equivalence requirements is subject to any existing federal or state law, including any provision relating to protection of customers, as though it were the original check, to the extent that it is not inconsistent with Check 21.
- 2) **Commentary.** Law is not inconsistent with Check 21 or regulations merely because it allows for the recovery of additional damages.

V. *Substitute Check Warranties. 229.52*

A. Content and provision of substitute warranties. **229.52(a)**

1) A bank that transfers, presents, or returns a substitute check (or a paper or electronic representation of a substitute check) for which it receives consideration warrants to the parties listed in (229.52(b)) that

- a) The substitute check meets the requirements for legal equivalence.
- b) No depository bank, drawee, drawer, or indorser will receive presentment or return of, *or otherwise be charged for*, the substitute check, the original check, or a paper or electronic representation of the substitute check or original check such that the person will be asked to make a payment based on a check that it has already paid.
- c) **COMMENTS REQUESTED** on whether an ACH debit could be considered an electronic version of a substitute check or original check to which the duplicative payment warranty would apply. **COMMENTS SPECICALLY REQUESTED** on whether using information from a check to create an ACH debit entry should be a payment request covered by this warranty.

2) **Commentary.**

- a) A bank that receives a substitute check created by a nonbank makes warranties when it transfers for consideration either the substitute check it received or an electronic or paper representation of that substitute check.
- b) The warranties also are given by any subsequent bank that transfers for consideration either the substitute check or a paper or electronic representation of the substitute check.
- c) A bank that truncates the original check and by agreement transfers the check electronically to a subsequent bank does not make the substitute check warranties to the recipient. However, parties may, by agreement, allocate liabilities associated with the exchange of electronic check information.
- d) Examples provided.

B. **Warranty recipients. 229.52(b)** Warranties are made:

- 1) To the person to which the bank transfers, presents, or returns the substitute check or a paper or electronic representation of such substitute check; and
- 2) To any subsequent recipient which could include a collecting or returning bank, the depository bank, the drawer, the drawee, the payee, the depositor, and any indorsers.
- 3) Clarifies that only flows forward, not backward.
- 4) **Commentary.** Person that initially handled only the original could become a warranty recipient if that person later received a returned substitute check or paper or electronic representation of a substitute check derived from the original check.

VI. *Substitute Check Indemnity 229.53*

A. **Scope of Indemnity 229.53(a)** A bank that transfers, presents, or returns a substitute check or a paper or electronic representation of a substitute check for which it receives consideration shall indemnify the recipient and any subsequent recipient for any loss incurred by any recipient of a substitute check if that loss occurred due to the receipt of a substitute check instead of the original check. (Flows forward.)

1) **Commentary.**

- a) Highlights that the indemnity applies only if the first indemnified party incurred a loss due to the receipt of the substitute check instead of the original check.
- b) However, a bank that paid an indemnity (other than the first reconverting bank) would in turn be eligible to make an indemnity claim even if that bank only received a representation of a substitute check.
- c) Examples provided.

B. Indemnity amount. 228.53(b)

- 1) Amount of the indemnity is:
 - a) the amount of any loss (including interest, costs, reasonable attorney's fees, and other expenses of representation) caused by the breach of a substitute check warranty, or
 - b) in the absence of a breach of a substitute check warranty, the amount of the loss, up to the amount of the substitute check, plus interest and expenses (including costs and reasonable attorney's fees and other expenses of representation).
- 2) Comparative negligence **225.53(b)(2)**
 - a) indemnity amount will be reduced in proportion to the amount of negligence or bad faith of the party making the indemnity claim.
 - b) this comparative negligence section does not reduce any person's rights under the U.C.C. or other applicable law.
 - c) **Commentary.** Examples provided.
- 3) Effect of producing original or sufficient copy **225.53(b)(3)**
 - a) If indemnifying bank produces original check or sufficient copy, indemnifying bank shall:
 - i) Be liable only for losses incurred up to the time the bank provides the original check or sufficient copy; and
 - ii) Have a right to the return of any funds it has paid in excess of those losses.

C. Subrogation of rights 225.53(c).

- 1) An indemnifying bank shall be subrogated to the rights of the party it indemnifies to the extent of the indemnity it has provided and may attempt to recover from another party based on a warranty or other claim.
- 2) **Duty of indemnified party.** Indemnified parties shall have a duty to comply with all reasonable requests for assistance from an indemnifying bank
- 3) **Commentary.** Examples provided.

