

1-1-2007

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### Recommended Citation

Peggy D. Hamilton, *WHY THE CHECK CASHERS WIN: REGULATORY BARRIERS TO BANKING THE UNBANKED*, 30 W. New Eng. L. Rev. 119 (2007), <http://digitalcommons.law.wne.edu/lawreview/vol30/iss1/8>

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# WHY THE CHECK CASHERS WIN: REGULATORY BARRIERS TO BANKING THE UNBANKED

PEGGY DELINOIS HAMILTON\*

## INTRODUCTION

Across the United States, stories of the unbanked and efforts to address their financial needs abound. The unbanked refers loosely to those people who currently do not have a formal relationship with an insured depository institution or bank.<sup>1</sup> Another term, the underbanked, refers to those people who have a formal relationship with a bank but who nonetheless substantially rely on alternative financial service providers for basic financial transactions like cashing checks or obtaining loans. For the working class, cashing a check, particularly one associated with ongoing employment, is an essential function necessary to meeting everyday financial needs, such as paying rent and purchasing food. The unbanked and the underbanked rely on check-cashing operations to cash their payroll checks at a cost that banks, government authorities, and nonprofit organizations have all tried to ameliorate.

Cashing a check for an unbanked working person is an uncomplicated but costly transaction. A consumer presents her check, indorses it, and presents one or two pieces of identification to verify her identity. The check casher, after deducting a fee of approximately two percent of the face value of the check, gives the consumer the remaining cash.<sup>2</sup> For a consumer making \$20,000 per

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1. Note that the word "bank" in this Essay refers only to a depository institution insured by the Federal Deposit Insurance Corporation and chartered and examined by either a federal or state bank regulatory agency.

2. James H. Carr & Jenny Schuetz, *Financial Services in Distressed Communities: Framing the Issue, Finding Solutions*, in FANNIE MAE FOUND., FINANCIAL SERVICES IN DISTRESSED COMMUNITIES: ISSUES AND ANSWERS 8 (2001), available at <http://www.fanniemaefoundation.org/programs/financial.PDF>.

year after taxes, the fees to cash her paycheck on a regular basis total approximately \$400 per year.

Cashing a check for the banked person is more complicated but less costly. The consumer must first be a bank customer, which means opening a checking account.<sup>3</sup> At a minimum, opening a checking account requires an application, verification of identity,<sup>4</sup> and a good banking history.<sup>5</sup> If a consumer opens a checking account, she must meet the minimum balance requirement of that account or will incur monthly fees.<sup>6</sup> Should a customer not meet the minimum balance requirements, then the fees alone would rival, if not exceed, the fees associated with using a check-cashing establishment. If a customer is able to meet the minimum balance requirements, banks typically will not charge a fee to cash a check. Thus, for the banked person, the annual cost of cashing a check is nearly zero.<sup>7</sup>

Despite the financial savings related to using a bank account rather than a check casher, the check-cashing industry is thriving. Unfortunately, given the regulatory requirements under which banks must operate, check cashers have a competitive advantage when cashing checks, notwithstanding the higher cost.<sup>8</sup>

This Essay is based on comments that I presented at the Current Issues in Community Economic Development Conference held at the Western New England College School of Law on March 30, 2007. The topic of the panel discussion was “Fringe Banking: Predators or the New Economic Model?” Looking to answer the question, I reviewed the check-cashing industry and its activities relative to the banking industry given that check cashers are per-

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3. Although not required by law, many banks offer check-cashing services to existing-bank customers.

4. The USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 376 (2001), requires that banks establish customer identification programs to verify a customer's identity. 31 C.F.R. § 103.121 (2006).

5. Many banks use ChexSystems, a reporting agency that banks rely upon to determine whether a customer has mishandled an account in the past and whether to offer a new customer an account. See Consumer Debit Res., Frequently Asked Questions, <https://www.consumerdebit.com/consumerinfo/us/en/chexsystems/faqs.htm> (last visited Aug. 31, 2007) [hereinafter Consumer Debit Resource].

6. Banks sometimes offer nonminimum-balance accounts to account holders with direct deposit of their regular pay.

7. Banks often charge a fee to purchase checks associated with a checking account. The purchase of checks, however, is often not necessary to cash checks or maintain a checking account.

8. See generally MICHAEL P. MALLOY, PRINCIPLES OF BANK REGULATION § 1.9 (2d ed. 2003) (discussing the numerous regulatory requirements under which banks must operate).

forming a task that is commonly considered a basic “banking” function: the cashing of checks. Although I did not address whether check cashers are predators or whether they present a new model of financial services, I concluded that check cashers have successfully found a way to take advantage of an inefficiency in the banking system. From an economic perspective, the check cashers have done exactly what they are supposed to do as good capitalists. From a community development perspective, however, the check cashers are making a significant profit from people who can least afford the costs.

