

Amending the Expedited Funds Availability Act: Placing a Check on Holds

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I. INTRODUCTION

Thanks to the broad adoption of electronic check processing (ECP), banks can safely make funds from most check deposits available to their customers faster than ever before.¹ However, banks²

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1. Through the use of direct electronic check clearing, banks are often able to ascertain same-day whether they will be reimbursed for the amount they make available to their customer for a deposited check. See *Tsongas files legislation to boost consumer rights, benefit seniors*, CONGRESSWOMAN NIKI TSONGAS, <http://tsongas.house.gov/index.cfm?sectionid=49&parentid=48§iontree=48,49&itemid=368> (last visited Mar. 9, 2012) (“[M]ost checks are now processed electronically giving banks almost instant access to the funds being deposited.”). Congresswoman Niki Tsongas noted that “[i]n today’s world of e-commerce, when a check is cashed the funds are transferred nearly instantaneously.” *Id.* “Nearly all interbank checks are now cleared electronically. This has increased the efficiency of check clearing at a time when check usage is declining at a faster rate than in prior periods.” FEDERAL RESERVE SYSTEM, THE 2010 FEDERAL RESERVE PAYMENTS STUDY: NONCASH PAYMENT TRENDS IN THE UNITED STATES: 2006–2009, at 19 (Apr. 5, 2011), available at http://www.frbservices.org/files/communications/pdf/press/2010_payments_study.pdf [hereinafter 2010 FEDERAL RESERVE PAYMENTS STUDY Update]. In 2009, “97 percent of ‘interbank’ checks—those deposited at one depository institution but drawn on another—involved electronic clearing.” FEDERAL RESERVE SYSTEM, THE 2010 FEDERAL RESERVE PAYMENTS STUDY: NONCASH PAYMENT TRENDS IN THE UNITED STATES: 2006–2009, at 12 (Apr. 5, 2011), http://www.frbservices.org/files/communications/pdf/research/2010_payments_study.pdf [hereinafter 2010 FEDERAL RESERVE PAYMENTS STUDY Release]. “16.3 billion interbank checks—excluding Treasury checks and postal money orders—were presented electronically to the paying banks in 2009 This represents 92.4 percent of all interbank checks received by DIs.” *Id.* at 19.

2. This Note generally refers to the practices of banks because most checks are paid by commercial banks, though sizable portions are also paid by credit unions and savings institutions. See 2010 FEDERAL RESERVE PAYMENTS STUDY Update, *supra* note 1, at 10 (“In 2009, commercial banks paid 84.5 percent of checks by number and 92.5 percent by value.

may keep and earn interest on customers' check deposits until required by law to credit each customer's account.³ Federal law mandates maximum "hold periods": how long a bank may take before making your money available to you after you deposit a check there.⁴ Depending on the type of check and other criteria outlined in the regulations' funds availability schedule, banks may place holds on checks ranging from one to nine days.⁵ In some circumstances, federal regulations allow for even longer or undefined hold periods.⁶

In effect, current federal legislation allows banks to hold on to most check deposit funds for longer than necessary. The purpose of this law is to limit banks' holds on checks to only as long as generally necessary to ensure that the banks will not take a loss.⁷ Once a bank

Credit unions and savings institutions paid 8.6 percent and 5.5 percent by number and 2.3 percent and 4.1 percent by value, respectively.").

3. This process is called "float." See RETAIL PAYMENT SYSTEMS HANDBOOK, FED. FIN. INSTS. EXAMINATION COUNCIL (2010), <http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/appendix-b-glossary.aspx#F> (defining "float" as "[f]unds held by an institution during the check-clearing process before being made available to a depositor. Interest may be earned on these funds").

4. Expedited Funds Availability Act, 12 U.S.C. § 4002 (2006); Regulation CC, 12 C.F.R. §§ 229.10-229.13 (2011).

5. 12 C.F.R. § 229.10 (assigning limited cases warranting "next-day availability"); 12 C.F.R. § 229.12 (regular availability schedule); 12 C.F.R. § 229.13 (assigning an array of "exceptions" to the normal funds availability schedule of § 229.12).

6. The regulations provide for specific circumstances warranting extensions beyond the normal hold periods and general ones. 12 C.F.R. § 229.13(a) ("New accounts"); § 229.13(b) ("Large deposits"); 12 C.F.R. § 229.13(c) ("Redeposited checks"); § 229.13(d) ("Repeated overdrafts"); 12 C.F.R. § 229.13(f) ("Emergency conditions"). The regulations also provide generally for extensions where necessary under a "reasonable person" test for "reasonable cause to doubt collectibility." 12 C.F.R. § 229.13(e). In the case of a "new account," the allowable hold period is "nine business days." 12 C.F.R. § 229.13(a). For the remainder, the extension may only be for a "reasonable period." 12 C.F.R. § 229.13 ("For the purposes of this section, a 'reasonable period' is an extension of up to one business day for checks described in § 229.10(c)(1)(vi), five business days for checks described in § 229.12(b)(1) through (4), and six business days for checks described in § 229.12(c) (1) and (2) or § 229.12(f). A longer extension may be reasonable, but the bank has the burden of so establishing.").

7. See Donald L. Kohn, Vice-Chairman of the Bd. of Governors of the Fed. Reserve Sys., Speech at the Western Payments Alliance 2006 Payments Symposium in Las Vegas, Nevada: Evolution of Retail Payments and the Role of the Federal Reserve (Sept. 11, 2006), available at <http://www.federalreserve.gov/newsevents/speech/kohn20060911a.htm>. In his speech on the technological developments affecting check processing, Donald L. Kohn, Vice-Chairman of the Board of Governors of the Federal Reserve System from 2006 to 2010, notes the central function of the payment schedules of the Expedited Funds Availability Act: "The Expedited Funds Availability Act requires that the Board reduce the maximum hold periods to the period of time necessary for the depository bank to reasonably expect to learn of the

learns that it will be reimbursed for cashing a customer's deposited check,⁸ it has no justifiable reason to continue to withhold that customer's money.⁹ The bank does, however, have incentive to hold that money for as long as allowable.¹⁰

In February 2010, the Federal Reserve Board of Governors consolidated all of its check processing centers nationwide into one central facility.¹¹ This action profoundly altered the effect of the federal regulations on hold periods and rendered substantial portions of the regulations virtually moot.¹² The Federal Reserve Board effectively shortened banks' allowable hold periods for many checks, requiring them to make funds available to their customers sooner.¹³ The Federal Reserve's check processing region consolidation would not have been feasible, however, if not for federal legislation that allowed for the broad implementation of ECP by banks: the Check Clearing in the 21st Century Act of 2003 ("Check 21").¹⁴

nonpayment of most checks in a given category." *Id.* at n.4. "107.4 million interbank checks were returned unpaid in 2009. They totaled \$104.2 billion, averaging \$970 per check." 2010 FEDERAL RESERVE PAYMENTS STUDY Release, *supra* note 1, at 24.

8. The method by which banks learn whether they will be reimbursed for paying out on a deposited check is discussed *infra* note 79.

9. See Kohn, *supra* note 7.

10. See RETAIL PAYMENT SYSTEMS HANDBOOK, *supra* note 3 (explaining that banks may collect interest on funds held); *infra* notes 120, 121, 122 (explaining bank check float in greater detail).

11. Press Release, Fed. Reserve Bd. (Dec. 31, 2009), <http://www.federalreserve.gov/newsevents/press/bcreg/20091231a.htm>. The Federal Reserve Bank Board of Governors began consolidating check processing regions in 2003, and formally announced its decision in December 2009 to ultimately consolidate them into one nation-wide check processing region, and completed the consolidation effective February 27, 2010. See *infra* Part II.D.

12. See, e.g., Availability of Funds and Collection of Checks, 75 Fed. Reg. 2, 219 (Jan. 5, 2010) ("Subsequent to these amendments, there will only be a single check processing region for purposes of Regulation CC and there will no longer be any checks that are nonlocal.").

13. Stephen C. Veltri & Greg Cavanaugh, *Business Lawyer*, 65 BUS. LAW 1241, 1248 (2010).

14. 12 U.S.C. §§ 5001–5018 (2003) (effective Oct. 2004). See discussion of Check 21 *infra* at Part II.B. See FED. FIN. INSTS. EXAMINATION COUNCIL, RETAIL PAYMENT SYSTEMS HANDBOOK (2010), available at http://ithandbook.ffiec.gov/ITBooklets/FFIEC_ITBooklet_RetailPaymentSystems.pdf ("By authorizing the use of a new negotiable instrument called a substitute check, Check 21 facilitates the broader use of electronic check processing."); *Check Restructuring Resource Center*, FED. RESERVE BANK SERVS., http://www.frbservices.org/communications/check_restructuring.html (last visited Mar. 7, 2012) ("The Federal Reserve has made changes to its check processing and adjustments operations in response to the changing market, including the decline of paper check volumes industry-wide.").

