

FEDERAL RESERVE SYSTEM

12 CFR Parts 210 and 229

Regulations J and CC; Docket No. R-1226

Collection of Checks and Other Items By Federal Reserve Banks and Funds Transfers Through Fedwire and Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors is adopting a final rule amending Regulation CC to define “remotely created checks” and to create transfer and presentment warranties for such checks. The purpose of the amendments is to shift liability for unauthorized remotely created checks to the depository bank, which is generally the bank for the person that initially created and deposited the remotely created check. The Board is also adopting conforming cross-references to the new warranties in Regulation J.

EFFECTIVE DATE: July 1, 2006.

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SUPPLEMENTARY INFORMATION:

Background

Existing Law and the Board’s Proposed Rule

“Remotely created checks” typically are created when the holder of a checking account authorizes a payee to draw a check on that account but does not actually sign the check.¹ In place of the signature of the account-holder, the remotely created check generally bears a statement that the customer authorized the check or bears the customer’s printed or typed name. Remotely created checks can be useful payment devices. For example, a debtor can authorize a credit card company to create a remotely created check by telephone, which may enable the debtor to pay his credit card bill in a timely manner and avoid late charges. Similarly, a person who does not have a credit card or debit card can purchase an item from a telemarketer by authorizing the seller to create a remotely created check.

On the other hand, remotely created checks are vulnerable to fraud because they do not bear the drawer’s signature or other readily verifiable indication of authorization. Because remotely created checks are cleared in the same manner as other checks, it is difficult to measure the use of remotely created checks relative to other types of checks.

¹ There is no commonly accepted term for these items. The terms “remotely created check,” “telecheck,” “preauthorized drafts,” and “paper draft” are among the terms that describe these items.

However, there have been significant consumer and bank complaints identifying cases of alleged fraud using remotely created checks.

Existing Law on Remotely Created Checks

A remotely created check is subject to state law on negotiable instruments, specifically Articles 3 and 4 of the Uniform Commercial Code (U.C.C.) as adopted in each state. Under the U.C.C., a bank that pays a check drawn on the account of one of its customers may charge a customer's account for a check only if the check is properly payable. A bank generally must recredit its customer's account for the amount of any unauthorized check it pays.² This obligation is subject to limited defenses.³ In addition, the paying bank may obtain evidence that the depositor did in fact authorize the check and is seeking to reverse the authorization. Under such circumstances, the paying bank would not be obligated to recredit its customer for the amount of the check.⁴

A paying bank may, until midnight of the banking day after a check has been presented to the bank, return the check to the bank at which the check was deposited if, among other things, the paying bank believes the check is unauthorized. Once its midnight deadline has passed, the paying bank generally cannot return an unauthorized check to the depository bank.⁵

The provisions of the U.C.C. cited above implement the rule set forth in the seminal case of Price v. Neal,⁶ which held that drawees of checks and other drafts must bear the economic loss when the instruments they pay are not properly payable because the drawer did not authorize the item.⁷ Under the Price v. Neal rule, the paying bank must bear the economic loss of an unauthorized check with little recourse other than bringing an action against the person that created the unauthorized item. This rule currently applies to all checks, including remotely created checks, in a majority of states.

The policy rationale for the Price v. Neal rule is that the paying bank, rather than the depository bank, is in the best position to judge whether the signature on a check is the authorized signature of its customer. Remotely created checks, however, do not bear a handwritten signature of the drawer that can be verified against a signature card. In most cases, the only means by which a paying bank could determine whether a remotely created check is unauthorized and return it in a timely manner would be to contact the customer before the midnight deadline passes. However, before a paying bank can verify the authenticity of remotely created checks, it first must identify remotely created checks drawn on its accounts. Because there is no code or feature on remotely created checks

² U.C.C. 4-401.

³ For example, the paying bank may be able to assert that the customer failed to notify the bank of the unauthorized item with "reasonable promptness" (U.C.C. 4-406(c) and (d)).

⁴ The FTC's Telemarketing Sales Rule prohibits a telemarketer from issuing a remotely created check on a consumer's deposit account without the consumer's express verifiable authorization. The authorization is deemed verifiable if it is in writing, tape recorded and made available to the consumer's bank upon request, or confirmed by a writing sent to the consumer prior to submitting the check for payment. 6 CFR part 310.

⁵ See U.C.C. 4-301 and 4-302. In limited cases, the paying bank may be able to recover from the presenting bank the amount of a check that it paid under the mistaken belief that the signature of the drawer of the draft was authorized. This remedy, however, may not be asserted against a person that took the check in good faith and for value or that in good faith changed position in reliance on the payment or acceptance. U.C.C. 3-418(a) and (c).

⁶ 97 Eng. Rep. 871 (K.B. 1762).

⁷ See also Interbank of New York v. Fleet Bank, 730 NYS 2d 208 (2001).

that would enable a paying bank to identify them reliably in an automated manner, remotely created checks rarely come to the attention of paying banks until a customer identifies the check as unauthorized, usually well after the midnight deadline.

Recent Legal Changes to Address Remotely Created Checks Amendments to the U.C.C.