This Essay is divided into three sections. Part I briefly describes the check-cashing industry and the unbanked population. This section presents an overview of the unbanked and the reasons this population does not use banks to cash their checks. Part II discusses Regulation CC,<sup>9</sup> one piece of federal banking regulation that appears to put banks at a competitive disadvantage as compared to check-cashing operators. Part III looks at one particular innovation: the community development bank and its attempt to bridge the gap between banks and alternative financial service providers.

## I. CHECK CASHERS AND THE UNBANKED

Check cashers, businesses that identify cashing checks as their primary activity, are everywhere. Approximately 9500 businesses in the United States list their primary activities as check cashing, with 1300 more listing it as their secondary line of business.<sup>10</sup> Alternative financial service providers, in addition to check cashers, include payday lenders, rent-to-own centers, tax refund providers, pawn shops, and title lenders. Check cashing is the most common product among alternative financial service providers.<sup>11</sup> Comparatively, there are approximately 8600 banks in the United States.<sup>12</sup>

The check-cashing industry is dominated by two major chains. Ace Cash Express and Dollar Financial Group account for twelve

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9. 12 C.F.R. § 229 (2007).

10. DOVE CONSULTING, SURVEY OF NON-BANK FINANCIAL INSTITUTIONS FOR THE DEPARTMENT OF TREASURY 13 (2000), <http://www.treas.gov/press/releases/reports/nbfirpt.pdf> [hereinafter DOVE REPORT].

11. *Id.* at 25-26.

12. FED. DEPOSIT INS. CORP., STATISTICS ON DEPOSITORY INSTITUTIONS REPORT (2007), <http://www2.fdic.gov/sdi/main.asp> (follow “Retrieve Predefined Standard Reports” hyperlink; then, under “Standard Report # 3” follow “Run Report” hyperlink) [hereinafter FDIC REPORT].

percent of the market.<sup>13</sup> Five other chains comprise twenty percent of the market, with the remainder being independent operators.<sup>14</sup> Most checks that are cashed are payroll checks, equaling eighty percent of checks cashed, and approximately sixteen percent are government checks.<sup>15</sup> Unlike personal checks where the possibility that funds are not available to cover the check are high, payroll and government checks are relatively low risk. That is, the risk that a payroll or government check would “bounce” or that there would be insufficient funds to cover the check is very low.<sup>16</sup> “ACE Cash Express calculates that returned uncollected checks account for 0.11 percent of the company’s fee revenue. Dollar Financial calculated that net write-offs after collection accounted for 0.31 percent of the checks that were cashed.”<sup>17</sup> In contrast, the face value of inter-bank checks that were returned in 2000 was 0.64%.<sup>18</sup>

The check-cashing industry is quite profitable. Its return on assets (ROA) is 4.39% on average.<sup>19</sup> The ROA of banks is approximately 1.34%.<sup>20</sup> The return on equity (ROE) of the check cashers is 9.06% on average.<sup>21</sup> Most of the check casher’s profits are derived from fees charged to cash a check. On average, fees between 1.5% and 3% are charged for cashing a payroll or government check, and a fee up to 20% is charged for cashing a personal

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13. DOVE REPORT, *supra* note 10, at 14.

14. *Id.*

15. *Id.* at 9.

16. See Scott R. Paulsen, Comment, *Regulation CC and Expedited Funds Availability: A Flotation Device for Consumers, But Will Banks Take a Bath?*, 14 J. CORP. L. 785, 794 n.82 (1989) (describing checks with next-day availability as low risk).

17. JEAN ANN FOX & PATRICK WOODALL, CONSUMER FED’N OF AM., CASHED OUT: CONSUMERS PAY STEEP PREMIUM TO “BANK” AT CHECK CASHING OUTLETS 5 (2006), available at [http://www.consumerfed.org/pdfs/CFA\\_2006\\_Check\\_Cashing\\_Study\\_111506.pdf](http://www.consumerfed.org/pdfs/CFA_2006_Check_Cashing_Study_111506.pdf).

18. Michael S. Barr, *Banking and the Poor*, 21 YALE J. ON REG. 121, 142 (2004).

19. Ace Cash Express (Ace) and Dollar Financial Corp. (Dollar) ROAs for period ending June 30, 2006, are calculated by taking the net incomes from the years 2005 and 2006 and dividing those amounts by the respective years’ average total assets. For more information on the financial data for both Ace and Dollar see Ace Cash Express, Inc., Annual Report (Form 10-K) at 70 (June 2006), available at <http://ar.twst.com/ar/co/AACE/report.html> (follow the “Jun 2006 10-K” hyperlink), and Dollar Fin. Corp., Annual Report (Form 10-K) at 34 Sept. 13, 2006, available at <http://www.secfilings.com/companies/1271625/Collar-Financial-Corporation/secfilings.aspx?fid=6>. Note that the average ROA and ROE stated for the fringe financial service providers may not be representative of the entire industry as they reflect only the average of the two largest publicly-traded players. Publicly available data for the remaining 80% of the check cashing outlets is limited. See DOVE REPORT, *supra* note 10, at 14.