VII. Expedited Recredit For Consumers. 229.54

A. Circumstances giving rise to a claim. 229.54(a) Consumer may make claim for recredit if consumer asserts in good faith:

- 1) Consumer's bank charged account for a substitute check that was provided to the consumer (consumer need not be in possession of substitute check);
- 2) Substitute check was not properly charged to the consumer account or consumer has a warranty claim;
- 3) Consumer suffered a loss; and
- 4) Production of original check or sufficient copy is necessary to determine whether or not the substitute check was improperly charged or whether warranty claim is valid.
- 5) **Commentary.**
 - a) Provides details concerning when consumer meets criteria for bringing an expedited claim.

b) Consumer's recovery under 229.54 is limited to amount of the substitute check (plus interest if interest-bearing account). Consumer suffering greater loss can seek recovery by bringing warranty, indemnity, or other claim under this subpart or other applicable law.

B. Procedures for making a claim. 229.54(b)

1) **Timing of claim. 229.54(b)(1)** Consumer must submit claim by end of 40th calendar day after later of the calendar day on which bank mailed or delivered periodic statement containing information about the transaction or the substitute check giving rise to the claim. Longer time for extenuating circumstances. **229.54(b)(1)(ii).**

2) **Content of claim. 229.54(b)(2)** must contain:

- a) Description of consumer's claim, including reason consumer believes account was improperly charged or nature of warranty claim;
- b) Statement the consumer suffered loss and estimate of amount;
- c) Reason production or original check or sufficient copy is necessary to determine whether charge was proper or warranty claim valid; and
- d) Sufficient information to allow bank to identify substitute check and investigate the claim.
- e) **Commentary** discusses improper charges and why original check or sufficient copy would be necessary to determine validity of claim.

3) **Form and submission of claim. 229.54(b)(3)** Customer's bank may require consumer to submit information required in writing. May permit electronic submission. Bank must compute time period for acting on claim from date written claim is submitted.

a) **Commentary:**

- i) Statute measures time from "business day" of receipt of claim. Board proposes to use banking day (as with rest of Regulation CC).
- ii) **BOARD REQUESTS COMMENT** on both adjustments relating to time period calculations.

C. Action on claims 225.54(c)

1) **Valid consumer claim. 225.54(c)(1)**

- a) Recredit consumer account for amount of loss, up to amount of substitute check, plus interest if interest-bearing account, no later than end of business day after banking day bank makes determination; and
- b) Send notice as required by **225.54(e)(1).**

2) **Invalid consumer claim. 225.54(c)(2)**

- a) Send notice in **225.54(e)(2).**

3) **Recredit pending investigation. 225.54(c)(3)** If bank has not taken above two actions, before end of 10th business day after banking day consumer submitted claim, bank must:

- a) Recredit account up to amount of loss, up to lesser of amount of check or \$2500, plus interest, if account is interest-bearing, by end of that day and send notice per **225.54(e)(1);** and
- b) Recredit account for remaining amount of loss no later than end of 45th calendar day after banking day consumer submitted claim and send notice per **225.54(e)(1),** unless bank prior to that time has determined consumer's claim is or is not valid.

4) **Reversal of credit. 225.54(c)(4)** Bank may reverse a recredit (including interest) if it:

- a) Determines that substitute check was properly charged or warranty claim was not valid; and
- b) Notifies consumer per **225.54(e)(3).**

5) **COMMENTS REQUESTED** on whether interest credit should be reversed as statute does not specifically provide this information.

6) **COMMENTS REQUESTED** on whether or not its proposed reorganization of the statutory provisions regarding action on claims is an improvement over the statutory organization and encourages specific organizational suggestions.

7) **Commentary.** Bank must provide the recredit pending investigation for each substitute check for which claim submitted, even if the consumer submitted multiple check claims in the same communication.

D. Availability of recredit. 225.54(d)

1) **Next day availability. 225.54(d)(1)** Except as provided in **225.54(d)(2)**, amounts recredited shall be available for withdrawal no later than the start of the business day after the banking day of recredit.

2) **Safeguard exception. 225.54(d)(2)** Bank may delay availability until start of earlier of business day after banking day bank determines claim is valid or the 45th calendar day after banking day on which consumer submitted claim if:

a) Claim submitted during 30-day calendar period beginning on the banking day account was established; or

b) Without regard to charge giving rise to recredit claim -

i) On six or more business days during 6-month period prior to consumers submitting claim, balance in the account was negative or would have been if checks had been paid; or

ii) On two or more business days during such 6-month period, balance in account was negative or would have been negative in amount of \$5,000 or more if checks had been paid.

c) Bank has reasonable cause to believe claim is fraudulent

3) **Overdraft fees. 225.54(d)(3)** bank that delays availability may not impose an overdraft fee for drafts drawn by the consumer on recredited funds until the 5th calendar day after the calendar day on which the bank sent notice required by **225.54(e)(1)**.

