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STUDENT ARTICLE

America Checks Into a New Banking Era With Check 21

By Sarah Malmfeldt*

I. Introduction

Have you ever post-dated a check? Have you ever written a check for an amount greater than your checking account balance, trusting that your bank would credit your account with a deposit more quickly than it would clear the check? Millions of Americans would answer these questions in the affirmative.¹

In an ideal world, everyone would bank responsibly. We would balance our checkbooks weekly and our checks would never bounce. In reality, however, Americans' banking habits are far from perfect.² Americans frequently play the "float"—the time it takes a check to clear.³ The "float" grants us leeway when we pay by check.⁴ For example, an American consumer can write a check for \$100 when his checking account balance is only \$50 as long as he knows that the bank will soon credit a \$500 paycheck to his account. Therefore, if the consumer successfully plays the float, his check

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¹ See Tom Abate, *New Checking Law to Sink the Float*, S.F. CHRON., Oct. 17, 2004, at J.1 (describing the banking habits of a San Francisco resident).

² See *id.* (describing the banking habits of a San Francisco resident). See Sarah Talcott, *Bank Customers to Lose 'Float' Time*, THE BOSTON GLOBE, Oct. 26, 2004, at D1 (referencing a Bostonian who juggled check payments as a result of "float").

³ Janice Francis-Smith, *Erasing Check Float Time to Have Profound Impact*, J. REC. (Okla. City), Sept. 7, 2004, News.

⁴ See Talcott, *supra* note 2, at D1 (referencing a Bostonian who juggled check payments as a result of "float").

won't bounce.⁵ To the dismay of American consumers, the rules of the "float" game have just changed dramatically. The Check Clearing for the 21st Century Act ("Check 21"), which went into effect on October 28, 2004, virtually eliminates "float,"⁶ thereby increasing the risks associated with playing the "float" game.⁷

Check 21 is among the most significant federal laws ever passed concerning check processing⁸ and it has instituted the most drastic check processing changes seen within the past fifty years.⁹ Congress passed the Act with the hope of increasing the efficiency of check processing and insulating the system from many problems, such as those related to weather and terrorism.¹⁰

This article will examine Check 21 and its impact on both consumers and the banking industry. It will first address the general purposes of the law in the context of the inadequacies in the prior check processing system. Second, the article will explore the construction and details of the Act. The article will next analyze Check 21's impact on the banking industry and the succeeding benefits to banks under the Act. Finally, the article will discuss the new challenges American consumers will face now that Check 21 has taken effect.

II. The Reasons for Check 21's Enactment

A. The Role of the Federal Reserve in the U.S. Banking System

The Federal Reserve System ("FRS") is the foundation of America's banking industry.¹¹ In addition to conducting the nation's

⁵ See Talcott, *supra* note 2, at D1 (referencing a Bostonian who juggled check payments as a result of "float").

⁶ *Id.*

⁷ *Keeping Sailors in Check*, STATES NEWS SERVICE, Nov. 8, 2004 (quoting the manager of the Smokey Point Navy Federal Credit Union Member Service Center).

⁸ Robert Ballen & Tom Fox, *The Check 21 Act: New Law Marks A New Century for Check Payments*, 8 NO. 6 ELEC. BANKING L. & COM. REP. 11, 11 (2003).

⁹ Robin Sidel, *Banks, Customers Adapt to Paperless Check Processing*, WALL ST. J., Oct. 28, 2004, at B1.

¹⁰ See H.R. REP. NO. 108-132, at 11 (2003).

¹¹ THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, 8th Ed. (1994), available at <http://www.federalreserve.gov/pf/pdf/frsprop.pdf>.

monetary policy and maintaining stability within the financial system, the FRS regulates American banking institutions and provides services to financial institutions and the public.¹² The FRS, created by the Federal Reserve Act of 1913,¹³ occupies a unique position in that the President need not ratify any of its decisions but it is nevertheless subject to congressional oversight.¹⁴ Thus, its directors must work within the framework of the government's overall economic and financial objectives.¹⁵

The FRS supervises the entire banking industry in the United States.¹⁶ Some of its regulations apply only to member banks¹⁷—which consist of all banks chartered by the federal government (“national banks”) and banks chartered by individual states (“state banks”) that have chosen to join the FRS.¹⁸ Those banks that chose not to join the FRS are subject to other FRS regulations.¹⁹

The FRS includes twelve Federal Reserve district banks.²⁰ These banks play an important role in America's financial system by distributing currency and coin and operating the country's check payment system.²¹ To assist in the operation of the check payments system, Federal Reserve banks by serve as intermediaries in the check clearing process.²² Private banks across the country may choose to use the Federal Reserve banks' intermediary services or those of a private intermediary institution.²³ The role of

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, *supra* note 11, at 5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* At the end of 1993, there were 11,212 commercial banks in the United States, of which, 4,338 were member banks, and of those, 3360 were national banks and 978 were state banks. *Id.* at 14.

²⁰ *Id.*

²¹ THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, *supra* note 11, at 14.

²² *Id.* at 94.

²³ “When I Pay for my Groceries by Check, Where Does that Check go?,” at <http://money.howstuffworks.com/question500.htm> (last visited Jan. 25, 2005)

intermediaries in the banking system is discussed in Part B below.

B. America's Check Processing System Prior to Check 21

Americans write forty-two billion checks annually.²⁴ Until Check 21 went into effect, the vast majority of these checks traveled physically through a cumbersome nationwide check-processing network.²⁵ The network relied on three different types of banks: depository banks, collecting banks, and paying banks.²⁶ A check's journey began at the depository bank—the bank where the consumer deposited the check.²⁷ If the check was an “on us” check, meaning that it drew on an account held at the depository bank, the check would be processed in-house.²⁸ If the check was an inter-bank check—a check that drew on funds held by an outside bank—the depository bank could not process the check in house.²⁹ Whenever an inter-bank check was deposited, the depository banks were required to physically deliver the check to a collecting bank.³⁰ The collecting bank served as an intermediary between depository banks and paying banks.³¹ The collecting bank would review the routing number³² that is printed at the bottom of the check to identify the paying bank—the bank that housed the account the check drew upon.³³ The collecting

[hereinafter “*Where Does that Check go?*”].

²⁴ David Wells, *The Future is Clear for Cheques*, FIN. TIMES, Sept. 15, 2004, at 15.

²⁵ “*Where Does that Check go?*,” *supra* note 23.

²⁶ *Id.* See also THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, *supra* note 11, at 94 (explaining the role of the Federal Reserve Banks in the check processing system).

²⁷ Check 21 Act § 3(3)(B), 12 U.S.C. § 5002(3)(3)(B) (2004).

²⁸ “*Where Does that Check go?*,” *supra* note 23. Approximately twenty nine percent of checks are “on us” checks. David C. Wheelock & Paul W. Wilson, *Trends in Efficiency of Federal Reserve Check Processing Operations*, 86(5) FED. RES. BANK OF ST. LOUIS REV. at 7, Sept. 1, 2004.

²⁹ THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, *supra* note 11, at 7.

³⁰ Wheelock & Wilson, *supra* note 28, at 7.

