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Testimony by

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of the

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Mr. Chairman and members of the Subcommittee on Consumer and Regulatory Affairs, I am pleased to appear today to discuss the Expedited Funds Availability Act. This Act limits the length of a hold an institution may place on its customers' deposits, requires disclosure of an institution's funds availability policy, and gives the Federal Reserve Board the authority to make improvements to the check clearing system. We have now had 18 months of experience with this new law and I agree that it is time to undertake an assessment of its impact on both depository institutions and their customers. I believe it is particularly appropriate to assess what changes to the Act should be adopted to decrease the costs and risks to depository institutions without jeopardizing the Act's objectives.

I would like to begin by discussing the objectives of the Act and whether these objectives have been met. Next, I will describe several amendments to the Act that the Board recommends that Congress adopt. I will conclude by relating some lessons that I believe can be learned from our experience with the Act.

First, I believe it is important to evaluate whether the objectives of the Expedited Funds Availability Act have been successfully achieved. The central objective of the Act is to ensure prompt availability of funds deposited in transaction accounts. The minority of institutions that, prior to the Act, had been placing very long holds on their customer's deposits (sometimes of several weeks or more) must now make funds available to their customers for withdrawal in much shorter time

frames. Thus, the abusive practices of a few institutions that prompted Congress to enact this law have been eliminated. Surveys that have been conducted in the wake of the Act indicate that most institutions -- 75 percent or more -- provide their customers with same-day or next-day availability, and therefore do not impose holds as long as those permitted by the Act, except in unusual circumstances. The remaining institutions place blanket holds on their customers' deposits, because they perceive a higher risk of fraud loss from making funds available for withdrawal before having an opportunity to learn whether deposited checks are being returned. These holds are limited by the availability schedules of the Act. Overall, most institutions did not need to make significant changes to their availability policies to comply with the Act's requirements. Of particular concern to me, however, is the evidence that some institutions actually lengthened the holds they place on deposits in response to the Act. Some bankers have indicated that this phenomenon is due to the fear that disclosure of a prompt availability policy would increase the risk of fraud loss.

The second primary objective of the Act is to inform customers of when funds they deposit in transaction accounts will be available for withdrawal. The Act requires an institution to disclose its specific funds availability policy to new customers when an account is established; institutions provided this disclosure to existing customers when the Act became effective. Notices of an institution's availability policy must also be

posted in its branches, at ATMs, and on deposit slips. If an institution delays availability of a particular deposit beyond the times established in its general policy, it must notify the customer of the imposition of the longer hold. In addition, institutions must provide a copy of their availability policy disclosure to any person upon request. This requirement facilitates comparison shopping for those customers that consider availability an important criterion in selecting an institution in which to establish a transaction account.

Examinations of institutions by the federal bank regulatory agencies have shown a high level of compliance with the Act's availability and disclosure requirements. Of course, requiring institutions to provide disclosures to customers won't ensure that the customers will read them. A recent survey conducted by TransData Corporation for the American Banker revealed that only 53 percent of consumers were aware that their institution had a formal funds availability policy. Nonetheless, customers who are interested have access to information regarding when they may start drawing against their deposited funds. Therefore, disclosure of an institution's funds availability policy is a very important achievement of the Act.

Improved access to customers' funds and improved information as to when funds are available for withdrawal may enhance economic efficiency if the benefits exceed the cost. To the extent that these goals have been achieved without a corresponding increase in risk and cost to banks in their

provision of payment services, they represent a positive step in the development of our payments system. In recognition of the importance of achieving these benefits without increasing risks, the Act's third main objective is to minimize the increase in risk to institutions from making funds available for withdrawal promptly by giving the Board authority to improve the check collection and return system. The Board has used this authority to implement changes to expedite the collection of checks and the return of unpaid checks. These rules appear in Subpart C of the Board's Regulation CC.

Prior to the implementation of Regulation CC, the check return system was a slow, labor-intensive operation that relied on visual inspection of indorsements on the check instead of machine-readable information that allows for high-speed automated processing. In addition, returns were often transported by mail rather than by courier, further slowing their trip to the institution of first deposit. A check was generally returned through each of the institutions that collected the check, even though this may not have been the most efficient path to route the return. Under the old check return procedures, most returned checks would not have been received by the institution of first deposit by the time the Act requires that funds be made available for withdrawal under the temporary schedule. An even higher percentage would not have been returned within the time frames established in the permanent schedule.