20. FDIC Report, *supra* note 12.

21. See Ace Cash Express, Inc., *supra* note 19; Dollar Fin. Corp., *supra* note 19; see also *supra* note 19 (discussing the calculation of Ace and Dollar’s ROAs).

check.<sup>22</sup> Check cashers process over 180 million transactions, generating gross revenue of \$60 billion and fees of \$1.5 billion annually.<sup>23</sup> For the same year, banks compared favorably with an ROE of nearly 13%.<sup>24</sup>

In the United States, nearly 12 million households do not have a bank account or rely primarily on alternative financial service providers.<sup>25</sup> According to a 2004 survey conducted by the Federal Reserve Board, the unbanked represent 8.7% of U.S. families.<sup>26</sup> A substantial number of minority households are unbanked. Approximately thirty-three percent of African American households and twenty-nine percent of Hispanic households are unbanked.<sup>27</sup> According to the 2004 survey, unbanked families were disproportionately characterized as low income and minority.<sup>28</sup> Approximately eighty-three percent of low-income families are unbanked.<sup>29</sup>

The reasons why so many are unbanked are numerous.<sup>30</sup> A reason often given by consumers is that they cannot meet the requirements set by banks.<sup>31</sup> Low-income consumers often cannot afford to meet the minimum balance required to open an account or to avoid ongoing maintenance charges. Furthermore, ChexSystems, proprietary software that records consumers with poor banking practices, often serves as a bar to opening an account.<sup>32</sup> Banks that rely on ChexSystems to weed out high-risk or fraudulent consumers also bar inexperienced consumers or consumers who have made inadvertent mistakes from returning to the banking system.<sup>33</sup> Consequently, the penalty for misuse of a checking account, even

22. Carr & Schuetz, *supra* note 2, at 8.

23. *Id.* at 10.

24. FDIC REPORT, *supra* note 12.

25. Carr & Schuetz, *supra* note 2, at 6.

26. Brian K. Bucks, Arthur B. Kinnickell & Kevin B. Moore, *Recent Changes in U.S. Family Finances, Evidence from the 2001 and 2004 Survey of Consumer Finances*, FED. RES. BULL., Mar. 22, 2006, at A13 tbl.5, available at <http://www.federalreserve.gov/pubs/bulletin/2006/06index.htm> (stating that 91.3% of all families hold "Transaction Accounts").

27. Carr & Schuetz, *supra* note 2, at 6.

28. Bucks et al., *supra* note 26, at A12.

29. Arthur B. Kinnickell, Martha Star-McChuer & Brian J. Surette, *Recent Changes in U.S. Family Finances, Results from the 1998 Survey of Consumer Finances*, FED. RES. BULL., Jan. 2000, at 9, available at <http://www.federalreserve.gov/pubs/bulletin/2000/00index.htm>. Low-income families are defined as families earning less than twenty-five thousand dollars annually. *Id.*

30. See Bucks et al., *supra* note 26, at A15 (listing reasons for not belonging to a bank given by unbanked families).

31. *Id.*

32. Consumer Debit Resource, *supra* note 5.

33. *Id.*

inadvertently, is high. If a bank report reflects bounced checks or a bank reports "NSF" (nonsufficient funds) activity to ChexSystems, the consumer is effectively barred from banking.<sup>34</sup>

Banks often do not view the unbanked population as profitable. Depository institutions are reluctant to make an investment in a low-balance depositor. With the enactment of the Gramm Leach Bliley Act, many banks have seized the opportunity to reach high net worth consumers through the sales of securities or insurance products.<sup>35</sup> Spending resources to attract the low-income consumer, by offering low or no minimum-balance accounts, is not as lucrative.

Furthermore, traditional checking products are ill-suited to meet the needs of the lower-income, working-class population. Maintaining a checking account imposes a few conditions that may be difficult to meet. First, the customer must already have sufficient funds in her account to cover the check to be cashed immediately.<sup>36</sup> Having one paycheck's worth of funds held in reserve can prove difficult for a working individual who relies on the weekly receipt of her pay. Second, unless the customer has direct deposit (which would not be the case for our hypothetical lower-income, unbanked consumer), banks typically require a minimum balance maintained in the account. Finally, cashing a check as a bank customer typically requires that you already have a bank account and a good banking history. As I will discuss in Part II of this Essay, the system of holds for cashing checks in the banking system is a natural deterrent to participating in the banking system.