³¹ Federal Reserve Banks process more than forty percent of America's inter-bank checks. THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS, *supra* note 11, at 7.

³² “*Where Does that Check go?*,” *supra* note 23.

³³ Check 21 Act § 3(3)(C), 12 U.S.C. § 5002(3)(3)(C) (2004).

bank then delivered the check to the paying bank, which paid the depository bank for the amount of the check and debited the payor's checking account.³⁴

The distances between the depository bank, the collecting bank and the paying bank complicated this process.³⁵ For instance, the depository bank might be located in Oregon, the collecting bank in California, and the paying bank in Maine. Because bank employees physically shipped checks from the paying bank to the collecting bank, and from the collecting bank to the paying bank, this system relied heavily upon the free flow of highway and air travel.³⁶ Consequently, inclement weather, threats of terrorism and other transportation disasters threw America's check processing system into chaos.³⁷

The Uniform Commercial Code ("UCC") has long permitted banks to accept checks in non-original form.³⁸ Under the UCC, banks can agree to accept an electronically transmitted image of a check instead of the physical, original check.³⁹ The heart of electronic image transmittal ("EIT") is check truncation—the process of taking an original check out of the system and converting it into a digital representation that banks can transfer electronically.⁴⁰ Banks truncate checks by scanning both sides of a check and storing the images on a computer.⁴¹ Once a bank truncates a check, it sends the digital image of the check to another bank, which prints a copy of the check and processes the copy as if it were the original check.⁴²

³⁴ *Id.*

³⁵ See Wells, *supra* note 24, at 15 (stating that banks were virtually paralyzed after September 11 because they relied so heavily upon transportation).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Availability of Funds and Collection of Checks (12 C.F.R. pt. 229), available at <http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040726/attachment.pdf>, at 1 (July 27, 2004).

³⁹ U.C.C. § 3-501 (2002); H.R. REP. NO. 108-132, at 11 (2003).

⁴⁰ Wells, *supra* note 24, at 15. See also Check 21 Act § 3(18), 12 U.S.C. § 5002(18) (2004) (defining the term "truncate").

⁴¹ See Matthew de Paula, *Hawking the ATM of the Future*, U.S. BANKER, Nov. 1, 2004, at 30 (describing how images of checks can be loaded onto an ATM's computer screen).

⁴² See Check 21 Act § 4(b), 12 U.S.C. § 5003(b) (2004) (stating that substitute checks are the legal equivalent of original checks).

Check truncation never gained wide popularity before Check 21.⁴³ With over fifteen thousand banks, thrifts and credit unions operating in the United States,⁴⁴ it was impracticable for every depository bank to have an EIT agreement with every collecting bank and every collecting bank to have an EIT agreement with every paying bank.⁴⁵ Since banks could not use EIT in the absence of an EIT agreement, even banks that invested in imaging technology could not truncate checks because they could not legally send images of checks to the destination bank.⁴⁶ Consequently, many banks could not take advantage of the opportunity to use EIT and continued to rely on the age-old method of physically moving original checks across the country.⁴⁷

C. The Goals of Check 21

Congress enacted Check 21 to modernize America's check processing system and protect the system from air and ground transportation problems.⁴⁸ In August of 1987, Congress passed the Expedited Funds Availability Act, thereby directing Federal Reserve Board ("FRB") to consider whether America's check processing system might benefit from requiring banks to transmit data electronically.⁴⁹ The findings of the FRB confirmed Congress' suspicions that EIT would likely result in increased efficiency in the processing system.⁵⁰

The pre-Check 21 system depended upon air and ground

⁴³ Availability of Funds and Collection of Checks, *supra* note 38, at 1-2.

⁴⁴ S. REP. NO. 108-79, at 1-2 (2003).

⁴⁵ Availability of Funds and Collection of Checks, *supra* note 38, at 1-2.

⁴⁶ *See id.* (explaining that the requirement that banks present the original check unless it had an alternative image presentment agreement with the recipient bank prevented banks from taking advantage of the benefits of check truncation).

⁴⁷ *See id.* (stating that the payments system has not achieved the efficiencies and potential cost savings associated with electronic check processing).

⁴⁸ H.R. Rep. No. 108-132, at 11 (2003). *See also* Kathy M. Kristof, *Checks About to Be Put on Fast Track*, L.A. TIMES, Sept. 5, 2004, at C3 (explaining bankers' perspectives).

⁴⁹ *See* Check 21, § 2(a)(1), 12 U.S.C. § 5001(a)(1) (2004) (describing the purposes of the Expedited Funds Availability Act).

⁵⁰ *See id.* § 2(a)(3) (concluding that electronic check transmittal is just as desirable now as it was in 1987).

transportation to physically move paper checks between banks.⁵¹ This dependence was extremely costly for banks.⁵² Furthermore, road closings and flight delays due to inclement weather have posed a problem for the check processing industry.⁵³ Consequently, the banking industry has long lobbied Congress to redesign the nation's check processing system to avoid these problems and increase the system's efficiency.⁵⁴ Congress largely ignored their pleas until the September 11, 2001 terrorist attacks shed new light on the infirmities of the system.⁵⁵

In the days following September 11, the U.S. government grounded all air traffic.⁵⁶ The check processing industry, so heavily dependent upon air travel, was virtually paralyzed.⁵⁷ The flight disruption stranded checks at depository and collecting banks, causing huge delays in the check clearing process.⁵⁸ September 11 forced check processing into the congressional forefront and triggered Check 21's enactment.⁵⁹

After Congress concluded that the check processing system's reliance on air and ground transportation was illogical considering the availability of computers, scanners and the Internet, it asserted that EIT would make check processing less expensive over the long term.⁶⁰ Congress wanted to discourage banks from depending on air and ground transportation by making EIT a more attractive option.⁶¹

⁵¹ See Kathleen Pender, *Writing a Check? Be Sure It's Covered*, THE SAN FRANCISCO CHRONICLE, September 10, 2004, at J.1 (stating that banks will save money by reducing paperwork).

⁵² See generally Michelle Singletary, *The Color of Money: A Check on Bad Banking Habits*, THE WASH. POST, Sept. 19, 2004, at F01 (explaining that many checks have to be transported across the country before they can be cleared).

⁵³ See Pender, *supra* note 51, at J.1 (referencing the problems caused by the September 11 attacks).

⁵⁴ Pender, *supra* note 51, at J.1. Dave Burge, *Farewell to the Float*, EL PASO TIMES, Sept. 20, 2004, at 1F.

⁵⁵ SEN. REP. NO. 108-179, at 2 (2003).

⁵⁶ Wells, *supra* note 24, at 15.

⁵⁷ *Id.*; H.R. REP. NO. 108-132, at 11 (2003).

⁵⁸ See Wells, *supra* note 24, at 15 (noting check processing problems caused by the September 11 terrorist attacks).

⁵⁹ H.R. REP. NO. 108-132, at 11 (2003). S. REP. NO. 108-79, at 2 (2003).

⁶⁰ S. REP. NO. 108-79, at 2 (2003).

