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Chairman Ben Bernanke
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

RE: RIN No. 7100-AD68, Availability of Funds and Collection of Checks (Comment on Proposed Rule)

Dear Chairman Bernanke,

The Pew Safe Checking in the Electronic Age Project, an initiative of the Pew Health Group, is tasked with providing research and policy recommendations related to consumer checking accounts to create a safer and more transparent marketplace. In October of 2010, the Project studied the largest 10 banks in the U.S. by deposit volume, reviewing over 250 account agreements offered online by these institutions.[1] We collected data on the prevalence and disclosure of practices and fees in checking accounts, including information on funds availability policies.

The Project released a report in April entitled "Hidden Risks: The Case for Safe and Transparent Checking Accounts."[2] In this report we recommend that policy makers require the following:

- Information on important checking account terms in a disclosure box similar to the Schumer Box used for credit cards;
- Complete disclosure of all overdraft options;
- Reasonable and proportional overdraft fees; and
- The posting of deposits and withdrawals in a neutral manner such as chronological order.

We also recommended that the Consumer Financial Protection Bureau examine the prevalence of dispute resolution clauses in checking account agreements and fee shifting provisions in them.

We appreciate the Board of Governors of the Federal Reserve System (hereinafter "the Board") taking comments on their proposed amendments to Regulation CC. Based on our research, we have six specific recommendations related to this request for comment, which are set out below:

1. **The Board should independently study the check processing system and reduce hold periods to as short a time period as current technology allows.**

The proposed changes, which limit certain hold periods, are a welcome simplification of what has been a complicated funds availability schedule for consumers. Advancements in technology and the passage of the Check Clearing for the 21st Century Act have made the check clearing system much more efficient, as almost all banks currently process checks and other transactions electronically.[3] Yet the Board is only now proposing to amend regulations that have been in place for over 20 years.

Many banks make funds available faster than is required by the Expedited Funds Availability (EFA) Act and Regulation CC. Our research in October of 2010 found that the ten largest banks in the U.S. all made several types of deposits available on a faster schedule than is required by law. Seven of the ten banks studied made cash deposited with a teller available the same day. All ten banks made at least some checks deposited in person available at least by the next day, and two banks made funds from some checks available the same day. Nine out of ten banks made funds from direct deposit or wire transfers available the same day. Three out of ten banks made the first $100 of any check or checks available the same day if the remainder of the deposit is delayed longer.

As our research shows, banks are increasingly able to make funds available on faster schedules, presumably due to the growing use of electronic processing. According to the Board's own research, the cost of electronic processing has decreased in recent years. While not all institutions are currently using the same technology as the 10 largest banks, the Board needs to study the processes used by all banks and provide a timetable for all institutions to move to processing speeds now available to the market. The Board should amend Regulation CC to prevent banks from unnecessarily delaying the implementation of these advancements while allowing them the time necessary to make these improvements.

2. **Financial institutions should be required to post withdrawals made after hours the following business day and to post all transactions chronologically.**

Currently, banks are permitted to hold deposited funds for a period of days before making them available to customers.[4] These delays are permitted so that financial institutions can ensure the validity of deposits. During this hold period, national banks are free to post withdrawals made from an account at any time, including before processing credits on the same day.[5] In addition, many banks manipulate the posting order of transactions by reordering withdrawals from highest to lowest, which increases the frequency of overdraft fees.[6] The reordering of deposits and posting debits before credits makes it more likely for consumers to overdraw their accounts.[7]

Our research showed that 8 out of the 10 largest banks reserve the right to process withdrawals before deposits in their account agreements. In addition, most banks delay the availability of deposits, which is allowed by the EFA Act and Regulation CC.[8] Three out of ten banks delay cash deposits made at branches for one day. Eight banks have hold periods of at least one day for checks deposited at branches. Eight out of ten banks hold deposits of checks in ATMs for at least one day. These delays can cause consumers to overdraft on withdrawals that are made while deposited funds remain unavailable.

Millions of consumers receive their paychecks on Fridays and deposit them into their accounts that afternoon. While these funds are not available until Monday, banks are allowed to post withdrawals made during the weekend without delay. This practice causes customers to overdraft their accounts and incur fees at a time when they have deposited funds into their accounts and are waiting for the bank to post them. They are being penalized because the bank is unable or unwilling to post their deposits. A similar situation can arise when a withdrawal made on a weekday night is posted prior to funds becoming available the next morning. The Board should not allow this to continue.[9]

Withdrawals made during non-business hours should not be posted until the following business day, when any funds from previous deposits are made available to offset them.[10] Furthermore, transactions that occur during non-business hours should be posted chronologically; so funds deposited prior to the weekend that will become available on Monday would be posted prior to withdrawals that occurred in the interim.[11]

3. **The Board should require financial institutions to process all deposits made during normal business hours on the same day.**

The current rules for deposit hold periods are exceedingly confusing and can cause even cautious consumers to lose track of their balances. Banks are allowed to process certain deposits the following day if they are received after a specified time ("cutoff time").[12] They also are allowed to treat in-person deposits after 2:00 PM and ATM deposits after noon as if they were received the following business day.[13] This creates a longer delay before the funds become available to the accountholder.