In recognition of the particular problems presented by remotely created checks, the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 2002 approved revisions to Articles 3 and 4 of the U.C.C. that specifically address remotely created checks. The U.C.C. revisions define a remotely created check (using the term “remotely-created consumer item”) as “an item drawn on a consumer account, which is not created by the paying bank and does not bear a hand written signature purporting to be the signature of the drawer.”⁸ The U.C.C. revisions require a person that 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.⁹ Accordingly, the U.C.C. alters the Price v. Neal rule for remotely-created consumer items by shifting liability for those items to the transferors.¹⁰

These revisions rest on the premise that it is appropriate to shift the burden of ensuring authorization of a remotely created check to the bank whose customer deposited the remotely created check because this bank is in the best position to detect the fraud.¹¹ The U.C.C. warranty provides an economic incentive for the depository bank to monitor customers that deposit remotely created checks and, therefore, should have the effect of limiting the quantity of unauthorized remotely created checks that are introduced into the check collection system.

Amendments to State Laws

Fewer than half the states in the U.S. have amended their Articles 3 and 4 to include provisions to address remotely created checks.¹² Among the states that have made such amendments, the definitions and warranties are not uniform in their scope or requirements. In addition to the state codes, some check clearinghouses have adopted warranties that apply to remotely created checks that are collected through these clearinghouses. The state-by-state approach to the adoption of remotely created check warranties complicates the determination of liability for remotely created checks collected across state lines, because the bank that presents a check may not be subject to the same rules as the paying bank.

⁸ U.C.C. 3-103(16).

⁹ U.C.C. 3-416(a). A person that transfers a remotely-created consumer item for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee, 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. See also U.C.C. 4-207(a)(6), 3-417(a)(4), 4-208(a)(4).

¹⁰ For items other than remotely-created consumer items, the transferor must warrant only that it has “no knowledge” that the instrument is unauthorized. U.C.C. 3-417(a)(3).

¹¹ U.C.C. 3-416, Official Comment, paragraph 8. The Official Comment notes that the provision supplements the FTC’s Telemarketing Sales Rule, which requires telemarketers to obtain the customer’s “express verifiable authorization.”

¹² Those states include Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Maine, Missouri, Minnesota, Nebraska, New Hampshire, North Dakota, Oregon, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin.

Proposed Rule

On March 4, 2005, the Board published for comment a proposal to amend Regulation CC to provide transfer and presentment warranties for remotely created checks.¹³ This proposal was issued pursuant to the Expedited Funds Availability Act (the EFA Act), Pub. L. 100-86, 101 Stat. 635 (codified at 12 U.S.C. 4001 *et seq.*), which authorizes the Board to establish rules allocating losses and liability among depository institutions “in connection with any aspect of the payment system.”¹⁴ As noted above, the check collection and return system operates nationally. As a result, in order for the remotely created check warranties to be effective they must apply uniformly and nationwide.

The Board proposed to define a “remotely created check” as a check that is drawn on a customer account at a bank, is created by the payee, and does not bear a signature in the format agreed to by the paying bank and the customer. Unlike the U.C.C. amendments, the Board’s proposed definition would apply to remotely created checks drawn on both consumer and non-consumer accounts.

The Board proposed to create transfer and presentment warranties that would apply to remotely created checks that are transferred or presented by banks to other banks. Under the proposed warranties, any transferor bank, collecting bank, or presenting bank would warrant that the remotely created check that it is transferring or presenting is authorized according to all of its terms by the person on whose account the check is drawn. The proposed warranties would apply only to banks and ultimately would shift liability for the loss created by an unauthorized remotely created check to the depository bank. A paying bank would not be able to assert a warranty claim under the Board’s proposed rule directly against a nonbank payee that created or transferred an unauthorized remotely created check.

General Comments

The Board received over 250 comments on the proposed rule from depository institutions of various sizes, trade associations that represent depository institutions, state attorneys general, individuals, academics, consumer representatives, the Permanent Editorial Board of the U.C.C., and Reserve Banks. This section presents an overview of the central points contained in the comments that the Board received. The section-by-section analysis of the final rule, set forth below, discusses the comments in greater detail and responds to specific concerns regarding the definition of remotely created check and the scope of the warranties.

The commenters provided overwhelming support for the proposed rule, although many suggested that the Board make specific revisions in the final rule. The Board received many comments in favor of the proposal from small depository institutions, many of which noted that they regularly suffer losses as the result of unwittingly paying remotely created checks that customers later identify as unauthorized. Large depository

¹³ 70 FR 10509.

¹⁴ The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Such liability may not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability. 12 U.S.C. 4010(f).

institutions and their trade associations also strongly supported the proposal and specifically addressed a number of important issues discussed below.

Only one depository institution opposed the proposal in its entirety, arguing that there is no factual predicate for the proposed rule because paying banks do not verify the authenticity of customer signatures on any checks. The Board believes that many banks do examine signatures on some subset of checks. Nevertheless, given that remotely created checks do not bear a verifiable mark of authentication, the depository bank is in a better position to prevent the introduction of unauthorized remotely created checks into the check collection process by acquainting itself with the business practices of its customers who routinely deposit such checks. The purpose of the Board's rule is to create an economic incentive for depository banks to perform the requisite due diligence on their customers by shifting liability for unauthorized remotely created checks to the depository bank.

