

VOLUME NO. 37

OPINION NO. 86

CREDIT UNIONS - Prohibition against checking account services, share draft programs; CHECKING ACCOUNTS - Credit unions, share draft programs prohibited; REVISED CODES OF MONTANA, 1947 - Sections 14-613, 14-676.

HELD: State-chartered credit unions are prohibited by section 14-613(16), R.C.M. 1947, from offering "share draft" programs. However, the Director of the Department of Business Regulation may authorize them to do so upon written request submitted pursuant to section 14-676, R.C.M. 1947.

10 November 1977

Kent Kleinkopf, Director
Department of Business Regulation
805 North Main
Helena, Montana 59601

Dear Mr. Kleinkopf:

You have requested my opinion on the following question:

May a state-chartered credit union offer a "share draft" program under section 14-613(16), R.C.M. 1947?

Section 14-613 is a detailed enumeration of the general powers of a state-chartered credit union and provides in part:

A credit union may:

* * *

(16) collect, receive and disburse moneys in connection with the sale of negotiable checks, money orders and other money type instruments, and for such other purposes as may provide benefit or convenience to its members, and charge a reasonable fee for such services, but not including checking account services. (Emphasis added.)

The question is whether share draft programs fall within the above-quoted prohibition against checking account services.

A share draft is an instrument which directs a credit union to withdraw funds from a member's account and to pay those funds either to the member or to a third party designated by the member. A share draft is payable through a bank and is in operation similar to or identical with the common bank check. While there are some operational and definitional differences between checking accounts and share drafts, these are differences of form rather than substance, especially in the context of section 14-613(16) which broadly and without elaboration prohibits "checking account services."

The Montana Credit Union Act (section 14-601, et seq.) does not define the term "checking account services," and no usable definition was found in the banking statutes (see, e.g., section 5-1001). Section 87A-3-104 of the Uniform Commercial Code provides:

- (1) Any writing to be a negotiable instrument within this chapter must
 - (a) be signed by the maker or drawer; and
 - (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
 - (c) be payable on demand or at a definite time; and
 - (d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

* * *

- (a) a "draft" ("bill of exchange") if it is an order;
- (b) a "check" if it is a draft drawn on a bank and payable on demand;

* * *

A general definition of check has been stated as:

A check may be defined as a bill of exchange drawn on a bank and payable on demand. It is drawn against funds on deposit in a bank, and its office is well understood in all commercial circles. Checks on banks are made to take the place of actual cash, although the check itself is the means of obtaining money of the drawer from the bank for the holder of the check.

10 Am.Jur.2d, Banks, § 538. Further definition is provided as:

A check is an order drawn upon a bank purporting to be drawn upon a deposit of funds for the payment in all events of a certain sum of money to a person or his order or to bearer upon demand. The sole function of a check is to transfer money, and it is of the essence that it should be payable in money.

11 Am.Jur.2d, Bills and Notes, § 16. In Brown v. Bank of Newkirk, 291 P.2d 828 (Okla. 1955), the court defined checking as follows:

The contract entered into when the depositor opens a general checking account at a bank is usually one that is implied; the depositor delivers his money or funds to the bank in return for which the bank assumes the obligation to pay out on his demand or order a sum equal to the deposit balance.

* * *

This court has held that a check is merely an order on the bank to pay money.... (Emphasis added.)

While these definitions of "check" are all framed in reference to banks, that is not an indication that credit union share drafts are per se excluded from the generic

category of checking accounts. Rather, it is only an indication that banks and only banks ordinarily offer "checking account services." This of course is no longer the case since credit unions are seeking to provide their members with a variety of services such as share draft accounts which operate with the same convenience as a checking account. It is clear that the purpose and effect of share draft programs is for all practical purposes identical to the ordinary checking account as described in the above-quoted definitions. This same conclusion was reached by the Attorney General of Washington, who held on July 7, 1977, that share drafts constituted "checking accounts" under that state's equivalent to the prohibition of section 14-613(16).

It should be emphasized that this conclusion is based only upon consideration of a general definition of share draft accounts. It is not based upon an analysis of any specific share draft plan. Therefore, it is possible that there might be a program labeled as a "share draft," but which could be fashioned to avoid the statutory obstacle of section 14-613(16). Such a plan is being developed in the State of Washington, for example, in the wake of the above-cited opinion from that state's attorney general.

This opinion applies only to state-chartered credit unions organized under section 14-601 et seq. Pursuant to regulations announced at 42 Fed. Reg. No. 39, p. 11247 (February 28, 1977), it is anticipated that federally-chartered credit unions will soon be empowered to offer share draft accounts to their members. This fact greatly concerns state-chartered credit unions who fear a significant competitive loss to the federal credit unions. This situation is specifically addressed by section 14-676, which provides:

The director [of the Department of Business Regulation] may authorize any credit union to engage in any activity in which such credit union could engage were it operating as a federal chartered credit union at the time such authority is granted. Such powers shall include but not by way of limitation, the power to do any act, and own, possess and carry as assets, property of such character including stocks, bonds or other debentures which, at the time the authority is granted, are authorized under federal laws and regulations for transactions by federal credit unions notwithstanding any restrictions elsewhere

contained in the statutes of the state of Montana except that the director may not charter a credit union not having a common bond of membership as defined in section 15 [14-615] of this act. Upon receipt of a written request from any state chartered credit union, the director shall exercise such power by the issuance of a special order therefor if he deems it reasonably required to preserve and protect the welfare of such an institution and promote the general economy of this state. (Emphasis added.)

This broad power to allow "any act...notwithstanding any restrictions elsewhere contained in the statutes" clearly encompasses the power to allow state-chartered credit union to offer share draft accounts. Therefore, if the offer of share draft accounts by federally-chartered credit unions threatens the "welfare" of state-chartered credit unions, that situation can be rectified.

THEREFORE, IT IS MY OPINION:

State-chartered credit unions are prohibited by section 14-613(16), R.C.M. 1947, from offering "share draft" programs. However, the Director of the Department of Business Regulation may authorize them to do so upon written request submitted pursuant to section 14-676, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General