



Credit Union National Association

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Submitted via email: regs.comments@federalreserve.gov

May 2, 2014

Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Re: Availability of Funds and Collection of Checks
[Regulation CC; Docket No. R-1409, RIN 7100-AD68]

Dear Mr. deV. Frierson:

This comment letter represents the views of the Credit Union National Association (CUNA) regarding the Federal Reserve Board's (Board's) proposed changes to Regulation CC on the availability of funds and collection of checks. By way of background, CUNA is the largest credit union advocacy organization in this country, representing state and federal credit unions, which serve about 99 million members.

CUNA generally supports efforts to improve the check clearing process and to account for the shift towards fully electronic checks, but we have concerns with the proposed changes relating to remote deposit capture (RDC). Our members feel the changes would increase risks for all financial institutions that offer RDC, and we ask the Board to consider appropriate, alternative approaches. The Board should also minimize the impact to smaller institutions from the proposed changes, including the proposed return requirements that would encourage all institutions to use electronic returns. Further, there should be a delayed effective date of at least one year to provide adequate time for credit unions and others to implement any changes. Our concerns and recommendations for improvement are addressed in greater detail below.

Remote Deposit Capture

The Board believes a financial institution that accepts an original paper check should not bear the loss if that check has been deposited multiple times through remote deposit capture (RDC). In that connection, the proposed rule is intended to address some duplicate presentments



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involving RDC. It would allow a depository financial institution that accepts an original check to recover directly from the financial institution that permitted the check to be deposited through RDC when there has been duplicate presentment. The proposal also provides for a new indemnity relating to RDC to cover institutions that receive deposit of an original paper check returned unpaid, because it was previously deposited (and paid) using RDC.

Credit unions have concerns that the proposed changes would increase risks for institutions offering RDC. Also, financial institutions offering RDC have generally taken steps to reduce the risk of duplicate presentments and the likelihood that other institutions will deposit the paper check again after they have honored it. As an example, financial institutions often have policies and agreements that require members or customers to restrictively endorse the original paper checks before accepting the RDC (e.g., marking the check with the words, “For deposit only / account number / financial institution name / signature”). In light of that, the Board should consider whether the proposed indemnity could be applied only to paper checks that have not been restrictively endorsed.

Also, there could be unintended consequences, such as potential reductions in RDC services for consumers and businesses. These proposed changes would increase risks and liability to all financial institutions offering RDC, and the risk management effects and adjustments may be more significant for smaller institutions that handle a smaller volume of transactions. The Board should fully assess and minimize such unintended consequences.

Return Requirements

The proposed rule provides two alternative approaches to encourage all financial institutions to use electronic returns. Under Alternative 1, the expeditious-return requirement currently imposed on paying and returning financial institutions for returned checks would be eliminated. Also, there would be a notice-of-nonpayment requirement only for paying institutions that send a paper return. Under Alternative 2, the current expeditious-return requirement—using the current two-day test—would be retained only for a depository institution that has agreed to accept returned checks electronically, but the notice-of-nonpayment requirement would be eliminated for all types of checks. Currently, a paying institution that determines not to pay a check must return the check in an expeditious manner, under the “two-day test” or “forward-collection test.”

Almost all returns in the check system are currently electronic. The Federal Reserve Banks have estimated that paying institutions initiated electronic returns 99% of the time at the end of 2013.

While a fully electronic check system has many benefits, we are concerned the proposed changes would penalize some smaller institutions that currently rely on paper returns. Smaller institutions that currently rely on paper returns would incur costs to shift to electronic returns and generally have fewer resources to manage the increased risk and exposure from potentially slower paper returns. Based on the Board's December 2012 data, which is the latest available, approximately 31% of smaller institutions with assets of \$500 million or less had not made arrangements to receive electronic returns. Additional institutions have continued to transition to electronic returns.

Our members appreciate that there are benefits and negative factors associated with each proposed alternative approach. We request that the Board further assess and research the likely operational impacts from the proposed alternative approaches, and that it limit changes to Reg CC that would maintain an expedited check-return process.

Same Day Settlement

The proposal would also retain, without change, Reg CC's current same-day settlement rule for paper checks, which requires a paying institution to provide same-day settlement for checks presented in accordance with reasonable delivery requirements established by the paying institution and presented at a designated location.

Credit unions generally support retaining the current same day settlement rule for paper checks, while also permitting financial institutions that use electronic check presentment to determine the terms of presentment by agreement.

Electronic Checks and Returns

As proposed, electronic checks and electronic returned checks that financial institutions exchange by agreement would be subject to the check collection and return provisions under Reg CC, unless otherwise agreed by the sending and receiving institutions. The proposal would apply Check-21-like warranties to electronic images and electronic information.

Credit unions have some concerns that the proposed changes to cover electronic checks and returns under Reg CC could potentially result in some increased risks to financial institutions, because electronic checks and returns are currently governed by agreements between financial institutions. The Board should address and limit any increased risks to financial institutions.

Electronically-Created Items

Electronically-created items (or “electronic payment orders” or “EPOs”) are electronic images that resemble images of the fronts and backs of paper checks but that were created electronically and not from, for example, scanning a paper check to create the electronic image.

The Board should clarify the indemnities and warranties in Reg CC that should apply to electronically-created items. However, electronically-created items are fairly recent developments and the Board should provide appropriate flexibility for financial institutions to vary certain terms by agreement, and also address risk management regarding the unique attributes and risks associated with electronically-created items.

Delayed Effective Date

The Board should provide a delayed effective date of at least one year from the issuance of a final rule to provide adequate time for credit unions and others to implement any Reg CC changes. The proposed changes regarding paper returns will disproportionately impact smaller institutions, including some credit unions, that currently rely on paper returns. Also, all financial institutions offering RDC will need time to make risk management and other changes to comply with the proposed RDC changes. In general, financial institutions will need time to make training; processing; disclosure and agreement updates; and other necessary changes internally and through their payment processors.

In addition, all financial institutions are currently facing significant compliance burdens. These include burdens stemming from the need to implement the Consumer Financial Protection Bureau’s (CFPB’s) rules and from potential changes from the Board’s proposed Payment System Risk Policy and Reg J changes from November 2013, which would expedite the posting of certain checks and automated clearing house (ACH) transactions.

Consumer Financial Protection Bureau

As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, after July 2011, the Board and CFPB have joint rulemaking authority for provisions under the Electronic Funds Availability Act and certain parts of Reg CC, such as hold periods, exceptions to funds availability, and model forms and disclosures.

We continue to encourage the Board and CFPB to work closely with credit unions on check and other payments issues, and to solicit comments on the impact to credit unions during the rulemaking processes.

Thank you for the opportunity to comment on this proposal. If you have any questions concerning our letter, please feel free to contact CUNA SVP and Deputy General Counsel Mary Dunn or me at (202) 508-6733.

Sincerely,

A handwritten signature in blue ink that reads "Dennis Tsang". The signature is written in a cursive style with a long, sweeping underline.

Dennis Tsang
CUNA Assistant General Counsel