Some commenters, including Attorneys General representing 35 states, recommended that the Board prohibit the use of remotely created checks altogether, arguing principally that legitimate use of remotely created checks has significantly declined, largely as a result of new automated clearing house (ACH) payment applications that can be used in place of remotely created checks. Several commenters, however, reported an increase in the use of the remotely created checks (albeit some noting that this increase in use has been accompanied by a commensurate increase in unauthorized remotely created checks). The Board believes that substantial additional research would be required about the uses of remotely created checks and the commercial impact of an outright ban before a prohibition by statute or regulation could be justified. The Board believes its rule provides effective protections against unauthorized remotely created checks while still allowing for the legitimate use of those checks.

Some commenters argued that remotely created checks also should be covered by the Board's Regulation E (12 CFR Part 205), because payments by remotely created check are in fact electronic fund transfers subject to the Electronic Funds Transfer Act (EFTA), which, among other things, requires certain disclosures related to transfers covered by the Act.¹⁵ Under the EFTA, the term "electronic fund transfer" includes any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument.¹⁶ Therefore, as a general matter, the EFTA does not apply to funds transferred from a consumer's account by means of a check. The commenters argued that a remotely created check is initiated by an electronic communication between the consumer and a third party and not by a check or similar paper instrument. Further clarification of the applicability of the EFTA to check transactions that are authorized on-line or by telephone must be made within the context of Regulation E. The Board will continue to monitor developments to determine whether further action is appropriate.

Extension of the midnight deadline.

The Board invited comment on whether a different approach to address the risks of remotely created checks would be appropriate. One alternative on which the Board requested comment was whether the Board should extend the U.C.C. midnight deadline for paying banks that return unauthorized remotely created checks to give the paying bank more time to determine whether a particular check was authorized. Some

¹⁵ 15 U.S.C. 1693 *et seq.*

¹⁶ 15 U.S.C. 1693a(6).

commenters favored the approach because it would mirror the ACH rules set forth by the National Automated Clearing House Association for unauthorized ACH debits, while others opposed this approach arguing that it would delay finality of check payments. One commenter argued that if the Board adopted this approach, then it also should exempt remotely created checks from the funds availability schedule in Regulation CC because the availability schedules are generally related to the collection and return times for a check.

Other commenters viewed the possible midnight deadline extension not as an alternative to creation of new warranties, but as a different enforcement mechanism for the new warranties. These commenters thought that instead of having to make a warranty claim outside of the check collection process when the paying bank seeks to recoup losses following a breach of the remotely created check warranty, extension of the midnight deadline would enable the paying bank to return the unauthorized remotely created through the check collection process. Many of the commenters in this group advocated handling the warranty claim on a “with entry” basis, which is a procedure that has been adopted by certain clearinghouses and which allows a warranty claim to be made through the procedures for returned checks.¹⁷ A few commenters suggested an additional nuance to this approach: unauthorized remotely created checks under \$1000 should be handled on a “with entry” basis and unauthorized remotely created checks over \$1000 should be handled as a warranty claim outside of the check collection and return process.

Because the Board believes that finality of payment and the discharge of the underlying obligation are fundamental and valuable features of the check collection process, the final rule does not make any adjustments to the midnight deadline. Until otherwise established by agreement, banks must assert claims arising under transfer and presentment warranties for remotely created checks outside of the check collection process.

Action by State Governments

The Board also requested comment on whether it should refrain from addressing remotely created checks in Regulation CC and await adoption of the U.C.C. warranties for remotely created checks, or some variation thereof, by all of the states. Numerous commenters expressed opposition to this approach. Generally, these commenters argued that states have been too slow to act on this issue and have not and will not necessarily act uniformly. However, one commenter urged the Board to refrain from usurping the U.C.C. process, arguing that hesitancy by state legislatures to adopt a uniform law may signal defects in the proposed amendment. In light of the comments favoring action by the Board from the Permanent Editorial Board of the U.C.C., as well as thirty-five state Attorneys General, the Board believes that there is broad support for amendments to Regulation CC to address remotely created checks on a nationwide basis and that such amendments are appropriate.

¹⁷ Under the Electronic Check Clearing House Organization’s Uniform Paper Check Exchange Rules, the paying bank “may make a warranty claim” by “delivering such check to the clearinghouse or the depository bank for settlement, in accordance with the clearinghouse’s rules for returned checks.” While the claim is processed through the return settlement process, the delivery of the check to the clearinghouse, and ultimately the depository bank, is not a “return” of the check under the U.C.C. or Regulation CC.

Section-by-Section Analysis

Section 229.2(fff) Definition

The Board proposed the following definition: a remotely created check means a check that is drawn on a customer account at a bank, is created by the payee, and does not bear a signature in the format agreed to by the paying bank and the customer. Commenters had numerous concerns regarding the scope of the proposed definition.