Moreover, cashing a check outside of the banking relationship imposes external costs including the inability to save<sup>37</sup> and an increase in criminal activity. Cashing a weekly or biweekly paycheck without the ability to keep some in reserve and accrue interest, as would be the case with a savings account, thwarts any attempts to accumulate wealth. Financial Service Centers of America has recently established the NetSpend system giving consumers who use check cashers the ability to save money,<sup>38</sup> but it is still unclear

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34. *Id.*

35. Gramm Leach Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (codified at 15 U.S.C. §§ 6801-6809 (2000)).

36. In fact, the customer is simply withdrawing existing funds.

37. *See* Barr, *supra* note 18, at 137.

38. Press Release, NetSpend, NetSpend® and FiSCA Break New Ground with 3 Percent Annual Percentage Yield on NetSpend National Savings Program (Oct. 9, 2006), <http://www.fisca.org/pr96.htm> (last visited Jan. 9, 2007).

whether this has become a reasonable substitute for establishing a savings account. In addition, many communities have reported a rise in crime related to the cash-and-carry economy generated by cashing regular paychecks.<sup>39</sup> For example, in New Haven, Connecticut, the City has begun to offer municipal identification cards in order to better enable undocumented immigrants to open bank accounts so as to “lessen their vulnerability as crime victims.”<sup>40</sup>

Conversely, check-cashing operations are perceived as consumer friendly, notwithstanding the financial and nonfinancial costs of using such services. Check cashers are often open early in the morning, late into the evening, and on both weekend days. Compared to banks, which often have only limited hours of operation, check-cashing operators are more accessible to the low- and moderate-income, working-class population who may not have the flexibility to leave work to cash a check or whose working hours extend beyond nine a.m. and five p.m.<sup>41</sup> An additional advantage that check cashers have over the banks is that they are concentrated in low- and moderate-income neighborhoods, giving them a highly visible presence in their target market, which in any given metropolitan area are often lower-income and minority neighborhoods.<sup>42</sup>

Notwithstanding its consumer-friendly practices, the check-cashing industry has been severely criticized for its effect on low- and moderate-income minority neighborhoods. First, many who use check cashers are the least able to afford the services. Those who are unbanked rely on check cashers and other fringe financial service providers to cash regular payroll and government benefit checks. Typical workers using a cash checker spend more than \$600 annually to cash weekly paychecks—more than one week’s pay.<sup>43</sup> Social Security recipients spend nearly \$300 a year at check cashers.<sup>44</sup> For a person making \$25,000 per year, this approximates to nearly three percent of her annual salary.

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39. Sandra Amrhein, *Reactions in the Tampa Bay Area*, ST. PETERSBURG TIMES, July 25, 2007, at 5, available at 2007 WLNR 14221836 (Westlaw); Caitlin Carpenter, *New Haven Opts to Validate Its Illegal Residents*, CHRISTIAN SCI. MONITOR, July 17, 2007, at 2, available at 2007 WLNR 13547571 (Westlaw); Matt Nussbaum, *Valley Views: Ex-Local Resident Sees Torn New Orleans*, POUGHKEEPSIE JOURNAL, Sept. 6, 2007, at 6A.

40. Mary E. O’Leary, *Group Wants City ID Cards Ready Sooner*, NEW HAVEN REG., Dec. 21, 2006, at A3.

41. This is not to suggest that all banks have limited hours.

42. DOVE REPORT, *supra* note 10, at 16.

43. FOX & WOODALL, *supra* note 17, at 11.

44. *Id.* at 10.

Second, check cashers offer no ability to establish good credit. Check-cashing establishments often provide collateral services in addition to cashing checks, such as credit products, most commonly the payday loan.<sup>45</sup> Without going into detail, the payday loan is a cash loan based on the customer's personal check held for future deposit by the check casher. These loans often carry a very high rate of interest, upwards of 400% annual percentage rate.<sup>46</sup> Moreover, these loans are not reported to credit bureaus, such as Equifax and TransUnion.<sup>47</sup> The failure to report prompt payments hampers the borrower's ability to establish a good credit history and obtain mainstream credit (like a credit card) at more reasonable rates (between fifteen to twenty-five percent annual percentage rate).<sup>48</sup>

Third, check cashers offer limited opportunities to save money and build assets and wealth. Check cashers, unlike banks, do not enable a customer to save money. The ability to deposit savings is not only necessary to avoid the crime associated with carrying cash, but is vital to mitigate the effects of poverty. Without savings, low-income workers cannot buy homes, pay for education, or start small businesses; all of which are proven measures to develop assets and accumulate wealth.<sup>49</sup>

The check-cashing industry has responded to these claims vociferously. It claims that most customers are not unbanked.<sup>50</sup> In a recent study, approximately sixty percent of check cashers' customers currently have a bank account and twenty percent of customers previously had a bank account at one time.<sup>51</sup> In addition, industry representatives state that check-cashing customers are very satisfied with the services they receive, with a majority rating the service as

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45. DOVE REPORT, *supra* note 10, at 25.

