

February 7, 2019

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

[Delivered Electronically](#)

Joseph Baressi
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Subject: Docket No. R-1637; RIN 7100 AF-28, Availability of Funds and Collection of Checks (Reg CC)

Dear Ms. Misback and Mr. Baressi,

On Monday, December 10, 2018, the Bureau of Consumer Financial Protection (Bureau) and the Federal Reserve System (Board) issued a proposed rule and reopened the comment period for the Board's 2011 proposed rule impacting Regulation CC—The Funds Availability Act. The agencies are jointly seeking feedback on the proposals regarding the availability of funds and collection of checks on transaction accounts.

The Northwest Credit Union Association (Association)¹ is pleased to offer comments specific to these proposals. The Association also appreciates the Board and Bureau's willingness for dialogue to determine how to best strike the balance between protecting the consumer, while simultaneously mitigating risk and reducing operational burdens impacting financial institutions.

General Comments

The Association understands that several of the proposed changes stem from statutory updates included in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) as well as the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). The Dodd-Frank Act gives the Board and Bureau (the Agencies) authority to promulgate rules that support specific statutory requirements. The Association appreciates the careful consideration put into the proposed regulation and the re-opening of the comment period for the Board's 2011 Funds Availability Proposal.

This proposal impacts the operations of credit unions. Adjusting hold amounts and time frames will require credit unions to reconfigure several vendor platforms and software systems, including their core provider.

¹ The Northwest Credit Union Association is a regional trade association representing the interests of more than 180 credit unions and their 7.3 million consumer-members; institutions that employ and engage more than 18,700 people and hold more than \$83.3 billion in aggregate assets. The Association is a nonpartisan advocacy organization representing the interests of its member institutions on a variety of systemically important banking issues.

Credit unions affiliated with the Association are principally domiciled in Idaho, Oregon, and Washington, but the Association also has members from the states of Alaska, California and Hawaii. Learn more about the Association at www.nwcua.org.

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Additionally, credit unions will need to update their disclosures, policies, procedures, and train staff on the changes. The Association's members indicated that the proposed timeline for implementation of the changes would be sufficient to complete the steps necessary to update the systems, policies, procedures and train staff.

Specific Feedback on Availability Thresholds

The Association is pleased to provide specific comments regarding the proposed methodology that establishes the minimum amount that credit unions must make available after a deposit (minimum amount), as well as provide specific feedback regarding the re-opened 2011 Board Reg CC appraisal, specifically Subpart B. We appreciate and understand that the Agencies are proposing to modernize the Funds Availability Act to provide greater access of deposited funds to account holders. In most cases, Northwest credit unions do not make a practice of holding checks presented for deposit.

Proposed Methodology for Adjustments

We recognize that the adjustment requirements outlined in the proposal stem from the Dodd-Frank Act, specifically Section 1086(f) which states:

(f) Adjustments to Dollar Amounts

Inflation.--The dollar amounts under this title shall be adjusted every 5 years after December 31, 2011, by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as published by the Bureau of Labor Statistics, rounded to the nearest multiple of \$25.

When asked about the proposed methodology, credit unions in the Northwest were generally supportive. However, several credit unions indicated that the requirement to round the minimum amount to the nearest multiple of \$25 every five years would be burdensome. While we recognize that the Dodd-Frank Act stipulates that the dollar increase should be rounded to the nearest multiple of \$25, we ask that the Agencies consider a less burdensome method and require the minimum amount to be rounded up to the nearest multiple of \$100.

Rounding up to the nearest multiple of \$100 would significantly reduce the operational burden associated with the updates, which are necessary for every increase in the minimum amount. Additionally, this method would not only provide a greater benefit to members due to an increase in the amount of funds available for more immediate withdrawal, but it would also make the disclosures easier to understand

We would recommend setting the minimum amount to \$300. This would reduce the burden on credit unions as it would take several adjustment periods to reach the \$300 threshold. This calculation method would make it easier for all parties involved to better understand and recognize the hold amounts that have been established.