On the issue of whether the definition of remotely created checks should cover items drawn on both consumer and non-consumer accounts, all but one of the commenters addressing this issue supported covering remotely created checks drawn on both consumer and non-consumer accounts. These commenters stated that there is no reason to distinguish between fraud against consumers and fraud against businesses for purposes of this rule.¹⁸ Furthermore, one commenter noted that, as an operational matter, it would be more efficient for banks to treat remotely created checks drawn on both consumer and non-consumer accounts the same. For these reasons, the final rule applies to remotely created checks drawn on both consumer and non-consumer accounts.

With respect to the other elements of the definition, numerous commenters, particularly large depository institutions, preferred the following definition (or minor variations thereon): a remotely created check is a check that (i) is drawn on a customer account at a bank, (ii) is not created by the paying bank, and (iii) does not bear a signature purporting to be the signature of the customer. In the alternative, several commenters favored the definition of demand draft in the commercial code of California, arguing that this definition has been adopted in a number of states and has been applied successfully over the past nine years.¹⁹

With respect to the proposal that a remotely created check must be created by the payee, numerous commenters noted that depository institutions have no physical means of distinguishing between a remotely created check created by a payee and a remotely created check created by, for example, a bill payment service on behalf of the drawer.

The Board considered alternative ways of defining remotely created checks from the perspective of how they were created. Under one formulation, the definition could require that a check not be created by the paying bank in order to be a remotely created check. The advantage of that formulation is that the paying bank should be able to determine whether it created a check and whether the warranty applies. That requirement, however, would not exclude a check created by the customer (such as a check that a customer filled out but forgot to sign) or the customer's agent, such as a bill payment service. However, the Board believes that these checks do not present the same

¹⁸ The one commenter that favored limiting the scope to consumer items argued that if the definition covers commercial accounts, it would weaken the ability of the bank to contract with its commercial customers for timely review of account activity. The Board does not believe this concern warrants a limitation on the scope of the definition. The Board's final rule creates transfer and presentment warranties among banks and is not intended to interfere with the contractual relationships between depository institutions and their customers. The legal relationship between the paying bank and its customer with respect to whether a check was authorized or whether a claim was made in a timely manner continues to be governed by state law.

¹⁹ Under California U.C.C. § 3104(k) a demand draft means a writing not signed by a customer that is created by a third party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft shall contain the customer's account number and may contain any of the following: (1) The customer's printed or typewritten name. (2) A notation that the customer authorized the draft. (3) The statement "No Signature Required" or words to that effect.

risk that the check was not actually authorized by the drawer as the typical telemarketer-created check that is made payable to the entity that created it.

Under another formulation, the definition could exclude checks that are created by the paying bank as well as checks that are created by the customer or the customer's agent. This formulation, however, would exclude from the warranty checks created by telemarketers or other payees to the extent they were acting as agent of the customer, as well as checks created on behalf of the customer by a bill payment service. At a minimum, this formulation would raise issues as to the scope of the creating entity's agency and would seem to cause as many evidentiary difficulties as the Board's original proposal.

After considering the benefits and drawbacks of each formulation, the definition in the Board's final rule requires that a remotely created check must be created by a person other than the paying bank. This definition will be operationally efficient for paying banks because they easily can determine whether the warranty applies to a particular check. In addition, this formulation is consistent with the analogous definition in the U.C.C. Under this definition, the parties to the check will not have to distinguish checks that are created by the payee from checks that are created by a customer's bill-payment service in order to assert a warranty claim. As noted above, the definition will cover certain checks created remotely by bill-payment services, as well as checks that the drawer created but neglected to sign, where there is a less compelling reason for shifting liability for unauthorized checks to the depositor's bank. Including these checks, however, is unlikely to result in significantly greater liability for depository banks. It appears that such checks are generally less prone to fraud, and, therefore, less prone to trigger a warranty claim than are payee-created checks.

Numerous commenters objected to the requirement that a remotely created check not bear a signature "in the format" agreed to by the paying bank and the customer. Many commenters argued that litigation will ensue over the meaning of the phrase "in the format," and that the language will sweep traditional forged checks into the warranty because a forged check may be deemed to not bear a signature in the format agreed to by the paying bank and its customer. Most commenters favored focusing simply on whether a signature was present or not. The language of the proposed definition was intended to introduce greater specificity around the term "signature," which is very broadly defined under the U.C.C., to ensure that the definition does not include traditional forged checks in the warranties. However, in light of the persuasive criticism from numerous commenters, the final rule requires that a remotely created check not bear a signature "applied by, or purported to be applied by, the person on whose account the check is drawn." The commentary to the final rule explains that the term "applied by" refers to the physical act of placing the signature on the check. This formulation should more clearly exclude traditional forged checks from the operation of the new warranties, but include checks created by telemarketers and similar payees.

Several commenters noted that under the definition of customer account in Regulation CC, checks drawn on accounts such as money market accounts and credit accounts would be excluded from the definition of remotely created check, because the proposed definition is limited to checks drawn on a customer account, which under Regulation CC does not include all types of accounts on which checks can be drawn. These commenters pointed out that the U.C.C. definition of remotely created checks,

which covers “accounts” as defined by the U.C.C., includes checks drawn on various types of consumer checking accounts and the Board should also expand its definition of customer account for purposes of the remotely created check warranties. The Board sees no reason to exclude these types of checks from the operation of the new warranties and the final rule expands the definition of account in the final rule, solely for the purposes of the new warranties, to include any credit or other arrangement that allows a person to draw checks on a bank.