46. *See id.* at 8 (providing a description of the payday lending).

47. Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 996-98 (2006).

48. Credit card interest rates vary by lender. National averages range between ten and fifteen percent. Bankrate.com, *Credit Cards: National Rate Averages*, [http://www.bankrate.com/brm/publ/cc\\_top\\_ten\\_mkt.asp](http://www.bankrate.com/brm/publ/cc_top_ten_mkt.asp) (last visited Dec. 24, 2007).

49. *Building Assets for Low Income Families: Hearing Before Subcommittee on Social Security and Family Policy of the Senate Committee on Finance*, 109th Cong. 9 (2005) (testimony of Ray Boshara & Reid Cramer) [hereinafter *Boshara Testimony*], available at [http://www.newamerica.net/files/archive/Doc\\_File\\_2352\\_1.pdf](http://www.newamerica.net/files/archive/Doc_File_2352_1.pdf).

50. Bob Rochford, Special Counsel, Winne, Banta, Hetherington, Basralian & Kahn, P.C., Presentation at the Western New England College Law and Business Center for Advancing Entrepreneurship Conference: Issues in Community Economic Development (Mar. 30, 2007).

51. *Id.*

excellent or very good. Finally, some check-cashing establishments now offer “NetSpend,” a vehicle by which consumers can link a prepaid debit card to an interest-bearing savings account.<sup>52</sup>

## II. WHY THE BANKS CANNOT COMPETE

Banks are highly regulated financial institutions and the banking system in the United States is highly complex. To become a bank, a group of people must submit a business plan to either a federal or state banking agency responsible for chartering banks.<sup>53</sup> Once approved, the bank often must apply to the Federal Deposit Insurance Corporation (FDIC) for deposit insurance and a material review of the bank’s business plan. Banks can also choose to become members of the Federal Reserve System, which also requires an application as well as approval from the Board of Governors of the Federal Reserve System.

Each regulatory authority imposes rules governing banking practices.<sup>54</sup> When a bank commences business, it is subject to ongoing compliance requirements and examination by the agency that granted its charter, either a state or federal regulator or both.<sup>55</sup> In addition, the ability to offer customers deposits insured up to \$100,000 subjects a bank to the rules of the FDIC.<sup>56</sup> The Federal Reserve also has rules for its member and rules relating to its primary function “of implementing monetary and credit policy.”<sup>57</sup> One of the fundamental principles undergirding all these regulations is the need for a safe and sound banking system<sup>58</sup>—commonly referred to as “safety and soundness.”

In 1987, Congress passed the Expedited Funds Availability Act (EFAA) placing “strict requirements on when a depository institution must make deposited funds available to [the] depositor.”<sup>59</sup> Im-

52. *Id.*

53. At the state level, this is usually the state banking agency and at the federal level it can be the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the Office of the Comptroller of the Currency, depending on the type of charter or banking powers the organizers desire. *See* MALLOY, *supra* note 8, § 1.9.

54. *Id.* § 1.11.

55. *See* JONATHON R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* (2003) (providing an overview of the myriad of banking laws governing banking business practices).

56. *See* MALLOY, *supra* note 8, § 2.10.

57. *Id.* § 1.11(b).

58. *See id.* § 1.9.

59. Expedited Funds Availability Act, Pub. L. No. 100-86, tit. VI, § 603, 101 Stat. 637 (1987) (codified at 12 U.S.C. § 4002 (2000)); Paulsen, *supra* note 16, at 786.

plemented by the Federal Reserve as Regulation CC,<sup>60</sup> the EFAA requires that the Federal Reserve promulgate regulations to aid the process of clearing checks.<sup>61</sup> The EFAA also requires that the Federal Reserve regulate ALL aspects 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.”<sup>62</sup>

Regulation CC sets forth the outer limits by which a bank must make funds available to depositors. “In order to minimize losses resulting from the return of unpaid checks,” banks hold funds “until the institution knows that the particular check is ‘good’ or should be ‘good’ based upon traditional clearing times for similar types of checks.”<sup>63</sup> The regulation applies to cash, check, and electronic deposits. Banks rely on the regulation to hold the proceeds of a check in order to ensure that funds represented by the check are available in the payor’s account before releasing those funds to the payee or depositor.

