

Draft Regulations laid before Parliament under section 89F(3) of the Bills of Exchange Act 1882, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2018 No. ****

BANKS AND BANKING

The Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018

Made - - - -

Coming into force in accordance with regulation 1

The Treasury make the following Regulations in exercise of the powers conferred by sections 89D, 89E and 89F(1) of the Bills of Exchange Act 1882⁽¹⁾.

A draft of these Regulations has been laid before and approved by resolution of each House of Parliament in accordance with section 89F(3) of that Act.

PART 1

Introductory provisions

Citation and commencement

1. These Regulations may be cited as the Electronic Presentment of Instruments (Evidence of Payment and Compensation for Loss) Regulations 2018 and come into force on the 21st day after the day on which these Regulations are made.

Interpretation

2. In these Regulations, “working day” means any day other than—

- (a) Saturday or Sunday,
- (b) Christmas Day or Good Friday, or
- (c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971⁽²⁾ in any part of the United Kingdom.

(1) 1882 c. 61. Sections 89A to 89F were inserted by section 13 of the Small Business, Enterprise and Employment Act 2015 (c. 26).

(2) 1971 c. 80. Schedule 1 was amended by section 1 of the St Andrew’s Day Bank Holiday (Scotland) Act 2007 (asp. 2). There are other amendments but none is relevant.

PART 2

Copies of instruments and evidence of payment

Provision of copy of a paid instrument

3.—(1) A banker who has paid an instrument as a result of presentment under section 89A of the Bills of Exchange Act 1882 must, if requested to do so by the creator of the instrument⁽³⁾, provide a copy of the instrument to the creator before the end of the period of 10 working days beginning with the first working day after the banker received the request.

(2) The copy of the instrument must be a complete and accurate reproduction of both faces of the instrument.

(3) The copy of the instrument must be accompanied by the following information—

(a) confirmation of—

(i) the decision of the banker, or a person authorised to pay or refuse payment on the banker's behalf, that the payment should be made and the date upon which that decision was made, or

(ii) the automated instruction for payment of the instrument, and the date of that automated instruction;

(b) the value of the payment made to the banker authorised to collect payment of the instrument;

(c) the sort code and account number of the account of the creator of the instrument;

(d) any reference number allocated by the banker authorised to collect payment of the instrument, used to identify the payment instrument.

(4) The copy and accompanying information must be provided—

(a) on paper, or

(b) in a format which—

(i) enables the creator of the instrument to store the copy and information in a way which is accessible for future reference for a period of time adequate for the purposes for which the copy and information is provided to the creator; and

(ii) allows the unchanged reproduction of the copy and information.

(5) If the copy and accompanying information is provided in accordance with paragraph (4)(b) and the creator of the instrument requests that the copy and accompanying information be provided on paper, they must be provided on paper.

(6) The first copy of an instrument provided under paragraph (1) must be provided free of charge.

(7) If the creator of an instrument requests more than one copy of the instrument, or makes more than one request for a copy of the same instrument—

(a) the banker who paid the instrument may request that the creator pay a fee for the provision of the copies of the instrument other than the first copy, and

(b) if the banker makes such a request, until the creator has paid such fee the banker need not comply with the requirement in paragraph (1) in relation to copies other than the first copy.

(8) In paragraph (7), the references to a fee are to a fee which reasonably corresponds to the banker's costs of providing the copies of the instrument and accompanying information other than the first copy.

(3) Section 89D(3) of the Bills of Exchange Act 1882 makes provision about the meaning of "creator of the instrument".

Copy of instrument as evidence of payment

4. A copy of an instrument and the accompanying information provided in accordance with regulation 3 is evidence of receipt by the payee named in the instrument of the sum payable by the instrument.