Commenters also argued that the definition of remotely created check should cover “payable through” or “payable at” checks. Many of these checks are drawn on a nonbank, such as a mutual fund, but payable through or at a bank. Under Regulation CC the term “check” means a negotiable demand draft drawn on or payable through or at an office of a bank.²⁰ Therefore, the definition of remotely created check could include a “payable through” or “payable at” check if the other requirements of the regulation are met. With regard to the requirement that a remotely created check not bear the signature of the account-holder, the signature of the person on whose account the check is drawn would be the signature of the payor institution (e.g., a mutual fund) or the signatures of the customers who are authorized to draw checks on that account, depending on the arrangements between the “payable through” or “payable at” bank, the payor institution, and the customers. The Board has added clarifying language to the commentary.

One commenter urged the Board to confirm that a substitute check created from a remotely created check benefits from the warranties for remotely created checks. The commentary to the final rule specifically states that the transfer and presentment warranties for remotely created checks would apply to a substitute check that represents a remotely created check.

Section 229.34 Warranties

The Board proposed the following transfer and presentment warranties with respect to a remotely created check: A bank that transfers or presents a remotely created check and receives a settlement or other consideration warrants to the transferee bank, any subsequent collecting bank, and the paying bank that the person on whose account the remotely created check is drawn authorized the issuance of the check according to the terms stated on the check.

Numerous commenters urged the Board to limit the warranty to the terms stated on the “face of the check.” Others urged the Board to adopt the U.C.C. approach, requiring only a warranty that “the person on whose account the check is drawn authorized the issuance of the check in the amount for which it is drawn.”²¹ Commenters argued that the proposed warranty could be construed to cover the indorsements on the back of the check and the date. The Board did not intend to create warranties that would cover the indorsements on a remotely created check because the U.C.C. already contains indorsement warranties. In addition, other information on the front of the check, such as the date, does not give rise to the risk of fraud as does the name of the payee and the amount. Accordingly, the final rule states with specificity that the transfer and presentment warranties apply only to the fact of authorization by the account holder, the amount stated on the check, and issuance to the payee stated on the check.

²⁰ 12 CFR 229.2(k).

²¹ See e.g. U.C.C. 3-417(a)(4).

A few commenters suggested that the depositor of a remotely created check should also be required to make the new warranties, as is the case with the U.C.C. warranties relating to remotely created consumer items. One commenter suggested that the customer of the paying bank should be able to assert a § 229.34(d) warranty claim directly against a transferring or presenting bank. The authority under which the Board is adopting this amendment is limited to establishing rules imposing or allocating losses and liability among depository institutions in connection with any aspect of the payment system.²² However, although these warranties do not extend to losses and liability as between depository institutions and their nonbank customers, banks may choose to allocate liability to customers by agreement. The final rule also does not alter the rights or liabilities of customers of depository institutions under state law.

Commenters also suggested that the commentary address the situation in which the customer authorizes that the check be made payable to the payee's trade name, but the check is instead made payable to the legal name of the payee. Under the new transfer and presentment warranties, banks will warrant that the customer authorized the issuance of the check to the payee stated on the check. Whether an alteration of the payee's name from the trade name to the legal name would result in a breach of warranty will depend on whether the change is within the scope of the customer's authorization. Because that determination would have to be made on a case-by-case basis, the Board has not added any general statement on such a situation to the commentary.

A number of commenters urged the Board to state explicitly that the warranties would not cover the situation in which the initial authorization by the account-holder was subsequently disclaimed as the result of "buyer's remorse" by the account-holder. As noted in the proposed rule, the Board anticipates that the transfer and presentment warranties will supplement the FTC's Telemarketing Sales Rule (16 CFR 310.3(a)(3)), which requires telemarketers that submit instruments for payment to obtain the customer's "express verifiable authorization." A depository bank could tender the authorization obtained by its telemarketer customer as a defense to a paying bank warranty claim. Therefore, the paying bank would not prevail on a warranty claim if the customer had, in fact, authorized the transaction but later suffered "buyer's remorse." If the paying bank can show that the check was properly payable from the customer's account, then it would be able to charge the account for the check in accordance with U.C.C. 4-401.

Defenses to Warranty Claims

Several commenters argued that when a paying bank makes a claim under the remotely created check warranties a depository bank should be able to assert certain defenses that the paying bank would have against its customer under the U.C.C. Specifically, the commenters noted that U.C.C. 4-406 places a duty on a customer to discover and report unauthorized checks with reasonable promptness and limits a paying bank's liability if the customer fails to perform that duty. The commenters suggested that a paying bank should be precluded from asserting a warranty claim against a depository bank where the paying bank's liability to the customer would have been limited by U.C.C. 4-406 had the paying bank asserted its own defenses. The commenters noted that the U.C.C. warranty provisions permit similar defenses by warranting banks.

²² See footnote 14, *supra*.