E. Notices related to expedited recredit claims. 225.54(e)

1) **Notice of recredit. 225.54(e)(1)** Bank that recredits must notify consumer of recredit no later than business day after banking day on which bank recredits account and date on which recredit funds available for withdrawal.

2) **Notice that claim not valid. 225.54(e)(2)** No later than business day after banking day of determination. Notice which must include:

a) Original check or sufficient copy (except as provided in 229.58);

b) Explanation of the basis for the bank's determination; and

c) Information or documents, if any, bank relied on in making its determination or statement that consumer may request copies of such information or documents.

d) **Commentary.**

i) Bank must explain reason for denial.

ii) Bank must provide original check or sufficient copy unless bank is providing denial notice electronically and consumer has agreed to receive that type of information electronically.

3) **Notice of reversal of recredit: 225.54(e)(3)** Bank that reverses amount previously credited, must notify consumer no later than business day after banking day of reversal:

a) Amount of reversal: and

b) Date of reversal.

F. Other claims not affected. 225.54(f) Providing recredit does not absolve bank from liability for claim made under any other provision of law, such as claim for wrongful dishonor of a check under UCC or liability for additional damages under 229.53 or 229.56.

VIII. Expedited Recredit Procedures for Banks. 229.55

A. **Circumstances giving rise to a claim. 225.55(a)** Bank with indemnity claim may make expedited recredit claim against indemnifying bank if:

- 1) Claimant bank or bank that claimant bank has indemnified:
 - a) Has received claim from consumer; or
 - b) Would have been subject to such a claim if consumer account had been charged for a substitute check.
- 2) Claimant bank is obligated to provide expedited recredit with respect to such substitute check under 229.154 or otherwise has suffered a resulting loss; and
- 3) Production of original check or sufficient copy is necessary to determine validity of charge to account or validity of warranty claim.

B. **Procedures for making claim. 225.55(b)**

- 1) Timing of claim: **225.55(b)(1)** due by end of 120th calendar day after date of the transaction giving rise to the claim.
 - a) **Commentary.** Time period allows multiple banks that might have suffered a loss as a result of particular transaction to bring a claim.
- 2) Content of claim: **225.55(b)(2)**
 - a) Description of consumer's claim or warranty claim, including why bank believes substitute check not properly charged to consumer account;
 - b) Statement that claimant bank is obligated to recredit account or otherwise has suffered loss and estimate of amount of loss, including interest, if applicable;
 - c) Reason production of original check or sufficient copy is necessary to determine validity of charge to account or warranty claim; and
 - d) Sufficient information to allow indemnifying bank to identify substitute check and investigate the claim.
- 3) **Requirements relating to copies of substitute checks. 225.55(b)(3)** If the information submitted by claimant bank includes a copy of any substitute check, claimant bank must take reasonable steps to ensure that the copy cannot be mistaken for the legal equivalent of the check or sent or handled by any bank for forward collection or return.
- 4) **Form and submission of claim: computation of time. 225.55(b)(3)** The indemnifying bank may require claimant bank to submit information in writing, including copy of paper or electronic claim submitted by the consumer, if any. Bank that requires written claim shall compute any time period that begins with the submission of the claim from the date the bank received the written claim.

C. **Action on claims. 225.55(c)** No later than 10th business day after banking day that bank receives claim, indemnifying bank must:

- 1) **Recredit the claimant bank 225.55(c)(1)** for the amount of the claim, up to the amount of the substitute check, plus interest, if applicable.
- 2) **Provide the claimant bank the original check 225.55(c)(2)** or sufficient copy.
- 3) **Provide information 225.55(c)(3)** to claimant bank regarding why the claimant bank is not obligated to comply with **225.55(c)(1)** or **(c)(2)**.

D. **Recredit does not abrogate other liabilities. 225.55(d)** Providing recredit does not absolve indemnifying bank from liability for claims brought under any other law or from additional damages under 229.53 or 229.56

E. **Indemnifying bank's right to a refund. 225.55(e)**

- 1) If claimant bank reverses a recredit to consumer account or otherwise receives reimbursement, claimant bank must provide refund promptly to any indemnifying bank that previously advanced funds to claimant bank.
- 2) If indemnifying bank provides claimant bank with original check or sufficient copy, 229.53.(b)(3) governs indemnifying bank's entitlement to repayment of any amount

provided to the claimant bank that exceeds amount of losses claimant bank incurred up to that time.

IX. Liability 229.56

A. Measure of damages.

1) **In general. 229.56(a)(1)** Except as provided in 229.56(a)(2) or (a)(3) or 229.53, any person that breaches a warranty in 229.52 or fails to comply with any requirement of this subpart shall be liable to that person in the sum of:

a) Lesser of the amount of loss suffered as a result of the breach or failure or the amount of the substitute check; and

b) Interest and expenses, related to the substitute check.

