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By Facsimile and First Class U.S. Mail
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Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Regulation E-Docket No. R-1247

Dear Ms. Johnson:

Wells Fargo & Company ("Wells Fargo") is a diversified financial services company providing banking, insurance, investments, mortgage, and consumer finance to over 10 million households and 23,000,000 customers through over 6,200 banking facilities, the Internet ("wellsfargo.com"), and other distribution channels throughout North America, including all 50 states, and the international marketplace. Wells Fargo has over $482 billion in assets and 150,000 employees, as of December 31, 2005. Wells Fargo is one of the United States' top-40 largest private employers. Wells Fargo ranked fifth in assets and fourth in market value of its stock at September 30, 2005, among its peers. Wells Fargo is the only bank in the United States to receive the highest possible credit rating, "Aaa," from Moody's Investors Service.

Wells Fargo is pleased to submit its comments on the following.

I. Background. On September 17, 2004, the Board of Governors of the Federal Reserve System (the "Board") published a notice of proposed rule making in the Federal Register[1] (the "September 2004 proposal") to provide, among other things, that the term "account"[2] under Regulation E includes payroll card accounts established by an employer for the purpose of providing an employee's wages, salaries, and other compensation on a recurring basis. As proposed, a payroll card account would be subject to Regulation E whether it is operated or managed by the employer, a third party payroll processor, or a depository institution. In sum, the Board had proposed in the September 2004 proposal that all of the Regulation E provisions,

[1] 69 Fed.Reg. 55996 (September 17, 2004).
[2] Regulation E § 205.2(b)(1).

including, without limitation, initial disclosures, periodic statements, error resolution procedures, and other consumer protections, would apply to payroll card accounts.

In response to comments to the September 2004 proposal, on January 10, 2006, the Board issued an interim final rule[3] (the "Interim Final Rule") regarding the applicability of Regulation E to payroll card accounts.[4] The Interim Final Rule is effective July 1, 2007. Interested parties may comment on or before March 13, 2006, thereon.

II. Wells Fargo's Comments. We respectfully offer comments to the following issues raised in the Interim Final Rule.

A. Section 205.2; Definitions 2(b) Account. The Interim Final Rule provides that the term "account" for purposes of Regulation E includes:

> ...a "payroll card account" directly or indirectly established by an employer on behalf of a consumer to which electronic fund transfers of the consumer's wages, salary, or other employee compensation are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution or any other person.

This definition raises the following:

1. Multiple Coverage. In the September 2004 proposal, the Board suggested that one or more parties involved in offering payroll card accounts may meet the definition of a "financial institution" for purposes of Regulation E.[5] Wells Fargo voiced a concern with this proposal when it submitted its comments, dated November 18, 2004. If Wells Fargo were merely the depository of the employer's payroll account or, for that matter, any deposit account used by an employer for payroll purposes (to which employees' electronic fund transfers ("EFT(s)") of the

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[3] 71 Fed.Reg. 1473 (January 10, 2006).

[4] We support the Board's efforts under the Interim Final Rule to limit thereunder its application to payroll card accounts. We do not believe that extending Regulation E coverage to general spending accounts, e.g., gift cards, travel cards, and other prepaid products, would provide meaningful protection to consumers. Further, Regulation E requirements, such as periodic statements and error resolutions, would significantly impede the development of such emerging payment products. We urge the Board to guard against the tendency to be suspicious of, and therefore to overregulate unduly, new payment products without evidence of the need to regulate such general spending products.

[5] In the September 2004 proposal the Board noted (69 Fed. Reg. at 55999):

> For example, if an employer, by agreement, issues a payroll card to a consumer and opens an account at a bank into which the employer deposits the consumer's wages and from which the consumer can access funds by using the card, then both the employer and the bank would qualify as a financial institution with respect to that consumer's payroll card account.

consumer's wages, salary, or other compensation are regularly made) and the employer issues employees' payroll cards[6] and administers its employees' payroll cards directly or through a vendor (a third party processor or service provider), Wells Fargo maintained that it should not be deemed a "financial institution" for purposes of Regulation E and have regulatory obligations thereunder attach to it, especially if Wells Fargo has no (i) control over the employer or the employer's payroll operations; and (ii) knowledge of the purpose of the EFT or the issuance of the payroll cards by the employer or vendor. The employer or vendor ought to be solely responsible for compliance with Regulation E; the mere maintenance of the payroll deposit account (or any undesignated account used for payroll purposes by the employer) with Wells Fargo should not prompt Wells Fargo to be viewed as a financial institution for purposes of Regulation E. If the payroll deposit account is opened and maintained by the employer, the account is properly considered its commercial payroll account. The consumer account exists only in the relationship between the employer and the employee.