Prior to the broad implementation of ECP, shorter hold periods would have unjustifiably exposed banks to greater risks of loss due to fraud or bounced checks.¹⁵ But just as banks have continued to thrive since the Federal Reserve effectively shortened hold periods by consolidating the check processing regions into one national region, the comprehensive adoption of ECP enables banks to thrive under more stringent hold periods effected by proposed legislation.¹⁶ In 2005, shortly after the enactment of Check 21,¹⁷ Representative Carolyn Maloney prematurely proposed legislation that would mandate greater funds availability in shorter time periods.¹⁸ At that time, Banks had not achieved their current level of efficiency in check processing.¹⁹ However, most banks have since adopted ECP

15. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON FUNDS AVAILABILITY SCHEDULES AND CHECK FRAUD AT DEPOSITORY INSTITUTIONS ii (Oct. 1996), available at <http://www.federalreserve.gov/boarddocs/rptcongress/chkfraud.pdf> (recommending that the Expedited Funds Availability Act (EFAA) be amended to lengthen the maximum permissible hold period for local checks from two to three business days).

16. See *id.* at 9 (“If continued improvements to the check-processing system result in significantly reduced return times, the Board would shorten the availability schedule to reflect those improvements.”).

17. 12 U.S.C. §§ 5001–18 (2003) (effective Oct. 2004).

18. See Consumer Checking Account Fairness Act, H.R. 799, 109th Cong. (2005). The Consumer Checking Account Fairness Act (CCAF) never made it out of the House Subcommittee on Financial Institutions and Consumer Credit before the end of the 109th Congress. *H.R. Bill Summary & Status, 109th Congress (2005–2006), H.R. 799*, LIBRARY OF CONGRESS, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00799:@@D&summ2=m&> (last visited Mar. 9, 2012) [hereinafter *H.R. 799 Bill Summary & Status*].

19. See 2010 FEDERAL RESERVE PAYMENTS STUDY Update, *supra* note 1, at 8.

Over the past three years, the percentage of checks cleared electronically has more than doubled. These changes are increasing the efficiency of the check clearing system for interbank checks—those drawn on a different depository institution than the one at which they were deposited. At the time of the survey, an estimated 97 percent of interbank checks involved the replacement of the original paper check with electronic payment information at some point in the collection process, compared to an estimated 43 percent at the time of the prior survey [in 2006].

Id. However, even before Check 21 went into effect,

[O]nce a check [was] deposited with a bank, it [was] almost always delivered overnight to the paying bank and debited from the checkwriter’s account the next business day. Check-processing speeds should continue to increase, over time, as banks make further operational changes in response to Check 21. That means money may be deducted from your checking account faster.

Frequently Asked Questions About Check 21, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Nov. 6, 2009), http://www.federalreserve.gov/paymentsystems/check21_faq.htm.

and have gained the ability to process checks far more quickly than they could when the Expedited Funds Availability Act (EFAA) was first enacted.²⁰ Though legislatively reduced hold periods would not have been appropriate when first proposed, the time since the Federal Reserve's consolidation has provided banks with an adjustment period during which banks have proven their ability to minimize risk through the use of ECP.²¹ The time is now ripe for such legislation.

Appropriate legislation was proposed, but never passed, as the Faster Access and Shorter Transaction Time for Checks Act of 2010,²² and reintroduced before the present Congress as the Faster Access and Shorter Transaction Time for Checks Act of 2011 (FASTT Checks Act).²³ The FASTT Checks Act would directly benefit bank customers.²⁴ It would also encourage all banks to adopt the current ECP technology by indirectly placing a greater burden on banks to make funds available on a shorter timeline.²⁵ If the small portion of banks that have not adopted ECP are unable to determine whether a check will clear before its hold deadline is up, then those banks will be more susceptible to the risk of taking a loss on a dishonored check.²⁶ That risk could increase under proposed legislation that would further reduce hold deadlines, creating a

20. See *supra* note 1.

21. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 14, at 43

Using [electronic check processing] for payment can reduce risks to depository financial institutions because it permits them to deliver check data to paying financial institutions more quickly than by presenting paper checks. The shorter delivery time permits paying financial institutions to (1) identify checks that cannot be paid and (2) notify the depository financial institution about those returned checks using an electronic return notice and up to one day earlier than would occur with the physical exchange of paper checks.

Id. But cf. Kohn, *supra* note 7 (“This will present risk-management challenges for banks because a bank seldom learns that a local check is unpaid before it must make the funds available to the customer for withdrawal.”).

22. H.R. 4936, 111th Cong. (2010).

23. H.R. 1660, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bill.xpd?bill=h112-1660>.

24. The FASTT Act, if passed, would require that banks make certain deposited funds available to their customers more quickly. *Id.*

25. See, e.g., LYNN M. LOPUCKI, ELIZABETH WARREN, DANIEL KEATING & RONALD J. MANN, *COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH* 337 (4th ed. 2009).

26. See *id.*

greater incentive for banks to adopt the technology.²⁷ Comprehensive adoption of ECP is desirable because reducing reliance on physical transportation of checks provides greater stability in the check-processing system, which was a significant issue when the checking payment system came to a halt in 2001 following the 9/11 terrorist attacks.²⁸ The old methods of check processing are inefficient and undermine financial security.²⁹

Part II of this Note discusses the structure of the relevant federal regulations governing the check payment system as well as changes in its application and effect since Check 21 and the Federal Reserve's consolidation of check processing regions. It also discusses earlier bills that proposed amendments to the existing federal regulations but expired before Congress acted on them. Part III analyzes the impact of current legislation on banks and bank customers and the potential benefits and detriments that past proposed bills would have conferred on banks and their customers. Part IV discusses and proposes legislative action based on these earlier bills, past legislation, and current banking practices and conditions. This proposal mirrors the FASTT Checks Act's proposals for adjusting the dollar amounts used in the EFAA and Regulation CC to catch up and keep pace with inflation, treating Saturday as a "business day" for the purpose of calculating hold periods, and eliminating hold exceptions for "large deposits." However, unlike the FASTT Checks Act, this Note's proposal would also eliminate "large deposit" exceptions for all banks, not only those that use ECP and have total assets of \$10 billion.

27. *See id.*

28. JEFFREY M. LACKER, PAYMENT SYSTEM DISRUPTIONS AND THE FEDERAL RESERVE FOLLOWING SEPTEMBER 11, 2001, at 10 (Mar. 5, 2004), available at http://www.frbatlanta.org/filelegacydocs/epconf_lacker.pdf; BD. OF GOVERNORS OF THE FED. RESERVE SYS., Board of Governors of the Federal Reserve Bank, *Report to the Congress on the Check Clearing for the 21st Century Act of 2003* (Apr. 2007), available at <http://www.federalreserve.gov/boarddocs/rptcongress/check21/check21.pdf> ("Check 21 also lends greater stability and resiliency to the nation's check-collection system in the event of a regional or national emergency by helping to reduce the banking industry's extensive reliance on physical transportation, particularly air transportation, to collect paper checks. This reliance became a significant issue during the events of September 11.").

29. *See generally supra* note 28.

II. HISTORY

A. The Basic Framework: The Expedited Funds Availability Act and Reg CC

Congress enacted the EFAA in 1987.³⁰ Its purpose was to “end excessive holds on customer deposits by depository institutions.”³¹ Prior to the EFAA’s enactment, banks were governed primarily by state law deadlines dictating when the bank had to make check funds available to customers.³² As the Supreme Court noted, the “check-clearing process too often lagged, taking days or even weeks to complete. . . . [B]anks typically placed lengthy ‘holds’ on deposited funds. . . . Congress responded by passing the [EFAA]”³³

The EFAA provides a standardized system of maximum time periods for which banks can withhold funds after receiving a check for deposit: “hold periods.”³⁴ This system is mirrored and expanded upon in greater detail in Part 229 of Title 12 of the Code of Federal Regulations, also referred to as “Regulation CC,” or “Reg CC” for short.³⁵ The EFAA and Regulation CC distinguish various allowable “hold periods” based on the check’s origin³⁶ and type,³⁷ with exceptions to the normal schedule based on other conditions, such as

30. Expedited Funds Availability Act, 12 U.S.C. §§ 4001–10 (2012). The general funds availability schedule for deposited checks went into effect on September 1, 1990. 12 C.F.R. § 229.12(a) (2011).

31. S. REP. NO. 100-19, at 1 (1987).

32. *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 266–67 (1996).

33. *Id.*

34. 12 U.S.C. § 4002 (2006).

35. 12 C.F.R. § 229.10 (2011); *Id.* § 229.12 (2011); *Id.* § 229.13 (2011). The EFAA gives the Federal Reserve Board authority to prescribe regulations to implement and ensure compliance with the EFAA. *Id.* § 4008(a) (2006). The EFAA also charges the Federal Reserve Board with considering requiring certain listed regulations that would “improve the check processing system.” *Id.* § 4008(b). The EFAA gives the Board of Governors of the Federal Reserve System a broad mandate to regulate “any aspect of the payment system” and “any related function of the payment system with respect to checks.” *Id.* § 4008(c).

36. 12 C.F.R. §§ 229.12(b)–(c).

