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Via electronic submission

February 8, 2019

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., NW
Washington, DC 20551

Re: Availability of Funds and Collection of Checks (Regulation CC) [Docket No. R-1637; RIN 7100-AF 28]

Dear Ms. Misback:

The Independent Community Bankers of America (“ICBA”)¹ welcomes this opportunity to provide comment in response to the Board of Governors of the Federal Reserve System’s (“Board”) and the Consumer Financial Protection Bureau’s (“Bureau,” collectively, “Agencies”) joint proposed rule and reopening of the comment period for an existing proposed rule. The Agencies are seeking comments on two proposals to amend Regulation CC (“Reg CC”) – one newly issued (“2018 Proposal”) and one previously issued in 2011 (“2011 Proposal”).

Summary of Comments

- ICBA supports the Agencies’ 2018 Proposal as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) to establish the methodology used to calculate the statutorily-required adjustments to EFA Act, every five years.
- ICBA requests that the Agencies issue a Request for Information (“RFI”) or an Advance Notice of Proposed Rulemaking (“ANPR”) to formally resolicit comments on the 2011 Proposal, in keeping with the spirit of the Administrative Procedures Act (“APA”).

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

- A newly issued RFI or ANPR would benefit the public by providing an updated staff analysis and discussion of the current market and rationale for any proposed changes.

2018 Proposal

Subpart B of Reg CC implements the requirements set forth in the Expedited Funds Availability Act (“EFA Act”) regarding the availability schedules within which banks must make funds available for withdrawal, exceptions to those schedules, disclosure of funds availability policies, and payment of interest. The EFA Act and subpart B of Regulation CC contain specified dollar amounts, including, among other requirements, the minimum amount of deposited funds that banks must make available for withdrawal by the next business day, the threshold for determining whether an account has been repeatedly overdrawn, and the civil liability amounts for failing to comply with the EFA Act's requirements.

The Agencies’ 2018 Proposal would amend subpart B of Reg CC by specifying the methodology to calculate the statutorily required adjustments to the dollar amounts in the EFA Act every five years. The adjustments would be based on the aggregate annual percentage increase in the Consumer Price Index for Wage Earners and Clerical Workers (“CPI-W”), rounded to the nearest multiple of \$25. The Agencies propose to use the aggregate percentage change in the CPI-W from July 2011 to July 2018 as the initial inflation measurement period for the first set of adjustments, with each subsequent adjustment continued to be based on a period that begins in July of every fifth year.

Additionally, if finalized as proposed, the Agencies anticipate publishing the first set of adjustments in the first quarter of 2019 with an effective date of April 1, 2020, to provide an appropriate time after the issuance of the final rule for implementation by institutions. Subsequent adjustments would be published in the first quarter of every subsequent 5-year period prior to the adjustment’s effective date (e.g., 2025’s adjustments would be published in the first quarter of 2024, and 2030’s adjustments would be published in the first quarter of 2029, etc.). The Agencies request comment on the proposed methodology and the effective date schedules for future adjustments.

ICBA concurs with the Agencies’ assessment that the purpose of this Dodd-Frank Act amendment to the EFA Act was to keep the dollar amounts on-pace with inflation, as represented by the CPI-W. Accounting for upward and downward movements in the CPI-W in calculating any cumulative increase to the dollar amounts is consistent with the approach Congress took in the EFA Act of balancing the interests of depository institutions and their customers. ICBA also supports the Agencies’ proposal to publish the adjusted dollar amounts

well in advance of their effective date to provide adequate advance notice for banks and other affected entities to prepare for pending changes.

Reopening of the Comment Period for the 2011 Funds Availability Proposal

On March 25, 2011, the Board proposed wide-sweeping amendments to Reg CC. Since that proposal, the Board has conducted separate rulemaking processes to address other Reg CC amendments that remain within its sole rulemaking authority (i.e., check collection provisions of Subpart C of Reg CC).

Now, seven years later, the Agencies are seeking additional comments on certain portions of the 2011 Proposal that are now subject to the joint rulemaking authority of the Board and the Bureau (Subpart B). The Agencies recognize there may have been important changes in markets, technology, or industry practice since the public submitted comments seven years ago in response to the Board's 2011 Proposal. The Board and the Bureau therefore are now reopening the comment period in order to provide “an additional opportunity for public comment” on certain amendments to Reg CC that the Board first proposed in 2011.

While ICBA appreciates the additional opportunities to provide comment, we strongly believe the seven-year delay between the 2011 Proposal and the 2018 Proposal warrants the issuance of a separate ANPR or RFI by the Agencies. As noted by the Board, there have been “important changes in markets, technology, or industry practices since the public submitted comments seven years ago,” ICBA recommends that the Agencies seek formal comments via the publication of a RFI or ANPR before adopting the 2011 Proposal “as is” or modified based on comments received in response to this current solicitation.

The current solicitation of feedback on the 2011 Proposal appears to be ancillary to the 2018 Proposal. There does not appear to be any discussion or analysis of the 2011 Proposal’s scope or context – all hallmarks of widely-accepted compliance with the APA. The lack of such material could prove problematic if the Agencies move to finalize the 2011 Proposal, despite the fact that they were initially provided in 2011.

Under the APA, notice-and-comment rulemaking procedures are intended to give interested parties an opportunity to participate in the rulemaking process, in part, by ensuring “consideration of [...] relevant matter [is] presented.” Because there have been significant technological changes since the amendment was first proposed in 2011, it stands to reason that the Agencies are contemplating revisions to their 2011 Proposal. If such a presumption is true, then ICBA urges the Agencies to issue a RFI or ANPR that discusses these changes and summarizes the comments submitted in response to this current solicitation.

A newly issued ANPR or RFI would allow the Agencies to thoroughly discuss the technological changes since 2011, and more importantly, afford the public the opportunity to benefit from the discussion typically provided in the preamble to a proposal, including a summary of prior comments, a review of the important changes in the markets since the amendment was first proposed, and an updated cost-benefit analysis, and other due process considerations enjoyed under APA standards.

If you have any questions or would like additional information, please do not hesitate to contact me at (202) 659-8111 or michael.emancipator@icba.org.

Sincerely,

/s/

Michael Emancipator
Vice President, Regulatory Counsel