

November 18, 2004

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551

**RE: Comments on Proposed Amendments to Regulation E – Docket Number R-1210**

Dear Ms. Johnson:

This comment letter is submitted on behalf of First Data Corporation ("First Data") in response to the proposal (the "Proposal") to amend Regulation E - Electronic Fund Transfers – and the Official Staff Commentary thereto (the "Staff Commentary") issued by the Board of Governors of the Federal Reserve System (the "Board"). First Data appreciates the opportunity to present to the Board its view of the Proposal.

First Data, with global headquarters in Denver, Colorado, helps power the global economy. As a leader in electronic commerce and payment services, First Data serves approximately 3.5 million merchant locations, 1,400 card issuers and millions of consumers. With more than 30,000 employees worldwide, the company provides credit, debit, smart card and stored-value card issuing and merchant transaction processing services; Internet commerce solutions; money transfer services; money orders; and check processing and verification services throughout the United States. First Data also offers a variety of payment services around the world. Its Western Union and Orlandi Valuta money transfer networks include a total of more than 200,000 Agent locations in more than 195 countries and territories.

Several First Data subsidiaries offer products or services within the scope of the Proposal. For example, TeleCheck International is a world leading provider of paper and electronic check authorization services with more than 330,000 merchant locations, and has extensive experience in check conversion. The TeleCheck Electronic Check Acceptance® (ECA®) service is one of the most widely used services for point of sale check conversion.

First Data's subsidiary, STAR Systems, operates the STAR® Network, which offers PIN-secured debit acceptance at over 241,000 ATMs and one million point-of-sale locations nationwide. Founded in 1984, the STAR Network today has more than 6,200 financial institutions members from coast-to-coast and works daily with those financial institutions to provide consumers with secure, convenient, and efficient access to their funds through a combination of proven technology and continuous innovation.

REMITCO LLC is the remittance processing subsidiary of First Data offering customized payment solutions, including high-speed remittance processing, Web-based image archive, ARC and check clearing services. Leading telecommunications, utility, consumer finance and credit card companies benefit from REMITCO's solutions.

Our industrial bank subsidiary, First Financial Bank, together with other First Data subsidiaries, provides payroll card solutions to employers under the Money Network® and Universal Card brands. In addition to being a leading provider of such services to the transportation industry, this business has begun to provide payroll cards services to a broadly diversified employer market.

### **Board's Actions Concerning Regulation E**

First Data commends the Board on its efforts in drafting the Proposal. First Data appreciates the importance of updating Regulation E and the Staff Commentary to address issues that have arisen in connection with the continued evolution of electronic payments. With some important modifications and clarifications, the Proposal will provide certainty and efficiency to the application of the Electronic Fund Transfer Act ("EFTA") to electronic check conversion transactions and payroll cards.

## **COMMENTS TO THE PROPOSAL**

### **Section 205.2 Definitions**

#### **2(b) Account**

Proposed 202.2(b)(3) would provide that the term "account" include a payroll card account directly or indirectly established by an employer on behalf of a consumer to which EFTs of the consumer's wages, salary, or other employee compensation are made on a recurring basis. Further, a payroll card account would be subject to Regulation E whether the account is operated or managed by the employer, a third-party payroll processor, or a depository institution.

First Data does not object to a revised definition of the term "account", which would include a payroll card account. However, we believe that the Board should exempt payroll cards from the periodic statement requirements of Regulation E where issuers make account history information accessible to employees, for example, on-line, via a toll free number, via a terminal or, upon request and for a nominal fee, a written statement detailing the account history for 60 days preceding the request.

Payroll cards have become a convenient method for employers to limit the costs associated with corporate payroll. Moreover, employees have both benefited from the savings to their employers and the utility of payroll cards that may be used at ATMs, at the point-of-sale, and that, in some cases, provide convenience checks. In particular, employees who do not have bank accounts, often referred to as the "unbanked", benefit from being able to have ready access to their cash without having to carry around the sum of their wages in a purse or wallet. These benefits of convenience and safety would be jeopardized by the imposition of the Regulation E periodic statement requirement, because statementing would strip employers of the costs savings that payroll programs provide. As a result, employees could be subject to maintenance fees that

cover the costs of statementing or employers could decide not to participate in payroll card programs at all.