⁶¹ *Id.*

However, it did not want to compel all banks to use EIT because smaller banks might be unable to purchase imaging equipment.⁶² Congress thus intended Check 21 to encourage the use of EIT without burdening smaller, less financially secure, banking institutions.⁶³

III. Constructing the New System: The Building Blocks of Check 21

A. Substitute Checks Replace Original Checks

Substitute checks are the keystone to Check 21.⁶⁴ Under the Act, consumers who previously received original checks with their bank statements will now receive substitute checks instead of original checks.⁶⁵ Substitute checks are essentially enhanced photocopies of original checks.⁶⁶ They are the legal equivalent of original checks for all purposes, provided that the substitute check accurately represents all the information displayed on the front and back of the original check and bears the legend: "This is a legal copy of your check. You can use it the same way you would use the original check."⁶⁷ This legend is the primary distinction between a substitute check and a regular photocopy of a check.

Check 21 does not require banks to create substitute checks,⁶⁸ nor does it require banks to accept checks electronically.⁶⁹ However,

⁶² S. REP. NO. 108-79, at 1 (2003).

⁶³ *See id.* (stating that the Act is designed to facilitate check truncation without requiring any bank to convert to an electronic process).

⁶⁴ *See* Singletary, *supra* note 52, at F01 (referencing a connection between the appearance of digital images of checks and a decrease in the amount of time needed for a check to clear).

⁶⁵ Availability of Funds and Collection of Checks, *supra* note 38, at 7.

⁶⁶ *See* Eileen Alt Powell, *New Law to Sink Floating Checks*, THE SEATTLE TIMES, Oct. 10, 2004, at E1 (explaining that bank customers will receive photocopies of their checks with their statements instead of original checks).

⁶⁷ Check 21 Act § 4(b)(2), 12 U.S.C. § 5003(b)(2) (2004).

⁶⁸ *See id.* § 4(a) (stating that banks must accept substitute checks, but not indicating that banks must create substitute checks).

⁶⁹ Federal Reserve Board Press Release: Consumer Guides Published Regarding Check 21 and Check Processing Technology, *available at* <http://www.federalreserve.gov/boarddocs/press/other/2004/20041028> (Oct. 28,

it does compel all banks to accept substitute checks, regardless of whether they have an alternative processing agreement with the bank that forwarded the check.⁷⁰ Banks that choose to convert original checks into substitute checks are called reconverting banks.⁷¹ Because each American bank—whether it is operating as a depository bank, a collecting bank, or a paying bank—may choose to create substitute checks, every American bank may therefore elect to act as a reconverting bank.⁷² Reconverting banks must ensure that each substitute check bears all the endorsements applied by every bank that handled the check in its original, electronic, or substitute form.⁷³ Once a reconverting bank has created a substitute check, it may then forward the substitute check to the bank which will complete the next step in the processing system.⁷⁴

The value of the substitute check lies in its capacity to streamline the check processing system.⁷⁵ Because the UCC permits banks to enter into electronic presentment agreements with one another,⁷⁶ substitute checks have the potential to remove at least one physical transportation step from the processing system. There are two general scenarios under which substitute checks heighten the efficiency of the system. Under the first scenario, the depository bank and the paying bank have an electronic presentment agreement with the same collecting bank. The depository bank can truncate the check and send the electronic image to the collecting bank; the collecting bank can then forward the check's image to the paying bank.⁷⁷ In this first scenario, the original check never leaves the depository bank and

2004).

⁷⁰ Check 21 Act § 4(a).

⁷¹ Check 21 Act § 3(15)(A), 12 U.S.C. § 5002(15)(a) (2004). If a person other than a bank converts an original check into a substitute check, the first bank to transfer or present the substitute check is called the reconverting bank. *Id.* § 3(15)(B).

⁷² *See id.* § 4(a) (stating that banks must accept substitute checks).

⁷³ *Id.* § 4(c).

⁷⁴ *See id.* § 4(a) (stating that a person may send for collection a substitute check without the existence of an agreement with the recipient).

⁷⁵ *See* Singletary, *supra* note 52, at F01 (referencing the connection between the appearance of digital images of checks and the decrease in the amount of time needed for a check to clear).

⁷⁶ U.C.C. § 4-110 (2002).

⁷⁷ *See id.* (explaining that electronic presentment may be used when the parties involved have previously entered into an electronic presentment agreement).

the check is processed without any paper being exchanged.⁷⁸ Under the second scenario, assume the collecting bank has entered into an electronic payment agreement with the depository bank, but not with the paying bank. As in the first scenario, the depository bank can truncate the check and send the check's image to the collecting bank.⁷⁹ The collecting bank, however, cannot forward the check's image to the paying bank.⁸⁰ Nevertheless, it may use the image of the check to create a substitute check and physically deliver the substitute check to the paying bank.⁸¹ In this second scenario, the collecting bank and the paying bank must exchange paper, but, as under the first scenario, the original check never leaves the depository bank.⁸² Since the original check need not be moved from the depository bank, no bank is faced with the cost or hassle of transporting it. The decrease in cost and hassle results in increased efficiency throughout the system.

B. Consumer Protections Built Into Check 21

Check 21 prescribes several safeguards to protect consumers—and banks—from any losses they might suffer as a result of receiving a substitute check instead of an original check, including warranty, indemnification, expedited recredit and consumer notification provisions.⁸³

i. Warranties and Indemnification

Any bank that transfers, presents, or returns a substitute check warrants to any person or entity that receives the substitute check that the substitute check was properly made and that the check has been

⁷⁸ See generally Check 21 Act § 3(18), 12 U.S.C. § 5002(18) (2004) (describing the check truncation process).

⁷⁹ See *id.* § 4(a) (stating that banks must accept substitute checks).

⁸⁰ See UCC § 4-110 (2002) (providing that electronic presentment may be used when parties have entered into a prior agreement allowing for electronic presentment).

⁸¹ See Check 21 Act § 4(a) (stating that a person may present a substitute check without the existence of a prior agreement with the recipient).

⁸² See generally *id.* § 3(18) (explaining the system of check truncation).

⁸³ See generally Check 21 Act §§ 5-7, 12 U.S.C. §§ 5004-5006 (2004) (describing the procedures of substitute check warranties, indemnification and expedited recredit).

paid only once.⁸⁴ Furthermore, a reconverting bank and any bank that processes the substitute for consideration must indemnify any other bank or consumer that suffered a loss due to receiving a substitute check rather than an original check.⁸⁵ For example, if a collecting bank accidentally sends an illegible substitute check for \$3,000 to a paying bank, and the paying bank credits a consumer's account with \$5,000 because the correct number was difficult to decipher, the collecting bank must indemnify the paying bank for \$2,000.⁸⁶ However, if the loss to the consumer or the bank is a result of negligence on the part of an indemnified party, that particular party's indemnification will decrease in proportion to the amount of their negligence.⁸⁷ If, for instance, the paying bank in the above example could have used a magnifying glass to determine that the check was written for \$3,000 instead of \$5,000, its loss would result in part from its own negligence.⁸⁸ Thus, the collecting bank would not indemnify the paying bank for the full \$2,000 loss.⁸⁹ Also, if an indemnifying bank produces the original check or a copy of the original check, that bank will be liable only for losses incurred up to the time that the indemnifying bank produced that check.⁹⁰ Thus, if the collecting bank described in the above example realized soon after it sent the check to the paying bank that the check was illegible and immediately presented the paying bank with the original check, which clearly showed that the amount of the check was \$3,000, the collecting bank need only indemnify the paying bank if the paying bank had already credited \$5,000 to the consumer's account.⁹¹ If the

⁸⁴ *Id.* § 5.