Five of the ten banks the Project studied did not disclose the cutoff time for branches and ATMs in their account agreements or stated it as 2:00 P.M. or later. Three banks disclosed a cutoff time for ATM transactions (noon, 6:00 P.M. local time and usually 11:00 P.M. Eastern Time respectively) and no specific time for in-person deposits. One bank disclosed its cutoff time as 2:00 P.M. local time for branches and 3:00 P.M. Eastern Time for ATMs, and one bank disclosed cutoff times of at least 6:00 P.M. for deposits made at a branch and 8:00 P.M. for those made at an ATM.

The rules for cutoff times for deposits were adopted before electronic processing was the industry norm.[14] Customers should have access to their funds on as timely a schedule as practical. The EFA Act states any non-holiday weekday is a business day, and only deposits made after normal banking hours may be deemed as received the next day.[15] Cutoff times are allowed by Regulation CC and the UCC.[16] However, they are no longer necessary as financial institutions can process all checks electronically. Delays in the availability of funds should be limited as much as possible because they can harm consumers. Therefore, the Board should amend Regulation CC and prohibit financial institutions from imposing artificial cutoff times for the acceptance of deposits. All deposits made when financial institutions are open for business should be considered as having occurred that day.

4. **The Board should mandate that Pew Charitable Trusts' disclosure box, which includes the funds availability schedule, be posted on banks' Web sites, provided at account opening and on demand.**

In 2009, the only Board regulations to be the subject of more consumer complaints than Regulation CC were Regulation DD (Truth in Savings) and Regulation Z (Truth in Lending).[17]

When provided, current funds availability schedules can be very difficult for consumers to understand, with different rules for when certain types and sizes of deposits will become available. However, this task is even more difficult when financial institutions fail to make required disclosures. During the Project's research, we found that funds availability schedules were difficult to find on financial institutions' Web pages, and were often buried in lengthy account documents. The branch of one large bank we visited only had one copy of their funds availability schedule, which was enclosed in a plastic holder, not available in a form a consumer could keep.

The Project's research showed the importance of clear and concise disclosure. For the ten largest banks, the median length of bank disclosures for key checking account policies and fee information was 111 pages.[18] In addition, the banks did not summarize or collect key information anywhere. This means it is exceedingly difficult for an average American to find the basic information needed to either select a checking account or to responsibly manage his or her existing account. Such deficiencies call for action that requires depository institutions to disclose fully and clearly key checking account terms, policies, and fees in a concise, consolidated format. The Board should require the use of Pew Charitable Trusts' disclosure box, which was tested in focus groups in three cities, to help consumers better understand the terms of their accounts. A copy of our disclosure box is attached.

5. **Electronically-created items, like remotely created checks, should be covered by Regulation CC.**

The Board asked for comment on whether electronically-created items should be included in subpart C, which regulates the collection of checks and mandates expedited return by paying banks.[19] An electronically-created item is an instrument whereby a payment is authorized by the payee and created by the payor, and a computer image that resembles a check is produced. These items are very much like remotely created items, which are made in paper form and therefore qualify as checks.[20] The fact that electronically-created items were never in a tangible form is a distinction that is irrelevant for electronic processing purposes. Therefore, both of these items should have expedited return requirements under subpart C.

For the same reasons that electronically-created items should be brought under subpart C, they should also be regulated by subpart B, which requires that funds be made available to accountholders by a specified time depending on the type of deposit.[21] Remotely created checks already must be made available on the same schedule as other checks. The Project believes electronically-created items should also be made available according to this timetable.[22]

Electronically-created items are popular with businesses that use the Internet or a mobile application to create an instrument whereby they can withdraw funds from customers' accounts. In the future, these instruments could also be used for payments made to individuals. The Board should consider possible advancements in technology and be proactive in making sure consumers have access to all deposits in a timely manner.[23]

6. **The Project supports the Board's recommendation to require electronic notice of extended holds on deposits.**

When a financial institution places an extended hold on a consumer's account, it is required to provide notification.[24] This is usually done at the place and time of deposit, but not always. The proposed amendment to § 229.13(g)(1)(F)(ii) mandates that if a customer has agreed to receive notices electronically, the bank must send messages so that they are received by the accountholder by the day after the deposit or when the bank learns of the delay, whichever is later (e.g. by email, text).

Our research found that for the 10 largest banks, virtually all types of deposits are routinely made available either the same day or the next day. On the other hand, none of these banks explicitly stated that they would provide electronic notification if an extended hold is placed on a deposit.[25] Seven banks said they would provide notice by regular mail, two had unclear policies, and one was silent on the issue. This means that customers at these banks could easily be uninformed of an unexpected delay.

