

From: "Paula Bearns Keller" <pbkeller@ohiocul.org> on 03/12/2004 05:10:26 PM
Subject: Availability of Funds & Colection of Checks

Ms. Johnson: Please see the below comments filed on behalf of the Ohio Credit Union League

March 12, 2003

regs.comments@federalreserve.gov

Ms. Jennifer Johnson
Secretary, Board of Governors
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

**Re: Docket No. R-1176
Check Clearing For The 21st Century Act**

Dear Ms. Johnson:

The Ohio Credit Union League appreciates the opportunity to file comments with the Board of Governors of the Federal Reserve System ("Board") regarding its proposed regulations for the Check Clearing For The 21st Century Act ("Check 21"). The Ohio Credit Union League ("OCUL") is the trade association for credit unions in the State of Ohio representing approximately 430 credit unions, both federal and state chartered.

In general, Check 21 is intended to allow financial institutions to decide voluntarily to send checks electronically to each other; and, allow any financial institution that does not want to receive an electronic check to request a paper copy of the electronic check file, which is called a "substitute check." In addition, this proposal will amend Regulation CC, add a new subpart D, set forth the requirements of Check 21 that apply to banks, provide a model disclosure and model notices relating to substitute checks, and set forth endorsement requirements and truncating bank and reconverting bank identification requirements for substitute checks. The proposed amendments would also clarify some existing provisions of the rule and commentary.

In particular, the Board has requested comments on certain aspects of the proposed regulatory amendments that will be addressed below.

➤ **The statute measures time from the "business day" a day other than a weekend or legal holiday. The Board proposes to incorporate the term "banking day" as it has for other party of Regulation CC. Banking day means "that part of any business day on which an office of a bank is open to the public for caring on substantially all of its banking function." The Board believes that "banking day" is an appropriate term when referring to the time limits for a bank to provide a recredit and make funds available for a recredit. The Board requests comment on both of these adjustments relating to time**

period calculations.

It is OCUL's position that the term "banking day" is appropriate and since "banking day" has the same meaning that "business day" has in Regulation E it would provide a consistent application that could benefit the consumer.

➤ **The Board provides sample notices for notifying consumers in the following situations: that their claim is valid; their claim is not valid; their account has been recredited; and their recredit has been reversed. Check 21 requires that a financial institution provide these notices, but does not require the Federal Reserve to provide sample notices. In addition, Check 21 does not provide safe harbor for these notices. Should the Federal Reserve include these sample notices in its appendix? Please explain if all samples should be kept or if only certain ones should be kept.**

It is OCUL's opinion that the inclusion of sample notices in the appendix would not only be useful but also have the effect of developing a standard notice format. By doing so, the notification process would be simplified and therefore would ensure that the minimum data fields are always present. More importantly, OCUL also supports the "standard notice" format as a "safe harbor" to comply with the notice requirements. Without a "safe harbor" and a "standard notice" the notice format could be continually subjected to interpretation by the judicial system.

➤ **The proposed rule notes that, unless the bank already has provided the disclosure, a case-by-case disclosure is required when (1) a consumer receives a substitute check in response to his or her specific request for an original check or a copy of a check or (2) a check deposited by a consumer is returned unpaid to the consumer's account in the form of a substitute check. The Board has proposed two alternative rule provisions regarding when a bank must provide the disclosure to a consumer who requests a copy of a check. One alternative tracks the statute and requires a bank to provide the disclosure at the time of the request, but the other alternative requires provision of the disclosures at the time the bank provides the substitute check to the consumer. The Board specifically requests comment on which of these alternatives is preferable.**

It is OCUL's opinion that it would be preferable to provide the notice along with the substitute check. By providing the notice in this manner a complete transaction with all documentation would be disclosed at the same time.

➤ **Is the Check 21 required consumer awareness notice regarding substitute checks clear and conspicuous? Does your organization recommend any changes? Please explain.**

OCUL does not recommend any changes to the consumer awareness notice. It is OCUL's opinion that the notice is complete and clear in its disclosure. OCUL is concerned that making the notice too weighty and detailed may create confusion or result in the consumer not reading the notice in whole or in part.