The U.C.C. provides that the warrantor may defend a warranty claim based on an unauthorized indorsement or alteration by proving that the drawer is precluded from asserting that claim because of his or her failure to discover the lack of authorization in a timely manner.²³ The Official Comment explains the purpose of the provision: if the drawer's conduct contributed to a loss from a forged indorsement or alteration, the drawee should not be allowed to shift the loss from the drawer to the warrantor.²⁴ While the drafters of the U.C.C. did not extend this defense to an unauthorized remotely-created consumer item, commenters argued that the stated purpose of the U.C.C. 3-417(c) defense should apply to a remotely created check warranty claim under Regulation CC. The Board believes that such a defense would be appropriate. Therefore, the regulation and the commentary to the final rule provide that the depository bank may defend a remotely created check warranty claim by proving that customer is precluded under U.C.C. 4-406 from asserting a claim against the paying bank for the unauthorized issuance of the check. This may be the case, for example, when the customer fails to discover the unauthorized remotely created check in a timely manner.

One commenter stated that the proposed warranty for remotely created checks should be limited in a way that is similar to the indemnification related to the creation and collection of substitute checks. The commenter argued that the indemnity provision of the Check Clearing for the 21st Century Act, as implemented by Regulation CC, shifts liability to the reconverting banks for losses due to the absence of security features that do not survive the imaging process, and, therefore, do not appear on substitute checks, only in those instances in which the paying bank's processes actually would have relied on the security features that were lost in the imaging process. These lost security features, it is argued, are analogous to the lack of an authorized signature on the remotely created check.²⁵ The commenter argued that by analogy the warranty that the Board proposed with respect to remotely created checks should not apply under circumstances in which the paying bank would not have verified the signatures anyway, for example because the checks were under the dollar amount set by the paying bank for such purposes.

The Board's rule on remotely created checks is intended to reduce the fraudulent use of unauthorized remotely created checks by creating an incentive for depository banks to be more vigilant when accepting such checks for deposit. This incentive would be seriously weakened if the regulation required the paying bank to make the showing suggested by the commenter. Therefore, the final rule does not adopt this suggestion.

Effective Date

A number of commenters suggested that the final rule include an implementation period of not less than six months. The final rule is effective July 1, 2006.

Additional Considerations

MICR Line Identifier

The Board requested comment on whether digits should be assigned in the External Processing Code (EPC) Field (commonly referred to as Position 44) of the magnetic ink character recognition (MICR) line to identify remotely created checks.

²³ U.C.C. 3-417(c).

²⁴ U.C.C. 3-417, Official Comment, 6.

²⁵ 12 U.S.C. 5005, as implemented at 12 CFR 229.53(a) and the accompanying commentary.

Most commenters opposed this aspect of the proposal, arguing that the unassigned digits in the EPC Field could best serve other purposes and that enforcement of such a rule would be cumbersome at best. Ten commenters specifically expressed support for assigning digits in the EPC Field, arguing that it would facilitate the tracking of remotely created checks. However, without broad support for such a rule, and in light of the impracticalities of enforcement, the Board has determined not to pursue a MICR identifier for remotely created checks.

Relation to State Law

Many commenters supported the proposed amendment to Regulation CC as a means to establish uniformity with respect to liability for unauthorized remotely created checks. Some of these commenters presumed that the amendment to Regulation CC would preempt state laws that address unauthorized remotely created checks or their equivalents. However, several commenters raised the issue of preemption explicitly by stating that the warranties provided in Regulation CC should preempt state law warranties and that the one-year statute of limits for actions under subpart C of Regulation CC should preempt statute of limitations for breach of demand draft warranties under state law (generally 3 years). One commenter recommended that the Board's amendments explicitly preempt the field to eliminate confusion about the application of state laws that govern remotely created checks. Section 608(b) of the Expedited Funds Availability Act provides that Board rules prescribed under that Act shall supersede any provision of state law, including the UCC as in effect in such state, that is inconsistent with the Board rules. To the extent that the state law is inconsistent with the Board's rules on remotely created checks, the Board's rules would supersede such state law. The Board will monitor the interaction of state law and Regulation CC, and may take further action at a later time if necessary.

Price v. Neal

One commenter suggested that the Board overrule the Price v. Neal doctrine for all checks. The Price v. Neal doctrine dates back to the 1760s and is based on the assumption that the paying bank should bear the loss for unauthorized checks because it is in the best position to prevent fraud by comparing signatures on checks with signature cards on file with the bank. The commenter argued that, at present, automated check processing that relies on the MICR line means that signature verification of checks by back-room personnel no longer plays a meaningful role in stopping check fraud. However, other commenters argued that the depository bank generally has no better means to detect unauthorized checks than the paying bank and, therefore, the argument would provide no logical basis for abandoning the Price v. Neal doctrine. Furthermore, as one commenter noted, the advent of signature recognition software may soon enable the paying bank to verify signatures on an automated basis. The final rule reverses the Price v. Neal rule for remotely created checks only. However, the Board would welcome a public dialogue on broader check law issues, such as the utility of and possible alternatives to the Price v. Neal rule in the modern check processing environment.

Conforming amendments to Regulation J

The Board is also amending Regulation J to make clear that the new remotely created check warranties apply to remotely created checks collected through the Federal Reserve Banks.