By law, banks can hold funds from one to nine business days. The regulation states that cash deposits and electronic payments must be made available by the next business day.<sup>64</sup> The effect of this regulation is that a bank may retain a cash deposit for one business day. Thus, for the consumer who is concerned about carrying cash, having a bank account can impede the intra-day transaction. Making a cash deposit means that one does not have access to her *cash* until the next day. For some, holding the cash may be more convenient and expedient than having to return to the bank or wait for use of the funds.

While checks are typically held longer than cash or electronic deposits, certain checks can be made available the next business day. U.S. government checks, U.S. postal money orders, state government checks, cashiers checks, and checks deposited and drawn in the same branch of a bank are available by the next business day.<sup>65</sup> Although the reason is not addressed in the regulation, it follows that checks made available the next day present the highest probability of being paid. These checks present the lowest risk to the bank and there is very little risk in cashing the check before the

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60. 12 C.F.R. § 229 (2007).

61. 12 U.S.C. § 4008(b).

62. *Id.* § 4008(c).

63. Robert L. Vitale, *The Expedited Funds Availability Act and Regulation CC*, 38 R.I. B.J. 9, 9 (1989).

64. 12 C.F.R. § 229.10.

65. *Id.* § 229.10(c).

check clears the payment system.<sup>66</sup> The bank must also make one hundred dollars of any check available the next business day.<sup>67</sup>

Other than the deposits mentioned above, banks are permitted to hold funds associated with most other checks between two and nine business days.<sup>68</sup> For checks that are locally drawn, that is, checks written on a bank located in the same processing region, banks may hold funds for up to two business days.<sup>69</sup> Funds for checks that are not local may be held for five business days.<sup>70</sup> Additionally, new account holders may have to wait up to nine business days if a check is written in an amount that exceeds five thousand dollars.<sup>71</sup>

Banks also have broad power to suspend the availability of a check when there is doubt about its collectability.<sup>72</sup> The regulation neither specifies nor gives examples of the factors or types of activity that can cause doubt by the paying bank. The bank need only have a “reasonable cause to believe that the check is uncollectible” and such belief cannot “be based on the fact that [a] check is of a particular class or is deposited by a particular class of persons.”<sup>73</sup> Nonetheless, the bank can extend the hold from one to six additional business days depending on the type of deposit.<sup>74</sup>

Check cashers, on the other hand, process checks immediately. Check-cashing establishments, unlike depository institutions, are not regulated by the Federal Reserve, and therefore are not obligated to follow the rules of the payment system. Consequently, check cashers make funds available immediately. When a customer presents a check at the check-cashing establishment, a fee is charged and the customer receives the full amount of the check minus the fee within minutes, without waiting until the next day or waiting for two, five, or nine business days.

Check cashers successfully avoid the “hold” system by processing only limited types of checks, effectively reducing the amount of risk in their business. Unlike banks, which will accept any check upon presentment and then hold to verify the availability of funds,

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66. Paulsen, *supra* note 16, at 794.

67. 12 C.F.R. § 229.10(c)(1)(vii).

68. *Id.* §§ 229.12(b)-(c), 229.13(a)(1)(ii).

69. *Id.* § 229.12(b).

70. *Id.* § 229.12(c).

71. *Id.* § 299.13(a).

72. *Id.* § 229.13(e).

73. *Id.*

74. *Id.* § 229.13(h)(4).

check cashers typically only fund checks which have a high probability of payment. Check cashers often limit their services to only funding government checks (both state and federal), payroll checks, and certified or cashier's checks.<sup>75</sup> Most checks that are cashed by the check-cashing industry are payroll checks, representing eighty percent of the business, with the remainder mostly comprised of government checks, representing approximately sixteen percent. Not surprisingly, these are largely the checks for which banks will make funds available after one or two business days.<sup>76</sup> Whereas a bank relies on time to mitigate the risk of default and to ensure that the funds are available, check cashers charge a fee to mitigate the risk.

The success of the check-cashing industry, as evidenced by its growth and profits, suggests that consumers prefer to pay a fee rather than wait. Like most consumers in the U.S. economy, instant access to goods and services is desired. Although a two percent fee is high given the nearly zero cost for cashing a check at a bank, it appears that many prefer to pay the fee given the proliferation of check cashers. This assessment has not been proven empirically, however. Given the other barriers to banking and the other benefits to using an alternative financial services provider, this Essay does not attempt to study whether consumers actually prefer waiting versus paying a fee. The use of tax preparation services and refund loans strongly suggest that consumers will pay for instant access to funds at a high cost.<sup>77</sup> Certain tax preparation firms offer instant loans to taxpayers. These rapid refund loans, or refund anticipation loans, satisfy those who would rather receive the proceeds of the refund the same day as filing rather than waiting the three to six weeks that it takes the IRS to provide a refund.<sup>78</sup>

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75. ACE Cash Express states on its website that due to technological advances it can also process personal checks. See ACE Cash Express, Cash Your Checks at ACE and Get Rewards, [http://www.acecashexpress.com/cs\\_services\\_check.php](http://www.acecashexpress.com/cs_services_check.php) (last visited Sept. 30, 2007). However, it is the experience of the author that most check cashers do not accept personal checks and those that do charge upwards of fifteen to twenty percent of the face value of the check to cash.