2011 Funds Availability Proposal – RIN No. 7100-AD68

In addition to the changes proposed in RIN 7100 AF-28, the Agencies indicated that the 2011 Funds Availability Proposal had not yet been finalized and that comments would be considered within this submission. In the context of the 2011 proposal, it is important to point out the issues that fraudulent checks cause within the financial system and why shortening hold timelines may not address this risk adequately.

Understanding Check Fraud

In the context of this proposal, it is important to point out the issues that fraudulent checks cause within the financial system and why shortening hold timelines may not address this risk adequately. We appreciate and understand that the Agencies are proposing to modernize the Funds Availability Act to provide greater access of deposited funds to account holders. In most cases, Northwest credit unions do not make a practice of holding checks presented for deposit; however, credit unions also work tirelessly to protect their members from the broad array of fraud schemes that are targeting their members every day. Check holds play a vital role in maintaining balance between proper member service and risk mitigation. While credit unions do not routinely place check holds, they need the flexibility to do so when a check presented has some of the indicators of fraud. One issue that the Agencies do not appear to consider, in this proposal, is that a large portion of fraudulent checks in circulation feature mismatched routing and account numbers. When this occurs, there is very little chance that the institution of first deposit will receive any type of notification that the item is not valid or is being returned for non-payment in a timely manner. The fictitious MICR information on the check causes the item to bounce around, within the processing system, until it is finally assigned to an institution. Once an institution is finally identified, it may take that institution some time to determine that the account number listed in the MICR doesn't belong to it.

Unfortunately, the majority of credit union members that fall victim to fraud schemes are specifically instructed not to discuss any details of the scheme with any financial institutions or their representatives. This means that information important to detecting fraud is specifically, but unknowingly kept from the credit union, thus making it harder for institutions to protect its members. Northwest credit unions are already struggling to identify a fraudulent item with the current check hold timelines. Often times with fraud schemes, the member is instructed to turn the funds over to a third party as soon as possible, which means the member is left owing the credit union money when the check is eventually returned.

Remote Deposit Capture

Remote deposit capture is a newer technology that allows account holders to deposit checks via a mobile capture program. The program requires the user to take a photograph of a check with their phone and submit the photo to the depositing institution electronically. Currently, the Funds Availability Act does not apply hold time frames for checks deposited via this channel. Due to the sharp increase in remote deposit capture fraud that credit unions are currently experiencing, the Association recommends that checks deposited via remote deposit capture continue to not be covered under the scope of the hold time frames of the rule. Remote deposit capture is currently governed by a contractual agreement between the credit union and its members, instead of the credit union's Funds Availability Policy. However, due to the emerging risk presented with this method of deposit, credit unions need to retain the ability to take swift action to mitigate risk as outlined within their contracts without fear of violating the Funds Availability Act.

Hold Times

Subpart B of the 2011 Funds Availability Proposal addresses hold time frames that credit unions rely on as part of their ongoing risk mitigation strategy. While we understand the necessity of providing timely access to funds after deposit, it is important to know that most holds are placed as a way to mitigate losses due to the return of an item as they are presented for payment. Given today's fraud landscape and the rate at which individuals are falling victim to the vast number of scams that circulate online and via various technology and social media platforms, holding funds on a suspected fraudulent check protects the credit union and the member.

When a check is returned for nonpayment, the funds that were credited to the depositor's account are deducted. This can result in the depositor losing funds they believe were valid and/or causing an overdraft

on the account that may not be repaid. In many cases, the depositor cannot recover from the loss of the funds and ends up with a negative account that must be charged off. This charge off hurts the depositor as they end up in collections. Additionally, this also hurts the other members of the credit union as a loss sustained by one member is a loss felt by all members. Due to this ongoing risk to the depositor and the credit union, and with careful consideration and input from our member credit unions, we recommend the following.

Northwest credit unions have indicated that reducing the hold time frame for deposited items does not benefit the depositor or the credit union. While we appreciate that the proposed reduction in hold time frames was made after careful consideration of technology advancements, it is important that the Bureau and Board understand that advances in technology are outpaced by ongoing advances in fraud schemes. We strongly encourage the Agencies to leave the hold time frames as-is and not reduce the holds to maximum time of four business days. Most credit unions do not place holds on checks without proper reason but appreciate the ability to place a longer hold of five or six business days in the event that collectability of the check is doubted, especially if fraud is suspected. Reducing the hold time frame would provide the consumer with access to funds quicker, but in the event that the member is falling victim to a fraud scheme, this is not actually beneficial to them as the member will be liable to the credit union for the amount of the check once it is returned unpaid.