37. *Id.* § 229.10(c). Checks that are drawn on the U.S. Treasury; a U.S. Postal Service Money Order; drawn on a Federal Reserve Bank or Federal Home Loan Bank; drawn by a state or a unit of general local government; and a cashier’s, certified, or teller’s check may have hold periods requiring funds available by the business day after the business day on which they are deposited. *Id.* §§ 229.12(b)–(c).

the monetary amount of the check or how recently the checking account was opened.³⁸ Regulation CC premises its hold system on the check processing methods used in 1987.³⁹ When the EFAA was enacted, check processing generally required at least three banks: a “depository bank,” a “payor bank,” and an “intermediary bank.”⁴⁰ At that time, and up until quite recently, the Federal Reserve had check processing centers all throughout the United States, resulting in many check processing regions.⁴¹ The Federal Reserve check processing center in each region would often serve as an intermediary between the bank that held the account from which the check was drawn and the bank where the check was deposited.⁴²

The EFAA provided that a check drawn on an account from a bank (the “payor bank”) in a *different* check processing region from the bank where the check was deposited (the “depository bank”) would have one funds availability schedule; and checks that originated and were deposited at banks in the *same* region would have another schedule of hold periods.⁴³ Checks originating in a different check processing region than where they were deposited, dubbed “non-local checks,” had longer maximum hold periods than “local checks,” which were deposited in the *same* region where they originated.⁴⁴

For “local checks” deposited into an account, Regulation CC (implementing the EFAA) currently requires that banks make the first \$100 available by the first “business day” after the “banking day” on which the check was deposited.⁴⁵ The remaining amount of the

38. *Supra* note 6.

39. *See* S. REP. NO. 100-19, at 23–28 (1987).

40. LOPUCKI ET AL., *supra* note 25, at 317–18.

41. *See* FED. RESERVE BANK OF NEW YORK, *Check Processing* (July 2009), <http://www.ny.frb.org/aboutthefed/fedpoint/fed03.html> (noting that in 2003, the Federal Reserve had forty-five check processing locations).

42. LOPUCKI ET AL., *supra* note 25, at 357. Private intermediaries also serve a similar function to the Federal Reserve check processing centers, and banks can choose among intermediaries. *Id.* (“One of the most prominent options—clearance through the Federal Reserve process—is operated by the federal government. The other principal options, multilateral clearinghouses, bilateral correspondents, and direct-send arrangements—are established by private contracts among the banks involved.”).

43. 12 C.F.R. § 229.12 (2011).

44. *Id.*

45. *Id.* § 229.10(c)(1)(vii)(A).

check, up to \$5,000, need not be made available until the second “business day” after the “banking day” of deposit.⁴⁶ Any funds in excess of \$5,000 deposited in an account on any one “banking day,” even if they come from different checks drawing on accounts at different banks, need not be made available to the customer until the seventh business day after deposit.⁴⁷ In cases where a customer would cash a check, rather than just deposit it, Regulation CC allows banks to withhold funds over the first \$500 for an additional “business day.”⁴⁸

Regulation CC defines a “business day” as all days except for Saturdays, Sundays, and federal holidays.⁴⁹ Regulation CC defines a “banking day” as a business day on which the bank is actually open and operational.⁵⁰ Because weekends and holidays are excluded from these calculations, a seven-day hold period placed on a check deposited on Friday could last eleven days or, if there is an intervening holiday, even longer.⁵¹

Exceptions that also extend the allowable hold period to seven business days (even for amounts under \$5,000) exist when: (1) the customer’s account has been overdrawn for six or more business days of the previous six months;⁵² (2) the account has been overdrawn for two or more business days in excess of \$5,000 in the previous six months;⁵³ (3) the check is a copy of a check previously dishonored;⁵⁴ or (4) where the bank has reason to doubt that the check is collectable.⁵⁵ A further exception exists for checks deposited into accounts that have been open for fewer than thirty days—“new

46. *Id.* § 229.12(b); *Id.* § 229.13(b).

47. *Id.* §§ 229.13(b), (h)(1), (h)(4) (collectively stating that the deadline may be extended by a “reasonable period of time,” defined as an extension of up to “five business days” for “local checks” and thereby requiring only that funds falling under this exception be made available by the seventh business day after the banking day of deposit).

48. *Id.* § 229.12(d).

49. *See id.* § 229.2(g).

50. *Id.* § 229.2(f).

51. *See id.* § 229.2(g).

52. *Id.* § 229.13(d) (“Repeated overdrafts”).

53. *Id.*

54. *Id.* § 229.13(c) (“Redeposited checks”).

55. *Id.* § 229.13(e) (“Reasonable cause to doubt collectability”).

accounts”—extending the allowable hold period to nine business days.⁵⁶

Where a bank customer would deposit a “non-local” check, a designation that no longer applies to any checks originating within the United States, Regulation CC would require that banks make the first \$100 of funds available on the first business day, just as with a local check.⁵⁷ After that, for checks that would be deposited rather than cashed, the remainder up to \$5,000 would not be due until the fifth business day.⁵⁸ For checks that would be cashed, the remainder up to \$400 would be due by the fifth business day,⁵⁹ while all of the rest above the first \$500 would be due on the sixth business day.⁶⁰

Banks often make “provisional settlements” to their customers, wherein the depository bank credits the amount of the check to the customer’s account at the time of deposit, but does not make final payment on the check.⁶¹ Should the payor bank timely dishonor the check, the depository bank may “charge back,” or revoke, the provisional credit.⁶² In fact, depository banks are even entitled to “charge back” funds that have been withdrawn by the customer.⁶³ However, the depository bank may find that recovering funds that a customer has already spent to be a challenge and decide to just take the loss rather than make the effort to pursue those funds.⁶⁴ Thus, banks want to know if the payor bank will honor their customer’s check before their hold period is up and they must make final payment.⁶⁵ Provisional credits do not exist for cashed checks.⁶⁶ When

56. *Id.* § 229.13(a) (“New accounts”). Exceptions are also in place for some “low-risk” items, *shortening* the usual schedule of hold periods. *Id.* § 229.10.

57. *See id.* § 229.10(c)(1)(vii)(A).

58. *Id.* § 229.12(c).

59. *Id.* § 229.10(d).

60. *Id.* § 229.10(d).

61. LOPUCKI ET AL., *supra* note 25, at 356–57.

62. *Id.*

63. U.C.C. § 4-214(a) (2005) (Right of Charge-Back or Refund); *Id.* § 4-301(b) (2005) (stating that a depository bank’s chargeback rights may include “recover[ing] the amount . . . withdrawn by its customer”).

64. One could imagine that when the bank customer’s account does not contain funds sufficient to cover the customer’s debt to the bank, it would not be an effective use of bank resources to pursue debts measured in the hundreds of dollars.

65. *See* LOPUCKI ET AL., *supra* note 25, at 357.

66. *See id.* at 355.

a bank pays in cash for a check, that payment is final and irrevocable.⁶⁷

Regulation CC is enforceable against banks under Section 8 of the Federal Deposit Insurance Act.⁶⁸ For national banks and for federal branches of foreign banks, compliance with Regulation CC is enforced by the United States Office of the Comptroller of the Currency.⁶⁹ For banks that are members of the Federal Reserve System (but not national banks) and which are branches of foreign banks (but not federal branches), Regulation CC is enforced by the Federal Reserve Board.⁷⁰ For banks that are insured by the Federal Deposit Insurance Corporation (FDIC) but are not members of the Federal Reserve System, or banks that are insured state branches of foreign banks, Regulation CC is enforced by the FDIC Board of Directors.⁷¹

Prior to Check 21, depository banks had to work with an inefficient check processing system and transmit the original paper checks to payor banks for presentment.⁷² The check would be sent first for clearance through the Federal Reserve process or a privately-owned intermediary, such as a clearinghouse.⁷³ Using a clearinghouse arrangement as an example: The clearinghouse would receive all of the checks from a depository bank directed to a specific payor bank and forward them to that bank, while keeping a tally of the total amount sent each day for presentment.⁷⁴ If the payor bank determined that its customer did not actually authorize payment, which is often an indication of checking fraud,⁷⁵ the check is not “properly payable”⁷⁶ and the payor bank would dishonor the check, refusing to

67. *Id.*

68. 12 C.F.R. § 229.3 (2011).

69. *Id.* § 229.3(a)(1)(i).

70. *Id.* § 229.3(a)(1)(ii).

71. *Id.* § 229.3(a)(1)(iii).

72. *See* LOPUCKI ET AL., *supra* note 25, at 357–59 (describing how depository banks obtain payment of physical checks through intermediaries); *see id.* at 427–29 (describing how depository banks obtain payment of digital copies of checks directly using ECP).

73. *Id.* at 357.

74. *Id.* at 358.

75. *See id.* at 324.

76. U.C.C. § 4-401(a) (2005); *Id.* § 4-401 cmt. 1. Checks are not “properly payable,” if they are not actually written by the customer, they are the product of fraud, or if a proper “stop payment” order has been issued on the check. LOPUCKI ET AL., *supra* note 25, at 324.

pay it.⁷⁷ Payor banks would dishonor a check by returning it to the clearinghouse, which would then send that same paper check back to the depository bank.⁷⁸ If the payor bank failed to timely dishonor the check,⁷⁹ it would be held to have implicitly agreed to honor the check and would be accountable to the depository bank for the amount written on the check.⁸⁰ If the payor bank were to honor a check that was not properly payable, then it would be stuck with the loss.⁸¹

When honoring the check, the payor bank would charge its customer's checking account.⁸² The clearinghouse would debit the payor bank for the total amount of the checks it honored each day, and would credit the depository bank for the total amount of the checks it presented that were honored each day.⁸³ Knowing whether a check was ultimately honored or dishonored would take days, during which time the depository bank would not know whether it would be

77. LOPUCKI ET AL., *supra* note 25, at 319.

78. *See id.* at 367. This returned check suffices as the payor bank's notice of dishonor to the depository bank. U.C.C. § 3-502(b)(1) (2005).