➤ **In the proposal, the Board clarifies that a bank may reverse the interest paid in the**

recredit, as well, although the statute did not specifically address this. The Board requests comments on this approach. The commentary also clarifies that a bank may, when appropriate, reverse any amount that it previously recredited, regardless of whether such amount originally was provided after a determination that a claim was valid or pending the bank's investigation. The Board requests comment on whether additional commentary would be useful and, if so, what specific points should be covered.

It is OCUL's opinion that the proposal appears to be descriptive and complete. Moreover, OCUL also believes that regardless of the clarity and detail of the documentation provided, there will still be situations where there will be a need to discuss these issues with the customer.

➤ **The Board notes that Check 21 and the proposed rule state that the warranty against duplicative presentment or return applies such that a person will not be asked to make a payment based on a check it already has paid. This language could be read to exclude a situation where a second charge results from an ACH debit that was created using information from an original check or substitute check. Such as ACH debit could be considered an electronic version of a substitute. The Board specifically requests comment on whether using information from a check to create an ACH debit entry should be a payment request covered by this warranty. Please comment.**

It is OCUL's position that the warranty should not apply to a second debit resulting from an ACH debit created from the original check or substitute. The rules in ACH process are provided to govern the return of a voided ACH entry.

➤ **However, the proposed rule provides that the recipient of an item that purports to be but is not a substitute check (e.g., a substitute check with the wrong amount in the MICR line) has warranty and indemnity rights, and, where applicable, recredit and consumer awareness disclosure rights under subpart D as though the item were a substitute check. The Board requests comments on whether an item that fails to meet any of the other substitute check requirements also should be treated as though it were a substitute check for those limited purposes.**

It is OCUL's opinion that an item failing to meet other substitute check requirements should not enjoy warranty and indemnity rights.

➤ **The Statute does not explicitly address the reversal of interest when reversing are credit, and the Board specifically requests comment on whether the proposed approach is appropriate.**

It is OCUL's opinion that the proposed approach to address the reversal of interest paid by a financial institution is appropriate and defensible on any reversal of credit. OCUL also believes that any further explanation for justification should not be necessary.

➤ **The Board also requests comments on whether there are circumstances under which**

it would be appropriate to reduce the time frame for providing a notice of nonpayment.

It is OCUL's position that the time frame for providing a notice of nonpayment could be reduced. In considering this proposal, it appears that action can occur anytime between disclosure of a problem and the deadline for resolution. This would result in action being taken early thereby having the effect of reducing the time frame for providing a notice of nonpayment.

➤ **Do you agree that the commentary adequately describes the interaction of Check 21 with other check law, such as the UCC? Please explain where more clarification is needed.**

In reviewing the commentary, the use of the phrase "Generally Applicable Industry Standards" appears in the rule. OCUL recommends further clarification and suggests that the commentary include more specific definitions for standards within its text. OCUL believes that if it is not clarified the result may be different interpretations on what constitutes "industry standards."

➤ **The Board request comments on whether it makes sense to incorporate a UCC revision. The UCC revision defines a remotely-created consumer item to mean "an item drawn on a consumer account, which is not created by the payor bank and does not bear a handwritten signature purporting to be the signature of the drawer." The UCC revision would allow a paying bank to use a warranty claim to absolve itself of responsibility for honoring this type of item if a drawer claims it is unauthorized. This revision rests on the premise that monitoring by depository banks can control this type of fraud more effectively than any practices readily available to paying banks.**

OCUL supports revising Regulation CC to provide a warranty claim on remotely-created drafts as well as all demand drafts and not limit the warranty claim to only those entries drawn against consumer accounts.

The Ohio Credit Union League appreciates the opportunity to provide the above comments on the proposed regulation for Check 21 and would be willing to provide additional information if requested.

If you have any questions, comments or if I can be of further assistance, please do not hesitate to contact me at (800) 486-2917.

Respectfully submitted,

John F. Kozlowski, General Counsel
Ohio Credit Union System

cc: Paul L. Mercer
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