Under the rules established in Subpart C of Regulation CC, institutions have a responsibility to return checks expeditiously. The regulation is designed to encourage the return of checks by the most direct route (rather than returning a check through each institution that handled the check for forward collection), to encourage the use of couriers rather than the mail to transport returned checks, and to provide for the automated processing of returned checks. These rules have generally speeded the return of unpaid checks. They also have increased the cost to institutions handling returned checks, particularly during this transition period. This increased cost is offset, at least in part, by the fact that a given returned check is now handled by fewer institutions than was the case prior to the implementation of the new procedures. We believe that as banks become more familiar with the new procedures, and as further efficiencies are introduced, the cost of handling returned checks will decline.

A recent survey of returned checks processed by the Federal Reserve indicates that institutions receive most checks that are returned unpaid by the day they must make funds available for withdrawal under the temporary availability schedule. More than 90 percent of nonlocal returns and nearly two-thirds of local returns surveyed were delivered to the institution of first deposit by the day funds must be made available for withdrawal under the temporary schedule. The situation changes dramatically, however, when the shorter

permanent schedule established by the Act becomes effective in September 1990. While almost three-quarters of nonlocal checks in the survey were returned to the institution of first deposit by the day funds must be made available for withdrawal under the permanent availability schedule, virtually no local checks were returned within this time frame (although it may be possible to return many checks that are exchanged directly through local clearinghouse arrangements within this time). I should note, however, that the Act requires that funds be made available for withdrawal by the start of business on the day specified in the availability schedules, and that few returned checks are delivered to the institution of first deposit by the start of its business day.

We believe that the improvements already made have helped to control the level of check fraud that could have resulted from the temporary availability schedule; however, we cannot be sanguine regarding the potential for fraud that could occur after the permanent schedule becomes effective in September of this year. It is difficult to assess the magnitude of check losses in the industry because these losses are often aggregated with other types of losses and are difficult to isolate. The Board does not have any industry-wide data on how the Act has affected check losses. The anecdotal evidence we have received indicates a very disparate impact from institution to institution. While some institutions have stated that their losses after the implementation of the Act are relatively

unchanged from those experienced before the Act took effect, other institutions have reported very large increases in fraud losses. The results suggest that while the Act has not encouraged widespread check fraud, some banks have been subject to increased losses, and continued attention needs to be devoted to this issue.

Generally, the Act envisions two mechanisms to protect institutions from risk of loss when they must make funds available for withdrawal on a prompt basis. First, the Act permits institutions to extend the hold on deposits in certain specified higher-risk situations. These "safeguard exceptions" include deposits to new accounts, large-dollar deposits, deposits to accounts of repeated overdrafters, and deposits that the institution has reasonable cause to believe are uncollectible. However, the Act does not allow institutions to apply these safeguard exceptions to certain check deposits that must be given next-day availability. This risk exposure is addressed in the Board's recommended amendments to the Act, which I will discuss shortly.

Second, the Act attempts to link the availability schedules (with the exception of the next-day availability requirements) with the time that most returned checks would be received by the institution of first deposit. A depositor attempting to defraud an institution should not be able to rely on the availability schedules to ensure that funds are available for withdrawal before a fraudulent check is returned. As noted

earlier, institutions will not be protected by this second mechanism with respect to most local checks under the permanent schedule.

Overall, the Board believes that the Act already has increased somewhat the risk exposure to institutions, despite efforts to improve the check return process. The Act places upward pressure on institutions' costs, and provides greater incentives for institutions to consider customers' creditworthiness before allowing them to establish transaction accounts. These factors may have curtailed services to customers, and undoubtedly will do so to a greater degree in the future.

The Board believes that Congress can alleviate some of these risks without jeopardizing the objectives of the Act, and hopes you will amend the Act to reduce compliance costs and otherwise further its purposes. In this regard, the Board has recommended several proposed amendments to the Act. These amendments have been described in reports to Congress that have been submitted by the Board pursuant to the Act.

For example, when the Act was adopted, Congress indicated that the requirements related to the availability of funds deposited at nonproprietary ATMs should be reassessed, and directed the Board to study this issue and report to Congress on its findings. During consideration of the Act, banks reported to Congress on the processing limitation associated with accepting deposits at nonproprietary ATMs; specifically, that the

account-holding institution does not have information regarding the composition of the deposit that is necessary to place differential holds. Given this limitation, the Act, in effect, allows the account-holding institution to treat any such deposits as though they were composed of nonlocal checks under the temporary availability schedule. Congress anticipated that technological advances would eliminate the need for special treatment of these deposits, once the permanent schedule became effective. The Board has investigated a number of potential alternatives with ATM networks and participating institutions, and has concluded that there is currently no viable solution to address this processing limitation.