79. The payor bank has a "midnight deadline," defined as "the close of the first banking day after the banking day on which the payor bank receives the check" by which it must dishonor a check. LOPUCKI ET AL., *supra* note 25, at 370. If a payor bank fails to dishonor a check by its midnight deadline, then it must honor the check. *Id.* When the account on which the check is drawn has funds available to pay the check, the payor bank is obligated to honor it. *Id.* at 330. However, the bank only owes an obligation to its customer to pay the check; the payor bank owes no obligation to the depository bank to pay any check. *Id.* So, for the purposes of calculating its risk in making funds available to a customer, the depository bank has no consolation if the payor bank wrongfully dishonored a check on which the depository bank had permanently made funds available to its customer. *See id.* Indeed, a payor bank may wrongfully dishonor a check and even the person who deposited the check, the person owed on the check, cannot force the payor bank to honor it. *Id.* at 349. Certified checks, cashier's checks, and teller's checks are exceptions to the payee's inability to enforce the check against the payor bank. *Id.* at 354. Further, the payor bank's obligation to honor properly payable checks when sufficient funds are available in the account is eased by the rule that those funds must be available *at the time that the payor bank evaluates the account.* *Id.* at 330–31. So, even if there are sufficient funds in the account on which the check is drawn at the time that the payor bank dishonors the check, the dishonor was proper if there were not sufficient funds when the payor bank last checked the balance of the account. *Id.*

80. *See id.* at 370. Payor Banks are even allowed to honor checks that would result in an overdraft and often levy overdraft fees to the account on which they are drawn. *Id.* at 320, 322. The exception to that rule is the case in which the payor bank has agreed to pay for overdrafts, providing "overdraft protection." *Id.* at 322. "[A] bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft." U.C.C. § 4-402(a) (2005).

81. *See* LOPUCKI ET AL., *supra* note 25, at 324.

82. *Id.* at 366.

83. *Id.*

reimbursed for the funds it made provisionally available to its customer.⁸⁴

This slow process for presenting paper checks and the inherent risk of dishonor assumed by depository banks constitute the basis for the long hold periods placed on funds from deposited checks authorized by Regulation CC.⁸⁵ The deadlines on hold periods mandated by the EFAA are enforceable against depository banks *whether or not they know if the payor bank will honor the check.*⁸⁶

B. Towards a More Efficient System: The “Check 21” Act

Congress enacted Check 21⁸⁷ under the authority of the EFAA.⁸⁸ The legislature found that

[c]heck truncation [was] no less desirable in 2003 for both financial service customers and the financial services industry, to reduce costs, improve efficiency in check collections, and expedite funds availability for customers than it was over 15 years ago when Congress first directed the Board to consider establishing such a process [with the EFAA].⁸⁹

Check 21 made it feasible for depository banks to adopt the process of transmitting digital images of checks, “truncated” checks, for presentment to payor banks.⁹⁰ While banks were within their rights to use ECP before the Act, Check 21 permitted banks to present a “substitute check,” a paper copy of a digital version of the original

84. *See id.* at 354–74.

85. *See Kohn, supra* note 7.

86. *See* 12 U.S.C. §§ 4002, 4009 (making no mention of the depository bank’s knowledge of whether the payor bank will pay the check).

87. Check 21 Act, Pub. L. No. 10-100 § 1, 117 Stat. 1177, 1177 (2003).

88. Check 21 Act § 2 (“In the Expedited Funds Availability Act . . . the Congress directed the Board of Governors of the Federal Reserve System with full authority to regulate all aspects of the payment system, including the receipt, payment, collection, and clearing of checks, and related functions of the payment system pertaining to checks.”).

89. *Id.* The legislature’s purposes behind Check 21 were “[t]o foster innovation in the check collection system without mandating receipt of checks in electronic form,” and “[t]o improve the overall efficiency of the Nation’s payments system.” *Id.*

90. *Id.*

paper check, to banks that did not accept digital copies.⁹¹ The substitute check option facilitated check truncation, one of the legislature's stated purposes in enacting Check 21, by enabling banks that adopted ECP to still present checks to those that had not adopted the technology.⁹²

C. Amending the EFAA in Light of Check 21's Enactment: The Consumer Checking Account Fairness Act

Representative Carolyn Maloney and twenty-seven co-sponsors introduced the Consumer Checking Account Fairness Act (CCAF) in the House of Representatives on February 15, 2005,⁹³ but it never passed.⁹⁴ Representative Maloney proposed the CCAF as an amendment to the EFAA,⁹⁵ like Check 21, to reduce maximum check hold periods and to eliminate unnecessary hold period exceptions in accord with banks' new ability to learn of nonpayment more quickly.⁹⁶ The CCAF followed in the wake of the increased check

91. 12 U.S.C. § 5003(a)-(b) (2011).

92. LOPUCKI ET AL., *supra* note 25, at 428–30.

93. Consumer Checking Account Fairness Act, H.R. 799, 109th Cong. (2005); *Bill Summary & Status, 109th Congress (2005-2006), H.R. 799*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00799:@@D&summ2=m&> (last visited Mar. 5, 2012) [hereinafter *H.R. 799 Bill Summary & Status*].

94. *See H.R. 799 Bill Summary & Status, supra* note 93. The bill was referred to the House Subcommittee on Financial Institutions and Consumer Credit but never made it out of subcommittee before expiring at the end of the 109th Congress. *See id.*

95. *Id.*

96. Consumer Checking Account Fairness Act, H.R. 799, 109th Cong. (2005); *H.R. 799 Bill Summary & Status, supra* note 93. The Consumer Checking Account Fairness Act was proposed in 2004 “[t]o amend the Expedited Funds Availability Act to redress imbalances between the faster withdrawals permitted under the Check 21 Act and the slower rates for crediting deposits, and for other purposes”—essentially to reduce bank deposit hold times. *See* Consumer Checking Account Fairness Act, H.R. 799, 109th Cong. The bill would

direct the Board of Governors of the Federal Reserve System to prescribe regulations to: (1) reduce the expedited funds availability time periods to take into account the time within which any receiving institution can reasonably expect to learn of the nonpayment of most items for each category of checks under the Checking Clearing for the [Check 21 Act] or its implementing regulations; and (2) eliminate distinctions between the time period schedules if the Board finds that they no longer have any significance for any category of checks under such Act or regulations.

H.R. 799 Bill Summary & Status, supra note 93.

processing efficiency made possible by Check 21.⁹⁷ The bill, if passed, would have: (1) “[e]xtend[ed] the next business day availability requirement⁹⁸ to funds deposited at a proprietary ATM;” (2) “[s]et[] a limit upon certain overdraft fees imposed during a check hold period;” (3) “[r]equire[d] that Saturday be treated as a business day in the calculation of any period within which funds deposited in an account are required to be made available if the depository institution debits accounts on Saturdays for checks received;” and (4) “[r]educe[d] from four business days to two business days the mandatory check hold period on funds deposited by nonlocal checks.”⁹⁹ Representative Maloney succinctly stated the problem that her bill sought to remedy: “[C]hecks consumers write will clear sooner. However, banks are still allowed to place the same long check holds on consumers’ deposits.”¹⁰⁰

97. See Donald L. Kohn, Vice Chairman, Bd. of Governors of the Fed. Reserve Sys., Evolution of Retail Payments and the Role of the Federal Reserve, Speech Before the Western Payments Alliance 2006 Payments Symposium (Sept. 11, 2006), available at <http://www.federalreserve.gov/newsevents/speech/kohn20060911a.htm> (“[B]anks are starting to realize many of the benefits of the end-to-end electronic check processing that were envisioned when Check 21 was enacted, including efficiency gains and cost savings.”).

98. 12 C.F.R. § 229.10 of the EFAA extends “next-day availability,” mandating that banks make deposited funds available on the business day after the banking day on which the funds are deposited for cash deposits and certain electronic and check deposits. 12 C.F.R. § 229.10 (2012).

99. *H.R. 799 Bill Summary & Status*, *supra* note 93. Other requirements of the proposed CFAA not discussed in this Note include: (1) “[r]equir[ing] a depository institution to credit all deposits to a consumer checking account before debiting any check drawn on the account and presented for payment”; (2) “[p]rohibit[ing] a depository institution from imposing a fee for paying any check drawn on an account which lacks sufficient funds (bounce protection) unless the accountholder has requested check protection service”; and (3):

[a]mend[ing] the Check 21 Act to provide that if a bank that holds the account of a consumer imposes any fee for producing a copy of a substitute check, the expedited recredit process shall be available for all charges initiated by check against the account regardless of whether a substitute check was involved or provided to the consumer.

Id.

100. 151 CONG. REC. 2360 (2005) (statement of Representative Carolyn B. Maloney).

D. Altering the Framework: The Federal Reserve's Check Processing Region Consolidation

Since February 27, 2010, the United States has consisted of only one check processing region.¹⁰¹ The Federal Reserve Board consolidated all of its check processing operations into one site: the Federal Reserve Bank of Cleveland.¹⁰² As recently as 2003, the Federal Reserve Bank had forty-five processing sites throughout the country.¹⁰³ The effect of this massive consolidation was to effectively eliminate “non-local” checks as defined in the EFAA and Regulation CC.¹⁰⁴ Since all checks originating in the United States are now “local,” checks that would have once been subject to Regulation CC’s “non-local” payment schedule are now subject to the shorter “local check” payment schedule.