As the Board noted in its Proposal, some issuers are generally compliant with Regulation E requirements. We believe that First Data falls into this category and is a prime example of the industry's self-regulation. Although we do not provide paper statementing to cardholders as a matter of course, we afford cardholders the benefit of Regulation E consumer protections. Our cardholders may access and review their transaction history by calling a toll free customer service number and using an interactive voice recognition unit. We also permit cardholders to access their transaction history online and provide a paper statement option. We believe that this "modified compliance" model works, because cardholders are provided with Regulation E protections, while their employers save on the considerable costs that would be incurred if paper statementing were required under Regulation E. Therefore, we believe that if the Board adopts its proposal to redefine the term "account" to include payroll cards, the Board should exempt payroll cards from Regulation E's periodic statement requirements where issuers make account history information accessible to employees, for example, on-line, via a toll free number, via a terminal or, upon request and for a nominal fee, a written statement detailing the account history for 60 days preceding the request. This approach would strike an appropriate balance, by providing employees with essentially all of the Regulation E consumer protections and providing employers with an option to continue offering Regulation E compliant payroll card programs without incurring substantial statementing expenses. Further, this approach is similar to that which the Board contemplated with regard to on-line stored value card systems in the 1996 Proposed Amendments to Regulation E, which were not adopted, and the exception adopted by the Board under the rule applicable to EBT systems. *See* 61 Fed. Reg. 19,696 and 12 C.F.R. 205.15, respectively.

#### Comment 2(b)-2

Proposed Comment 2(b)-2 would explain that Regulation E would not apply to a card which is exclusively used to disburse non-salary-related payments, such as a petty cash or a travel per-diem card. However, such fund transfers would be covered by the regulation to the extent that the funds are transferred to or from the employee's payroll card account.

We request that this Comment be revised to clarify that a non-salary-related transfer to a card with dual functionality, *i.e.*, a card that is engineered to hold, on a segregated basis, separate account data for payroll funds and non-salary-related funds, would not be subject to Regulation E. For example, a card that has two sides — employer-funded and employee-funded. On the one hand, per diem and petty cash funds are advanced to the employer-funded side that also operates like a corporate expense card, *e.g.*, a traditional fuel card. On the other hand, the employee-funded side holds the employee's payroll funds. The employer funded transfers are never aggregated with the employee funded transfers (salary). This scenario is clearly distinguishable from a circumstance where non-salary-related payments are "dumped" into the employees' salary funds and the employee could be confused about his balance in terms of which funds are employer funded vis-à-vis employee funded.

## Definition of "Financial Institution"

The Proposal explains that one or more parties involved in offering payroll card accounts may meet the definition of a "financial institution" under the regulation – whether it be the employer, a financial institution, or other third party involved in the transfer of funds to the account or in the issuance of the card. The Proposal provides as an example: "if any 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." The proposal points to existing regulation (205.4(e)) in explaining that the parties may contract among themselves to comply with the regulation. We request that the Board clarify that disclosure obligations satisfied by one party would be imputed to another party; *e.g.*, that initial disclosures provided by a participating bank would satisfy any disclosure obligations an employer might have if it too were considered a "financial institution" by virtue of establishing the account into which employee wages are deposited, and from which consumers access funds.

In addition, we request that the Board clarify that in payroll card programs where there is both an account holding bank (in which the funds are held in an account denominated as a "custodial", "agent", "for the benefit of", "trust", or other pooled account) and an electronic funds transfer service provider (which issues the card that accesses the pooled account), that so long as the service provider satisfies any obligations that may be imposed on payroll cards with respect to periodic statements, that the account holding bank's obligation under 12C.F.R 205.14 (c)(1) would be satisfied. Otherwise, there would be a duplication of efforts. Further, in many cases, the account holding bank may not even have information on the beneficiaries of the pooled account.