⁸⁵ *Id.* § 6(a). "Processing" includes transferring, presenting or returning. *Id.*

⁸⁶ See Summary of Check 21, at www.aba.com/About+ABA/CheckTruncationAct.htm (Oct. 3, 2003) (referencing how warranty and expedited recredit provisions protect those who process illegible checks).

⁸⁷ Check 21 Act § 6(c)(1), 12 U.S.C. § 5005(c)(1) (2004).

⁸⁸ See generally *id.* (explaining that a party's indemnification will be reduced in proportion to the amount of negligence attributed to that party).

⁸⁹ *Id.*

⁹⁰ Check 21 Act § 6(d)(1)(A), 12 U.S.C. § 5005(d)(1)(A) (2004). In addition, banks have a right to the return of any money they paid that is in excesses of those losses. *Id.* § 6(d)(1)(B).

⁹¹ See generally *id.* § 6(d)(1)(A) (providing that a party will be liable only for losses incurred up to the time that the original check or a copy of the original check is provided to the indemnified party).

paying bank received the original check before it credited the consumer's account, it would not have suffered any loss as a result of receiving the illegible check because it could use the original check to determine the correct check amount and credit the consumer's account accordingly.⁹²

If a bank breaches the warranty described above, the amount of the indemnity will be the amount of any loss to the consumer or bank, including reasonable attorneys fees that the breach proximately caused.⁹³ Thus, if the paying bank in the above example did not act negligently and paid an attorney \$500 to facilitate the recovery of its \$2,000 loss, the paying bank may recover \$2,500 from the collecting bank.⁹⁴

ii. Expedited Recredit

Consumers who receive a substitute check may request an expedited recredit from a bank where they hold an account.⁹⁵ An expedited recredit is a procedure that allows consumers to quickly recover funds lost because of any type of bank error.⁹⁶ Expedited recredit helps consumers by requiring banks to hold disputed funds in consumer accounts rather than in their internal accounts.⁹⁷ To qualify for expedited recredit, consumers must satisfy the following four requirements: (1) the bank must have charged the consumer's account for a substitute check that it provided to the consumer; (2) either the bank did not properly debit the consumer's account or the bank breached its warranty with respect to the substitute check; (3) the consumer suffered a loss as a result; and (4) the production of the original check or a better copy of the original check is necessary to validate the consumer's claims.⁹⁸ A consumer has forty days from either the date the bank delivered the substitute check to the

⁹² Check 21 Act § 6(d)(1)(A), 12 U.S.C. § 5005(d)(1)(A) (2004).

⁹³ *Id.* § 6(b)(1).

⁹⁴ *See generally id.* § 6(b)(1) (explaining that the amount of indemnity a party must provide is the amount of any loss, including costs and attorneys fees, that are proximately caused by the warranty breach).

⁹⁵ *Id.* § 7(a).

⁹⁶ *See id.* § 7(a) (stating the procedures for obtaining an expedited recredit).

⁹⁷ *See* Check 21 Act § 7(c)(2)(B), 12 U.S.C. § 5006(a) (2004) (stating that a bank must automatically credit consumer accounts if it has failed to determine the validity of the consumers claim within ten days).

⁹⁸ *Id.* § 7(a)(1).

consumer, or the date the bank made the check available to the consumer, to submit an expedited recredit request.⁹⁹ The bank may require the consumer to submit the expedited recredit request in writing.¹⁰⁰

The bank must recredit the consumer's account no later than one day after the bank determines that the consumer's claim is valid.¹⁰¹ If, however, within ten business days after the claim submission, the bank does not determine whether the consumer's loss is actually a result of a bank error, the bank must recredit the consumer's account for the lesser amount of the value of the substitute check or \$2,500, with interest, by the end of the tenth business day.¹⁰² If the bank has yet to determine the validity of the consumer's claim by the end of the forty-fifth calendar day following the consumer's expedited recredit claim submission, the bank must recredit the consumer's account for the remaining value of the substitute check not previously paid, with interest.¹⁰³ Thus, if a bank is unable to determine whether use of a substitute check proximately caused a consumer's loss, the consumer gets the benefit of the doubt.¹⁰⁴ The time restrictions included in this provision also encourage banks to investigate expedited recredit claims in a timely manner.¹⁰⁵

Under Check 21, banks must make the recredited funds readily available for withdrawal.¹⁰⁶ However, a bank may reverse its recredit if it determines that the substitute check in question was properly credited to the consumer's account and notifies the consumer of this determination.¹⁰⁷ This provision prevents consumers from abusing the expedited recredit provision by filing a false claim because his or her bank will remove all recredited funds from the

⁹⁹ Check 21 Act § 7(a)(2), 12 U.S.C. § 5006(a)(2) (2004). The latter of these two dates applies. *Id.* This forty-day period may be extended due to extenuating circumstances, such as illness or extended travel of the consumer. *Id.* § 7(a)(3).

¹⁰⁰ *Id.* § 7(b)(2).

¹⁰¹ *Id.* § 7(c)(2).

¹⁰² *Id.* § 7(c)(2).

¹⁰³ Check 21 Act § 7(c)(2), 12 U.S.C. § 5006(c)(2) (2004).

¹⁰⁴ *See id.* § 7(c)(2) (describing when banks must recredit accounts).

¹⁰⁵ *See id.* § 7(c)(2) (explaining the proper timing for recredits).

¹⁰⁶ *Id.* § 7(d)(1).

¹⁰⁷ *Id.* § 7(e).

consumer's account once it determines that the claim was bogus.

iii. Required Notification to Consumers of Check 21

Because Check 21 changes the way banks process checks, the Act requires banks to inform their customers of the Act's procedures and how the Act will affect customer banking.¹⁰⁸ Check 21 compels banks to provide to their customers a brief statement explaining how substitute checks function as the legal equivalent of original checks and how customers may claim a recredit if they have reason to believe that the bank did not properly charge a substitute check to their account.¹⁰⁹ Check 21 requires banks to provide such notice to any existing customer to whom the bank generally sent original checks under the bank's agreement with the customer.¹¹⁰ Under the Act, banks were required to provide notice of Check 21 no later than first regularly scheduled customer communication after October 28, 2004.¹¹¹ Banks must also provide all new account holders with notice of the Act at the time the customer opens an account.¹¹² Furthermore, if a customer requests a copy of a check, the bank must notify the customer of Check 21 at the time of the request.¹¹³

C. Required Studies Will Evaluate Check 21's Success

Check 21 requires the Federal Reserve Board ("FRB") to conduct a study to evaluate the impact of the Act on both banks and consumers.¹¹⁴ Congress elected that the FRB conduct this study because the FRB holds the authority to regulate America's check processing system.¹¹⁵ The study must determine how many checks were transferred electronically rather than physically during the

¹⁰⁸ Check 21 Act § 12(a), 12 U.S.C. § 5011(a) (2004).