101. See Availability of Funds and Collection of Checks, 75 Fed. Reg. 219 (Jan. 5, 2010) (to be codified at 12 C.F.R. pt. 229); Stephen C. Veltri & Greg Cavanaugh, *Payments*, 65 BUS. LAW 1241, 1247–48 (2010).

102. Veltri & Cavanaugh, *supra* note 101.

103. Kohn, *supra* note 97. Just prior to February 27, 2010, the Federal Reserve was operating only two check processing sites nationwide. See Bd. of Governors of the Fed. Reserve Sys., *infra* note 104 (“On February 27, 2010, the Reserve Banks will transfer the check processing operations of the head office of the Federal Reserve Bank of Atlanta to the head office of the Federal Reserve Bank of Cleveland.”).

104. See Press Release, Bd. of Governors of the Fed. Reserve Sys., Announcing Restructuring of Federal Reserve Banks’ Check-Processing Operations (Dec. 31, 2009), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20091231a.htm> (“[T]here will only be a single check processing region for purposes of Regulation CC and there will no longer be any checks that are nonlocal.”); Availability of Funds and Collection of Checks, 75 Fed. Reg. at 219.

*E. Amending the EFAA in Light of Check 21's Success: The FASTT Checks Act*¹⁰⁵

Representative Niki Tsongas introduced the “Faster Access and Shorter Transaction Time for Checks Act of 2010” (FASTT Checks Act) on March 24, 2010 without co-sponsors but, like the CCAF, Congress did not pass it.¹⁰⁶ Representative Tsongas re-introduced the FASTT Checks Act before the 112th Congress with two co-sponsors, Representative Jackie Speier and Representative Frederica Wilson.¹⁰⁷ The bill, if signed into law, would amend the EFAA to provide a shorter payment schedule for funds from depository banks by doubling the amounts available for withdrawal after deposit under the present schedule.¹⁰⁸ It would also eliminate the “large deposit”

105. Other bills before the 111th Congress and related to the CCAF Act or the EFAA, but not discussed in this Note, include: The Innocent Check Depositor Protection Act, H.R. 1366, 111th Cong. (2010), sponsored by Representative Anthony Weiner, which would “amend[] the [EFAA] to prohibit a receiving depository institution from imposing check dishonorment fees upon a depositor if the check is drawn on an account at an originating institution which subsequently dishonors it for lack of sufficient funds,” *Bill Summary and Status, 111th Congress (2009–2010), H.R. 1366*, LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr1366> (follow “CRS Summary”) (last visited Mar. 28, 2012); the Consumer Overdraft Protection Fair Practices Act, H.R. 1456, 111th Cong. (2010), sponsored by Representative Maloney, to provide restrictions on overdraft protection fees, *id.*; and the Consumer Checking Fairness Act, H.R. 1488, 111th Cong. (2010), sponsored by Representative Kendrick Meek, to

amend[] the [EFAA] to require depository institutions to: (1) post checks presented for payment against checking accounts used primarily for personal, family, or household purposes after the close of any business day in the numerical order of the checks, beginning with the lowest number; (2) notify accountholders of, and require their written consent for, an alternate posting order; and (3) credit all deposits to such accounts after the close of any business day before debiting any check drawn on the account and presented for payment.

Bill Summary and Status, 111th Congress (2009–2010), H.R. 1488, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.01488>: (follow “CRS Summary”) (last visited Mar. 28, 2012).

106. H.R. 4936, 111th Cong. (2010); *Bill Summary and Status, 111th Congress (2009–2010), H.R. 4936*, LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr4936> (follow “CRS Summary”) (last visited Mar. 28, 2012) [hereinafter *Bill Summary and Status, H.R. 4936*]. The FASTT Checks Act, like the CCAF, was referred to the House Committee on Financial Services but expired at the end of the 111th Congress. *See id.*

107. H.R. 1660, 112th Cong. (2011).

108. *Bill Summary and Status, 112th Congress (2011–2012), H.R. 1660*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:H.R.1660>: (follow “CRS Summary”)

exception to Regulation CC's payment schedule in cases where the check was deposited at a bank with at least \$10 billion in assets and was truncated and cleared under Check 21.¹⁰⁹ The FASTT Checks Act also proposes to treat Saturday as a "business day" when counting how many days a bank has to make funds available under Regulation CC.¹¹⁰ As originally introduced in 2010, the FASTT Checks Act would have also adjusted the dollar amounts used in Regulation CC every five years based on inflation.¹¹¹

III. ANALYSIS

A. *The Benefits of Check 21: Security and Efficiency*

Since the enactment of Check 21, the vast majority of checks are processed electronically.¹¹² Check 21 is well on its way to fully achieving Congress's purposes in passing the Act.¹¹³ The 9/11 terrorist attacks on the United States brought check processing to a

(last visited Feb. 23, 2012) [hereinafter *Bill Summary and Status, H.R. 1660*]; see also H.R. 1660 § 2.

109. *Bill Summary and Status, H.R. 1660, supra* note 108. The bill:

Revises the next business day availability requirement for cash deposited in a new depositor account. Eliminates the exception from this rule (thus requiring next business day availability) for large deposits in large depository banks if a check: (1) has been truncated and cleared in accordance with the Check Clearing for the 21st Century Act, and (2) is received for payment or deposit at a depository bank with total assets of \$10 billion or more. Treats Saturday as a business day in the calculation of any period within which funds deposited in an account at a receiving depository institution are required to be available.

Id.

110. *Id.*

111. See *Bill Summary and Status, H.R. 4936, supra* note 106.

112. Press Release, Fin. Servs. Policy Comm., Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Banks Complete Check Processing Infrastructure Changes (Mar. 28, 2010), available at <http://www.federalreserve.gov/newsevents/press/other/20100302a.htm>. "At the time Check 21 went into effect, 100 percent of the items processed by the Reserve Banks were in paper form. Today, almost 99 percent are processed as images." *Id.*

113. See Paul W. Bauer & Geoffrey R. Gerdes, *The Check is Dead! Long Live the Check! A Check 21 Update*, ECONOMIC COMMENTARY (Fed. Reserve Bank of Cleveland), Sept. 21, 2009, <http://www.clevelandfed.org/research/commentary/2009/0609.pdf> ("A clear goal of Check 21 was to improve the overall efficiency of the nation's payments system. Encouraging depository institutions to switch from a paper-based infrastructure to an electronic one was seen as an important way to improve the robustness of the system.").

halt by grounding all air traffic.¹¹⁴ Congress and commentators identified the checking payment system's dependence on air transportation as a major weakness.¹¹⁵ Since the passage of Check 21 and the wide-scale adoption of ECP, however, the large majority of checks are now processed without reliance on physical transportation of any sort.¹¹⁶ By implementing ECP, banks are breaking the United States economy's reliance on physical transportation for payment processing.

ECP reduces the transactional cost of presenting checks for banks.¹¹⁷ ECP also speeds up check presentment, and the proceeds of this increased efficiency are currently split between the banks and their customers.¹¹⁸ Banks' customers sometimes enjoy earlier availability of funds than they would have realized before Check 21, but this is at the discretion of their banks.¹¹⁹

114. See Kohn, *supra* note 97 (“[T]he September 11th attacks highlighted the banking industry's extensive reliance on air transportation as planes came to a standstill and the collection of checks slowed dramatically . . . This prompted a heightened focus on how electronic processing technologies could be applied to the check-collection system to reduce the reliance on air transportation and improve check-processing efficiency more generally.”).

115. See *id.*; see also Jeffrey M. Lacker, *Payment System Disruptions and the Federal Reserve Following September 11*, FED. RESERVE BANK OF RICHMOND WORKING PAPER SERIES, Dec. 23, 2003, at 26, available at <http://www.carnegie-rochester.rochester.edu/Nov03-pdfs/lacker.pdf> (“Deliberate terrorist attacks on physical infrastructure are obviously capable of interrupting normal payment functions, and September 11 was not the first such attack.”). In addition, “[i]nterbank payment disruptions appear to be a central feature” of certain reviewed crises, which, “for various reasons”, is a trend that “appear[s] likely to recur.” *Id.* at 1; see also Bauer & Gerdes, *supra* note 113 (“[T]he transition of checks to a more robust electronic clearing mechanism should promote market resiliency during more unusual times, reducing risks from a variety of threats from terrorists to natural disasters.”).

116. FED. RESERVE SYS., *supra* note 1, at 12.

117. See Kohn, *supra* note 97.

118. *Id.* (“[B]anks are starting to realize many of the benefits of the end-to-end electronic check processing that were envisioned when Check 21 was enacted, including efficiency gains and cost savings. In addition, they are beginning to offer their customers new and better services. For example, some banks are offering their business customers the ability to truncate checks and deposit them electronically. Also, banks are now able to set a later-in-the-day cutoff hour for check deposits because they can transmit checks electronically from their branches to their central processing facilities for collection. As a result, banks should be able to provide customers with improved funds availability, more efficient cash management services, and better access to services for their geographically remote customers.”).

119. Ron Lieber, *Hurry Up and Credit My Account*, N.Y. TIMES, Sept. 19, 2009, at B1 (“Banks can and do move faster than the regulations require. . . . But you can't count on that happening.”).

