the day of settlement. Interest compensation is not required in the case of an involuntary closing on a business day, such as a closing required by state law. In addition, if the paying bank is closed on a business day due to emergency conditions, settlement delays and interest compensation may be excused under § 229.38(e) or U.C.C. 4–109(b).

- 5. Good faith. Under § 229.38(a), both presenting banks and paying banks are held to a standard of good faith, defined in § 229.2(nn) to mean honesty in fact and the observance of reasonable commercial standards of fair dealing. For example, designating a presentment location or changing presentment locations for the primary purpose of discouraging banks from presenting checks for same-day settlement might not be considered good faith on the part of the paying bank. Similarly, presenting a large volume of checks without prior notic could be viewed as not meeting reasonable commercial standards of fair dealing and therefore may not constitute presentment in good faith. In addition, if banks, in the general course of business, regularly agree to certain practices related to same-day settlement, it might not be considered consistent with reasonable commercial standards of fair dealing, and therefore might not be considered good faith, for a bank to refuse to agree to those practices if agreeing would not cause it harm.
- 6. U.C.C. sections affected. This paragraph directly affects the following provisions of the U.C.C. and may affect other sections or provisions:
- a. Section 4–204(b)(1), in that a presenting bank may not send a check for same-day settlement directly to the paying bank, if the paying bank designates a different location in accordance with paragraph (f)(1).
- b. Section 4–213(a), in that the medium of settlement for checks presented under this paragraph is limited to a credit to an account at a Federal Reserve Bank and that, for checks presented after the deadline for sameday settlement and before the paying bank's cut-off hour, the presenting bank may require settlement on the next business day in accordance with this paragraph rather than accept settlement on the business day of presentment by cash.
- c. Section 4–301(a), in that, to preserve the ability to exercise deferred posting, the time limit specified in that section for settlement or return by a paying bank on the banking day a check is received is superseded by the requirement to settle for checks presented under this paragraph by the close of Fedwire.
- d. Section 4–302(a), in that, to avoid accountability, the time limit specified in that section for settlement or return by a paying bank on the banking day a check is received is superseded by the requirement to settle for checks presented under this paragraph by the close of Fedwire.

XXIII. Section 229.37 Variations by Agreement

A. This section is similar to U.C.C. 4–103, and permits consistent treatment of agreements varying Article 4 or Subpart C, given the substantial interrelationship of the two documents. To achieve consistency, the official comment to U.C.C. 4–103(a) (which

- in turn follows U.C.C. 1–201(3)) should be followed in construing this section. For example, as stated in Official Comment 2 to section 4–103, owners of items and other interested parties are not affected by agreements under this section unless they are parties to the agreement or are bound by adoption, ratification, estoppel, or the like. In particular, agreements varying this subpart that delay the return of a check beyond the times required by this subpart may result in liability under § 229.38 to entities not party to the agreement. This section is consistent with the limits on truncation agreements in § 229.36(c).
- B. The Board has not followed U.C.C. 4–103(b), which permits Federal Reserve regulations and operating letters, clearinghouse rules, and the like to apply to parties that have not specifically assented. Nevertheless, this section does not affect the status of such agreements under the U.C.C.
- C. The following are examples of situations where variation by agreement is permissible, subject to the limitations of this section:
- 1. A depositary bank may authorize another bank to apply the other bank's indorsement to a check as the depositary bank. (See § 229.35(d).)
- 2. A depositary bank may authorize returning banks to commingle qualified returned checks with forward collection checks. (See § 229.32(a).)
- 3. A depositary bank may limit its liability to its customer in connection with the late return of a deposited check where the lateness is caused by markings on the check by the depositary bank's customer or prior indorser in the area of the depositary bank indorsement. (See § 229.38(d).)
- 4. A paying bank may require its customer to assume the paying bank's liability for delayed or missent checks where the delay or missending is caused by markings placed on the check by the paying bank's customer that obscured a properly placed indorsement of the depositary bank. (See § 229.38(d).)
- 5. A collecting or paying bank may agree to accept forward collection checks without the indorsement of a prior collecting bank. (See § 229.35(a).)
- 6. A bank may agree to accept returned checks without the indorsement of a prior bank. (See § 229.35(a).)
- 7. A presenting bank may agree with a paying bank to present checks for same-day settlement at a location that is not in the check processing region consistent with the routing number on the checks. (See $\S 229.36(f)(1)(i)$.)
- 8. A presenting bank may agree with a paying bank to present checks for same-day settlement by a deadline earlier or later than 8:00 a.m. (See § 229.36(f)(1)(ii).)
- D. The Board expects to review the types of variation by agreement that develop under this section and will consider whether it is necessary to limit certain variations.

XXIV. Section 229.38 Liability

A. 229.38(a) Standard of care; liability; measure of damages

1. The standard of care established by this section applies to any bank covered by the requirements of Subpart C of the regulation. Thus, the standard of care applies to a paying

- bank under §§ 229.30 and 229.33, to a returning bank under §§ 229.31, to a depositary bank under §§ 229.32 and 229.33, to a bank erroneously receiving a returned check or written notice of nonpayment as depositary bank under § 229.32(d), and to a bank indorsing a check under § 229.35. The standard of care is similar to the standard imposed by U.C.C. 1–203 and 4–103(a) and includes a duty to act in good faith, as defined in § 229.2(nn) of this regulation.
- 2. A bank not meeting this standard of care is liable to the depositary bank, the depositary bank's customer, the owner of the check, or another party to the check. The depositary bank's customer is usually a depositor of a check in the depositary bank (but see § 229.35(d)). The measure of damages stated derives from U.C.C. 4–103(e) and 4–202(c). This subpart does not absolve a collecting bank of liability to prior collecting banks under U.C.C. 4–201.
- 3. Under this measure of damages, a depositary bank or other person must show that the damage incurred results from the negligence proved. For example, the depositary bank may not simply claim that its customer will not accept a charge-back of a returned check, but must prove that it could not charge back when it received the returned check and could have charged back if no negligence had occurred, and must first attempt to collect from its customer. (See Marcoux v. Van Wyk, 572 F.2d 651 (8th Cir. 1978); Appliance Buyers Credit Corp. v. Prospect Nat'l Bank, 708 F.2d 290 (7th Cir. 1983).) Generally, a paying or returning bank's liability would not be reduced because the depositary bank did not place a hold on its customer's deposit before it learned of nonpayment of the check.
- 4. This paragraph also states that it does not affect a paying bank's liability to its customer. Under U.C.C. 4–402, for example, a paying bank is liable to its customer for wrongful dishonor, which is different from failure to exercise ordinary care and has a different measure of damages.
- B. 229.38(b) Paying Bank's Failure To Make Timely Rreturn
- 1. Section 229.30(a) imposes requirements on the paying bank for expeditious return of a check and leaves in place the U.C.C. deadlines (as they may be modified by § 229.30(c)), which may allow return at a different time. This paragraph clarifies that the paying bank could be liable for failure to meet either standard, but not for failure to meet both. The regulation intends to preserve the paying bank's accountability for missing its midnight or other deadline under the U.C.C., (e.g., sections 4–215 and 4–302), provisions that are not incorporated in this regulation, but may be useful in establishing the time of final payment by the paying bank.

C. 229.38(c) Comparative negligence

1. This paragraph establishes a "pure" comparative negligence standard for liability under Subpart C of this regulation. This comparative negligence rule may have particular application where a paying or returning bank delays in returning a check because of difficulty in identifying the depositary bank. Some examples will illustrate liability in such cases. In each