Based on this analysis, the Board recommends that Congress amend the Act to treat nonproprietary ATM deposits under the permanent schedule in the same manner as they are treated under the temporary schedule. This would help ensure that deposit-taking at nonproprietary ATMs is not restricted or discontinued by those institutions that believe they need the flexibility to place longer holds on these deposits to limit their risk exposure. If such an amendment were enacted, consumers would continue to be able to choose between the convenience of making a deposit at a nonproprietary ATM and the marginally prompter availability that may be provided if the deposit were made by other means.

In addition to this amendment, the Board recommends the Act also be amended in several other respects. Specifically, the Board recommends amendments that would:

- o expand the scope of the safeguard exceptions to include deposits of checks subject to next-day availability;
- o provide the Board with greater flexibility to tailor the requirements of the exception hold notices to the exception invoked;
- o apply the same condition to next-day availability of Treasury checks and "on-us" checks as is currently applied to other deposits (including deposits of cash, state and local government checks, and official checks) that generally must receive next-day availability;
- o resolve the long-run operational and disclosure difficulties associated with the determination of whether payable through checks are local or nonlocal checks;
- o clarify the Board's ability to allocate liability among depository institutions as well as among other participants in the payments system, and clarify the damages for which payments system participants may be liable; and
- o provide for direct review in the U.S. Court of Appeals of any Board regulation or any other Board order issued pursuant to this Act.

The appendix to this testimony includes the specific amendments proposed by the Board and the rationale for their adoption.

In conclusion, I believe we have learned several lessons from our experience in implementing the Expedited Funds Availability Act. The first lesson is that, in legislation as well as regulation, there are costs and benefits that must be balanced, but which are often unrecognized at the time the laws or rules are adopted. In this instance, the Act has imposed and will impose significant costs on all institutions, including those institutions that were already in substantial compliance with the law's requirements. Most depository institutions provided prompt availability prior to the implementation of the Act; only a small portion of institutions imposed the unduly long holds on their customers' deposits that were the impetus of the legislation. Virtually no institution, however, had a policy that was in complete conformance with the detailed requirements that were subsequently included in the Act. Compliance with the Act required all institutions to analyze the implementing regulations, make certain policy and operational changes, issue numerous types of disclosures, and conduct extensive staff training. Surveys have indicated that the cost of this compliance was not inconsequential. Over the long term, institutions are likely to pass these costs on to their customers, and may become more selective in determining the customers they will serve.

The second lesson learned is that the specificity of the Act has limited the ability of the Board to adopt regulations that carry out the intent of the law in the most efficient, cost

effective manner. Had the Act provided greater flexibility to the Board in carrying out the law's objectives (as was the case with the Senate version of the Act), many of the problems identified by the Board could have been resolved by regulation rather than statutory amendment. While we believe that the Act's objectives, for the most part, have been achieved, these lessons suggest that they might have been accomplished at a lower cost. Finally, our experience with implementing the Act indicates that the short lead time between enactment and the effective date of the law further increased the industry's and the Federal Reserve System's implementation costs, particularly given the complexity of the Act's requirements. As is often the case, if you need something fast, you usually pay more for it.

I appreciate this opportunity to discuss our experience implementing the Expedited Funds Availability Act, and to suggest certain modifications that should be made to the Act. I would be glad to answer any questions that you may have.

Thank you very much.

Attachment

APPENDIX

PROPOSED AMENDMENTS TO THE EXPEDITED FUNDS AVAILABILITY ACT

SECTION 603(e)(2). DEPOSITS AT AN ATM. -- Section 603(e)(2) of the Expedited Funds Availability Act (12 U.S.C. § 4002(e)(2)) is amended as follows:

(1) Revise paragraph (A) to read as follows:

"(A) Not more than 4 business days shall intervene between the business day a deposit described in paragraph (1)(B) is made at a nonproprietary automated teller machine (for deposit in an account at a depository institution) and the business day on which funds from such deposit are available for withdrawal."

(2) Delete paragraphs (B) and (C); and

(3) Redesignate paragraph (D) as paragraph (B).

