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National Association of Federally-Insured Credit Unions

February 8, 2019

Ms. Ann E. Misback
Secretary, Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Mr. Joseph Baressi
Senior Counsel, Office of Regulations
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Availability of Funds and Collection of Checks
(RIN 3170-AA31)

Dear Ms. Misback and Mr. Baressi:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the proposal to amend Regulation CC, jointly issued by the Board of Governors of the Federal Reserve System and the Bureau of Consumer Financial Protection (the Agencies). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 115 million consumers with personal and small business financial service products. While NAFCU understands that the proposal is primarily intended to implement statutory amendments to the Electronic Funds Availability Act (EFA Act) that were introduced by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Agencies should consider ways to mitigate funds availability disclosure costs that will disproportionately impact small credit unions. With respect to the proposal's technical amendments, NAFCU supports clarification of existing regulatory language and the correction of errors in Regulation DD.

Adjustment of Dollar Amounts

As amended by the Dodd-Frank Act, Section 607(f) of the EFA Act requires the Agencies to issue regulations to adjust the dollar amounts that apply to funds availability schedules every five years. Section 607(f) also specifies that the dollar amounts under the EFA Act shall be adjusted by the annual percentage increase in the CPI-W, as published by the Bureau of Labor Statistics, rounded to the nearest multiple of $25.

Taking into consideration that future adjustments to the dollar amounts are governed largely by statutory parameters, NAFCU agrees that the proposed methodology for determining the first set of adjustments (using the aggregate percentage change in the CPI-W from July 2011 to July 2018), and subsequent adjustments, is consistent with the approach adopted in the EFA Act. NAFCU also supports the Agencies' approach for tracking changes to the CPI-W on a year-to-year basis. While Section 607(f) states that adjustments be based on the "annual percentage increase" in the CPI-W, it must be inferred that any adjustment must take into account negative movements in the CPI-W. And while the decision to categorically avoid negative dollar amount adjustments is a somewhat

arbitrary interpretation in this context, NAFCU generally agrees that the aggregate change in the CPI-W every five years would most likely be zero or positive.

Nonetheless, NAFCU remains concerned that changes to the dollar amounts every five years will have a disproportionate cost impact on smaller credit unions that must print new disclosures to reflect new funds availability schedules. For many smaller credit unions, the costs associated with printing and mailing notices to members, including change-in-terms notices, can be significant relative to overall revenues. For credit unions that lack the scale to absorb new disclosure costs, transitioning to new disclosures every five years introduces yet another regulatory burden. As the proposal itself notes, the Bureau estimates that a small percentage of entities will face a "significant economic impact," a fact that should not be written off given that many of these smaller institutions are likely community-based institutions. Accordingly, NAFCU urges the Agencies to consider ways to reduce the length of required funds availability disclosures.

While NAFCU understands that funds availability disclosures and notices are statutorily required, the Agencies can and should make the model forms shorter and more compact. For example, the 2011 Funds Availability Proposal suggested the use of a tabular format instead of a narrative format to convey important information—a change that NAFCU would support once the adjusted dollar amounts are finalized. NAFCU would also encourage the Agencies to identify alternative means of delivery that would allow credit unions to convey required funds availability information on existing disclosures—such as a table on a periodic statement or other required notice—instead of as an entirely separate document (whether electronic or paper).

Technical Amendments

NAFCU supports the technical amendments to Regulation CC which would clarify the scope of the Agencies' joint rulemaking authority as well as implement amendments made to the EFA Act by the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). NAFCU believes that the Agencies' implementation approach is consistent with EGGRCPA's statutory provisions, which extended EFA Act coverage to the remaining U.S. Territories.

With respect to the correction of technical errors in Regulation DD, NAFCU recommends that the Agencies consult with the NCUA to determine whether it will be necessary to amend credit unions' equivalent regulation under the Truth in Savings Act—specifically, Appendix A to Part 707 which contains the calculation for annual percentage yield.

Reopening of the Comment Period for the 2011 Regulation CC Proposal

NAFCU believes that reconsideration of certain provisions in Regulation CC that are now subject to the Agencies joint rulemaking authority may be appropriate, but should proceed through a separate proposal or formal request for information. At this stage, NAFCU recommends that the Agencies explore improvements to the current rules for check holds in 12 CFR 229.13(e), but not seek to shorten existing check hold periods as proposed in the 2011 Funds Availability Proposal (2011 Proposal). NAFCU also recommends that the Bureau update the commentary to subpart B

of Regulation CC to ensure that it ultimately aligns with future amendments to funds availability amounts as well as changes made by the Federal Reserve to subparts C and D in 2017 and 2018 (such as removing references to nonlocal checks).

Regarding proposed changes to the hold period under § 229.12(d), while there is no longer a distinction between "local" and "nonlocal" checks, shortening the maximum period from five business days to four business days for nonproprietary ATM deposits could potentially increase incidents of fraud. Not all nonproprietary ATMs will convert checks to electronic images or do so in a consistent manner, which could result in settlement or processing delays. Given these limitations, it would be unwise to adopt shorter holds when fraudsters continue to exploit processing and settlement delays to their advantage.

Regarding the duration and scope of check holds under § 229.13, the Agencies should aim to adopt a more flexible framework that provides credit unions with the necessary time to determine whether a check will be subject to a hold exception before funds are made available. At the very least, this should entail preservation of existing check hold periods. It might also involve reconsideration of how holds are applied to certain types of checks—such as cashier's checks—when a credit union has experienced fraud-related losses in connection with these items. While NAFCU generally agrees that subpart B should reflect today's predominantly electronic check processing environment, the Agencies should ensure that rules aimed at incentivizing electronic acceptance of items do not burden credit unions with a greater risk of fraud.