It is very important that consumers be aware of when funds will be posted to their accounts. For all financial institutions, if a consumer's funds are given an extended hold, the proposed rule mandates only two additional days for a maximum total of four in most situations. The use of traditional contact methods such as the U.S. Postal Service will in many cases be ineffective. Therefore, the Project strongly supports the proposed regulation.[26]

Conclusion

The Project commends the Board for proposing rules to shorten the timeframe a financial institution may hold certain deposits before making them available and undertaking consumer testing to improve disclosures. Delays in funds availability can push potential customers out of the banking world into less desirable alternatives in order to receive funds more quickly.[27] When funds are deposited, they belong to the accountholder and should be made available as quickly as possible. The funds availability schedule should be simple, easy to understand, and not difficult to obtain. We believe the changes in the proposed rule are a good first step in improving Regulation CC. The Project looks forward to working with you as the Board implements new rules for funds availability schedules. As always, we are available to discuss these comments or any other aspect of our work at any time. If you would like to be in contact, I can be reached at 202-540-6598 or sweinstock@pewtrusts.org. Thank you for reviewing our comments.

Sincerely,

Susan Weinstock

Susan K. Weinstock
Project Director
Safe Checking in the Electronic Age
Pew Charitable Trusts

[1] At that time, PNC did not provide funds availability disclosures online or in a document for consumers to keep at a Washington, D.C. branch visited by Pew staff.
[2] Pew Health Group, "Hidden Risks: The Case for Safe and Transparent Checking Accounts" (April 2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe_Banking_Opportunities_Project/Pew_Report_HiddenRisks.pdf.
[3] Check Clearing for the 21st Century (Check 21) Act, 12 USC § 5001 et seq.
[4] Expedited Funds Availability Act, 12 USC §§ 4001(3), 4002.
[5] UCC § 4-401, The Office of the Comptroller of the Currency, "Answers About Overdraft Fees and Protections," available at http://www.helpwithmybank.gov/faqs/banking_overdraft.html#drop06.
[6] E.g., Gutierrez v. Wells Fargo Bank, 730 F. Supp. 2d 1080 (N.D. Cal. 2010).
[7] Pew Health Group, "Hidden Risks: The Case for Safe and Transparent Checking Accounts" (April 2011).
[8] 12 USC § 4002; Regulation CC, 12 CFR §§ 229.10, .12.
[9] The Project is not suggesting that financial institutions should be required to extend provisional funds to consumers who have deposited checks that are not yet available. Since the only withdrawals that can be made during non-business hours are electronic transactions, a bank should be free to decline a transaction if the customer does not have available funds to cover it or has not opted into an overdraft service.
[10] Banks should be free to post withdrawals on any day if they also post deposits on those days as if they were normal business days.
[11] This would also apply to withdrawals made after a bank's normal hours during the week if funds from a deposit are scheduled to be available the next morning.
[12] 12 CFR §§ 229.2(g), .19(a)(5)(ii).
[13] 12 CFR § 229.19(a)(5)(ii).
[14] The Boards initial regulations on funds availability included discussion about courier schedules that were a large part of the rationale for cutoff times. 54 Fed. Reg. 13841 (April 6, 1989).
[15] 12 USC §§ 4001(3), 4006(a).
[16] 12 CFR § 229.19(a)(5)(ii); UCC § 4-108 (2005).
[17] Federal Reserve Board Annual Report – Consumer and Community Affairs (2009). Available online at http://www.Boarderalreserve.gov/boarddocs/rptcongress/annual09/sec2/c2.htm. Other studies have also found that banks do not comply with disclosure requirements. See U.S. PIRG Education Fund, "Big Banks, Bigger Fees: A National Survey of Bank Fees and Fee Disclosures" (April 2011), available at http://creativecommons.org/licenses/by-nc-sa/3.0/, Government Accountability Office, "Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts" (January 2008), available at http://www.gao.gov/new.items/d08281.pdf.
[18] Pew Health Group, "Hidden Risks: The Case for Safe and Transparent Checking Accounts" (April 2011).
[19] 12 CFR § 229.30.
[20] 12 CFR § 229.2(ww), (fff).
[21] 12 CFR §§ 229.10, .12
[22] Financial institutions could already be providing funds from these instruments on the same schedule as checks or a faster schedule, but the Board should still mandate this practice to ensure this is the case.
[23] As we stated in our first recommendation, the Board should study processing times and make delays for all types of deposits as short as possible.
[24] 12 USC § 4003(f).
[25] The banks we studied generally disclosed that they would inform customers of an extended hold at the time of the deposit. This data, and the need for electronic notice, relates only to circumstances where an extra hold is placed on a deposit after the accountholder has left the branch or ATM.
[26] The Board should recognize that there may be privacy concerns with providing notice electronically and allow customers to elect not to receive electronic notification of extended holds.

[27] Federal Deposit Insurance Corporation "A Study of the Unbanked & Underbanked Consumer in the Tenth Federal Reserve District" May, 2010.