COMMENT

The proposed amendments would provide that, under the permanent schedule, all deposits to nonproprietary ATMs would continue to be treated in the same manner as deposits of nonlocal checks, i.e., they must be made available for withdrawal on the fifth business day after the business day of deposit. Under the temporary schedule, both deposits to nonproprietary ATMs and deposits of nonlocal checks must be made available on the seventh business day after the business day of deposit. Currently, the Act provides that, under the permanent schedule, deposits to nonproprietary ATMs generally be treated identically to deposits at proprietary ATMs (cash, next-day, and local checks available

on the second business day after deposit, nonlocal checks available on the fifth day after deposit).

The Act equalized the proprietary and nonproprietary ATM rules under the permanent schedule in anticipation that ATM technology would advance sufficiently by September 1, 1990, so that depository institutions could capture and verify deposit information from the two types of ATMs in the same amount of time. However, the Board believes that depository institutions and ATM network operators have indicated that the industry has not yet identified a viable solution to nonproprietary ATM processing limitations.

Although the capability does exist to provide information regarding the composition of deposits made at nonproprietary ATMs, all identified solutions are costly and would likely result in increased fees for customers who make deposits at nonproprietary ATMs. In addition, depository institutions and ATM operators have expressed concern that the potential for fraud will increase if institutions must give second-day availability to deposits made at nonproprietary ATMs. Substantial increases in operating costs or fraud losses could lead some institutions to cease accepting deposits at nonproprietary ATMs, resulting in a degradation of shared ATM network efficiency and slower collection of checks, which would be contrary to the intent of the Act.

Although § 604(e) of the Act provides that the Board may suspend the availability requirements for any classification of checks if depository institutions are experiencing an

unacceptable level of check-related fraud losses, the Board must provide evidence to Congress to substantiate such an action. Because no such evidence will exist until after the permanent schedule goes into effect, some depository institutions could suffer significant fraud losses before the Board could suspend the availability schedules for deposits to nonproprietary ATMs; other institutions may discontinue offering this service in anticipation of such fraud losses.

The proposed amendment would help ensure that deposit-taking at nonproprietary ATMs is not restricted or discontinued by those institutions that believe they need the flexibility to place longer holds on these deposits to limit their risk exposure. In addition, customers would continue to be able to choose between the convenience of making a deposit at a nonproprietary ATM and the marginally prompter availability that may be provided if the deposit were made by other means.

SECTION 604 SAFEGUARD EXCEPTIONS. -- Section 604 of the Expedited Funds Availability Act (12 U.S.C. § 4003) is amended as follows:

(1) In subsection (b), insert "(a)(2)," after "subsection";

(2) In subsection (c), delete "(F)" after "subsections (a)(2)";

(3) In subsection (d), insert "(a)(2)," after "subsections"; and

(4) In subsection (f)(2)(C) insert "(b)," after "subsection".

COMMENT

(1), (2), and (3) Exceptions for Next-Day Checks

The proposed amendments would expand the scope of most of the § 604 exception holds to include deposits of all "next-day" checks, such as U.S. Treasury checks, state and local government checks, and depository checks. Currently, the exceptions for large or redeposited checks or accounts with repeated overdrafts in § 604(b), the reasonable cause exception in § 604(c), and the emergency conditions exception in § 604(d) do not apply to some or all of the next-day checks covered in § 603(a)(2).

A large number of depository institutions have expressed concern that the inapplicability of these exceptions causes excessive exposure to risk from the return of checks that must be accorded next-day availability. In particular, depository institutions have noted the ease of forgery of these checks. The Board is aware of a number of cases of this type of

check fraud and believes that fraud will increase as forgers become more familiar with the Act, Regulation CC, and check collection practices. Fraud loss reduction would benefit depository institutions as well as their customers, who otherwise would likely face increased service fees.

(4) Notice of Large-Dollar, Redeposited Check, and Repeated Overdraft Exceptions

The proposed amendment would grant the Board more flexibility in tailoring the requirements for exception hold notices to the exception invoked. Under § 604(f), whenever any exception to the schedules is invoked, the depository institution must notify the customer of the exception hold. Although individual notices may be appropriate in the case of the reasonable cause exception, which is invoked on a case-by-case basis, they may not be appropriate for the large-dollar, redeposited check, or repeated overdraft exceptions. These exceptions may be invoked for all deposits over a specified amount (in the case of the large-dollar exception), all checks covered by the redeposited check exception, or all deposits during some time period (in the case of the repeated overdraft exception). In these cases, it would be more efficient and less costly to depository institutions if the notice requirement could be tailored to the exception invoked. For example, a single notice to repeated overdrafters describing the special schedules applicable to the account for the time the exception is in effect may be appropriate. Customers would also benefit from receiving advance notice of any exception holds that will be in effect

under certain conditions or for a certain period of time, rather than receiving on-the-spot or after-the-fact notices upon each deposit.

