

§229.54(d)(2). The safeguard exceptions apply to new accounts and repeatedly overdrawn accounts, or if the bank has reasonable cause to suspect the claim is fraudulent. A bank may delay availability of a provisionally-recredited amount until the start of the earlier of the business day after the banking day on which the bank determines the consumer's claim is valid or the 45th calendar day after the banking day on which the bank received the claim if the account is new, the account is overdrawn, or the bank has reasonable cause to believe that the claim is fraudulent. When the bank delays availability under this section, it may not impose overdraft fees on checks drawn against the provisionally-credited funds until the fifth calendar day after the day on which the bank sent the notice regarding the delayed availability.

If, after providing the recredit, the bank determines that the consumer's claim was invalid, the bank may reverse the recredit. This reversal must be accompanied by a consumer notification using the notice discussed below (*Notices Relating to Expedited Recredit Claims*).

Notices Relating to Expedited Recredit Claims

Section 229.54(e) outlines the requirements for providing consumer notices related to expedited recredit:

- The bank must send the notice of recredit no later than the business day after the banking day on which the bank recredits the consumer's account. This notice must include the amount of the recredit and the date the recredited funds will be available for withdrawal.
- The bank must send notice that the consumer's claim is not valid no later than the business day after the banking day on which the bank makes this determination. This notice must include the original check or a sufficient copy of it. (Except as provided in §229.58, *see* below). The notice must demonstrate to the consumer why the claim is not valid. The notice also must include either any information or document that the bank used in making its determination or an indication that the consumer may request copies of this information.
- The bank must send the notice of a reversal of recredit no later than the business day after the banking day on which the bank made the reversal. The notice must include all of the information required in a notice of invalid claim plus the amount (including interest) and date of the reversal. §229.54(e)(3)(i).

Appendix C to Regulation CC contains model forms (models C-23 through C-25) that a bank may use to craft the various notices required §229.54(e). Although there is no statutory safe harbor for appropriate use of these models, the Board published them to assist banks in complying with §229.54(e).

Expedited Recredit for Banks – §229.55

Section 229.55 sets forth expedited recredit procedures applicable between banks. A claimant bank must adhere to the timing, content, and form requirements of §229.55(b) in order for the claim to be valid. A bank against which an interbank recredit claim is made has ten business days within which to act on the claim (§229.55(c)). The provisions of §229.55 may be varied by agreement. (No other provisions of subpart D may be varied by agreement).

Liability – §229.56

Section 229.56 describes the damages for which a bank or person would be liable in the event of breach of warranty or failure to comply with subpart D:

- The amount of the actual loss, up to the amount of the substitute check, resulting from the breach or failure, and
- Interest and expenses (including costs, reasonable attorney's fees, and other expenses of representation) related to the substitute check.

These amounts could be reduced in the event of negligence or failure to act in good faith. It is also important to note that §229.56 has a specific exception that allows for greater recovery as provided in the indemnity section. Thus, a person that had an indemnity claim that also involves a breach of a substitute check warranty could recover all damages proximately caused by the warranty breach.

Section 229.56(b) excuses failure to meet this subpart's time limits because of circumstances beyond a bank's control. Section 229.56(c) provides that an action to enforce a claim under this subpart may be brought in any United States district court. Section 229.56(c) also provides the subpart's statute of limitations: one year from the date on which a person's cause of action accrues.⁷ Section 229.56(d) states that if a person fails to provide notice of a claim for more than 30 days from the date on which a cause of action accrues, the warranting or indemnifying bank is discharged from liability *to the extent of any loss caused by the delay in giving notice of the claim*.