PART 3

Compensation for loss

Responsible banker to compensate eligible claimants

5.—(1) Subject to the following provisions of this Part, a responsible banker(4) must compensate a person (“the claimant”) for loss incurred by the claimant if—

- (a) the claimant incurred the loss in connection with electronic presentment or purported electronic presentment of an instrument(5),
- (b) the claimant is—
 - (i) the customer of the banker which has paid the instrument, from whose account the payment was debited, or
 - (ii) the banker which paid the instrument,
- (c) the loss resulted wholly or in part from a factor other than—
 - (i) gross negligence(6) on the part of the claimant, or
 - (ii) fraudulent activity in which the claimant was knowingly involved,
- (d) the claimant has notified a banker in accordance with regulation 6(1) and made a claim in accordance with regulation 6(3) and (4), and
- (e) one of the criteria in paragraph (2) is met.

(2) The criteria are—

- (a) the electronic presentment or purported electronic presentment of the instrument was of a type described in section 89E(2)(c), (d) or (e) of the Bills of Exchange Act 1882;
- (b) the instrument was collected for or paid to a person other than the true owner of the instrument.

(3) Paragraph (1) applies irrespective of fault for the loss incurred by the claimant (but regulation 8 makes provision for the reduction in the amount of compensation to be paid in certain circumstances).

(4) In this regulation, references to “loss” are to loss arising directly from the debiting of funds from the claimant’s account and do not include any further loss arising in consequence thereof.

Procedure for making and determining claims

6.—(1) Before making a claim for compensation under this Part—

(4) Section 89E(3) of the Bills of Exchange Act 1882 makes provision about the meaning of “responsible banker”.
(5) Section 89E(2) of the Bills of Exchange Act 1882 makes provision about the meaning of “electronic presentment or purported electronic presentment of an instrument”.
(6) The phrase “gross negligence” is also used in regulations 75 and 77 of the Payment Services Regulations 2017 (S.I. 2017/752). The Payment Services Regulations 2017 transposed in part Directive 2015/2366/EU of the European Parliament and of the Council of 25th November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and repealing Directive 2007/64/EC (OJ L 337 23.12.2015, p.35).

- (a) where the claimant is the customer of the banker which paid the instrument, and from whose account the payment was debited, the claimant must notify that banker in writing of the loss to which the claim relates;
 - (b) where the claimant is the banker which paid the instrument, the claimant must notify the responsible banker in writing of the loss to which the claim relates.
- (2) Where the banker which paid the instrument has been notified in accordance with paragraph (1)(a), that banker must notify the responsible banker in writing of that notification before the end of the period of 5 working days starting on the first working day after the banker received the notification.
- (3) A claim for compensation under this Part must—
- (a) be made to the responsible banker in writing, and
 - (b) include all information relating to the claim necessary for the responsible banker to assess whether the conditions in regulation 5 have been met.
- (4) A claim for compensation under this Part—
- (a) may be made only if—
 - (i) the period of 56 days beginning with the day after the day on which the claimant notified the loss in accordance with paragraph (1) has expired, and
 - (ii) compensation for the total loss to which the claim relates has not been paid to the claimant, whether under another scheme or otherwise, and
 - (b) must be made before the end of the period of 6 years beginning with the day after the day on which the loss was incurred.
- (5) Subject to paragraph (7), the responsible banker must before the end of the period of 15 working days beginning with the first working day after the day on which the responsible banker receives a claim for compensation under this Part, send to the claimant in writing—
- (a) acceptance of the claim, and confirmation of—
 - (i) the amount that has been paid in respect of the claim, or
 - (ii) the amount that will be paid in respect of the claim and the date by which such amount will be paid, which must be before the end of the period of 10 working days beginning with the first working day after the day on which the acceptance is sent,
 - (b) refusal of the claim and the reason for the refusal, or
 - (c) a request for further information to enable the responsible banker to assess the claim.
- (6) If the responsible banker requests further information under paragraph (5)(c), the responsible banker must in any event send the claimant an acceptance or refusal of the claim as described in paragraph (5)(a) or (b) within the period of 120 days beginning with the day after that on which the responsible banker received the claim.
- (7) The responsible banker is not required to give a notification of refusal in accordance with paragraph (5)(b) if—
- (a) the responsible banker has reasonable grounds to suspect fraudulent activity in which the claimant was knowingly involved,
 - (b) the responsible banker has notified the appropriate authority of such suspected fraudulent activity and grounds, and
 - (c) the responsible banker considers that giving a notification in accordance with paragraph (5)(b) would be likely to prejudice any investigation into the suspected fraudulent activity.

