

**Financial Services ClipSheet / Check 21 Special Edition**  
**Issues Relating to HR 5410 Introduced by Congresswoman Maloney on November 19, 2004**

The inquiries concerning HR 5410 are an outgrowth of the letter from Congresswoman Maloney to Members of Congress last month regarding Check 21 float issues. The 2004-1202 AQUBANC ClipSheets - Check 21 Special Edition is to keep you informed about an important Check 21 issue.

We wish to thank David Walker, President of the Electronic Check Clearing House Organization (known as ECCHO) for granting permission to reprint this overview, Rep. Maloney's letter and the ECCHO briefing document.

There are a number of provisions in HR 5410 that relate to check float and check collection generally, such as reducing the hold period for local checks to one day. There are two items in the bill that directly relate to Check 21/check image collections. These are:

1. A provision that would require the Fed to exercise its authority to regulate deposit clearing times so that they reflect the new check clearing times under Check 21.
2. A provision that would require financial institutions to either: a) provide the consumer a substitute check on request and without a fee, or b) provide the right of recredit under Check 21 to all consumers whose checks are electronically processed in whole or in part, whether or not the consumer was provided with a substitute check.

Having received a copy of a letter from Representative Mahoney to her congressional colleagues in advance the introduction of the HR5410, ECCHO worked with Ed Hill, in-house lobbyist for Bank of America (BoFA), to create a document to address some of the issues that we anticipated would be in her bill. You may remember Ed's many contributions in the passage of Check 21. On November 12, Tom Fox distributed this briefing document to the Industry Group with the intention that the D.C. trades and bank lobbyists would distribute it to congressional staff members as they met with them during this quiet period between the 108<sup>th</sup> and 109<sup>th</sup> Congresses.

Ed Hill also recently met with the staff of the offices of Congressmen Oxley, Frank, Maloney and Bachus and it appears that the staff members understood the issues regarding float and Check 21 that were described in the briefing materials that ECCHO/BoA prepared. It does not appear that there is sufficient interest for a hearing on this issue or that Rep. Maloney's proposed bill would have much success at this time.

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**Issues Relating to Funds Availability and Potential Reduction in Check Float**

**Background:** There have been recent newspaper articles that raise two related questions regarding whether the implementation of Check 21 will reduce the check “float,” which is the time that it takes the banks to collect a check after the check enters the banking system.

**A. Reduction in Check Hold Time Periods**

**Issue:** If banks can collect checks faster as a result of the implementation of Check 21, should there be a reduction today in the maximum hold time periods, under the Expedited Funds Availability Act (“EFAA”) and Regulation CC, that a bank may place on a deposited check?