## Section 205.3 Coverage

### 3(a) General

The Board has specifically requested comment as to whether a consumer's signature should be required as authorization for an electronic check conversion ("ECK") transaction at the point-of-sale. We recognize that written authorization often provides the best form of disclosure to the consumer. A Regulation E signature requirement would also mimic long tested and consumer accepted payment procedures such as credit card and signature-based debit signature procedures. However, we do not believe that such a requirement is necessary, since, as the Board noted in the Proposal, the National Automated Clearing House's ("NACHA") Rules currently require the signature of a consumer that authorizes a point-of-purchase ("POP") transaction. Therefore, imposing a signature requirement under Regulation E would be duplicative, and arguably a step backwards in the evolutionary process of payments regulation. We request that the Board carefully consider both the benefits and burdens of a signature requirement in finalizing the regulation.

### Costs to Industry

Moreover, we respectfully request that the Board consider that there would be significant costs to the industry associated with implementation of a Regulation E signature requirement. Under NACHA's POP rule, originators of POP entries must obtain the consumer's written authorization prior to initiating a debit entry through the Automated Clearing House ("ACH") network. Other than to require that the authorization be in writing and signed (or similarly authenticated), be readily identifiable as an ACH debit authorization, and clear and conspicuous in its terms, the NACHA Rules do not prescribe the content of the written statement. If the Board were to require a written authorization as well, it is possible that the requirements would differ to some extent from the NACHA requirements.

In order to comply with the NACHA Rules, point-of-sale terminals include authorization language, which is printed and signed by the consumer. In order to accommodate new Regulation E requirements with regard to these authorizations, each terminal at each location would need to be re-programmed. TeleCheck estimates its cost to be over \$1 million. We also estimate that there are approximately 200,000 merchant locations industry wide using check conversion.

The language used by TeleCheck merchants at the point of sale is compliant with the NACHA Rules and provides, in general, that the consumer authorizes the conversion of the check to an EFT and the debiting of the account for payment of the sale amount. Our experience has been that this authorization is not confusing to the consumer (especially since checks are given back to the consumers under the NACHA Rules for point of sale transactions), and we do not believe it conflicts with the proposed amendments or the model notices. In the event the Board imposes a signature requirement, we believe that the new requirement should be consistent with the NACHA Rules for point of sale transactions requiring written authorization, and must be short and concise to effectively fit on the typical receipts provided by merchants at the point of sale. To the extent the signature requirement goes beyond the existing NACHA requirement, we would like clarification that existing authorizations, which are compliant with the NACHA Rules, can be continued and supplemented with additional model notices posted at the point of sale. Even if the Board does not impose a signature requirement, we would like the Board to confirm that existing authorizations can be continued and supplemented with the additional posted model notices. Alternatively, we suggest merely grandfathering authorization language used in existing terminals. Terminals have a limited useful life (average 3-5 years) and we anticipate that any new terminals would be programmed to include the new language.

#### 3(b)(2)(ii) & Comment 3(b)(2)-4 Imputed Notice

The Proposal discusses imputed notice in the context of ARC transactions. For example, if several roommates each write a check in payment of a shared utility bill, authorization from the person whose name is on the utility account constitutes authorization to convert all the checks submitted in payment of that bill. First Data assumes this provision would support the conversion of multiple payments, i.e. transactions that have more than one check received with more than one coupon, as well check only transactions in which multiple checks are remitted without the accompanying remittance coupon. First Data would like the Board to provide additional examples of circumstances where notice may be imputed. For example, if a college student mails his parents' check to a lock box in payment of his utility bill, would notice to the college student be acceptable to convert the parents' check to an EFT? Outside of ARC, if

a college student presents his parents' check (properly endorsed by the parents) at the on-campus bookstore to purchase text books, would his authorization be imputed to his parents? We believe that there are a number of legitimate circumstances in which the account holder may not be in the position to receive notice or grant authorization for his check to be processed as an EFT. Therefore, it would be helpful for the Board to more fully address this issue.