Regulatory Analysis

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1) and under authority delegated by the Office of Management and Budget, the Board has reviewed the final rule and determined that it contains no collections of information.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (RFA), an agency must publish a final regulatory flexibility analysis with its final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 601-612.) The Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The RFA requires agencies to examine the objectives, costs and other economic implications on the entities affected by the rule. (5 U.S.C. 603.) Under section 3 of the Small Business Act, as implemented at 13 CFR part 121, subpart A, a bank is considered a “small entity” or “small bank” if it has \$150 million or less in assets. Based on June 2005 call report data, the Board estimates that there are approximately 13,400 depository institutions with assets of \$150 million or less.

The amendments to Regulation CC create a definition of a remotely created check and warranties that apply when a remotely created check is transferred or presented. The amendments require any bank that transfers or presents a remotely created check to warrant that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check. The purpose of the amendments is to place the liability for an unauthorized remotely created check on the bank that is in the best position to prevent the loss. By shifting the liability to the bank in the best position to prevent the loss caused by the payment of an unauthorized remotely created check, the Board anticipates that the amendments will reduce costs for all banks that handle remotely created checks. Banks seeking to minimize the risk of liability for transferring remotely created checks will likely screen with greater scrutiny customers seeking to deposit remotely created checks. The Board believes that the controls that small institutions will develop and implement to minimize the risk of accepting unauthorized remotely created checks for deposit likely will pose a minimal negative economic impact on those entities. Furthermore, there was unanimous support for transfer and presentment warranties for remotely created checks from the small institutions that commented on the proposal. These institutions noted that the warranties will enable them to reduce losses they currently suffer when they inadvertently pay an unauthorized remotely created check.

The RFA requires agencies to identify all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule. As noted above, the Board’s Regulation J includes cross-references to the warranties set forth in Regulation CC and the rule amends such cross-references to include the warranties. As also noted above, the rule overlaps with at least 19 state codes that presently provide warranties for instruments that are similar to remotely created checks.

List of Subjects in 12 CFR Parts 210 and 229

Banks, Banking, Federal Reserve System, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Board is amending parts 210 and 229 of chapter II of title 12 of the Code of Federal Regulations as set forth below:

PART 210-COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS AND FUNDS TRANSFERS THROUGH FEDWIRE (REGULATION J)

1. The authority citation for part 210 continues to read as follows:

Authority: 12 USC 248(i) and (j), 12 USC 342, 12 USC 464, 12 USC 4001 et seq., 12 USC 5001-5018.

2. In § 210.5, revise paragraph (a)(3) to read as follows:

§ 210.5 Sender's agreement; recovery by Reserve Bank

(a) * * *

* * * * *

(3) Warranties for all electronic items. The sender makes all the warranties set forth in and subject to the terms of 4–207 of the U.C.C. for an electronic item as if it were an item subject to the U.C.C. and makes the warranties set forth in and subject to the terms of § 229.34(c) and (d) of this chapter for an electronic item as if it were a check subject to that section.

* * * * *

3. In § 210.6, revise paragraph (b)(2) to read as follows:

§ 210.6 Status, warranties, and liability of Reserve Bank

* * * * *

(b) * * *

(2) Warranties for all electronic items. The Reserve Bank makes all the warranties set forth in and subject to the terms of 4–207 of the U.C.C. for an electronic item as if it were an item subject to the U.C.C. and makes the warranties set forth in and subject to the terms of § 229.34(c) and (d) of this chapter for an electronic item as if it were a check subject to that section.

* * * * *

4. In § 210.9, revise paragraph (b)(5) to read as follows:

§ 210.9 Settlement and payment

* * * * *

(b) * * *

(5) Manner of settlement. Settlement with a Reserve Bank under paragraphs (b)(1) through (4) of this section shall be made by debit to an account on the Reserve Bank's books, cash, or other form of settlement to which the Reserve Bank agrees, except that the Reserve Bank may, in its discretion, obtain settlement by charging the paying

bank's account. A paying bank may not set off against the amount of a settlement under this section the amount of a claim with respect to another cash item, cash letter, or other claim under § 229.34(c) and (d) of this chapter (Regulation CC) or other law.

* * * * *

PART 229 AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

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

Authority: 12 U.S.C. 4001 et seq., 12 U.S.C. 5001-5018.

6. In section 229.2, add a new paragraph (fff) to read as follows:

§ 229.2 Definitions

* * * * *

(fff) Remotely created check means a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn. For purposes of this definition, “account” means an account as defined in paragraph (a) of this section as well as a credit or other arrangement that allows a person to draw checks that are payable by, through, or at a bank.

7. In § 229.34, redesignate paragraphs (d), (e), and (f) as paragraphs (e), (f), and (g), and add a new paragraph (d) to read as follows:

§ 229.34 Warranties

* * * * *

(d) Transfer and presentment warranties with respect to a remotely created check.

(1) A bank that transfers or presents a remotely created check and receives a settlement or other consideration warrants to the transferee bank, any subsequent collecting bank, and the paying bank that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check. For purposes of this paragraph (d)(1), “account” includes an account as defined in § 229.2(a) as well as a credit or other arrangement that allows a person to draw checks that are payable by, through, or at a bank.