**Response:** For the reasons set forth below, the deposit hold periods should not be reduced at this time:

- **Check 21 is Still Being Implemented.** Although Check 21 is now effective, banks are still in the process of implementing both the Check 21 substitute check process and fully-electronic check image exchange. As a result, it is unclear at this time how significantly Check 21/check image exchange will speed up the check collection (including the check return) process and thereby reduce float times. Any attempt to adjust hold periods without appropriate experience with Check 21 is premature, and could expose banks to increased fraud risk and losses.
- **Congress Addressed Check Hold Issue in Check 21.** Congress expressly considered and addressed the issue of potentially faster check collection during the consideration of Check 21. To address this issue, Congress enacted Section 16 of Check 21 which requires the Federal Reserve to conduct a study of the impact of Check 21 on the check collection system to determine the percentage of checks collected electronically and the appropriateness of the deposit hold time periods under the EFAA. This Federal Reserve study is to be completed before the end of 30 months from the effective date of Check 21. This 30 month time period is appropriate to allow banks sufficient time to fully implement Check 21 and check image exchange before the study is completed.
- **Federal Reserve Has Existing Authority/Obligation to Reduce Hold Periods.** The Federal Reserve has existing authority and the obligation to reduce the maximum hold periods on deposited checks, if there is a corresponding increase in the speed of collection of checks. The EFAA requires the Federal Reserve to reduce the funds availability schedules to as short a time as reasonably possible. (See 12 U.S.C. § 4002(d)). As such, the Federal Reserve monitors check collections times, and if checks are being collected faster as a result of Check 21 or any other reason, the Federal Reserve has existing authority to reduce the amount of time that banks can place holds on deposited checks. Indeed, the Federal Reserve in the past has indicated that when two-thirds of the checks in a given category are collected faster (including both forward and return time periods) than existing standards, it will shorten the mandated availability period for that category of checks. (See, for example, 63 Fed. Reg. 69027, 69028 (Dec. 15, 1998)).
- **Hold Periods Reflect Both Forward Collection and Potential For Return of Check.** The current hold periods under EFAA and Regulation CC reflect both (a) the time that it takes for the check to move forward in the check collection process to the paying bank, and (b) the time period that it takes the paying bank to review the check and, in certain cases, return the check to the bank where it was first deposited. Even if Check 21 ultimately reduces the time period for the forward collection of a check, the current hold periods may still be necessary to accommodate paying bank review and potential return of the check. The impact of shortening the hold period to less than the time required to complete collection and return cycle would increase the risk to the depository bank that it will make funds available before the bank knows whether the funds are any good.
- **Not Possible to Track Collection of Single Check.** It is not possible for a depository bank to track the collection of a single check and to release a deposit hold when that particular check is paid. Checks are not collected on an individual basis, but rather are exchanged in batches between banks and settled on a net basis (e.g. all checks received minus all checks sent). As a result, a depository bank that has accepted a check for deposit does not receive notice that a specific check has been paid. Therefore, the depository bank must assume a check is unpaid, and subject to possible return by the paying bank, until the full time period for a possible return expires.

**B. Risk of Increased Bounced Checks**

*Issue:* If checks are collected faster as a result of Check 21, will a consumer who writes a check without sufficient funds in his/her account (in anticipation of other funds being deposited into the account during the float period) be at an increased risk of bouncing the check because available funds are not yet in the account?

*Response:* For the reasons set forth below, it is unlikely that the average consumer will experience faster collection of a check that he or she writes to a merchant. Moreover, even if a particular check is ultimately collected faster as a result of Check 21, the paying bank should treat that check the same as all other checks when determining whether there are sufficient funds in the account to pay that check.

- Checks Should Not Be Written on Insufficient Funds. Customers should not, as a general matter, write a check when there are insufficient funds in their checking account to cover the check. In certain cases, writing a check without corresponding funds on deposit may be a crime.
- Check 21 Is Still Being Implemented. (See discussion above). It is not clear when Check 21 and check image exchange will reduce float times, such that the reduced collection time would increase the risk to a consumer of unintentionally bouncing a check.
- Most Checks Reach the Paying Bank Within One or Two Days. Even without implementation of Check 21 or check image exchange, there is little float time on the forward collection side for most checks today once the check enters the banking system. The amount of time it takes for checks to reach the paying bank has been declining for the last 30 years. Most checks today are presented to the paying bank within one or two days from the time the check enters the banking system; some checks even arrive at the paying bank on the same day they are deposited by the payee at the bank. In addition, certain other electronic processes unrelated to Check 21, such as conversion of checks to an ACH transfer, are further speeding the forward collection of some checks. This short float time suggests that consumers today do not anticipate or expect significant float time for checks within the banking system.

The fact that a check may arrive at the paying bank a few hours earlier on the same day will not result in increased bounced checks. Checks are not charged against a consumer's checking account at the time they are received by the paying bank. Rather, checks are charged against the consumer's account at the end of the day on a batch basis with all other credits and debits to the same consumer's account.