Extended Holds and Exceptions

A credit union may only extend a check hold beyond the time periods established in § 229.10(c) and § 229.12 by a "reasonable period of time." For local checks, a reasonable period of time is defined as an extension of up to five days—which grants a total hold period of seven days.[1] When a credit union learns information after the time of deposit that causes doubt as to the collectability of the check, the length of the extended hold runs from the original banking day of deposit, which would—in some circumstances—give the credit union only a small window of opportunity to determine whether the funds should be made available. For example, if information becomes available five business days after the original day of deposit, the credit union would only be able to hold the funds for two days while remaining within the safe harbor provided for in § 229.13(h)(4).

In general, funds availability rules should recognize the need for timely access to funds as check processing becomes virtually all electronic; however, as long as physical checks are processed by credit unions, extended holds will sometimes be necessary to avoid the risk of loss. Furthermore, because Regulation CC prohibits a credit union from basing its reasonable doubt determination on the fact that a check is of a particular class, credit unions will always face some degree of risk when accepting physical checks due to mismatch between the allowable hold period and the time

[1] See 12 CFR 229.13(h)(4).

necessary to justify the reasonable doubt (e.g., waiting to learn that a check will be returned when it is sent through the mail). Given the limited staffing resources at many credit unions, shortening hold times for the sake of member convenience may not be possible without increasing the severity and frequency of check fraud. Accordingly, NAFCU asks that the Agencies avoid any changes to the funds availability exceptions in § 229.13 unless those changes are intended to improve credit unions' ability to detect fraudulent checks before funds are made available.

Actions that would help mitigate the risk of fraud might include the addition of a new type of exception in § 229.13 for retired routing numbers. As other industry commenters have observed, the presence of retired routing numbers may be indicative of a potential fraud or a closed account, yet it may take a paying bank longer to research such an item if the correct routing number must be identified first.

The Agencies should also consider a framework that allows credit unions to avail themselves of the reasonable doubt exception when a particular combination of check and institution is associated with a known or suspected fraud scheme. While the statutory prohibition in 12 USC § 4003(c)(2) fundamentally limits the reasonable cause exception's broad applicability to classes of checks or persons, NAFCU believes that if the Agencies were to utilize existing information sharing channels to identify general characteristics of check fraud schemes, then it would be possible for credit unions to use those characteristics as the basis for their reasonable doubt determination.

NAFCU also believes that the Agencies should not proceed with any proposed requirement to disclose the "total amount of deposit" on the notice of exception required by § 229.13(g). Not only would this be operationally complex, it would entail investments in entirely new systems to track split deposits and cash back deposits. More generally, NAFCU believes that the Agencies should not mandate changes to the form or content of funds availability notices unless changes are needed to reflect statutory updates (such as the adjusted dollar amounts). For example, requiring electronic delivery of exception hold notices and disclosure of the exact day of funds availability (as suggested in the 2011 proposal) would provide minimal benefit to members while adding substantially to administrative and compliance costs for credit unions. Given the infrequent nature of check hold events and the absence of any formal cost benefit analysis to support the Agencies' proposal, NAFCU does not support these changes.

The 2011 Proposal also sought comment on the extent to which credit unions continue to find it useful to apply case-by-case check holds in the absence of nonlocal checks, and whether the provisions allowing for such holds should be deleted. Credit unions continue to use case-by-case holds to make funds available sooner than required to their members, while reserving the flexibility to utilize the maximum hold period when no statutory exception applies and certain indicia of risk are present. Accordingly, NAFCU would strongly oppose any proposed deletion of Regulation CC's case-by-case hold provisions.

Lastly, if the Agencies intend to revisit the scope of subpart B, any future proposal should clarify that funds availability requirements do not apply to checks that are processed through remote

deposit capture (RDC) platforms. Given the unique risks involved in the RDC processing environment—particularly, the possibility of multiple presentment—and general variation in the terms and conditions that apply to consumer users and corporate users of RDC, it would be inappropriate to extend funds availability rules to RDC deposits. Doing so would not only introduce substantial fraud risks, but require a total reevaluation of existing policies and procedures that govern the use of RDC services. For credit unions that have built successful mobile banking platforms around RDC technology, imposing funds availability rules would have enormous repercussions. NAFCU recommends that the Agencies adopt commentary in Regulation CC that expressly states that deposits made by RDC are not subject to subpart B.

Conclusion

NAFCU believes that the Agencies' proposal to implement the EFA Act requirement to adjust the funds availability dollar amounts every five years is consistent with the statutory parameters set forth in Section 607(f). Although the cost of mailing new funds availability disclosures may not be significant for larger institutions, the Agencies should consider improvements to the model disclosure forms to help defray mailing and printing costs for smaller credit unions. With respect to the reopening of the 2011 Funds Availability Proposal, NAFCU believes that the Agencies should proceed with a separate request for information. Furthermore, the Agencies should not adopt proposed changes to subpart B of Regulation CC that would shorten hold times or mandate changes to the form and content of required notices.

NAFCU appreciates the opportunity to provide comments on the proposed rule. If you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or 703-842-2266.

Sincerely,

Andrew Morris
Senior Counsel for Research and Policy