Protection of potential claimant by section 80 of the Bills of Exchange Act 1882

7. Regulation 5 does not require the responsible banker to compensate the claimant if the claimant is entitled to the same rights, and is placed in the same position, as if payment of the instrument had been made to the true owner thereof pursuant to section 80 of the Bills of Exchange Act 1882 (protection to banker and drawer where cheque is crossed).

Contributory behaviour by the claimant

8. Where a claimant incurs a loss in respect of which a responsible banker is liable to pay compensation under regulation 5, and that loss results wholly or in part from an act or omission of the claimant, the amount of the compensation to be paid by the responsible banker to the claimant is reduced in proportion to the contribution of such act or omission to the loss.

Action for damages

9. A failure by a banker to pay the full amount of compensation to be paid to a claimant under this Part is actionable at the suit of the claimant, subject to the defences and other incidents applying to actions for breach of statutory duty.

Review

10.—(1) The Treasury must from time to time—

- (a) carry out a review of the regulatory provision contained in these Regulations, and
- (b) publish a report setting out the conclusions of the review.

(2) The first report must be published before the end of the period of five years beginning with the date on which these Regulations come into force.

(3) Subsequent reports must be published at intervals not exceeding 5 years.

(4) Section 30(4) of the Small Business, Enterprise and Employment Act 2015(7) requires that a report published under this regulation must, in particular—

- (a) set out the objectives intended to be achieved by the regulatory provision referred to in paragraph (1)(a),
- (b) assess the extent to which those objectives are achieved,
- (c) assess whether those objectives remain appropriate, and
- (d) if those objectives remain appropriate, assess the extent to which they could be achieved in another way which involves less onerous regulatory provision.

(5) In this regulation, “regulatory provision” has the same meaning as in sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 (see section 32 of that Act).

Date

Name
Name
Two of the Lords Commissioners of Her
Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations support the presentment for payment of instruments by electronic image under section 89A of the Bills of Exchange Act 1882 (c. 61) (“the 1882 Act”). Part 2 provides for banks to provide copies of paid instruments as evidence of payment. Part 3 provides for banks to provide compensation for loss arising out of presentment by electronic image.

In Part 2, regulation 3 requires a banker who has paid an instrument following presentment under section 89A of the 1882 Act to provide a copy of the instrument and the prescribed accompanying information to the creator of the instrument on request. Regulation 4 provides for the copy and information provided to be evidence of receipt by the payee named in the instrument of the sum payable by the instrument (there being a similar provision for paper cheques in section 3 of the Cheques Act 1957 (c. 36)).

In Part 3, regulation 5 requires a responsible banker (as defined in section 89E of the 1882 Act, and usually the bank collecting payment of an instrument on behalf of its customer) to compensate the bank which paid the instrument or the person from whose account money has been debited, following presentment of an instrument under section 89A of the 1882 Act, for loss incurred in certain circumstances. That regulation sets out certain criteria to be met in order for compensation to be payable, including that the bank or person has made a claim in accordance with regulation 6, which sets out the procedure for such a claim.

Regulation 7 provides that a claimant is not entitled to compensation under regulation 5 if they are protected by section 80 of the 1882 Act.

Regulation 8 provides that the compensation to be paid by a responsible banker under regulation 5 is reduced if the claimant’s behaviour contributed to the loss.

Regulation 9 confirms that, where a claim has been made for compensation under regulation 5 and the responsible banker has not paid the full amount of compensation to be paid under that regulation, the claimant may bring an action in court.

Regulation 10 provides for the periodic review by the Treasury of these Regulations and subsequent publication of a report setting out the conclusions of the review.

An impact assessment of the effect of Part 4A (presentment of cheques and other instruments by electronic means) of the 1882 Act on the costs of business and the voluntary sector was prepared and is available from Her Majesty’s Treasury, 1 Horse Guards Road, London, SW1A 2HQ or on www.gov.uk.