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**Reprint of Rep. Carol Maloney Letter dated November 22, 2004**

## **Consumers Deserve the Same Protection as Banks**

Become a cosponsor of H.R. 5410, requiring banks to reduce the time they hold deposits to match the increased speed of clearing checks permitted under Check 21

Dear Colleague,

Last Friday I introduced a bill to help consumers by reducing the amount of time it takes to make funds available on a deposited check, to reflect the accelerated times in which banks can now clear checks under the new Check 21 legislation. H.R. 5410 will redress the present imbalance and use the technological advances of electronic funds transfer to help consumers as well as banks. I was delighted that some of my colleagues joined me as original cosponsors for this bill even under the very rushed conditions of its submission and I urge my other colleagues to add their names to this pro-consumer initiative. I do plan to reintroduce this bill in the 109<sup>th</sup> Congress at which time we may expand, refine, or eliminate some of its provisions to reflect further developments.

The new Check 21 legislation, which went into effect last month, allows banks to process checks electronically, dramatically reducing the time it takes to deduct money from a check writer's account. However, current law does not give the same rights to consumers who have deposited a check. That is, banks can still hold deposited checks before making the funds available - up to two days for local checks and five days for nonlocal checks and an astonishing 11 days for checks over \$5,000. With banks processing checks faster, while continuing to put a hold on deposits, they are increasing the chances that customers will bounce a check.

As the New York Times editorialized; " Never content to pass savings along to customers, banks - with a little help from their friends in Congress - are again poised to turn a basic service into a profit center." Due to the new imbalance between check clearing and deposit clearing times, banks are greatly increasing the amount of income they make on the float. Even worse, the fact that money comes out of customers' accounts instantly but goes in over days or weeks will lead unsuspecting consumers to bounce an estimated seven million more checks a month and pay an additional \$170 million in monthly bounced-check fees.

H.R. 5410 would address this imbalance. Specifically, the bill would :

1. Require the Fed to exercise its authority to regulate deposit clearing times so that they reflect the new check clearing times under Check 21.
2. Eliminate the extra day of check holds for ATM deposits at proprietary ATMs. ATMs are far more indispensable now than in 1987 when the Expedited Funds Availability Act was enacted. Banks which accept deposits from others' ATMs would still be able to impose the longer time period.
3. Prohibit bounced check fees or "overdraft/bounce protection" fees if the deposit had, in fact, cleared when the check was paid even if the funds availability period had not yet passed on that deposit. If the funds really are there, there is no justification for a bounced check fee.
4. Require financial institutions to credit all deposits received before checks presented for payment on the same day. Crediting deposits first should reduce the volume of bounced checks, reducing fees for consumers and costs for merchants.
5. Count Saturday as a business day in calculating allowable check hold times, unless the bank doesn't debit checks on Saturdays. If a bank chooses to clear checks on Saturday, then Saturday should count towards satisfying the hold period.
6. Reduce the time that a bank can hold a non-local check by one day. In light of technological innovations and electronic funds transfer, there is no longer a valid justification to hold non-local checks for four business days.
7. Update the rule that the first \$100 in funds must be available the next day to \$500. This would help make smaller deposits count sooner. Also, the \$100 rule needs modernization.
8. Update the \$5,000 cap on hold times for local and non-local checks to \$7,500. The sum of \$5,000 in 1987 is worth more than \$7,500 in today's dollars.

9. Prohibit fees for "bounce protection" unless the program was affirmatively requested by the customer. Consumers shouldn't be charged for a service that they did not authorize.

10. Require financial institutions to either: 1) provide the consumer a substitute check on request and without a fee, or 2) provide the right of recredit under Check 21 to all consumers whose checks are electronically processed in whole or in part, whether or not the consumer was provided with a substitute check. Other requirements of Check 21, including exceptions to the ten business day right of recredit, would be left undisturbed. Banks should not be able to deny consumers the document they need to receive the right of recredit, or charge a high fee to get that document. This give banks a choice: either issue the substitute check on request or give the right to consumers regardless of whether they have the substitute check.

To be a cosponsor of this legislation, or for more information, please have your staff contact Eleni Constantine of my staff at x5-7944 or [eleni.constantine@mail.house.gov](mailto:eleni.constantine@mail.house.gov). <mailto:eleni.constantine@mail.house.gov>

Rep. Carolyn Maloney

Member of Congress