#### Clarification of ECK Amendments' Applicability to POS & ARC Transactions

##### Only

We request that the Board clarify in Regulation E, or the Staff Commentary, that the ECK amendments, ultimately adopted, would apply only to ECK applications in which a consumer physically provides a check to a merchant or biller. For example, NACHA's POP and ARC applications. Without such clarification, one could mistakenly conclude that the amendments are applicable to transactions where a consumer merely provides a merchant or biller his bank routing number and account, *e.g.*, EFT transactions initiated over the telephone or via the Internet.

#### Transactions Initiated in Error

In the Proposal, the Board states that where a merchant or other payee initiates an EFT in error, the transaction would not be covered by Regulation E if the transaction does not meet the definition of an EFT:

"For example, if a merchant or other payee uses information from a consumer's money order mailed in by a consumer or from a convenience check tied to a line of credit to initiate an EFT, the transaction is not covered by Regulation E because there is no transfer of funds from a consumer account. Rather, the funds are transferred from an account held by the issuer of the money order or are extensions of credit. The transaction would be considered to have originated by check, even where notice has been provided that the transaction will be processed as an EFT."

We would suggest using different terminology on this issue "... a check converted which is unable to be processed through the ACH Network..." or something to that effect. The inability to process an item is not necessarily the result of an "error".

#### **Proposed Model Disclosures**

The Board has determined that there is confusion and a lack of consistency with regard to the notices provided to consumers in connection with electronic check conversion transactions. Thus, the Board has proposed three model clauses for authorizing a one-time electronic fund transfer using information from a check.

We raise several issues in connection with the model clauses below:

#### Costs to Industry

Prior to adopting the proposed model clauses, we request that the Board consider the implementation time and costs of this proposed requirement. For example, the costs of replacing currently posted point of sale signage for ECK transactions, to conform with the proposed notices, would be very costly to merchants and First Data, as well as other processors of ECK transactions. Further, replacing existing signs at the point of sale at thousands of merchant locations will require significant lead time. We would also request clarification that a posted notice can supplement a written authorization whether or not the Board imposes a signature requirement.

#### Reference to Draft Processing Required

As proposed, the model clauses only reference that a transaction may be processed as an EFT or check. We believe that the clauses should be amended to authorize processing the transaction as a “draft” as well as a check. This alternative is important since the consumer receives his or her check back under the NACHA Rules for POP transactions, and this may, in certain circumstances, be the only way to resubmit certain returns (*e.g.*, administrative) for payment. This additional language will better reflect industry practice and provide greater flexibility to merchants and processors of ECK transactions.

#### Insufficient Funds Reference

The proposed model clauses provide: “If there are insufficient funds in your account, you authorize us to charge a fee of \$\*\*, and collect that amount through an electronic fund transfer from your account.” Since insufficient funds is only one of a number of reasons for returning an item unpaid, we suggest revising the sentence to read: “If an electronic fund transfer or draft is returned unpaid from your account, you authorize us to charge a fee of \$\*\*, and collect that amount through an electronic fund transfer or draft from your account.” This notice would also cover notifying consumers of the fees which may be collected outside of EFT networks. We request that the Board also clarify that if the fee is not a flat fee we can disclose and charge a percentage as permitted by applicable law.

#### Processing Time & Consumer’s Bank May Not Return Check

The Proposal would require a person initiating an ECK transaction to provide notice that when the transaction is processed as an EFT, funds may be debited from the consumer’s account quickly/as soon as the same day we receive your payment.