Unfortunately, notwithstanding Wells Fargo's concern, the Board has apparently indorsed this multiple coverage under Regulation E, leaving it up to the involved parties to contract compliance responsibility among themselves.[7] Indeed, if the employer uses a third party vendor to provide the access device for the payroll card account, that third party would also be a financial institution,[8] resulting in three parties covered by the Interim Final Rule, the employer,

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[6] The payroll card is a debit card, normally using the Visa® or MasterCard® debit card network. (While the payroll card could in theory be issued merely as an automated teller machine ("ATM") card, and thereby fall outside the Visa® or MasterCard® debit card network by using another network, a card with such limited features would have little appeal as a payroll card product.) Thus, technically, the card would have to be issued by a bank as a member of Visa® or MasterCard®. The card could be branded with either the Visa® or MasterCard® logo and the employer's brand (along with the identification of the issuing bank). Nevertheless, if the employer administers the card, the bank providing the deposit account service should not be deemed to be a financial institution for purposes of Regulation E compliance, in addition to the employer, based merely on providing that service. While, as between the employer and the bank, by agreement, responsibility may be allocated, that allocation will not necessarily shield the bank from liability. The double coverage of both the employer and the bank raises the specter of vicarious liability, and attendant reputation risk, to banks for acts by an employer or a processor used by the employer.

[7] 71 Fed.Reg. at 1477, the Board provides:

> To the extent more than one party is a "financial institution" under the rule with respect to a particular payroll card account, such parties may contract among themselves pursuant to the jointly provided services provision under § 205.4(e) to ensure compliance with the interim final rule. For example, if an employer, by agreement, issues a payroll card to a consumer and opens an account at a bank into which the employer deposits the consumer's wages and from which the consumer can access funds by using the card, then both the employer and bank would qualify as a financial institution with respect to that consumer's payroll card account.

[8] 71 Fed.Reg. at 1477 provides:

the third party processor or service provider, and the depository institution. This result is particularly troubling especially if the depository institution has no knowledge of these payroll arrangements. The absence of knowledge would, of course, preclude contracting to address compliance responsibilities. A depository institution cannot be expected to discharge its regulatory responsibilities if it does not know such responsibilities have attached. The depository institution may only have knowledge of the mere existence of a deposit account, and have responsibility (and liability) attach under the Interim Final Rule.

Wells Fargo again urges the Board to provide through the a rule or official commentary thererto that a mere depository of a payroll account accessible through payroll cards issued by an employer (or a vendor or service provider on behalf of the employer) to its employees does not make that depository a financial institution for purposes of Regulation E, absent knowledge of this payroll arrangement. Under those circumstances, only the employer is a financial institution for purposes of Regulation E, having issued the payroll cards and funded them through an EFT.

2. Other Prepaid Products. Wells Fargo's comment letter also discussed other possible payroll accounts funded by compensation, including health savings accounts ("HSA"),[9] health reimbursement arrangements ("HRA"),[10] and health flexible spending arrangements ("FSA").[11] These accounts may be accessed through an EFT. Unfortunately, the Board has not addressed these concerns. While the Board graciously addressed our concern raised in our comment letter relative to gift cards,[12] it has not mentioned our concern relative to these additional accounts and arrangements. Wells Fargo again urges the Board to expressly exclude HSAs, HRAs, and FSAs outside the coverage of Regulation E's new definition of payroll card accounts through commentary for the reasons stated in the comment letter.

B. Section 205.8; Annual Error Resolution Notice. Under Regulation E § 205.8(b), a financial institution is required to mail or deliver to a consumer at least annually an error-

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Similarly, if an employer contracts with a third party processor or service provider to issue the access device for the payroll card account, the third party processor or service provider would also be a financial institution with respect to that payroll card account.

[9] Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, added § 223 to the Internal Revenue Code ("IRC"), to permit eligible individuals to establish Health Savings Accounts for taxable years beginning after December 31, 2003.

