

MEMORANDUM

To: Committee on the Uniform Commercial Code and Emerging Technologies
From: Stephen L. Sepinuck, Associate Reporter
Re: Payments Issues
Date: April 14, 2021

This Memorandum accompanies draft amendments to UCC Articles 3, 4, and 4A dealing with payments issues. The proposed amendments are presented in numerical order of the sections but the subjects they address can be grouped as follows:

1. Remote Deposit Capture – §§ 3-105, 3-309, 3-604 & 4-207
2. Statement of Account – § 4-406
3. The Scope of Article 4A – Unconditional Promise to Pay – § 4A-104
4. Revise Article 4A to Remove the References to a “Writing” – §§ 4A-202, 4A-203, 4A-207, 4A-208 & 4A-305
5. Security Procedures – §§ 4A-201, 4A-202, 4A-203, 4A-204 & 4A-206

Most of the proposed amendments, and the reason for them, are described in my earlier memorandum of February 20. What follows are some of the notable changes made following the Committee meeting on March 9.

1. The proposed amendment to the text of § 3-105 was dropped and replaced with a proposed amendment to the official comment. The amendment to § 3-105 would have re-defined when an instrument is “issued,” so as to ensure that issuance occurs if a drawer creates a check, makes and sends an image of it, but never delivers the check. During the meeting, it was suggested that payment effected in this manner could be treated as a funds transfer.

Upon further reflection, this suggestion was rejected for two reasons. First, the banking system currently treats and processes these things as truncated checks. Indeed, banks are unaware that there is an issuance problem and have no way to distinguish images of unissued checks from images of issued checks. Second, it appears that Regulation CC likely resolves the problem through its definition of “electronic check.” This second reason also suggests that amending § 3-103 is unnecessary. A comment was added to reference the relevant provision of Regulation CC.

2. The proposed amendment to the text of § 4-209 was dropped and replaced with a proposed amendment to the official comment to § 4-207. The amendment to § 4-207 was designed to make it clear that, if a drawer of a truncated check is forced to pay a HDC despite the fact the drawee bank has already paid based on electronic presentment, that drawer will have a breach of warranty claim against whoever truncated the check. The concern underlying the proposed

amendment was that the Regulation CC warranty might not cover it the double presentment problem.

After further reflection and discussion, it was concluded that the Regulation CC warranty likely does address this situation. The applicable warranty is 12 C.F.R. § 229.34(a), which provides in pertinent part:

(1) Each bank that transfers or presents an electronic check or electronic returned check and receives a settlement or other consideration for it warrants that –

* * *

(ii) No person will receive a transfer, presentment, or return of, or otherwise be charged for an electronic check or electronic returned check, the original check, a substitute check, or a paper or electronic representation of a substitute check such that the person will be asked to make payment based on a check it has already paid.

With respect to transfers for collection or presentment, this warranty is made to the transferee bank, any subsequent collecting bank, the paying bank, and the drawer. 12 C.F.R. § 229.34(a)(2)(i).

One concern underlying the prior draft was that the drawer who pays a HDC is not being “charged” for the check, and thus the warranty might not cover the scenario. Moreover, the payor bank does not make the warranty, and thus the drawer would not have a claim against the payor bank.

Nevertheless, in many cases, the payor bank – to which the warranty is made and whose cooperation the drawer would like need to identify the warrantors – will assist its customer by compensating its customer and pursuing the warranty claim itself. An ECCHO commentary acknowledges this, although it also acknowledges that the payor bank has no duty to refund its customer. Moreover, the Regulation CC warranty also covers “presentment” of the check that has already been paid, and presentment can be made to the drawer, rather than to the payor bank. *See* § 3-417(d) (referring to a dishonored draft “presented for payment to the drawer”).

On the whole, the proposed amendment to the text seems unnecessary. Instead, a comment has been added indicating that federal law supplements the warranties made under the UCC, and provides a specific example dealing with double presentment.

3. As requested during the March meeting, the proposed amendment to § 4-406(a) has been revised slightly. Instead of specifying that a statement of account must include the payee and date of each item, the text states merely that the statement must include an image of the item. Bracketed language for the Committee’s discussion would add that the name of the payee and date must be discernable from the image.

4. The proposed amendment to § 4A-206 has been modified to reflect concerns expressed during the March meeting. Instead of stating that a third party communication system agreed to as part of a security procedure is not automatically the agent of the customer, the language now states that that a third party communication system is not automatically the agent of the customer if the bank required the customer to use the system or the bank recommended the system and the customer relied on the bank’s expertise or judgment when agreeing to use the system. The official comments have been revised accordingly, and a new sentence has been inserted to comment 1 to § 4A-203, which discusses the more general statement about agency in § 4A-202(a)..