We disagree with the inclusion in the disclosure that the funds may be debited from the consumer’s account “quickly/as soon as the same day as we receive your payment”. This is not accurate as ACH transactions are often processed in relatively the same time as paper checks. For example, if a consumer is shopping at a TeleCheck merchant on Monday, their account will not be debited until Wednesday. Many local checks clear even faster than this process. Also with Check 21 and Image Exchange, many paper checks will be processed in much shorter time than ACH transactions. It seems inconsistent that this would be a requirement for this application but not for Check 21. Thus, to implement this disclosure under Regulation E would be to place unfair regulatory burden upon users of ECK processing while exempting banks engaged in similar expedited payment applications.

Additionally, we think the term “quickly” is vague; how would a consumer interpret “quickly”? Overall, we believe this disclosure creates more confusion and could be misinterpreted. In the event that the Board retains this proposed disclosure requirement, we request that the Board define "quickly" or provide some interpretive gloss in the Staff Commentary which would make it clear that consumers should have sufficient funds in their account at the time a check is presented at the point of sale.

Although we understand the Federal Reserve's objective for disclosure to the consumer regarding the possibility that they may not receive their check back from their bank, we do not believe it provides value to the consumer. In today's marketplace, many financial institutions do not provide consumers with their checks back with their statements. Moreover, with the emerging payment technologies, such as Check 21, Internet, telephone, and DDA payment cards, consumers are recognizing that they are making payments from their DDA and not receiving their original paper check back.

With respect to both of the disclosure requirements discussed directly above, from a merchants' perspective, adding additional verbiage is costly. In addition, if the proposed sentence, which encompasses both disclosures, is included in the final disclosure language, we think the disclosure would be too long and consumers would be discouraged from actually reading and/or understanding the disclosure.

#### Retention of Model Clauses

In the event that the Board adopts the proposed consumer notice requirements, we believe that the Board should retain all three of the proposed models. We agree that there needs to be flexibility in the authorization language. The three options provide broad flexibility for a merchant, payee or processor to determine which payment procedure is most efficient, depending upon the circumstances, costs, etc. There are a variety of reasons for which a check may not be converted into an electronic item including ineligibility under the NACHA Rules. This inability to convert results in administrative and other types of returns - there is no national database that provides information on accounts and their eligibility, nor is there any indication on the source document regarding eligibility to eliminate these returns. In addition, a payee may choose to not submit the item through the ACH. Since there are different ways to process/resubmit items and payees will differ on their methods, flexibility is important.

#### **Section 205.10 Preauthorized Transfers**

##### 10(b) Written Authorization for Preauthorized Transfers from Consumer's Account

The Board proposes to withdraw comment 10(b)-3, which states that an institution does not obtain written authorization for preauthorized transfers by tape-recording a telephone conversation with a consumer who agrees to recurring debits.

First Data believes that the Board should withdraw the comment and that such a revision to the Staff Commentary would allow providers of electronic debit services to provide consumers with greater flexibility in authorizing recurring payment arrangements electronically. Further, the change would, in fact, allow the convenience benefits of the Electronic Signatures in

Global and National Commerce Act ("E-SIGN") to flow to a broader group of consumers. Currently, with regard to arranging for recurring electronic payments services, the largest group of consumer beneficiaries are those that own home computers. However, many users of electronic payment services are consumers without access to a computer by which to arrange for recurring electronic payments services and, thus, may not arrange for such services electronically. A tape recorded procedure could arguably comply with the electronic signature requirements of E-SIGN. Withdrawing comment 10(b)-3 would remove the impediment to a broader implementation of E-SIGN, and allow those less affluent consumers without ready access to computers to electronically authorize recurring payments.

#### 10(c) Consumer's Right to Stop Payment

Proposed comment 10(c)-3 would be added to address procedures for stopping recurring debits in systems involving real-time processing, such as debit card systems. The proposed comment provides that an account-holding institution may use a third-party to block the transfers. We request that the Board elaborate on the procedure envisioned. For example, is an ATM network bound to cooperate; are there other type of third party entities that may provide the blocking service; and may a third party charge a service fee for blocking such payments?