Nonproprietary ATMs

In the proposal, the Board suggested reducing the hold time frames for checks deposited via nonproprietary ATMs from 5 days to 4 days, while contemplating whether the differentiation between ATMs and nonproprietary ATMs was still necessary. Northwest credit unions weighed in and indicated that the extended hold time frames for checks deposited at nonproprietary ATMs are still very important, as well as the differentiation of nonproprietary ATMs. Depending on the location of the nonproprietary ATM, credit unions may not have access to information about a deposited check for a few days after the deposit is made. If another financial institution is handling the deposits for the credit union in question, it may still be a few days before the image of the item is available to the credit union. The current 5-day hold period is relied upon by credit unions to ensure that the check received for deposit, through this deposit channel, has adequate time to be processed. Reducing the time frame, even by one day, will create a burden for credit unions that allow deposits at nonproprietary ATMs and may cause some to cease offering the service, which is important in rural areas and the strength and breadth of the overall network.

Case-by-case holds

Northwest credit unions were also asked to provide their opinions regarding the usefulness of case-by-case holds. Credit unions indicated that they do rely on case-by-case holds in specific circumstances and need to retain the ability to place holds under this provision. Any reduction in a credit union's ability to exercise a hold of any kind poses significant risk to the credit union due to the amount of check fraud that is currently occurring across the marketplace. We request that you do not remove this provision from the rule.

Hold Notification

Northwest credit unions were generally supportive of the proposed language changes to the hold forms. While there would be an operational burden to update the notices, credit unions agreed that it is important for consumers to better understand the hold notices. Credit unions were also supportive of the proposed ability to deliver hold notices electronically as many members no longer wish to receive paper receipts or notices. However, credit unions respectfully request that the notice not be subject to E-Sign regulations as this could be somewhat impossible to achieve. E-Sign contains a demonstratable consent provision which is difficult in a branch setting. The member, who would ultimately benefit from the ability to receive the notice electronically, would likely not remember to sign up for electronic notices upon exiting the credit

union. Allowing members to verbally consent to electronic delivery of the notice or allowing them to consent in-branch via a form or electronic signature should be deemed to be adequate consent. Additionally, credit unions indicated that the 8 ½” by 11” formatting requirement is not practical as the amount of information required on a hold notice is minimal. If the notice was printed at the teller line, it would likely lead to a negative member experience as the core platform used for transacting on accounts would need to be configured to interact with a printer or technology capable of printing such a large notice. As long as the required information is included on the notice and the font size is reasonable, any size of paper should be considered compliant with the rule.

Conclusion

The vast majority credit unions do not have blanket policies that result in a large percentage of checks holds as a standard operating procedure. Instead, credit unions make decisions for holds based on the historical relationship with the member and the circumstances surrounding the check(s) presented for deposit. While it is true that a large amount of checks are processed electronically and a large amount of checks are deposited without holds, it is vital to the operations of credit unions to preserve the right to place case-by-case holds, 5-day holds at nonproprietary ATMs, other extended holds, and ensure that members are notified in a timely manner of such fund delays. Risk mitigation is not only a prudent business practice, but in the case of check holds, it also provides excellent member service by helping unsuspecting members avoid victimization by fraud schemes. We respectfully request that the Bureau and Board retain the case-by-case and nonproprietary ATM definitions and sections within the Funds Availability Act, while also retaining the hold time frames as they currently stand.

We appreciate the Board and Bureau’s commitment to amending the Funds Availability Act to reflect the statutory updates as well as modernizing the requirements of the regulation. Thank you again for the ability to provide comments to the proposed changes. We would be happy to answer any questions or provide additional clarification required by the Board or Bureau.

Respectfully,



Katie Clark
Director, Regulatory Affairs and Risk Management
Northwest Credit Union Association