2) **Offset of recredits. 229.56(a)(2)** Amount of damages shall be reduced by any amount received as recredit under 229.54 or 229.55.

3) **Comparative negligence. 229.56(a)(3)** Amount of damages shall be reduced by proportion of negligence or bad faith. Nothing in this paragraph reduces the rights of consumer or any other persons under UCC or other applicable provision of state or federal law.

B. Timeliness of actions. 229.56(b) Delay by bank beyond any time limits in subpart is excused if delay is result of interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank and if the bank uses such diligence as the circumstances require.

C. Jurisdiction. 229.56(c) Person may bring action in any U.S. district court or any other court of competent jurisdiction. Claim must be brought within one year of date on which person's cause of action accrues. Cause of action accrues as of the date on which the injured party first learns, or by which such person reasonably should have learned, of the facts and circumstances giving rise to the cause of action, including the identity of the warranting or indemnifying bank against which the action is brought.

D. Notice of claim. 229.56(d) Except as otherwise provided in this paragraph, unless a person gives notice of a claim under this section to the warranting or indemnifying bank within 30 calendar days after the person has reason to know of both the claim and the identity of the warranting or indemnifying bank, the warranting or indemnifying bank is discharged from liability in action to enforce a claim under this subpart to the extent of any loss caused by the delay in giving notice of the claim. A timely recredit claim by a consumer under 229.54 constitutes timely notice under this paragraph.

X. Consumer Awareness 229.57

A. General disclosure requirement and content. 229.57(a) Banks must provide to consumer customers notice that:

1) Substitute check is legal equivalent of original if it meets the legal equivalence requirements; and

2) Consumer recredit right when consumer believes substitute check was not properly charged.

a) **Commentary:** Bank may, but is not required to use the model disclosures. Bank may include additional information.

B. Distribution 229.57(b)

1) To consumers who receive paid checks with periodic statements **229.57(b)(1):**

a) No later than first regularly scheduled communication with consumer after 28 October 2004, for each consumer who is a customer of bank on that date; and

- b) At time customer relationship initiated for each account opened after 28 October 2004.
- 2) To consumers who receive substitute checks only on an occasional basis (unless above notice already provided) **229.57(b)(2)**:
 - a) Board notes that providing notice at time of request may be impractical as bank may not know at the time of the request whether it will provide original check substitute check or other copy. **COMMENTS REQUESTED** on alternatives:
 - i) **Alternative 1:** requests an original check or copy of a check and receives a substitute check, at time of such requests
 - ii) **Alternative 2:** requests an original check or copy of a check and receives a substitute check, at the time the bank provides such a substitute check or
 - b) Receives a returned substitute check, at the time the bank provides such substitute check.

XI. Mode of Delivery of Information Required by This Subpart 229.58

- A. Bank may deliver any notice required by U.S. mail or by any other means through which recipient has agreed to receive account information.
- B. If bank required to provide original check or sufficient copy, bank may instead provide an electronic image of original or sufficient copy if recipient has agreed to receive that information electronically.

XII. Relation to Other Law. 229.59

- A. Check 21 supersedes any provision of federal or state law, including UCC that is inconsistent with Check 21, but only to the extent of the inconsistency.

XIII. Variation by Agreement 229.60

- A. Any provision of 229.55 may be varied by agreement of the banks involved.
- B. No other provisions may be varied by agreement by any person.

XIV. Remotely-Created Demand Drafts.

- A. **BOARD REQUESTS COMMENT** on whether it would be appropriate for to incorporate UCC revisions related to remotely-created demand drafts.
 - 1) Remotely-created consumer item means “an item drawn on a consumer account which is not created by the payor bank and does not bear a handwritten signature purporting to be the signature of the drawer.”
 - 2) UCC revisions require person who transfers a remotely-created consumer item to warrant that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.

XV. Model Availability Disclosures, Clauses, and Notices; Model Substitute Check Policy Disclosures and Notices

A. Appendix C contains model availability policy and substitute check policy disclosures, clauses, and notices to facilitate compliance with the disclosure and notice requirements of Reg. CC. The Board's notice indicated that while use of the models is not required, banks using the Substitute Check Policy Disclosure properly to make the required Reg. CC disclosure will be deemed to be in compliance.

The Models provided include:

- C-5A Substitute Check Policy Disclosure
- C-22 Expedited Recredit Claim, Full Refund
- C-23 Expedited Recredit Claim, Partial Refund
- C-24 Expedited Recredit Claim, Denial Notice
- C-25 Expedited Recredit Claim, Reversal Notice