¹⁰⁹ *Id.* § 12(a).

¹¹⁰ *Id.* § 12(b)(1). Even before the enactment of Check 21, many bank customers did not receive their original checks back in the mail. Singletary, *supra* note 52, at F01. Thirty-six percent of banking customers permit their banks to return copies of checks, rather than original checks. *Id.*

¹¹¹ Check 21 Act § 12(b)(1).

¹¹² *Id.* § 12(b)(2).

¹¹³ Check 21 Act § 12(b)(4), 12 U.S.C. § 5011 (b)(4) (2004).

¹¹⁴ *Id.* § 16(a).

¹¹⁵ *See id.* § 2(a)(2)(A) (outlining the role of the FRB).

thirty-month period following the enactment of Check 21.¹¹⁶ It must also evaluate whether banks made funds available to their customers more quickly than required under the Act.¹¹⁷ Additionally, the study must ascertain when depository banks learned of nonpayment on checks, how Check 21 affects check-related losses, and whether the time limits restricting when a customer may claim a recredit are appropriate.¹¹⁸ The FRB must report its findings to Congress at the end of the thirty-month period following the enactment of Check 21.¹¹⁹

Furthermore, the Comptroller General of the United States must study the impact of Check 21 on consumers and the banking industry.¹²⁰ The Comptroller General must continually evaluate the progress of the Act from its enactment through the fall of 2009.¹²¹ To do so, he must estimate Check 21's impact on economic efficiency and the extent to which consumers and financial institutions have benefited from its passage.¹²² Furthermore, he must determine whether consumers have accepted check truncation.¹²³ At the conclusion of this five-year period, the Comptroller General must report his findings to Congress and submit any recommendations for possible changes to Check 21.¹²⁴ This study will likely benefit consumers by bringing to light any distress they suffer as a result of the Act.

¹¹⁶ *Id.* § 16(a)(1).

¹¹⁷ *Id.* § 16(a)(2).

¹¹⁸ Check 21 Act § 16(a)(3-5), 12 U.S.C. § 5015 (a)(3-5) (2004).

¹¹⁹ *Id.* § 16(b).

¹²⁰ *Id.* § 18(a). The comptroller general is the head of the nation's Government Accountability Office ("GAO"). GAO Website, at <http://www.gao.gov/about/what.html>. The GAO studies the programs and expenditures of the American government and advises Congress how to increase the efficiency of government. *Id.* Commonly called the congressional watchdog, it is independent and nonpartisan. *Id.*

¹²¹ *See generally* Check 21 Act § 18 (stating that the Comptroller General must evaluate the implementation and administration of the Act).

¹²² *Id.* § 18(a)(1-3).

¹²³ Check 21 Act § 18(a)(1-3), 12 U.S.C. § 5017 (a)(1-3) (2004).

¹²⁴ *Id.* § 18(b).

IV. Analysis of Check's 21's Impact

A. Check 21's Effect on the American Banking Industry

i. How Banks Will Benefit Under Check 21

Banks expect to save billions of dollars under Check 21.¹²⁵ The banking industry will benefit from the Act in three different ways: (1) banks will save money by reducing the costs of processing checks;¹²⁶ (2) banks will benefit from the decrease in "float;"¹²⁷ and (3) Check 21 will allow banks to detect fraud more quickly.¹²⁸

First, Check 21 will allow banks to decrease their overhead.¹²⁹ While banks previously spent billions of dollars transporting checks across the country,¹³⁰ they can now decrease these costs.¹³¹ Instead of paying workers to sort, bundle, and physically move checks, banks have the option of investing in electronic processing equipment to help them become more cost efficient as they process checks.¹³² The Federal Reserve estimates that Check 21 will save banks \$2 billion each year.¹³³

Second, the decrease in "float" will enable banks to earn more

¹²⁵ *Banks Can Taste Savings From Check 21 Law*, CHI. TRIB., Oct. 29, 2004, at 3.

¹²⁶ Pender, *supra* note 51, at J.1.

¹²⁷ See Singletary, *supra* note 52, at F01 (stating that it is unfair that banks can quickly debit consumer accounts but will not be under any obligation to quicken the crediting of consumer accounts).

¹²⁸ See generally Burge, *supra* note 54, at 1F (referencing statements of George Acevedo, district manager for Chase's El Paso banks).

¹²⁹ *Id.*

¹³⁰ Powell, *supra* note 66, at E1.

¹³¹ Wells, *supra* note 24, at 15.

¹³² Burge, *supra* note 54, at 1F. Chase Bank and Bank One, who recently merged, have spent nearly \$100 million dollars for improved electronic processing technology. *Id.*

¹³³ Powell, *supra* note 66, at E1. Prior to Check 21, banks spent approximately eight billion dollars a year on check processing. *Id.* The Federal Reserve estimates that banks will only spend six billion dollars a year after Check 21. *Id.*

interest on their internal accounts.¹³⁴ Prior to Check 21, the “float” period could last up to five days.¹³⁵ With Check 21 now in full operation, however, the consumer’s check could clear in hours rather than days.¹³⁶ This change will benefit the banking industry because banks will process checks more quickly, thereby shortening the amount of time needed to debit consumer accounts.¹³⁷ However, Check 21 does not require banks to credit consumer accounts any more quickly than they did before the Act.¹³⁸ Thus, banks can store consumer’s money in their own accounts for days at a time, accruing interest that might otherwise be earned by consumers.¹³⁹ For example, before Check 21, if a consumer deposited a check for \$1,000, the check would drift through the system for several days. Banks could not earn interest off the \$1,000 during this time.¹⁴⁰ Since checks are processed more speedily under the Act, the depositing bank can more quickly access the \$1,000. The depositing bank can thus hold the \$1,000 in its own account for a few days, earning interest on the \$1,000 for each day it holds the money in its own account, allowing banks realize more interest on “floating” money.¹⁴¹

Third, Check 21 will further help the banking industry by facilitating the detection of check fraud.¹⁴² Since checks clear more quickly under Check 21, it will take less time for a bank to discover that a criminal has made an unauthorized draft on a consumer’s account.¹⁴³ Furthermore, as banks invest in imaging technology to

¹³⁴ See generally Singletary, *supra* note 52, at F01 (stating that it is unfair that banks can quickly debit consumer accounts but will not be under any obligation to quicken the crediting of consumer accounts).

¹³⁵ Pender, *supra* note 51, at J1 (stating that “float” could last up to five days).

¹³⁶ Lisa Stein, *Check It Out*, U.S. NEWS AND WORLD REP., Nov. 8, 2004, at 16.

¹³⁷ See Singletary, *supra* note 52, at F01 (stating that banks will be able to quickly debit consumer accounts but need not credit accounts any more quickly).

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ See Linda Stern, *The Check that Won't Float*, NEWSWEEK, Sept. 20, 2004, at 57.