[10] IRC §§ 105 and 106.

[11] IRC §§ 106 and 125.

[12] 71 Fed.Reg. at 1475.

resolution notice substantially similar to the model form error-resolution notice set forth in Appendix A (Model Form A-3). We suggest that financial institutions be afforded the option of providing an abbreviated annual notice through an ATM, e.g., on the receipt or periodic statement.[13] We believe that consumers are more likely to read a notice on the ATM receipt or periodic statement than on a separately mailed annual notice. Additionally, inasmuch as payroll card account holders are often more transient that other account holders, a written notice is less likely to reach them in the event of a change in address. Finally, eliminating the mailing requirement and enabling annual notice through an ATM may mitigate the cost of the payroll card product.

C. Section 205.18; Requirements for Financial Institutions Offering Payroll Card Accounts.

1. Telephonically Available Balance Information. In lieu of a regular periodic statement for each monthly cycle in which an EFT has occurred,[14] the Interim Final Rule provides an alternative method of informing consumers of an EFT. Included within this method is the option of securing balance information over the telephone.[15] However, the term "balance" is unqualified. It is not clear whether this balance information is available balance, ledger balance, or some other type of balance. Of course, available balance would be the most meaningful balance to a consumer. An explanation through commentary would be helpful.

2. The Periodic Statement. Given the limited nature of the payroll card account, in our comment letter, we suggested that the Board add a new section to Regulation E similar to § 205.15 governing EFT of government benefits. In this regard, we particularly indorsed the alternative to periodic statements authorized in Regulation E § 205.15(c) inasmuch as providing periodic statements to account owners is the principal regulatory burden arising from the adoption of this new definition of payroll card account.

The Board responded to this suggestion by providing a new Regulation E § 205.18 under the Interim Final Rule. However, unlike § 205.15(c), the financial institution is required to not only provide a written transaction history of the consumer's payroll card account covering at least 60

[13] Needless to say, if the consumer does not access the ATM, the annual notice would be sent by mail.
[14] Regulation E § 205.9(b).
[15] Regulation E § 205.18(b)(1)(i).

days preceding the date of receipt of a request by the consumer, but also an electronic transaction history of such account covering at least 60 days preceding the date of the electronic access by the consumer, such as through an Internet Website.[16]

While we applaud the Board's willingness to depart from the traditional periodic statement model, both in manner and timing of delivery of the account information, we do not support requiring both a written transaction history and an electronic transaction history. We would prefer to have a choice (at our discretion) of either the written or electronic history, to afford us flexibility in the manner in which we provide the transaction history information. If a written history is deemed sufficient for purposes of satisfying the periodic statement requirements as to EFT of government benefits remitted to consumers, we do not indorse the imposition of a higher statement standard relative to payroll card accounts.

Further, for purposes of the error resolution under Regulation E § 205.11, the 60-day notification period commences to run from the date the consumer receives the written transaction history or accesses the electronic transaction history. Consequently, if a financial institution were not afforded a choice, the financial institution may need to enhance its account system to be able to identify the date that the consumer accessed his/her electronic transaction history.[17] By providing an option to the financial institution between written or electronic transaction history, such additional expenses may be avoided if the financial institution is able to provide a written history, especially if that financial institution is already providing periodic statements under Regulation E § 205.15(c), as to government benefits. We stress that one of the principal benefits of the payroll card account is to enable an employer to discharge its payroll payment obligation in a cost-effective manner. By having wages loaded and reloaded to the payroll card, the employer avoids the expense, e.g., of having to issue and reconcile payroll checks. The employee also benefits by avoiding fees to cash payroll checks. As more requirements are

[16] In this regard, we recommend to the Board that it confirm that access to electronic transaction history include access to such history through an ATM. Some financial institutions permit consumers to access transaction history through the ATM and, in some cases, obtain a paper statement reflecting such information. This access may be more convenient to consumers without Internet access. ATMs are generally available to payroll card account holders. We understand that generally ATMs are the primary means by which payroll account holders secure payroll funds. For such reasons, access to periodic statements through the ATM should be one of the recognized means of electronically accessing such statements.

[17] As discussed below, this point is particularly important if "access" means more than merely logging onto a Website.

imposed, such benefits diminish rapidly because the cost to the financial institution of offering the product materially increases.