(2) If a paying bank asserts a claim for breach of warranty under paragraph (d)(1) of this section, the warranting bank may defend by proving that the customer of the paying bank is precluded under U.C.C. 4-406, as applicable, from asserting against the paying bank the unauthorized issuance of the check.

* * * * *

8. In § 229.43, revise paragraph (b)(3) to read as follows:

§ 229.43 Checks Payable in Guam, American Samoa, and the Northern Mariana Islands

* * * * *

(b) Rules applicable to Pacific islands checks. * * *

* * * * *

(3) § 229.34(c)(2), (c)(3), (d), (e), and (f);

* * * * *

9. In Appendix E to part 229:

a. Under paragraph II., § 229.2, paragraph (OO) is revised and a new paragraph (FFF) is added.

b. Under paragraph XX., § 229.34, redesignate paragraphs D., E., and F. as paragraphs E., F., and G., and add a new paragraph D.

APPENDIX E TO PART 229 – COMMENTARY

* * * * *

II. Section 229.2 Definitions

* * * * *

OO. 229.2(oo) Interest Compensation

1. This calculation of interest compensation derives from U.C.C. 4A-506(b). (See §§ 229.34(e) and 229.36(f).)

* * * * *

FFF. 229.2(fff) Remotely Created Check

1. A check authorized by a consumer over the telephone that is not created by the paying bank and bears a legend on the signature line, such as “Authorized by Drawer,” is an example of a remotely created check. A check that bears the signature applied, or purported to be applied, by the person on whose account the check is drawn is not a remotely created check. A typical forged check, such as a stolen personal check fraudulently signed by a person other than the drawer, is not covered by the definition of a remotely created check.

2. The term signature as used in this definition has the meaning set forth at U.C.C. 3-401. The term “applied by” refers to the physical act of placing the signature on the check.

3. The definition of a “remotely created check” differs from the definition of a “remotely created consumer item” under the U.C.C. A “remotely created check” may be drawn on an account held by a consumer, corporation, unincorporated company, partnership, government unit or instrumentality, trust, or any other entity or organization. A “remotely created consumer item” under the U.C.C., however, must be drawn on a consumer account.

4. Under Regulation CC (12 CFR part 229), the term “check” includes a negotiable demand draft drawn on or payable through or at an office of a bank. In the case of a “payable through” or “payable at” check, the signature of the person on whose account the check is drawn would include the signature of the payor institution or the signatures of the customers who are authorized to draw checks on that account, depending on the arrangements between the “payable through” or “payable at” bank, the payor institution, and the customers.

5. The definition of a remotely created check includes a remotely created check that has been reconverted to a substitute check.

* * * * *

XX. Section 229.34 Warranties

* * * * *

D. 229.34(d) Transfer and presentment warranties

1. A bank that transfers or presents a remotely created check and receives a settlement or other consideration warrants that the person on whose account the check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check. The warranties are given only by banks and only to subsequent banks in the collection chain. The warranties ultimately shift liability for the loss created by an unauthorized remotely created check to the depository bank. The depository bank cannot assert the transfer and presentment warranties against a depositor. However, a depository bank may, by agreement, allocate liability for such an item to the depositor and also may have a claim under other laws against that person.

2. The transfer and presentment warranties for remotely created checks supplement the Federal Trade Commission's Telemarketing Sales Rule, which requires telemarketers that submit checks for payment to obtain the customer's "express verifiable authorization" (the authorization may be either in writing or tape recorded and must be made available upon request to the customer's bank). 16 CFR 310.3(a)(3). The transfer and presentment warranties shift liability to the depository bank only when the remotely created check is unauthorized, and would not apply when the customer initially authorizes a check but then experiences "buyer's remorse" and subsequently tries to revoke the authorization by asserting a claim against the paying bank under U.C.C. 4-401. If the depository bank suspects "buyer's remorse," it may obtain from its customer the express verifiable authorization of the check by the paying bank's customer, required under the Federal Trade Commission's Telemarketing Sales Rule, and use that authorization as a defense to the warranty claim.

3. The scope of the transfer and presentment warranties for remotely created checks differs from that of the corresponding U.C.C. warranty provisions in two respects. The U.C.C. warranties differ from the § 229.34(d) warranties in that they are given by any person, including a nonbank depositor, that transfers a remotely created check and not just to a bank, as is the case under § 229.34(d). In addition, the U.C.C. warranties state 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. The § 229.34(d) warranties specifically cover the amount as well as the payee stated on the check. Neither the U.C.C. warranties, nor the § 229.34(d) warranties apply to the date stated on the remotely created check.

4. A bank making the § 229.34(d) warranties may defend a claim asserting violation of the warranties by proving that the customer of the paying bank is precluded by U.C.C. 4-406 from making a claim against the paying bank. This may be the case, for example, if the customer failed to discover the unauthorized remotely created check in a timely manner.

5. The transfer and presentment warranties for a remotely created check apply to a remotely created check that has been reconverted to a substitute check.

* * * * *

By order of the Board of Governors of the Federal Reserve System, November 21, 2005.

Jennifer J. Johnson (signed)

Jennifer J. Johnson
Secretary of the Board.