¹⁴² Wells, *supra* note 24, at 15. H.R. REP. NO. 108-132, at 11 (2003).

¹⁴³ Francis-Smith, *supra* note 3. Once banks invest in imaging technology, they will likely make images of cleared checks available for viewing online. See Wells, *supra* note 24, at 15. Thus, customers could detect an unauthorized draft

take full advantage of Check 21, more banks will post images of checks on secure websites.¹⁴⁴ Consumers will not have to wait for their banks to send them checks in the mail.¹⁴⁵ Rather, consumers will be able to view their checks online almost immediately after their checks clear, allowing them to detect and report fraud more quickly.¹⁴⁶ If the bank can discover fraud within twenty-four hours instead of five days, the criminal will have less time to flee and law enforcement agents will be more likely to capture the criminal.¹⁴⁷ Thus, banks will save money by recovering more stolen funds.¹⁴⁸

ii. Allocation of Check 21's Burden Among Banks

Although the banking industry will realize many benefits from the passage of Check 21, the Act imposes new obligations on all banks, even banks that do not truncate a check or accepted an electronic image of a check.¹⁴⁹ These new obligations include compliance with the Act's warranty, indemnification and expedited recredit provisions.¹⁵⁰ Since substitute checks are the legal equivalent of original checks,¹⁵¹ all banks will likely encounter these checks.¹⁵² Therefore, under the warranty and indemnification provisions of Check 21, all banks must warranty checks and indemnify any party who lost money as a result of receiving a substitute check.¹⁵³ Furthermore, any bank that returns a substitute check to a consumer may have to provide an expedited recredit to consumers who establish that they suffered a loss as a result of receiving the

extremely quickly. *Id.*

¹⁴⁴ Kristof, *supra* note 48, at C3.

¹⁴⁵ *See id.* (explaining that customers will be able to view and print check copies at any time).

¹⁴⁶ *Id.*

¹⁴⁷ Francis-Smith, *supra* note 3.

¹⁴⁸ *See generally* Kristof, *supra* note 48, at C3 (stating that customers will be able to quickly access their checks online).

¹⁴⁹ *See generally* Check 21 §§ 5-7, 12 U.S.C. §§ 5004-5006 (2004) (describing the warranty, indemnification and expedited recredit provisions).

¹⁵⁰ *See generally id.* (outlining the Act's procedural consumer protections).

¹⁵¹ *Id.* § 4(b).

¹⁵² Lilliane Thomas, *Check 21 Check-Up*, CREDIT UNION MAG., Nov. 1, 2004, at 80.

¹⁵³ Check 21 Act § 5.

substitute check.¹⁵⁴

Check 21 imposes even greater duties on reconverting banks.¹⁵⁵ Even though all banks that transfer, present or return a substitute check may be liable for losses that occur because they processed a substitute check rather than an original check, the reconverting bank will ultimately bear the loss.¹⁵⁶ Any bank that pays a warranty claim or provided an indemnity may bring a warranty, indemnity or expedited recredit claim against the reconverting bank.¹⁵⁷ Consequently, more of the burden of Check 21 falls upon the banks that choose to actively take advantage of the new opportunities that the Act presents while less of the burden falls upon banks that choose not to truncate checks or accept electronic check images.

B. The Impact of Check 21 on Consumers

i. Fears of Consumer Groups

The passage of Check 21 has caused alarm among consumer advocates, who suggest that the Act will hurt consumers by causing an increase in bounced check fees, fraud, error and inconvenience.¹⁵⁸

a. Elimination of the Float

Consumer groups are most concerned about banks imposing bounced check fees more frequently.¹⁵⁹ First, Check 21 is disastrous for Americans who play the “float.”¹⁶⁰ Consumers will bounce checks if they write checks for amounts greater than their checking account balances. Also, consumers who do not play the “float” may

¹⁵⁴ Availability of Funds and Collection of Checks, *supra* note 38, at 3.

¹⁵⁵ See Check 21 Act § 6(a), 12 U.S.C. § 5005(a) (2004) (describing the obligations of reconverting banks).

¹⁵⁶ See *id.* § 6(a) (describing the process of indemnification of indemnifying the reconverting bank).

¹⁵⁷ Availability of Funds and Collection of Checks, *supra* note 38, at 3-4.

¹⁵⁸ Stern, *supra* note 141, at 57.

¹⁵⁹ See Letter to Bank CEO's from Consumers Union, at http://www.consumersunion.org/pub/core_financial_services/001381.html (Sept. 20, 2004).

¹⁶⁰ See Singletary, *supra* note 52, at F01 (explaining that consumers will face many more bounced check fees as a result of Check 21's impact on “float”).

also bounce checks. As discussed above, banks may hold the funds from cleared checks in internal accounts rather than dispersing the funds directly to their customer's checking accounts.¹⁶¹ Likely, many consumers do not realize that banks may process the checks they write more rapidly than the checks they deposit.¹⁶² For example, if a consumer's checking account balance is \$40 and the consumer deposits a \$25 check into his account on Wednesday, the consumer may believe that his balance has jumped to \$65. On Friday, he pays his grocer with a \$50 check. The \$50 check may clear by Friday afternoon, but his bank need not credit his account for the \$25 deposit until the following Tuesday.¹⁶³ Under this scenario, the \$50 check will bounce.¹⁶⁴ Because consumers are likely to bounce more checks and incur more bounced check fees under Check 21,¹⁶⁵ consumer groups estimate that, by mid-2005, consumers will bounce nearly seven million more checks and pay nearly \$170 million more in bounced check fees than they had during a similar period in 2004.¹⁶⁶ Banks, in collecting these additional bounced check fees, will benefit at the expense of consumers.¹⁶⁷

Furthermore, while Check 21 requires banks to notify their customers of the Act, they did not need to do so until the first regularly scheduled communication after October 28, the date the Act went into effect.¹⁶⁸ Thus, many consumers likely bounced checks between October 28 and the date they received their banks'

¹⁶¹ See Singletary, *supra* note 52, at F01 (describing how banks may quickly debit consumer accounts but are under no obligation to credit consumer accounts quickly). See Kristof, *supra* note 48, at C3 (stating that banks may hold consumer accounts up to five days).

¹⁶² See Singletary, *supra* note 52, at F01 (stating that consumers groups have expressed that it is unfair to consumers that banks can quickly debit consumer accounts for checks they write but need not speed up the processing of deposited checks).

¹⁶³ Kristof, *supra* note 48, at C3. Banks may hold local checks for up to two days and out-of-town checks for up to five days. *Id.*

¹⁶⁴ Singletary, *supra* note 52, at F01.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Availability of Funds and Collection of Checks, *supra* note 38, at 5. Another consequence of the decrease in "float" is that consumers have less time to stop a check. See Stern, *supra* note 141, at 57 (explaining that a consumer who wish to stop a check should get to the bank fast).