76. The author assumes that consumers who use check cashers to access check proceeds work for local companies that use local banks. Consequently, such funds would be available under Regulation CC within two business days. See 12 C.F.R. § 229.

77. Barr, *supra* note 18, at 123.

78. See IRS, Topic 152—Refund Information, <http://www.irs.gov/taxtopics/tc152.html> (last visited Sept. 30, 2007).

### III. COMMUNITY DEVELOPMENT BANKS—A SOLUTION?

Access to and participation in the banking industry remain the primary vehicles to move from poverty to wealth. “Success in America today requires not just a job and growing income, but [also] the ability to accumulate a wide range of assets.”<sup>79</sup> Homeownership represents the single largest component of wealth, followed by bank accounts, stock investment and retirement accounts.<sup>80</sup> For the consumers of check cashers and the unbanked, homeownership may prove difficult. Check cashers will not extend credit sufficient to acquire a home, and mortgage lenders, banks, and nonbanks alike, will not extend credit to those who have poor or no credit history or do not have any savings for closing costs or a down payment.

The community development bank (CDB) seeks to bridge the gap between the unbanked and the financial mainstream. Since the enactment of the Riegle Community Development and Regulatory Improvement Act of 1994, more commonly known as the Community Development Banking Act (CDBA),<sup>81</sup> community-development banking has become a new cottage industry. CDBs are state or federally chartered FDIC-insured banks that have a primary mission of community development. Community development, although not consistently defined by regulatory authorities, typically includes activities that primarily benefit low- and moderate-income individuals or geographic areas.<sup>82</sup> Prior to the enactment of the CDBA, there were only two self-proclaimed CDBs, ShoreBank in Chicago, Illinois, and Elk Horn Bank & Trust, in Arkadelphia, Arkansas. With the formation of the Community Development Financial Institutions Fund, a wholly-owned government corporation established under the CDBA, over 750 Community Development Financial Institutions have been recognized, over fifty of which are banks.<sup>83</sup>

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79. *Boshara Testimony*, *supra* note 49, at 3.

80. *Id.* at 4.

81. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (codified in scattered sections of 12, 15, and 42 U.S.C.).

82. See 12 C.F.R. § 25.12(g) (2007).

83. CMTY. DEV. FIN. INSTS. FUND, U.S. DEP'T OF THE TREASURY, CERTIFIED COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS—ALPHABETICAL BY ORGANIZATIONS (2007), available at [http://www.cdfifund.gov/docs/certification/cdfi/CDFIbyOrgName\(11-1-07\).pdf](http://www.cdfifund.gov/docs/certification/cdfi/CDFIbyOrgName(11-1-07).pdf).

Many low- and moderate-income communities want to start CDBs to address the needs for capital, credit, savings, investment, and transaction services either not available to them at all or only available at predatory rates. CDBs are an attractive alternative to the check cashers, payday lenders, and pawnbrokers that often permeate these communities. CDBs provide loans at reasonable rates and transaction services in a safe and sound environment. CDBs can also provide a vehicle for savings and investment, a necessary element for creating wealth and alleviating poverty. CDBs provide an affordable alternative for buying a home, starting a small business, paying for college, and saving for retirement while also enabling the consumer to participate in the financial mainstream.<sup>84</sup>

One CDB in particular seeks to target the low-income communities served by check cashers. CheckSpring Community Corporation (CCC) was established in 2001 to understand, develop, and execute responsible financial services in underserved markets. CCC plans to open CheckSpring Bank in fall 2007 and plans to acquire several check-cashing operations in the Bronx, New York, that will offer and promote both check cashing and banking products and services. The check-cashing stores will essentially be converted into bank branches, facilitating the consumer to transition smoothly from being unbanked to banked.