Consumer Awareness – §229.57

Content requirements

A bank must provide its consumer customers with a disclosure that explains that a substitute check is the legal equivalent of the original check and describes the consumer's recredit rights for substitute checks. A bank may, but is not required, to use the Board's model form (model C-5A in appendix C to Regulation CC) to meet the content requirements for this notice. A bank that uses the model form appropriately is

⁷ For purposes of this paragraph, a cause of action accrues as of the date on which the injured person first learns, or reasonably should have learned, of the facts giving rise to the claim, including the identity of the warranting or indemnifying bank against which the action is brought.

deemed to be in compliance with the content requirement(s) for which it uses language from the model form. A bank may provide the notice required by §229.57 along with other information.

Distribution to consumer customers who receive cancelled checks with periodic account statements

Under §229.57(b)(1), a bank must provide this disclosure to existing consumer customers who routinely receive their cancelled checks in their periodic statement no later than the first statement after October 28, 2004. For customer relationships established after that date, a bank must provide the disclosure to a new consumer customer who routinely will receive cancelled checks in periodic statements at the time the customer relationship is established.

Distribution to consumer customers who receive a substitute check on an occasional basis

Under §229.57(b)(2), a bank also must provide the disclosure to a consumer customer who receives a substitute check on an occasional basis, including when a consumer receives a substitute check in response to a request for a check or a copy of a check, or when a check deposited by the consumer is returned to the consumer as an unpaid item in the form of a substitute check. A bank must provide the disclosure to a consumer customer in these cases even if the bank previously provided the disclosure to the consumer.

When the consumer contacts the bank to request a check or a copy of a check and the bank responds by providing a substitute check, the bank must provide this disclosure at the time of the request, if feasible. Otherwise, the bank must provide the disclosure no later than when the bank provides a substitute check in response to the consumer's request. It would not be feasible to provide the disclosure at the time of the request if, for example, the consumer made his or her request by telephone or if the bank did not know at the time of the request whether it would provide a substitute check or some other document in response. A bank is not required to provide the disclosure if the bank responds to the consumer's request by providing something other than an actual substitute check (such as a photocopy of an original check or a substitute check).

When a bank returns a deposited item unpaid to a consumer in the form of a substitute check, the bank must provide the disclosure when it provides the substitute check.

Mode of Delivery of Information – §229.58

Section 229.58 provides that banks may deliver any notice or other information required under this subpart by United States mail or by any other means to which the recipient has agreed to receive account information, including electronically. A bank that is required to provide an original check or a

sufficient copy (each of which is defined as a specific paper document) instead may provide an electronic image of the original check or sufficient copy if the recipient has agreed to receive that information electronically.

Examination Objectives – Part I Subparts A and B

NOTE: Subpart C of Regulation CC, "Collection of Checks", has been omitted. It addresses exclusively payment systems issues among financial institutions. There are no consumer-related regulatory compliance issues to review during the course of an examination. Subpart D, "Substitute Checks" begins on page VI-1.20.

1. Determine that the financial institution's funds availability policies comply with Regulation CC.
2. Determine that the financial institution has established internal controls for compliance with Regulation CC's provisions relating to funds availability.
3. Determine that the financial institution has established a training program for applicable employees addressing Regulation CC responsibilities.
4. Determine that the financial institution maintains records of compliance with Regulation CC for a period of two years.

Examination Procedures

A financial institution may delay funds availability for some deposits on a case-by-case basis and on other deposits on an automatic basis. In addition, the institution may make decisions concerning holds and may maintain records at branches as well as the main office. Therefore, to check for compliance with the hold policies, the examiner must determine the types of holds employed and how the decisions are made and where the records are maintained. If a branch makes its decision and maintains its own records, such as in a decentralized structure, sampling may be done at the branch. If the decision to delay availability is either centralized or made at a regional processing center and records are maintained there, sampling for compliance may be made at that location.

General

1. Determine the types of transaction accounts, as defined in Regulation D [§204.2(e)] (e.g., demand deposits, NOW accounts, ATS accounts) offered by the financial institution.
2. Obtain copies of the forms used by the financial institution for transaction accounts, including but not limited to the following:
 - Specific availability policy disclosures
 - Exception hold notices
 - Case-by-case hold notices
 - Special deposit slips