#### **205.11 Procedures for Resolving Errors**

##### 11(c) Time Limits and Extent of Investigation

Proposed comment 11(c)(4)-5 would require financial institutions to consider any relevant information within its own records, in addition to ACH payment instructions, for purposes of determining whether an error has occurred. We request that the Board clarify how the proposed error resolution process would work where an electronic fund transfer service provider (rather than an account-holding institution) is providing the electronic funds transfer service. Currently, account-holding institutions have a limited error resolution obligation with regard to errors resulting from a third party service. Would the interplay between the service provider and account-holding institution change as a result of the proposed comment?

#### **205.16 Disclosures at Automated Teller Machines**

Currently, 205.16 requires an ATM operator that imposes a fee on a consumer for initiating an EFT or a balance inquiry to provide notice to the consumer that a fee *will* be imposed for providing the EFT service or balance inquiry and to disclose the fee amount. In the Proposal, the Board has acknowledged that a disclosure on the ATM that a fee will be imposed in all instances could be overbroad and misleading with respect to instances in which consumers would not be assessed a fee. Consequently, the Board proposes that comment 205.16(b)(1)-1 would be revised to clarify that if there are circumstances in which an ATM surcharge will not be charged for a particular transaction, ATM operators may disclose that a fee *may* be imposed or may specify the type of EFTs or consumers for which a fee is imposed.

First Data believes that the proposed modification will help remedy a discrepancy in the reality of surcharging practice versus an overly literal interpretation of the current signage requirements. The proposed revision to the Staff Commentary recognizes that, in many cases, financial institutions elect not to surcharge certain transactions. A literal application of

Regulation E in its current form could lead to the counterintuitive result that consumers would be informed that a fee “will” be charged, when in fact, no such charge will occur. Clarification of the required signage language is both warranted and urgently needed.

### **Compliance Deadlines**

Generally, First Data believes that the compliance period for any of the electronic check conversion and payroll proposals ultimately adopted should be twelve months. A year would provide a workable timeframe to develop and implement the policies and procedures requisite for complying with the amended Regulation E. Moreover, it would allow industry participants the benefit of staggering the financial outlays over four financial quarters, rather requiring such costs to be absorbed within a single quarter or two quarters.

With regard to implementing signature requirements as discussed above, we reiterate our request that currently used point of sale terminals be grandfathered for their useful life (3-5 years). This would allow the industry to migrate to new Regulation E compliant POS terminals within a reasonable period without incurring millions of dollars in regulatory burden.

### **Future Regulation of Electronic Payments**

We respectfully request that the Board consider our argument that further regulation of electronic payments would not be required after the enactment of the currently proposed rulemaking. With some important modifications and clarifications requested by us and other industry members, the Proposal will provide a fair and workable electronic fund transfers framework for users and providers of electronic fund transfers services. However, further regulation would be unduly burdensome and without consumer benefit.

Industry participants have done an exemplary job of self-regulation. For example, in addition to complying with Regulation E, providers of ACH services must comply with the additional layer of rules embodied by the NACHA Rules. The NACHA Rules provide consumers with various rights and remedies related to electronic payment transactions. These rules reflect the efforts and policies of the NACHA voting membership, which is comprised of industry participants. Furthermore, providers of electronic payments must engender the trust of their consumer clientele or risk a diminished reputation which would result in a significant loss of business. Therefore, industry participants are motivated, from a business case standpoint, to adhere to best practices and assure consumer satisfaction.

Therefore, going forward, we request that the Board give due consideration to the significance and success of the industry's self-regulation efforts, prior to promulgating further rules under the Electronic Fund Transfer Act.

Once again, First Data appreciates the opportunity to provide its comments regarding the Proposal to the Board. If you have any questions regarding the foregoing, please contact me at 720-332-3399.

Sincerely,

/s/

Jeffrey R. Leventhal  
Special Counsel  
First Data Corporation