Banks regularly “float” checks.¹²⁰ That is, depository banks collect interest on checks in the time between when those banks are paid for a check by the payor bank and when the Regulation CC availability schedule requires the bank to make the funds available to its customer.¹²¹ With check float, banks stand to have a great deal of money at their disposal on which they may collect interest.¹²² Shortened hold periods mean earlier funds availability for customers and less time for banks to float checks and less interest that they can collect.¹²³

Because Check 21 enables banks to transfer a digital image of a check for presentment and processing, banks may destroy the now unnecessary original paper checks shortly after receiving them.¹²⁴

120. Michelle Samaad, *Technology Makes the Float Risky for Consumers*, BANKRATE.COM (Mar. 30, 1999), <http://www.bankrate.com/brm/news/bank/19990330.asp> (“The float is that lapse in time between when a check is deposited into an account and when the money becomes available. . . . Banks use this time to verify the legitimacy of a check. In the meantime, the bank or credit union earns interest on dormant checks—which has had some consumer groups crying foul.”); *Beware of “the Float”*, YAHOO! FINANCE, <http://banking.yahoo.com/chk7a.html> (last visited Apr. 19, 2012).

121. *Id.*; FED. FIN. INST. EXAMINATION COUNCIL, *supra* note 3 (defining “float” as “[f]unds held by an institution during the check-clearing process before being made available to a depositor. Interest may be earned on these funds”); *Beware of “the Float”*, *supra* note 120 (“For example, a person gives the landlord a rent check on Tuesday, but the money won’t be in the bank until Friday.”); Jeffrey M. Lacker, *The Check Float Puzzle*, 83/3 FED. RES. BANK OF RICH. ECON. Q. 4 (Summer 1997), http://www.richmondfed.org/publications/research/economic_quarterly/1997/summer/pdf/lacker.pdf (“To put it another way, an outstanding check does not earn interest while the check is being cleared. The implication is that clearing a check one day faster allows the presenting bank to earn an extra day’s interest.”).

122. Lacker, *The Check Float Puzzle* *supra* note 121, at 8:

A rough calculation gives a sense of the potential magnitudes involved. The total value of the checks cleared in 1995 was approximately \$73.5 trillion, or an average of \$201 billion per day (Committee on Payment and Settlement Systems of the central banks of the Group of Ten countries 1995). The overnight interbank interest rate averaged 5.83 percent that year, which corresponds to 0.016 percent per day. Multiplying this overnight rate by the value of checks cleared yields \$32.2 million per day (\$201 billion times 0.000160), or \$11.7 billion per year. This works out to about \$0.18 per check . . .

See Samaad, *supra* note 120 (“[Senior Analyst with the Division of Reserve Bank Operations and Payment Systems for the Federal Reserve Bank of Minneapolis, Kirsten E.] Wells said laws were passed in the early 1980s, partly in response to consumer complaints that banks were exploiting the float to their own advantage, holding on to checks and putting the money into short-term investments that would earn interest. . . . When it comes to getting access to checks you’ve been given, the float works against you.”).

123. *See supra* note 122.

124. *See Wachovia Bank, N.A. v. Foster Bancshares, Inc.*, 457 F.3d 619, 622 (7th Cir.

Around the time of the passage of Check 21, and even more recently, commentators expressed concerns that banks would also be destroying evidence that could be used in the investigation and prosecution of check fraud.¹²⁵ While it seems true that fingerprints and other identifying marks are eliminated when the checks are destroyed, the fears of increased check fraud seem unfounded.¹²⁶ There has been no increase in fraud or any additional detriment stemming from fraud as an effect of Check 21.¹²⁷

B. The Detriment of Check 21: Bank Customers' Lost "Float" Time

The quicker check processing made possible by Check 21 results in less time for a customer to ensure that his or her account has sufficient funds to cover a check after writing the check.¹²⁸ The practice of writing a check with the expectation that one can place the necessary funds into the account before the bank withdraws the funds to pay the check is *also* called "floating" checks.¹²⁹ Like the

2006); *see also* Beau J. Hurtig, *Check Fraud Liability: In the Wake of Check 21*, NW. FIN. REV., Mar. 15, 2007.

125. Heather Ratcliffe, *Tracking Bad Checks Just Got Harder*, ST. LOUIS POST-DISPATCH, Nov. 16, 2004, at 1 ("[D]igital copies . . . bear no fingerprints or other subtle clues that fraud cops have used for years.")

126. *See* ASS'N FOR FIN. PROF'L.S., 2010 AFP PAYMENTS FRAUD AND CONTROL SURVEY 21 (2010), *available at* http://www.afponline.org/pub/pdf/2010_Payments_Fraud_Survey.pdf ("Depositing and clearing check images does not currently appear to be impacting fraud levels or loss rates.")

127. *See id.*

128. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 3, at 6–7 ("Check 21, which became effective on October 28, 2004, has succeeded in reducing check processing times as well as the float period previously associated with physical processing."); *see also* ASS'N FOR FIN. PROF'L.S., *supra* note 126, at 23 ("With the Federal Reserve consolidating check operations to one site, making all checks local, and check image clearing used for nearly all checks, check float is becoming a thing of the past and so should not be a reason for organizations to continue to issue checks.")

129. Bob Sullivan, *A New Era in Banking Begins*, MSNBC.COM (Oct. 28, 2004), http://www.msnbc.msn.com/id/5880440/ns/business-online_banking/t/new-era-banking-begins/#.T4oH8fmxPIV ("Consumers trying to stretch their money have become accustomed to taking advantage of "the float"—the time it takes after they write a check for banks to deduct from their accounts. It's a bit of a secret loan, but Check 21 means it's about to be shut down for good."); Mellody Hobson, *Good Morning America*, ABCNEWS.GO.COM (Oct. 26, 2004), http://abcnews.go.com/GMA/MellodyHobson/story?id=198293&page=1#.T4oH7_mxPIW ("Consumers who rely on the float period (the lag time between when a check is deposited and when the funds clear) to get by every month are soon going to find themselves out of luck . . . a federal law called Check Clearing for the 21st Century Act or Check 21, will allow banks to

“floating” done by banks, customers make use of the time between the check deposit and when the funds must be made available to the payee.¹³⁰ Bank customers can be hit with bounced check fees or overdraft fees if they do not adapt to quicker check processing.¹³¹ As noted above, checks have already begun to diminish in popularity as compared with debit card usage.¹³² Thus, if one of the primary appeals of check-writing over debit card checking was that one could write a check before placing the funds in the checking account, then these shortened hold periods serve to further diminish the appeal of checks.¹³³

C. The Consolidated Fed: The Impact of Check 21 on the Federal Reserve

The Federal Reserve was able to consolidate the nation’s check processing centers down to one facility, located in Cleveland, because the use of checks has diminished¹³⁴ and because ECP has

process checks without any lag time.”); Jaime Holguin, *Check Floating Days Thing of Past*, CBSNEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/2100-500262_162-650977.html (explaining consumer check float by way of example: “[Tamara Hampton] occasionally floats a check—buying time to put money in her account—because she figures that check will need a couple days to clear.”).

130. *Supra* note 131.

131. Press Release, Consumers Union, Lawmakers Introduce “Check 21” Reform Bill to Make New Law More Fair for Consumers (Feb. 15, 2005) (quoting Gail Hillebrand, Senior Attorney for Consumers Union, as stating that, “Check 21 left some consumers more vulnerable to bouncing checks because it enables banks to debit accounts as quickly as the same day a check is written while still taking their time with customer deposits”).

132. FED. RESERVE SYS., *supra* note 1, at 4–5. Regulations governing debit cards, checks’ main competition, tend to allocate less risk to customers for costs of unauthorized use than do regulations governing checks. See ASS’N FOR FIN. PROF’LS., *supra* note 126, at 23 (“The survey results suggest that perhaps the single best way for organizations to protect themselves against payments fraud is to move away as quickly as possible from the use of checks for payment.”).

133. See Cliff G. Anderson, *Eliminating the Paper: The Truncation of Paper Checks*, 6 J. HIGH TECH. L. 280, 285 (2006). “Banks often pay the largest checks first and smaller checks later (that is, by descending order of amount).” LOPUCKI ET AL., *supra* note 25, at 323. The result is more bounced checks and greater fees charged to customers. *Id.* This is permissible under U.C.C. § 4-303(b). “[A] number of courts have suggested that high charges for processing bad checks could violate a bank’s implied duty of good faith or could be unconscionable, at least if the charges substantially exceed the cost to the bank of processing the bad checks.” *Id.* at 322.

134. *Check Restructuring Resource Center*, FED. RESERVE BANK SERVS., http://www.frbervices.org/communications/check_restructuring.html (last visited Mar. 7, 2012) (“The Federal Reserve has made changes to its check processing and adjustments operations in

largely replaced the presentment of paper checks.¹³⁵ Check 21 did *not* require that banks implement ECP; it simply made it more feasible by allowing banks that do adopt ECP to still present checks directly to banks that do not adopt ECP by delivering a “substitute check.”¹³⁶ However, the Federal Reserve’s check processing region consolidation shortened allowable hold periods on many checks by making all checks “local checks” (as opposed to “non-local checks” originating from another check processing region) subject to local checks’ earlier funds availability schedule.¹³⁷ In addition to the replacement of presentment of paper checks with digital images, the competition from other payment methods, such as credit cards and debit cards, has caused a drastic downward trend in check payments in general.¹³⁸ Without so many paper checks to be processed, the Federal Reserve can now manage them all in one place without being overwhelmed by the volume.¹³⁹

The Federal Reserve’s decision to consolidate the nation’s check processing regions reflected the fact that the Federal Reserve’s own role in check processing had changed, as fewer checks are now

response to the changing market, including the decline of paper check volumes industry-wide.”).