SECTION 603(a)(2). NEXT BUSINESS DAY AVAILABILITY FOR CERTAIN DEPOSITS. -- Section 603(a)(2) of the Expedited Funds Availability Act (12 U.S.C. § 4002(a)(2)) is amended as follows:

(1) In paragraph (A) --

(A) delete the word "and" at the end of clause (i);

(B) insert the word "and" at the end of clause (ii); and

(C) add a new clause (iii) as follows:

"(iii) is deposited in a receiving depository institution staffed by individuals employed by such institution."

(2) Revise paragraph (E) to read as follows:

"(E) A check which --

(i) is deposited in a branch of a depository institution staffed by individuals employed by such institution; and

(ii) is drawn on the same or another branch of the same depository institution if both branches are located in the same State or the same check processing region."

COMMENT

The proposed amendment would make the rules governing availability of Treasury checks and checks drawn on the receiving depository institution ("on us" checks) consistent with the rules for deposits of cash and other checks that receive next-day availability. The Act requires deposits of cash and certain

government and depository (cashier's, certified, teller's and certain other) checks to be made available for withdrawal on the next business day after the business day of deposit. One of the conditions of next-day availability for these deposits is that the deposit be made at a staffed teller facility. This condition recognizes the difficulties in ascertaining the contents of deposits at ATMs and other unstaffed facilities in time to update a depository institution's books so that it can make funds available at the opening of the next business day.

The current provisions of the Act provide that U.S. Treasury check deposits must be given next-day availability even if the checks are deposited at a proprietary ATM, and "on us" checks must be given next-day availability if deposited at a "branch," which may include an ATM located at a branch. Cash deposits under similar circumstances need not receive next-day availability.

As a practical matter, depository institutions and ATM networks have stated that they are unable to verify the contents of deposits made at ATMs in time to provide next-day availability for these checks. This problem exists for Treasury and "on us" checks to the same extent as it exists for cash and other types of checks that the Act recognizes need to be deposited at a staffed teller facility to receive next-day availability. Thus, the Board proposes that the Act be amended to apply the staffed teller facility condition for next-day availability of Treasury and "on us" checks.

SECTION 602(17). DEFINITION OF "ORIGINATING DEPOSITORY INSTITUTION". -- Section 602(17) of the Expedited Funds Availability Act (12 U.S.C. § 4001(17)) is amended to read as follows:

> "(17) The term 'originating depository institution' means the branch of a depository institution on which a check is drawn or through or at which a check is payable, as prescribed by regulations of the Board."

COMMENT

This amendment would resolve the long-run operational and disclosure difficulties associated with payable through checks by explicitly defining "originating depository institution" to include payable through and payable at banks. Regulation CC, as originally adopted, interpreted the definition to include payable through banks and provided that a payable through check is considered local or nonlocal based on the location of the payable through bank (where the check is actually sent for collection).

In a July 1988 ruling in a suit brought against the Board by the Credit Union National Association ("CUNA"), the U.S. District Court for the District of Columbia ruled that the determination of whether a credit union payable through draft is local or nonlocal should be based on the location of the credit

union[1/] rather than the location of the payable through bank. The Board modified Regulation CC to conform to the court ruling and to address the disclosure of availability policies with respect to payable through checks. Because the routing number on the payable through check is that of the payable through bank and not that of the credit union, customers and depository institutions cannot rely on the routing number to determine whether the check is local or nonlocal. Depository institutions that distinguish between local and nonlocal checks when placing holds must either describe to their customers in a disclosure statement how to determine whether a payable through check is local or nonlocal, or inform their customers that they may inquire regarding the availability of particular payable through checks.

The District Court's ruling has created significant operational difficulties for depository institutions trying to comply with the availability schedules of the Act, because reliance on the routing number is the only automated mechanism that can be used to determine whether a check is local or nonlocal. Consequently, if depository institutions wish to distinguish between local and nonlocal checks when placing holds, they must handle payable through checks manually, which is a costly, time-consuming process.