¹⁶⁸ Check 21 Act § 12(b)(1), 12 U.S.C. § 5011(b)(1) (2004).

notification letter, because they were unaware of the Act's existence.¹⁶⁹ More importantly, Check 21 does not compel banks to notify the approximately sixty-four percent of consumers who did not receive original checks.¹⁷⁰ Even if consumers are fully aware of Check 21 and of its impact on "float," old habits die slowly.¹⁷¹ Many consumers will be unable to rapidly adjust their banking habits to avoid bouncing checks.¹⁷²

Representatives of the banking industry insist that consumer groups are exaggerating the impact the decrease in "float" will have on consumers.¹⁷³ With more than nine thousand banks in the United States, banks fiercely compete with one another for customers.¹⁷⁴ If a customer believes that his bank takes too long to credit his account, the customer can simply switch his account to another bank.¹⁷⁵ Dissatisfied customers are very willing to leave their banks—eighty percent of unhappy customers choose to leave their bank instead of complaining.¹⁷⁶ The competition for customers will make it unlikely that many banks will be extremely slow in crediting its customers' accounts.¹⁷⁷ Furthermore, the banking industry asserts that consumers concerned about the decrease in "float" may protect themselves by securing overdraft protection.¹⁷⁸

¹⁶⁹ See *id.* § 12(b)(1) (explaining that banks must notify their existing consumers of Check 21 by the first regularly scheduled communication after the effective date of the Act).

¹⁷⁰ See *id.* § 12(b)(1) (stating that banks must notify customers who receive original or substitute checks). See also Singletary, *supra* note 52, at F01 (referencing a poll conducted by the American Bankers Association).

¹⁷¹ See *What Consumer Groups Are Advising*, THE CREDIT UNION J., Sept. 20, 2004, at 12 (describing the suggestions of consumer groups).

¹⁷² See *id.* (describing the suggestions of consumer groups).

¹⁷³ Jennifer Saranow, *Check-Clearing Changes Spur Worry On Overdraft Fees, Fraud*, WALL ST. J., Oct. 27, 2004, at D2. See also Kristof, *supra* note 48, at C3 (stating that consumer groups and bankers are sharply divided on whether Check 21 will help or hurt consumers).

¹⁷⁴ Kristof, *supra* note 48, at C3.

¹⁷⁵ See *id.* (explaining that banks that are slow to credit consumer accounts will likely lose customers to banks that are more consumer-friendly).

¹⁷⁶ *Check 21 Comes into Force as Consumers Cry Foul*, RETAIL BANKER INT'L, Nov. 5, 2004, at 3.

¹⁷⁷ *Id.*

¹⁷⁸ Stern, *supra* note 141, at 57. When a banking customer has overdraft protection, the customer has a line of credit greater than his account balance.

The banking industry has unjustifiably dismissed the concerns of consumer groups. While a consumer has the opportunity to shop around for the bank that will most quickly credit his account, the consumer still suffers the inconvenience of transferring his account from one bank to another. Transferring checking accounts from bank to bank is thus an undesirable option for consumers. In addition, consumers who do not understand that Check 21 may cause them to incur more bounced check fees will likely not secure overdraft protection.

b. Processing Errors

Consumer advocates also worry that Check 21 will result in more frequent check processing errors.¹⁷⁹ They fear that the existence of two legally equivalent versions of the same check—the original and the substitute—may cause confusion within the check processing system.¹⁸⁰ Specifically, consumer groups anticipate that banks may accidentally debit the same check more than once.¹⁸¹ Thus, consumers must be extremely vigilant in reviewing their bank statements to ensure that no errors occurred in the processing of their checks.¹⁸²

However, in this context, consumers groups' concerns may be slightly exaggerated. All checks are still subject to the safeguards provided in the UCC, regardless of how they are processed.¹⁸³ In addition, the problems associated with duplicate checks are not new, since photocopies of checks have long been drifting through America's check processing network.¹⁸⁴ Check 21's expedited recredit provisions provide consumers who receive substitute checks

Definition of "overdraft protection," at http://www.investorwords.com/3544/overdraft_protection.html (last visited Jan. 25, 2005). When the customer overdrafts the account, the check will not bounce, rather the bank will automatically grant the customer a loan. *Id.*

¹⁷⁹ Pender, *supra* note 51, at J.1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See Stern, *supra* note 141, at 57.

¹⁸³ See Pender, *supra* note 51, at J.1 (stating that consumers have the same protections against fraud regardless of how their checks are processed).

¹⁸⁴ See Singletary, *supra* note 52, at F01 (citing the American Bankers Association's observation that images of checks have long been accepted by the IRS and courts).

with an extra layer of protection by directing banks to quickly credit consumers the disputed amount of funds.¹⁸⁵ Moreover, while Check 21 may increase the chance for error, it also provides consumers with additional safeguards, such as indemnification, warranties and expedited recredit.¹⁸⁶ These provisions add a new level of security to consumers' check transactions.

c. Possibilities of Increased Fraud

With more banks investing in imaging technology, more banks will likely post images of checks on digital archives.¹⁸⁷ Hackers who illegally access images of a consumer's checks online could determine the appearance of the face of the checks, the sequence of numbers on the checks, and the appearance of the consumer's signature.¹⁸⁸ Using modern printing technology, the hacker could fabricate and use new checks that appear valid.¹⁸⁹ Security systems would be unable to detect this type of fraud.¹⁹⁰ Consequently, hackers could freely access their victims' checking accounts by presenting false checks to unknowing vendors and could fraudulently spend the victims' money in ways that banks could not detect.¹⁹¹

Though it is difficult to predict how widespread Internet check fraud will be under Check 21, the increased availability of images of checks online has the potential to devastate consumers.¹⁹² Frank Abagnale, the master counterfeiter whose life inspired the movie *Catch Me If You Can*, has warned that the Act will facilitate check counterfeiting.¹⁹³ Hackers, having the means to create fraudulent copies of checks that are virtually indistinguishable from

¹⁸⁵ *Id.*

¹⁸⁶ See Check 21 Act §§ 5-7, 12 U.S.C. §§ 5004-5006 (2004).

¹⁸⁷ Kristof, *supra* note 48, C3. See also Wells, *supra* note 24, at 15 (stating that as banks adopt imaging technology, hackers may be able to access images of checks stored in digital archives).

¹⁸⁸ Wells, *supra* note 24, at 15.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *id.* (describing the possibilities for hackers).

¹⁹³ *Catch Them If You Can*, FIN. TIMES, Oct. 29, 2004, at 12.

valid checks, could steal money from consumers.¹⁹⁴ Since banks often shred original checks as soon as they truncate them,¹⁹⁵ banks destroy the evidence that might help them catch the counterfeiters.¹⁹⁶

d. Increased Inconvenience for Consumers

Consumer advocates also contend that consumers will suffer general inconvenience as a result of Check 21.¹⁹⁷ Many consumers, particularly those over age fifty-five, are accustomed to receiving fat envelopes containing cancelled checks with their monthly bank statements.¹⁹⁸ Although original checks will not completely disappear under Check 21, consumers will begin to receive substitute checks interspersed with their original checks.¹⁹⁹ Consumer advocates fear that this change will exacerbate confusion as to how banks process check payments.²⁰⁰

Check 21 will likely cause less inconvenience than consumers' advocates fear. Only thirty-six percent of Americans still receive cancelled checks with their statements.²⁰¹ The impact of Check 21 is less visible to Americans who do not receive cancelled checks, because their banks will continue to send them ordinary photocopies of their cancelled checks.²⁰² Americans over the age of fifty-five will experience the most inconvenience of any consumer group since fifty percent of them receive cancelled checks with their statements.²⁰³

Some consumers might even find banking to be more

¹⁹⁴ See Wells, *supra* note 24, at 15 (explaining how hackers may utilize imaging technology to defraud consumers).