Finally, under some online transaction information systems provided by financial institutions, the information available regarding certain transactions may be misunderstood by a consumer. For example, certain transactions may only be "memo posted" transactions (or preliminary, provisional, or temporary transactions), subject to final settlement thereof. For instance, if a consumer were to use an access device to pay for a hotel or rental car, the memo posted amount reflecting such transactions may not be the final settlement amount. The final settlement amount may be verified upon presentment of the merchant's draft reflecting the final merchant or other vendor statement submitted to the financial institution. This type of online transaction history information may require further refinement to avoid consumer confusion, especially if the consumer understands that that information may trigger error resolution rights. This confusion is further compounded when the consumer receives a written transaction history covering the same period, because that written transaction history may not reflect memo posted transactions at all.

3. Limitations on Liability and Error Resolution. Regulation E §§ 205.18(c)(3) and (4) of the Interim Final Rule explain the application of the regulation's limitations on liability and error resolution procedures when a financial institution elects not to provide regular paper periodic statements under Regulation E § 205.9(b). Section 205.18(c)(3) specifies two differing triggers for beginning the 60-day period for limiting liability for unauthorized EFTs, depending on time and manner the consumer has obtained a history of his or her account transactions. If the consumer obtains transaction information electronically under § 205.18(b)(1)(ii), the 60-day period begins on the date the account is electronically accessed by the consumer. If the consumer has requested a written transaction history, the 60-day period begins on the date the financial institution sends the written history.

We recommend that the Board commence the 60-day period applicable to both liability limitations and error resolution at the time the transaction history information becomes available to the consumer, not, e.g., when it is sent.[18]

[18] This requirement is consistent with the obligation of a customer to review account statements under other law, such as Uniform Commercial Code § 4406(c).

Further, many financial institutions permit payroll account holders access to transaction history information greater than 60 days, e.g., up to a year. Under the Interim Final Rule, the liability and error resolution provisions could continue to apply for over a year, or a longer period.[19] Accordingly, we recommend that the Board clarify that the error resolution timeframe does not go on indefinitely if the consumer does not trigger the 60-day error resolution procedures by either accessing the information online or by requesting a written transaction history.

Allowing a lengthy and undefined period of time to file a dispute places financial institutions at an unfair disadvantage. Under Regulation E,[20] financial institutions are required to investigate claims of error within limited time frames, but for transactions older than 60 days, research becomes significantly more challenging. For instance, original documents, such as receipts and ATM photographs, are often archived or destroyed after a 60-day period. Older documents and information are simply more difficult to retrieve. Financial institutions should not be limited in their time to investigate in these older cases.

Similarly, financial institutions are placed at greater risk if liability is not limited as to unauthorized transactions made long after the initial unauthorized transaction, even though the consumer, not the financial institution, is in the best position, frankly, to identify such transactions and promptly report them. Indeed, consumers will likely have less incentive to monitor their accounts if the time periods do not begin to run until they access the account. Expanding these time periods and thus the potential liability as to financial institutions will encourage institutions to limit access to account history to 60 days, depriving accounts holders of this valuable service. Having greater risks may also serve as an additional disincentive in offering this payroll product.

In connection with the foregoing, we would encourage the Board to clarify that a consumer cannot use the error resolution procedures to dispute a transaction more than 120-days old. By providing a definitive bright line to dispute a transaction, the Board will foster certainty to both consumers and financial institutions.

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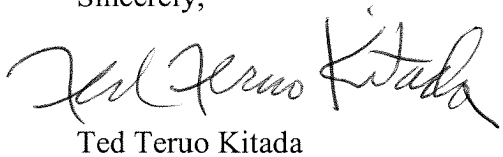
[19] Presumably, the one-year statute of limitations would apply under the Electronic Fund Transfer Act § 915(g) (15 U.S.C § 1693m(g)).
[20] Regulation E § 205.11.

If the Board chooses to base the 60-day period on electronic access to the account, it should clarify that the phrase "access to the account" means the consumer has logged onto the Website of the financial institution. Financial institutions normally can determine if a consumer has logged on, but they cannot determine if the consumers have actually accessed a particular account.

III. Conclusion. Wells Fargo wishes to express its appreciation for the opportunity to offer its comments to the Interim Final Rule. If you have any questions to the foregoing, please do not hesitate to contact us.

Sincerely,



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