CCC believes that it will be a successful bank for three reasons. The first is that the income from check-cashing and banking services is significantly more profitable than the income from either business alone. Second, the acquisition of existing check-cashing establishments provides for a larger volume of customers than simply serving banking customers or opening a new banking branch with no track record. Third, the costs related to operating a bank are much lower when compared with operating a check-cashing establishment. These lower cost funds enable CCC to generate a larger net income than by simply operating a check casher alone.<sup>85</sup>

Notably, unlike most banks, CCC has learned from the check cashers to make funds available faster. Currently, check-cashing establishments provide an attractive alternative to banks because they do not hold funds. Check cashers mitigate the risk in providing funds in advance of the traditional clearing process by identifying

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84. Peggy Delinois Hamilton, *Starting a Community Development Bank: A New Haven Story*, *Communities and Banking*, COMMUNITIES & BANKING, Spring 2006, at 10.

85. CheckSpring, Confidential Investor Summary (Apr. 2006) (on file with author).

those checks least likely to bounce and by charging a fee which more than compensates for any possible losses. CheckSpring Bank will similarly manage the risk Regulation CC was designed to ameliorate without the competitive disadvantage of holding funds for one, two, five, or nine business days. When compared with the check cashers, banks rely on Regulation CC to their disadvantage. Regulation CC provides a hold ceiling, not a floor.<sup>86</sup> In other words, the regulation sets forth the maximum number of days a check can be held for processing, not the minimum. Consequently, banks routinely hold funds for the permitted maximum in order to reduce risk and losses to the bank. Given recent advances in technology, banks (should they choose to) can quickly determine the availability of funds on any given check. As a consequence, banks need not wait several business days to determine whether a check has cleared.

Existing banks may not have the infrastructure to mitigate the risk of bad checks. A new bank such as CheckSpring can acquire new technological systems similar to those employed by check cashers that can more quickly determine whether a check is "bad." A new bank is also not constrained by the costs associated with the change needed to serve new markets. An existing bank, particularly one with a large branch network, strives to have uniformity and standardization across the entire company. Particularly with the advent of internet banking, banks often have to develop platforms which will attract the largest number of potential customers. A new bank that seeks to serve a niche market has to have the flexibility to develop standards and processes that meet the needs of that particular market.

In addition, CheckSpring, as a new bank acquiring existing check cashers can better price the cost of cashing checks. As a CDB, CheckSpring strives to serve a dual mission, promoting social goals of community development in low-income geographies as well as operating a profitable bank. CheckSpring can charge fees necessary to cover the costs of cashing checks, but at a price significantly lower than the rate charged by check cashers.

Should CheckSpring prove successful, it may serve as a model for other banks to provide a less costly alternative to check cashers as well as provide access to the financial mainstream. CheckSpring, scheduled to open in the fall of 2007, will be the first bank to offer

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86. See generally 12 C.F.R. § 229.10.

full-fledged check-cashing services from a bank teller window.<sup>87</sup> The bank's organizers believe that it can convert the unbanked into banking customers.

CheckSpring plans to offer its customers the full range of bank products in addition to check cashing, to establish itself as a commercial bank in a part of New York City that has very few banking services.<sup>88</sup> CheckSpring will join the fifty or so other community development banks across the country servicing low- and moderate-income neighborhoods. And although they may not earn a return as high as a check casher or a profit-maximizing bank, CDBs continue to make a positive impact on the low-income communities they serve.<sup>89</sup>

### CONCLUSION

Regulation CC, in effect for twenty years, is unlikely to change. The costs associated with funding bad checks, the propensity for fraud, and the costs to government should a bank fail, suggest that the regulatory agencies and the banking industry will not loosen the restrictions of Regulation CC to meet the needs of the unbanked. And, even though customers are inconvenienced, holds are necessary to mitigate the losses associated with checks that are returned.

Banks need to be more flexible, however, to meet the needs of unbanked markets. CDBs, as innovative institutions, may be best suited to meet those needs. Other banks have tried to serve the unbanked community. Union Bank of California, for example, has established teller windows in certain check-cashing establishments,<sup>90</sup> but only CheckSpring plans to use check cashing as its primary strategy to reach the unbanked.

As mentioned above, check cashers have taken advantage of inefficiency in the banking system. Given the volume of business that check-cashing establishments conduct, it remains unclear if existing banks can now respond without completely changing their business strategies.

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87. John Reosti, *Start-Up's Strategy Is to Turn Cashing into Bank Customers*, AM. BANKER, Jan. 18, 2006, at 5.

88. William Launder, *N.Y.C. Start-Up CheckSpring Eyes October Opening*, AM. BANKER, July 10, 2007, at 7.

89. See generally CDFI DATA PROJECT 2005, PROVIDING CAPITAL, BUILDING COMMUNITIES, CREATING IMPACT, [http://www.cdfi.org/Uploader/Files/cdp\\_fy\\_2005\\_full.pdf](http://www.cdfi.org/Uploader/Files/cdp_fy_2005_full.pdf).

90. Reosti, *supra* note 87, at 5.