135. Press Release, Fin. Servs. Policy Comm., Bd. of Governors of the Fed. Reserve Sys., Federal Reserve Banks Announce Reduced Number of Check Processing Sites and Accelerated Restructuring Schedule (Nov. 6, 2008), *available at* <http://www.federalreserve.gov/newsevents/press/other/20081106a.htm> (“This more rapid [check processing center consolidation] transition effort . . . is a clear measure of success in terms of the industry’s efforts to move to a more efficient electronic solution for clearing checks,” said Gary Stern, chairman of the Reserve Banks’ Financial Services Policy Committee and president of the Federal Reserve Bank of Minneapolis.”).

136. Check 21 required that banks accept substitute checks and honor them as they would an original paper check. Bauer & Gerdes, *supra* note 113.

137. Availability of Funds and Collection of Checks, 75 Fed. Reg. 219, 219 (Jan. 5, 2010) (to be codified at 12 C.F.R. pt. 229) (“[T]he amendments to appendix A are effective February 27, 2010. At that time, there will only be a single check-processing region for purposes of Regulation CC and there will no longer be any checks that are nonlocal.”).

138. See FED. RESERVE SYS., *supra* note 1, at 5. (“Since 2006, the debit card has eclipsed the check as the most used noncash instrument . . . This was not only because the number of debit card transactions increased at 14.8 percent per year from 2006 to 2009 but also because the number of checks paid declined 7.2 percent per year.”). “Consumers seem to view debit cards as a natural progression from cash and checks because they are a convenient electronic means of making payments without incurring the additional debt often associated with credit card use.” *Id.*

139. See Kohn, *supra* note 97.

processed in paper form.¹⁴⁰ The Federal Reserve still participates in check processing oversight as well as operations since Check 21.¹⁴¹ With greater reliance now on “truncated” check presentment, banks commonly process checks through transmission of digital images that are not as dependent on human labor¹⁴² or burdened by geography.¹⁴³ The Federal Reserve may still play an important operational role in competing with the private sector and reducing operational inefficiencies,¹⁴⁴ though the Federal Reserve’s intermediary role has now changed from primarily processing physical checks to electronic check processing.¹⁴⁵ Of course, the Federal Reserve is still committed to promoting efficiency and integrity in the check processing system, and is still charged with regulatory duties.¹⁴⁶

140. Fin. Servs. Policy Comm., *supra* note 135.

141. 12 U.S.C. § 4009(c)(1) (“Except to the extent that enforcement of the requirements imposed under this chapter is specifically committed to some other Government agency . . . , the Board of Governors of the Federal Reserve System shall enforce such requirements.”); Kohn *supra* note 97.

142. *See* Fin. Servs. Policy Comm., *supra* note 135. “As a result of the actions announced today, the Reserve Banks expect to reduce their overall check staff by approximately 750 positions.” *Id.*

143. Kohn, *supra* note 97 (“Clearly, Check 21 has begun to diminish the importance of geography and physical transportation in check processing, and banks have started to reengineer their backroom processes to accommodate end-to-end electronic check clearing.”).

144.

From its inception in 1913, the Federal Reserve has not only been closely involved in overseeing the nation’s payments system but has also been an important operational component of that system. This latter role has involved competing with the private sector to provide certain retail payments. Congress originally wanted the Federal Reserve to play this operational role to reduce inefficiencies in the payments arena. This role has changed considerably over the past century . . .

Kohn, *supra* note 97. *But see id.* (“As we move into a more steady-state electronic check environment, the Federal Reserve may find it appropriate once again to review its longer-term operational role in the retail payments system. Clearly, at that time, the Federal Reserve’s national reach will no longer be a compelling reason for its operational role.”).

145. *See supra* note 1; Fin. Servs. Policy Comm., *supra* note 135 (“[P]aper check volumes have declined significantly and no longer support the need for four full-service regional sites.”).

146. *Id.* (“While restructuring check operations will continue to be challenging, this process and related changes support the Reserve Banks’ mission to promote the long-term efficiency and integrity of the nation’s payments system.”); Kohn *supra* note 97 (“[T]he retail payments system will continue to become increasingly electronic even though the exact nature of that system is not yet clear. What is clear, however, is that the Federal Reserve will continue to foster a safe and efficient payments system.”); 12 U.S.C. § 4008 (“[T]he Board shall prescribe regulations—(1) to carry out the provisions of this chapter; (2) to prevent the

D. The Benefits of the Federal Reserve Consolidation: The First Step toward a Check on Holds

The Federal Reserve's region consolidation benefits bank customers by forcing banks to make funds available on some checks earlier than they would have previously.¹⁴⁷ In effect, the consolidation eliminated the "non-local check" status and made all checks, originating from anywhere within the United States, "local checks."¹⁴⁸ The EFAA sets shorter allowable hold periods for "local checks" than it does for the now virtually nonexistent "non-local checks."¹⁴⁹ Thus, the Federal Reserve's creation of one national check processing region accomplished one part of the proposal of CCAF: to shorten non-local checks' hold periods to the same duration as local checks.¹⁵⁰

The EFAA explains that payment schedule regulations should only allow hold periods that are "as short a time as possible" and "achievable" under the check processing system for depository banks to "reasonably expect" to learn of nonpayment of most checks in each category.¹⁵¹ Banks are allowed to place holds on checks because

circumvention or evasion of such provisions; and (3) to facilitate compliance with such provisions.").

147. See Availability of Funds and Collection of Checks, 75 Fed. Reg. 219, 219 (Jan. 5, 2010) (to be codified at 12 C.F.R. pt. 229).

148. Availability of Funds and Collection of Checks, 75 Fed. Reg. at 219; see also BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 15 ("[T]here will only be a single check processing region for purposes of Regulation CC and there will no longer be any checks that are nonlocal.").

149. Expedited Funds Availability Act, 12 U.S.C. § 4002 (1987).

150. Consumer Checking Account Fairness Act, H.R. 799, 109th Cong. § 3(e) (2005); Availability of Funds and Collection of Checks, 75 Fed. Reg. at 219.

151. 12 U.S.C. § 4002(d)(1). The statute provides that:

Notwithstanding any other provision of law, the Board shall, by regulation, reduce the time periods established under subsections (b), (c), and (e) of this section to as short a time as possible and equal to the period of time achievable under the improved check clearing system for a receiving depository institution to reasonably expect to learn of the nonpayment of most items for each category of checks.

Id.

The House Report on Regulation CC stated the basis on which the hold periods should be mandated:

The title adopts a test tied to depository institutions' ability to reasonably expect to learn of the nonpayment of a significant number of checks under the improved check

they face risk-management issues that arise when they are required to make funds available under the EFAA before they learn whether the payor bank will honor the check.¹⁵² That is, depository banks want to avoid cashing a check written to their customer only to then learn that the check is fraudulent, the account on which the check is drawn does not have the necessary funds, or any other reason that the bank will not be reimbursed for cashing that check. Depository banks that still rely on transmission of paper checks run a greater risk of taking a loss on a check because they may be required to pay a check before having the opportunity to learn that it is dishonored.¹⁵³

In order to manage their risks, depository banks must further break any reliance on paper-check-processing methods and make the change to ECP.¹⁵⁴ Some banks have not yet adopted digital check processing, perhaps because of the high up-front costs to invest in the necessary digital equipment and logistics.¹⁵⁵ Smaller banks that lack sufficient capital to update are thus exposed to the greatest risk.¹⁵⁶

clearing system. For example, if the new system makes it possible for two-thirds of the items of a category of checks to meet this test in a shorter period of time, then the Federal Reserve must shorten the schedules accordingly.

H.R. Rep. No. 100-261, at 179 (1987) (Conf. Rep.), *reprinted in* 1987 U.S.C.C.A.N. 588, 648.

152. *See* LOPUCKI ET AL., *supra* note 25, at 331–37.

153. FED. FIN. INST. EXAMINATION COUNCIL, *supra* note 3, at 43.

Using ECP for payment can reduce risks to depository financial institutions because it permits them to deliver check data to paying financial institutions more quickly than by presenting paper checks. The shorter delivery time permits paying financial institutions to (1) identify checks that cannot be paid and (2) notify the depository financial institution about those returned checks using an electronic return notice and up to one day earlier than would occur with the physical exchange of paper checks.

Id.

154. *See id.*

155. *Id.* at 7 (“For many financial institutions, implementing a Check 21 strategy involves a significant investment in new hardware and software as well as the reengineering of check processing routines. Consequently, financial institutions should deploy Check 21 with appropriate risk management, including strategic planning, project management, and vendor management.”).

