

WESTERN PAYMENTS ALLIANCE

November 19, 2004

Ms. Jennifer J. Johnson
Secretary, Board of Governors of
The Federal Reserve System
20th Street and Constitution Avenue, N.W. 20551

re: 12 CFR Part 205 [Regulation E; Docket R-1210]
Electronic Fund Transfers

Dear Ms Johnson:

The Western Payments Alliance¹ appreciates the opportunity to comment in response to the proposed revisions to Regulation E and associated Official Staff Commentary issued by the Board of Governors of the Federal Reserve System (the “Board”). Our comments address several sections of the proposal:

Electronic Check Conversion

WesPay commends the Board for its suggested modifications to Regulation E, including the Official Staff Commentary, related to electronic check conversion (“ECK”) transactions. We believe the majority of these proposed revisions will further clarify the rights, obligations, and responsibilities of parties to such transactions, and, on the whole, appear consistent with rules for processing ECK transactions through the Automated Clearing House (“ACH”) network promulgated by NACHA-The Electronic Payments Association (collectively, the “ACH Rules”).

While we believe merchants or other payees converting checks to ECK transactions at the point of sale be required to obtain the consumer’s written, signed authorization prior to conversion, in our opinion the Board should not make this a Regulation E requirement. EFT Network Rules (such as the *ACH Rules*) often establish authorization rules that go beyond those required by Regulation E—e.g., the *ACH Rules* currently contain a written authorization requirement for Point-of-Purchase transactions (conversion of a consumer check to an ACH debit at the point of sale²). WesPay feels the Board should clearly state that Regulation E standards for consumer authorization of an ECK transaction are minimum requirements, to be superseded by payment system rules that may require a more stringent authorization process.

¹ The Western Payments Alliance (“WesPay”) is a not-for-profit financial trade association providing electronic fund services to over 1,000 financial institution, and approximately 100 corporate members in California, Hawaii, Idaho, Nevada, Oregon, Utah, Guam, and associated Pacific Island regions. WesPay consults with its members on the application and interpretation of Automated Clearing House (ACH) Operating Rules, and provides a variety of workshops, seminars, and publications designed to increase its members’ knowledge of ACH processes, enhance rule compliance, and mitigate risk.

² 2004 *ACH Rules*, Subsection 2.1.2, Receiver Authorization and Agreement, requires that a debit entry to a consumer account must be in writing “signed or similarly authenticated” by the consumer.

WesPay generally concurs with the Board's position that consumers will benefit from additional information made available to the consumer regarding ECK transactions posting to his account. However, we are concerned that the Board's proposal [Section 205.3(b)(2)(iii)] requiring persons initiating an EFT based on information from a consumer's check, provide notice that funds could be debited from the consumer's account "quickly" may be confusing. In the case of ACH ECK transactions, which are processed in a batch mode and typically involve an Originator sending a file to a third party processor or financial institution for further processing into the ACH network, the process may take one to two days from the point of conversion to settlement. The inference in the proposed model disclosure, that funds could be debited "quickly/as soon as the same day we receive your payment," in our opinion, may not be entirely valid and could mislead consumers, since by definition ACH transactions may take as long as two days to process and settle. Additionally, WesPay suggests the Board consider expanding any notice requirement(s) it may ultimately adopt to include language informing consumers that they have the right to ask their account holding financial institution to obtain a copy of the original check from the payee. This consumer right is currently provided under *ACH Rules* for ECK transactions.³ Since any notices adopted would require financial institutions to modify and reissue Regulation E disclosure statements, our opinion is that an adequate timeframe for implementation should be allowed for financial institutions to comply with the revised notice requirement(s).

WesPay believes consumer confusion could arise should a disclosure be provided by a payee of a check stating that receipt of the consumer's check authorizes collection either as an EFT or as a check (proposed Comment 3(b)(2)-2). Consumers, confused by such disclosures, believing their check must be collected as a check, may instruct their account holding financial institution to return any ECK debits that result from the check conversion as an "unauthorized" ACH debit to their account. Payees wishing to obtain "alternate authorizations" for ECK collection efforts should be required to specify the circumstances under which a check received from the consumer will be processed as a check. Merchants who clearly spell out the specific situations that will result in the check being collected as a check will, we believe, help diffuse a potentially confusing situation for consumers.

WesPay is concerned with the proposed revision to Comment 3(c)(1)-1. This revision of the Commentary would be intended to clarify that a consumer authorizes a merchant or other payee to electronically debit a fee for insufficient funds from the consumer's account when the consumer proceeds with a transaction after receiving notice that the fee will also be collected electronically. Currently, the *ACH Rules* require a transaction representing a fee for a returned check be based on a separate written authorization from the consumer (meeting the requirements of section 2.1.2 of the *ACH Rules*). WesPay suggests, given the potential conflict such Commentary would create between Regulation E and *ACH Rules*, the Board consider further modification to the proposed commentary that would make clear that the Commentary on this issue would be superseded by any payment system rule that requires a more stringent authorization requirement for fees related to returned check conversion transactions.

Payroll Cards

WesPay agrees with the Board's proposal to amend Regulation E to classify a "payroll card account" that receives recurring direct deposits of a consumer's wages, salary, or other employee compensation as an account covered by Regulation E. Further, we concur that such an account should be subject to

³ 2004 *ACH Rules*, Subsection 2.7.5 (XCK Entries), Subsection 2.8.3.10 (RCK Entries), Subsection 2.9.3.2 (ARC Entries)

the regulation, regardless of whether the account is managed by the employer, a third-party payroll processor, or a depository institution. We believe employees receiving payment via this process should be offered the protections Regulation E provides, especially the error resolution procedures the regulation affords, whether they maintain a traditional "bank account" or a payroll card account.

However, we are concerned that "one time" EFT transactions related to salary or benefit payments are being excluded from coverage under the act. Should proposed section 205.2(b) One-time EFT of salary-related payments be adopted within the "Official Staff Interpretations" section, a consumer alleging an erroneous EFT transaction issued on a "one-time" basis will have no recourse under Regulation E for investigation and resolution of a disputed transaction. This circumstance should be analogous to "single entry" transactions under the *ACH Rules*, which make no distinction in consumer protection provisions between one-time and recurring transactions. We are unaware of any other regulation, legislation, or payment network rules that would protect a consumer's rights should an alleged "error" occur related to a one-time EFT.

Error Resolution

We have difficulty understanding the intent of proposed comment 205.11(c)(4)-5, which would require a financial institution, in addition to examining "payment instructions" as part of its error resolution responsibilities, to examine any additional information within "its own records" that would assist in resolving the alleged error. The RDFI is unlikely to have any information beyond the payment record(s) in question; the authorization agreement is executed between the Originator and the Receiver/consumer. Under the *ACH Rules*,⁴ a consumer is made whole for transactions in dispute by reporting in a timely manner and completing the appropriate paperwork with his account-holding institution. The proposed revision, at least as far as ACH transaction error investigation is concerned, appears to place unnecessary additional burden on the RDFI.

WesPay thanks the Board for the opportunity to comment. If you would like to discuss any of our comments in further detail, please do not hesitate to contact me by e-mail at: pyeatrakas@wespay.org, or by telephone at (415) 433-1230.

Sincerely,



Peter Yeatrakas
President & CEO

cc: Western Payments Alliance Board of Directors

⁴ 2004 *ACH Rules*, Subsections 7.7.1, 7.7.2, 7.7.3, 7.7.4