[1/]Although most payable through checks are written on credit unions, they may also be written on other types of depository institutions. For purposes of this comment, we will use the term "credit union" to represent the depository institution on which the payable through check is written.

Although this problem has been alleviated by labeling requirements for payable through checks that help consumers and depository institutions to readily identify payable through checks and to determine whether the check is local or nonlocal based on the first four digits of the routing number of the credit union, these requirements do not solve the operational difficulties faced by certain depository institutions that still must examine these checks manually to make the local-nonlocal determination. The proposed amendment to the Act would eliminate these problems and would be consistent with the scheme of the Act to allow longer holds on checks that must be sent to nonlocal banks for collection.

SECTION 611(f). AUTHORITY TO ESTABLISH RULES REGARDING LOSSES AND LIABILITY AMONG DEPOSITORY INSTITUTIONS. -- Section 611(f) of the Expedited Funds Availability Act (12 U.S.C. § 4010(f)) is revised to read as follows[2/]:

"(f) Authority to establish rules regarding losses and liability among depository institutions. The Board is authorized to impose on or allocate among depository institutions or other entities participating in the payments system, including States and political subdivisions thereof on which checks are drawn, the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, including finance charges, reasonable attorney's fees, and other expenses related to the check, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability."

COMMENT

This amendment clarifies the Board's ability to allocate liability among depository institutions as well as among other participants in the payments system, such as states and their political subdivisions. Other entities besides depository institutions are involved in the collection and payment of

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[2/]Added language is double-underlined.

checks. Some states and political subdivisions issue warrants drawn directly on themselves. These warrants are often used to pay employees, vendors, pensioners, and those receiving public assistance; they are thus very important to the recipients. In addition, other nonbank payors, such as insurance companies, draw checks directly on themselves that are also important to the recipients.

Under the 11th Amendment to the Constitution, suits against state governments are barred in federal court unless Congress subjects the states to federal jurisdiction in unequivocal statutory language. (See Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985).) Section 611(f) does not clearly authorize the Board to allocate liability for losses, such as those resulting from the mishandling of a returned check, among entities such as states or their political subdivisions or other nonbank payors. The proposed amendment would eliminate this ambiguity by allowing the Board to impose on or allocate among such entities the risks of loss and liability in connection with any aspect of the payments system, including the payment of checks. Liability under these provisions could then be enforced in the appropriate courts.

The amount of liability in cases against states or their subdivisions or other nonbank payors would be limited to the damages provided for in this subsection. The amendment would not allow against states or their subdivisions or other nonbank payors the punitive damages or the special class action awards

that may be had against depository insitutions under § 611(a) and (b).

The amendment also clarifies that a depository institution or other payments system participant may be liable for expenses related to the check such as finance charges and reasonable attorney's fees. The measures of damages for violations of Subpart C of Regulation CC are derived from the Uniform Commercial Code ("UCC"). Interpretations vary among state courts as to if and when the UCC damage provisions include attorney's fees. This amendment would provide for uniformity in the measure of damages for violations of Board rules governing the payments system.

SECTION 609 REGULATIONS AND REPORTS BY THE BOARD. -- Section 609 of the Expedited Funds Availability Act (12 U.S.C. § 4008) is amended by adding a new subsection (g) as follows:

"(g) JUDICIAL REVIEW. -- Any party aggrieved by any regulation prescribed by the Board pursuant to this Act, or any other order of the Board under this Act, may obtain a review of such regulation or order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order or final rule, a petition praying that the regulation or order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall have jurisdiction to affirm or set aside the regulation or order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive."

COMMENT

The proposal amends § 609 by adding a new subsection (g) providing for direct review of any regulations adopted by the Board and any other Board orders in the courts of appeal. This follows the approach adopted in § 9 of the Bank Holding Company Act (12 U.S.C. § 1848).

A factual hearing in a district court is not necessary if judicial review is based upon the administrative record. If the administrative record forms the basis for review, requiring aggrieved persons to go first to the district court results in unnecessary delay and expense and undesirable bifurcation of the reviewing function between the district courts and the courts of appeal.

Furthermore, the operation of the payments system, including the collection and return of checks, is an intricate subject with which few courts are familiar; any court must therefore of necessity rely heavily on the expertise of the Board. If a reviewing court was not in possession of sufficient facts to conduct adequate review, it would have to remand the case to the Board for further factual development. Under these circumstances, there is no reason to have yet another level of review in the process, and no need for district courts to conduct a de novo review of facts already established by the Board.