¹⁹⁵ Pender, *supra* note 51, at J.1.

¹⁹⁶ *Catch Them If You Can*, *supra* note 193, at 15.

¹⁹⁷ Stern, *supra* note 141, at 57.

¹⁹⁸ Singletary, *supra* note 52, at F01.

¹⁹⁹ Pender, *supra* note 51, at J.1.

²⁰⁰ See Availability of Funds and Collection of Checks, *supra* note 38, at 6 (stating that commentators on Check 21 have expressed fears that the substitute check system will exacerbate confusion as to the rights associated with checks).

²⁰¹ Singletary, *supra* note 52, at F01 (referencing a poll conducted by the American Bankers Association).

²⁰² See Stern, *supra* note 141, at 57. See also, Wells, *supra* note 24, at 15 (quoting a banking industry expert who claims that Check 21 is "innocuous").

²⁰³ Singletary, *supra* note 52, at F01.

convenient under Check 21. Before Check 21, banks could not place automated teller machines ("ATM") in remote locations because checks deposited at ATMs must be picked up and transported daily.²⁰⁴ Now, banks can enhance ATMs with check scanning capabilities and will not need to collect checks from the ATMs.²⁰⁵ Banks will thus likely install ATMs in more remote locations.²⁰⁶ Bank of America has already demonstrated its eagerness to implement this type of technology by running a high-profile television advertisement featuring ATMs that scan checks that customers insert into the machine.²⁰⁷ Thus, consumers living in these remote areas will benefit from the convenience of having ATMs nearby.

e. Right to Recredit

Consumer groups also oppose Check 21 because they argue that every consumer should have a right to recredit for every check that was processed electronically.²⁰⁸ Under Check 21, consumers have a right to recredit only for substitute checks that they received from their banks.²⁰⁹ Since substitute checks are the legal equivalents of original checks, banks must send substitute checks to consumers who, prior to October 28, received original checks with their statements.²¹⁰ However, banks need not send substitute checks to customers who previously received only photocopies of their checks.²¹¹ Banks can simply continue sending photocopies to these customers.²¹² If a consumer receives photocopies of checks, the

²⁰⁴ H.R. REP. NO. 108-132, at 11 (2003).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ de Paula, *supra* note 41, at 30.

²⁰⁸ Consumer's Union Questions and Answers About the Check Clearing for the 21st Century Act, at <http://www.consumersunion.org/finance/ckclear1002.htm> (July 27, 2004).

²⁰⁹ Check 21 Act § 7(a)(1)(A), 12 U.S.C. § 5006(a)(1)(A) (2004).

²¹⁰ *See id.* § 4(b) (stating that substitute checks are the legal equivalent of original checks for all purposes).

²¹¹ *Id.*

²¹² *See* Talcott, *supra* note 2, at D1 (explaining that consumers who previously agreed not to receive their cancelled checks in the mail will not be affected by the replacement of original checks with substitute checks).

consumer will not receive substitute checks and thus will not have a right to recredit, even if that check was processed electronically.²¹³ In effect, the expedited recredit provisions are very limited in that they protect only the relatively small percentage of consumers who received original checks prior to October 28.

ii. Suggestions for Tempering the Negative Effects of Check 21

Consumers Union and Consumer Federation of America have launched an online petition to encourage the banking industry to adopt self-imposed consumer safeguards.²¹⁴ Consumer groups have demanded that banks refrain from using Check 21 as an opportunity to bounce more checks.²¹⁵ Instead, banks should credit consumer's accounts as quickly as they debit them and suspend bounced check fees until January 2005.²¹⁶ Consumer advocates also request that banks recredit customer's accounts within ten business days in the event of error or fraud, regardless of how the check was processed and whether the consumer received a substitute check.²¹⁷ If banks recredit customer accounts subject to error or fraud within ten days regardless of whether the consumer received substitute checks, all bank customers could benefit from expedited recredit provisions. Finally, consumer groups have asked banks to charge no more for accounts that provide for the return of substitute checks than they had previously charged for accounts that provided for the return of original checks.²¹⁸ If banks charge more for substitute check-bearing accounts than for other types of accounts, they will discourage consumers from demanding substitute checks and thus from benefiting from the protections Check 21 extends only to consumers who receive substitute checks.

V. Conclusion

Congress passed Check 21 with the expectation that the Act

²¹³ Talcott, *supra* note 2, at D1.

²¹⁴ Singletary, *supra* note 52, at F01.

²¹⁵ *What Consumer Groups Are Advising*, *supra* note 171, at 12.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

would benefit both consumers and the banking industry.²¹⁹ The banking industry will realize several significant gains from the enactment of Check 21, namely a decrease in costs associated with check processing, the decrease in “float” time, and the possibility to expedite fraud detection. Since Check 21 will allow banks to operate at lower costs, it is quite possible that banks will eventually pass its savings onto consumers. After all, the implementation of a more efficient check processing system should ultimately benefit the nation as a whole.²²⁰ However, consumers could suffer short-term losses under Check 21.²²¹ The Act will increase the risk in playing the “float” and the incidence of processing errors, and will cause some consumers to suffer more banking inconvenience.²²² The decrease in “float” will likely be the biggest obstacle American consumers will face as a consequence of Check 21.²²³ Fortunately, the mandated Funds Availability Study and Report of the Comptroller General provisions of Check 21 indicate that the suffering of consumers will not go unnoticed.²²⁴ In the meantime, consumers should protect themselves by assuming that all of their checks will clear more quickly,²²⁵ closely monitoring their checking account balances and carefully reviewing their bank statements to ensure that no errors occurred in the processing of their checks.

²¹⁹ See H.R. REP. NO.108-132, at 11 (2003) (describing the need for the legislation); see also S. REP. NO. 108-79, at 2 (2003) (describing the expectations of the FRB).

²²⁰ Check truncation has been implemented in Hong Kong, Norway, Sweden, Finland and Australia. Wells, *supra* note 24, at 15. The system is most successful in countries with few financial institutions. *Id.* Thus, the United States, with over fifteen thousand financial institutions, may not benefit from check truncation as much as a smaller country might. See *id.* See also S. REP. NO. 108-79, at 1-2 (2003).

²²¹ Kristof, *supra* note 48, at C3.

²²² Saranow, *supra* note 173, at D2; Stern, *supra* note 141, at 57.

²²³ See generally Pender, *supra* note 51, at J.1 (explaining the impact of the decrease in “float”).

²²⁴ See Check 21 Act §§ 16, 18, 12 USC §§ 5015, 5017 (2004).

²²⁵ Saranow, *supra* note 173, at D2.
