

Client Alert

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Penny Proof for Deposits: Federal Banking Regulators Issue Interagency Guidance Regarding Deposit Reconciliation Practices

By Oliver I. Ireland, Leonard N. Chanin, and Ryan J. Richardson

On May 18, 2016, five federal banking agencies—the Board of Governors of the Federal Reserve System (“Board”), the Consumer Financial Protection Bureau (“CFPB”), the Federal Deposit Insurance Corporation (“FDIC”), the National Credit Union Administration (“NCUA”), and the Office of the Comptroller of the Currency (“OCC”) (collectively, the “Agencies”)—issued a supervisory bulletin titled “[Interagency Guidance Regarding Deposit Reconciliation Practices](#)” (the “Guidance”).¹ The Guidance outlines supervisory expectations for financial institutions’ investigation and resolution of “credit discrepancies” when customers make deposits in their checking and other deposit accounts.

Under the Guidance, a credit discrepancy arises when a customer makes a deposit to a deposit account and the amount that the financial institution credits to that account differs from the total of the items² tendered for deposit. For example, a customer may tender \$110 for deposit, but the financial institution will credit only \$100 because, for example, the deposit slip incorrectly says \$100. Common reasons for credit discrepancies include customer error or teller error in completing deposit slips, teller or back-office error in coding deposit transactions, and poor image capture. Per the Guidance, a credit discrepancy is a “detriment to the consumer,” and it “benefits the financial institution, if not appropriately remedied.”

The Guidance states that, through technological and other processes, financial institutions are capable of fully reconciling credit discrepancies, except in very rare cases (e.g., a check is damaged such that its amount cannot be determined). The Agencies “expect financial institutions to adopt deposit reconciliation policies and practices that are designed to avoid or reconcile discrepancies, or designed to resolve the discrepancies such that customers are not disadvantaged.”

As grounds for this expectation, the Agencies cite the Expedited Funds Availability Act (“EFAA”), 12 U.S.C. 4001 *et seq.*, and the EFAA’s implementing regulation, Regulation CC, 12 C.F.R. part 229. Together, the EFAA and Regulation CC outline the timelines under which financial institutions must make deposited funds available in a demand deposit or other similar account. See 12 U.S.C. 4002; 12 C.F.R. 229.12. Funds availability timelines allowed by the EFAA and Regulation CC vary based on the type of deposit (e.g., cash or check) and the method of deposit (e.g., teller station or ATM).

¹ For the Board release, [click here](#). For the CFPB release, [click here](#). For the FDIC release, [click here](#). For the NCUA release, [click here](#). For the OCC release, [click here](#).

² The Guidance includes the term “items.” We understand this to include cash and checks.

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To the extent a credit discrepancy leaves a customer without access to his or her funds as required by the availability timelines prescribed in the EFAA and Regulation CC, the credit discrepancy may subject the institution to an administrative enforcement action by its prudential regulator or possible liability. Moreover, the EFAA includes a private right action, which permits a customer aggrieved by a credit discrepancy to recover actual damages, a penalty, and attorneys' fees.

In addition to citing the EFAA and Regulation CC, the Agencies note that failure to reconcile or resolve credit discrepancies may constitute an unfair, deceptive, or abusive act or practice. The Agencies (other than the CFPB) are authorized to take action against entities within their respective jurisdictions for violation(s) of the prohibition on unfair or deceptive acts or practices, as set forth in Section 5 of the Federal Trade Commission ("FTC") Act. 15 U.S.C. 45(a)(1).³ Similarly, section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the CFPB to take action against entities within its jurisdiction for violation(s) of the prohibition on unfair, deceptive, or abusive acts or practices. 12 U.S.C. 5531, 5536. Notably, in bringing the only major enforcement activity to date concerning credit discrepancy practices, the CFPB, OCC, and FDIC only used their UDA(A)P authorities. They did not allege specific violations of the EFAA or Regulation CC.⁴

The Guidance notifies financial institutions that they are expected to integrate credit discrepancy mitigation and reconciliation into their compliance management systems, including applicable policies and procedures and relevant control, training, and monitoring functions. The Guidance also notes that taking these actions will "help minimize" exposure to potential supervisory action (emphasis added).