156. In 2007, the Federal Reserve conducted a study on the effects of Check 21 and found that because banks were still adjusting to Check 21 and because the consolidation of the forty-five check processing regions down to just a handful (at that time) put an additional burden on banks, it did not recommend decreasing the maximum hold periods:

Based on the results of the March 2006 survey, banks are now learning more quickly about the nonpayment of checks than reported in a similar survey conducted by the Board in 1995. This improvement, however, has not been sufficient to warrant changes

However, the full-scale adoption of ECP technology remains the general trend and the proper goal.¹⁵⁷

E. The Potential Benefits of the FASTT Checks Act

Check 21 and banks' pervasive implementation of ECP have made it possible for banks to make funds available from deposited checks earlier.¹⁵⁸ Not only did the Federal Reserve's consolidation create an incentive for banks to adopt ECP,¹⁵⁹ but the fact that the Federal Reserve would consolidate and the success of banks in dealing with shortened deadlines provides evidence that banks can operate under shorter hold periods than they could when the CCAF was passed.¹⁶⁰ The benefits to bank customers and to the checking payment system that the FASTT Checks Act would provide justify any expected detriment to banks.¹⁶¹ The FASTT Checks Act

in the maximum permissible hold periods mandated by the EFAA and Regulation CC. In particular, the study found that unpaid checks, whether classified as local or nonlocal checks, are not returned to depository banks soon enough to meet the long-standing Congressional benchmark for reducing associated maximum permissible hold periods. In addition, while the use of Check 21 authority has been growing quickly since the March 2006 survey, much broader adoption of new technologies and processes by the industry will likely be necessary before total check return times diminish appreciably.

FED. RESERVE SYS., *supra* note 1, at 2.

157. *See* Fin. Servs. Policy Comm., *supra* note 112.

158. *See supra* note 1.

159. Banks having "the incentive to speed up the [check processing] system" is a "likely long-term effect[] of giving banks the risk of loss that they face if the deadlines force them to release funds without determining whether a check will clear." LOPUCKI ET AL., *supra* note 25, at 377.

160. *See* Fin. Servs. Policy Comm., *supra* note 112 (quoting Patrick K. Barron, First Vice President of the Federal Reserve Bank of Atlanta and Retail Payments Office Director, as stating, "The movement to a single paper check processing site is recognition of the industry's success in moving to more efficient electronic solutions for clearing checks").

161. Any detriment suffered by banks would be the effect of this legislation essentially shifting the benefits provided by Check 21 from the banks to the banks' customers. *See* Consumers Union, *supra* note 131 ("'Consumers shouldn't have to wait so long to use the money they've deposited in their bank accounts,' said Gail Hillebrand, Senior Attorney for Consumers Union. 'Since banks are going to benefit from quicker check processing under Check 21, so should consumers.'").

Once banks embraced the new procedures, money disappeared from your account much faster when you wrote a check. But the old laws on how quickly banks must credit your account when you make a deposit did not change at all. They still haven't. In fact, they haven't changed in more than 20 years.

Lieber, *supra* note 119.

promotes the legislative purposes of the EFAA, the act that it would amend: to “end excessive holds on customer deposits by depository institutions.”¹⁶² Thus, the time is right for Congress to end excessive hold periods.¹⁶³

A 2006 Federal Reserve survey conducted prior to the Federal Reserve’s check processing region consolidation showed that banks held checks for the full duration allowed by the EFAA in consumer transactions for only about 10 percent of local and non-local checks.¹⁶⁴ The approximately 90 percent of banks that released funds to their customers sometime before the legislated deadline¹⁶⁵ may have been reacting to market forces impelling banks to take less than full advantage of the allowable hold periods in an effort to garner greater market share.¹⁶⁶ An argument that market forces alone will provide for earlier funds availability than the current EFAA hold periods require may be based on these observations. However, the proposed regulation remains necessary because: (1) this Federal Reserve survey indicates that about 10 percent of banks at the time of publication were taking *full* advantage of the relatively lenient EFAA hold periods, (2) the other 90 percent may have been taking *some* advantage of the current hold periods, and (3) hold periods have historically been as long or longer than they currently are, so deposited check funds availability is less likely to inform a customer’s choice among banks and bank customers might not realize that funds could be available sooner.

The proposed FASTT Checks Act of 2011 incorporates the “Saturday as a business day” proposal of the CCAF.¹⁶⁷ This would serve the same benefit to bank customers as shortening the

162. S. REP. NO. 100-19, at 1 (1987), *reprinted in* 1987 U.S.C.C.A.N. 489, 491.

163. *But see* Anderson, *supra* note 133, at 289 (“While shorter hold times are not necessarily a bad thing for banks, enforcing the CCAF hold times now . . . would be premature since it will take several years before significant effects of Check 21 will be felt.”).

164. BD. OF GOVERNORS OF THE FED. RESERVE SYS., BOARD OF GOVERNORS OF THE FEDERAL RESERVE BANK, REPORT TO THE CONGRESS ON THE CHECK CLEARING FOR THE 21ST CENTURY ACT OF 2003, 13 (Apr. 2007), *available at* <http://www.federalreserve.gov/boarddocs/rptcongress/check21/check21.pdf>.

165. *Id.*

166. *Id.* (“Here, as much as anyplace else in commercial law, the actors frequently are motivated not by legal commands, but by the desire to protect their reputations and augment the relationships that are crucial to their success.”).

167. FASTT Checks Act, H.R. 1660, 112th Cong. § 4 (2011).

Regulation CC availability schedules: it would make customers' money available to them sooner in the common cases of banks that operate on Saturdays.¹⁶⁸ The proposed FASTT Checks Act would also update the dollar amounts employed in the EFAA by doubling the amounts that must be made available at each specified time.¹⁶⁹ The earlier version of this bill also proposed coupling the amounts available to inflation.¹⁷⁰ The inflation amendment is logical because the EFAA was passed in 1987, and \$100.00 in 2010 (the amount of a check generally subject to next-day availability under the EFAA) had only the buying power that \$52.00 had in 1987.¹⁷¹ The FASTT Checks Act would also eliminate the "large deposit" exception, but only for banks that have over \$10 billion in assets and use ECP.¹⁷²

IV. PROPOSAL

The 112th Congress should consider enacting a variation on the FASTT Checks Act of 2011. The updated Act should mandate including Saturday as a business day for those banks that operate on Saturdays and double the dollar amounts in the availability schedule. As proposed by the FASTT Checks Act of 2010, Congress should tie dollar amounts to inflation. Congress should also eliminate the "large deposit" exception. Unlike Representative Tsongas' FASTT Checks Act, such legislation should *not* provide an exception for banks that do not truncate checks under Check 21 or that do not have \$10 billion in assets.

Eliminating the "large deposit" exception for all banks, regardless of size, would arguably burden small banks by compelling them to invest capital in expensive check truncation equipment.¹⁷³ Further, banks that have not themselves enjoyed the risk-management benefits of ECP would be required to take on the risk of earlier funds

168. *See id.*

169. *Id.* § 2.

170. *Bill Summary and Status, H.R. 4936, supra* note 106.

171. U.S. Bureau of Labor Statistics, *CPA Inflation Calculator*, http://www.bls.gov/data/inflation_calculator.htm (enter "100" for dollars; then select "2010" in the first box; then select "1987" in the second box) (last visited Mar. 7, 2012).

172. H.R. 1660 § 3.

173. *See* FED. FIN. INST. EXAMINATION COUNCIL, *supra* note 3, at 10.

availability if the exception were completely eliminated.¹⁷⁴ However, disparate funds availability schedules at different banks would unnecessarily complicate the system: customers' expectations could be undermined when they receive normal funds availability at Bank A, but Bank B places their funds on hold for over one and one-half weeks.¹⁷⁵ Moreover, the benefits of the ECP technology are proven, and its wide-scale adoption by banks is historically the product of banks' incentive to pay for it and use it.¹⁷⁶ Completely eliminating these two exceptions to the funds availability schedule, without regard to bank size or check processing methods, would preserve every bank's incentive to implement ECP.¹⁷⁷

V. CONCLUSION

It is only very recently that banks have so broadly implemented ECP.¹⁷⁸ By adopting this technology, banks generated far greater efficiency and security in the check processing system.¹⁷⁹ The Federal Reserve's check processing region consolidation resulted in shorter hold periods and provided an adjustment period for banks to become accustomed to shorter funds availability schedules. By amending the Expedited Funds Availability Act to reflect these changes, Congress would benefit bank customers, strengthen the payment system, and serve the purposes of the Expedited Funds Availability Act. Further,

174. See H.R. 1660, *supra* note 167.

175. See Lieber, *supra* note 119 ("The large deposit exception ensnares plenty of people, according to Gail Hillebrand, senior attorney for Consumers Union. They include those who are paid on commission or quarterly and those earning royalties, and a large number of others moving money around from, say, a brokerage account to their checking account to pay big medical or tuition bills or buy a car or house.").

176. See, e.g., Diane Franklin, *Early Explorers*, CREDIT UNION MGMT., Mar. 2008, at 48, 48. The Vice President of a credit union described her motivation for adopting ECP as the "reduction in float time, which would provide additional interest income, and reduction in fraud due to quicker check processing and notification of return items." *Id.*

177. See LOPUCKI, *supra* note 25, at 337 ("By putting that risk [of loss that they face if the deadlines force them to release funds without determining whether a check will clear] on banks, the system gives banks the incentive to speed up the system to limit the frequency with which the deadlines arrive before information about the validity of the check.").

178. Report to Congress, *supra* note 1, at 10 ("[T]he Board's March 2006 survey indicates that at least 93 percent of all checks paid in the United States still involved the presentment of a paper check.").

179. See *supra* note 141.

such legislation can help the paper check to remain a competitive payment option in an era of electronic payment.¹⁸⁰

180. “As a result of competition with other payment methods, check use has been declining since the mid-1990s, but because of the rapid adoption of electronic payment methods, checks are evolving and are unlikely to disappear anytime soon.” Bauer & Gerdes, *supra* note 115.