OUR TAKE

The Guidance elevates what has historically been an operational issue to a legal and compliance issue for both consumer and business accounts. Financial institutions supervised by the Agencies will want to review their current policies and procedures for accepting deposits and, if necessary, take appropriate steps to come into compliance.

Contact:

Oliver I. Ireland
(202) 778-1614
oireland@mofo.com

Leonard N. Chanin
(202) 887-8790
lchanin@mofo.com

Ryan J. Richardson
(202) 887-8761
rrichardson@mofo.com

³ For a discussion of the Agencies' (other than the CFPB's) authority to bring actions under Section 5 of the Federal Trade Commission Act, see FDIC Compliance Exam Manual (Nov. 2015), [Section VII](#).

⁴ See *In re Citizens Financial Group, Inc. et al.*, [Consent Order](#), No. 2015-CFPB-0020 (Aug. 12, 2015); *In re Citizens Bank of Philadelphia, Order for Restitution and Order to Pay Civil Money Penalty*, Nos. FDIC 14-0336, 14-0337b (Aug. 12, 2015); *In re Citizens Bank, N.A.*, [Consent Order](#), No. AA-EC-2014-109 (Aug. 12 2015); *In re Citizens Bank, N.A.*, [Consent Order for Civil Money Penalty](#), No. AA-EC-2014-109 (Aug. 12 2015).

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Financial Services Team

California

Michael J. Agolia	(415) 268-6057
Alexis A. Amezcua	(415) 268-6557
Elizabeth Balassone	(415) 268-7585
Roland E. Brandel	(415) 268-7093
Sarah Nicole Davis	(415) 268-7478
Henry M. Fields	(213) 892-5275
Joseph Gabai	(213) 892-5284
Angela E. Kleine	(415) 268-6214
Jim McCabe	(415) 268-7011
James R. McGuire	(415) 268-7013
Mark David McPherson	(212) 468-8263
Ben Patterson	(415) 268-6818
Sylvia Rivera	(213) 892-5734
Nicholas Alan Roethlisberger	(415) 268-7534
Grant C. Schrader	(415) 268-6635
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
Lauren Lynn Wroblewski	(415) 268-6458

New York

James M. Bergin	(212) 468-8033
Tiffani B. Figueroa	(212) 336-4360
David J. Fioccola	(212) 336-4069
Marc-Alain Galeazzi	(212) 336-4153
Adam J. Hunt	(212) 336-4341
Jessica Kaufman	(212) 336-4257
Mark P. Ladner	(212) 468-8035
Jiang Liu	(212) 468-8008
David H. Medlar	(212) 336-4302
Barbara R. Mendelson	(212) 468-8118
Michael B. Miller	(212) 468-8009
Judy Man Ni Mok	(212) 336-4073
Jeffrey K. Rosenberg	(212) 336-4130
Mark R. Sobin	(212) 336-4222
Joan P. Warrington	(212) 506-7307

Washington, D.C.

Leonard N. Chanin	(202) 887-8790
Meredith M. Cipriano*	(202) 887-6936
Rick Fischer	(202) 887-1566
Adam J. Fleisher	(202) 887-8781
Natalie A. Fleming Nolen	(202) 887-1551
Calvin D. Funk*	(202) 887-6930
Julian E. Hammar	(202) 887-1679
Oliver I. Ireland	(202) 778-1614
Steven M. Kaufmann	(202) 887-8794

Washington, D.C. (continued)

Donald C. Lampe	(202) 887-1524
Jeremy R. Mandell	(202) 887-1505
Amanda J. Mollo	(202) 778-1609
Obrea O. Poindexter	(202) 887-8741
Ryan J. Richardson	(202) 887-8761
Joe Rodriguez	(202) 778-1610
Sean Ruff	(202) 887-1530
Trevor R. Salter	(202) 887-1527
Nathan D. Taylor	(202) 778-1644

*Not admitted in District of Columbia. Practice supervised by principals of firm admitted in District of Columbia Bar.

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