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By Facsimile and First Class U.S. Mail
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BEST IMAGE AVAILABLE

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-1210

Dear Ms. Johnson:

Wells Fargo & Company ("Wells Fargo") is a diversified financial services company providing banking, insurance, investments, mortgage, and consumer finance through over 6,000 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 \$420 billion in assets and 146,000 employees. Wells Fargo is one of the United States' top-40 largest employers. Wells Fargo ranked fourth in assets and fourth in market value of its stock at June 30, 2004, among its peers.

I. Background. The Board of Governors of the Federal Reserve System (the "Board") has published for comment a proposal¹ (the "Proposal") to amend Regulation E.² Regulation E carries out the purposes of the Electronic Funds Transfer Act (the "EFTA").³ The EFTA establishes the basic rights, liabilities, and responsibilities of consumers using electronic fund transfer ("EFT") services and of financial institutions offering those services.

The Proposal would also revise the official staff commentary to Regulation E. The commentary interprets the requirements of Regulation E to facilitate compliance primarily by financial institutions offering EFT services to consumers.

Generally, the Proposal would revise Regulation E to address its coverage of electronic check conversion ("ECK") services and those providing the service. Among other things,

¹ 69 Fed. Reg. 55996 (September 17, 2004).

² 12 C.F.R. Part 205.

³ 15 USC § 1693, *et seq.*

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persons, such as merchants and other payees, that make ECK services available to consumers would be required to secure a consumer's authorization for the EFT. Additionally, Regulation E would be amended to provide that "payroll card accounts" established directly or indirectly by an employer on behalf of a consumer for the purpose of providing salary, wages, and other compensation on a recurring basis are accounts covered by Regulation E. Proposed official staff commentary revisions would provide guidance on preauthorized transfers, additional ECK issues, error resolution, and other matters.

II. Wells Fargo's Comments. Wells Fargo respectfully offers the following, in the order set forth in the Proposal under "Section-by-Section Analysis of the Proposed Revisions."⁴

A. Section 205.2 Definitions; 2(b) Account. Proposed Regulation E § 205.2(b)(3) would provide that the term "account" includes a "payroll card account" directly or indirectly established by an employer on behalf of a consumer employee to which EFTs of the consumer's wages, salary, or other compensation are made on a recurring basis. 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.⁵ The proposal to include payroll card accounts as subject to Regulation E raises the following issues.

1. Other Laws and Regulations. Wells Fargo is gravely concerned about the interplay between the expansion of coverage of payroll card accounts under Regulation E and the potential unintended impact of such expansion on other federal laws and regulations. The Proposal leaves unclear the impact of this change on other federal laws and regulations as they may relate to payroll card accounts. Currently, the applicability of the following federal laws and regulations, among others, to stored value and prepaid cards, including payroll cards, is generally unclear in many circles:

- Regulation D:⁶ Is the value of a stored value or prepaid card a "deposit" for purposes of Regulation D?⁷ Regulation D establishes requirements for depository institutions to hold

⁴ 69 Fed. Reg. at 55998.

⁵ Specifically, the proposed definition of "account" for purposes of Regulation E provides that (69 Fed. Reg. at 56008):

The term 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, or a depository institution.

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reserves in the form of either vault cash or noninterest earning balances held at a Federal Reserve Bank against transaction accounts that are held by such institutions on behalf of their customers. For purposes of Regulation E, if the Board were to determine the status of payroll card accounts as “accounts,” it may indirectly or impliedly determine that such accounts are also for purposes of Regulation D “transaction accounts,” thus subjecting such accounts to reserve requirements. For Wells Fargo and most other banks, the marginal reserve requirements would be 10%.⁸

- Regulation P:⁹ If a consumer maintains a payroll card account, is that consumer a “customer” for purposes of Regulation P?¹⁰ Does the consumer with a payroll card account with Wells Fargo maintain a “deposit” with Wells Fargo for purposes of Regulation P? If a payroll card account owner is a customer for purposes of Regulation P, the requirements of that regulation become applicable to this product, thereby increasing the cost of this product. For example, for each payroll card account owner, a bank would be required annually to send a privacy notice.¹¹
- Regulation CC:¹² If a payroll card account is a “deposit” for purposes of Regulations D and P, it may follow that the payroll card account is subject also to the requirements of Regulation CC, because Regulation CC’s definition of “account” incorporates by reference Regulation D’s definition of “deposit”¹³ that is a transaction account.¹⁴ If a payroll card account is a “transaction account” for purposes of Regulation CC; then the requirements of that regulation become applicable to this product, again thereby

⁶ 12 C.F.R. Part 204.

⁷ 12 C.F.R. § 204.2(a)(1).

⁸ For banks currently offering payroll card accounts, most, if not all, probably treat such accounts as transaction accounts. This practice affects the cost of all covered payroll card accounts. The additional reserve is presumably reflected in the fees charged to the consumers by such banks, thus increasing the cost of this product and undermining one of the core bases for offering it. Given the underlying purpose of payroll card accounts (as a low-cost, efficient way to distribute payroll), the Board may wish to determine if this current practice is consistent with the purpose of Regulation D.

⁹ 12 C.F.R. Part 216.

¹⁰ Regulation P § 216.3(h).

¹¹ Regulation P § 216.5(a)(1).

¹² 12 C.F.R. Part 229.

¹³ Regulation D § 204.2(a)(1)(i).

¹⁴ Regulation D § 204.2(c).

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increasing the cost of this product. For example, banks would be required to provide the funds availability disclosure before opening a payroll card account.¹⁵

- Regulation DD:¹⁶ Is a payroll card account an “account” for purposes of Regulation DD?¹⁷ If a payroll card account is deemed an “account” for purposes of Regulation DD, the requirements of that regulation become applicable to this product, again thereby increasing the cost of this product. For instance, the general disclosure requirements under Regulation DD will become applicable.¹⁸

As you can determine from the above list, a number of federal laws and regulations may be inadvertently impacted by providing an expansive definition for the term “account” under Regulation E. By so expanding the definition, the Board may implicitly cause payroll card accounts to become subject to these other laws and regulations as an unintended consequence. The Board and other regulators may be more willing to apply a number of the listed regulations to payroll card accounts due to this development, notwithstanding the burden of compliance. Due to compliance burdens, banks may lose their appetite to issue payroll cards as a product. Consequently, these cards may be issued by other businesses to fill the product vacuum. These businesses may be less regulated than the banking industry, resulting in less protection to consumers using this service.

Wells Fargo strongly urges the Board to conduct a comprehensive study of the impact of the Proposal, and in that connection, to confer closely with the Federal Deposit Insurance Corporation (“FDIC”) and the Office of the Comptroller of the Currency (“OCC”) to identify common regulatory goals and objectives prior to issuing a final rule.¹⁹ Rather than regulating stored value and prepaid cards in a piecemeal fashion (commencing with the payroll card) with

¹⁵ Regulation CC § 229.17.

¹⁶ 12 C.F.R. Part 230.

¹⁷ Regulation DD § 230.2(a).

¹⁸ Regulation DD § 230.3.

¹⁹ As you know, the FDIC has issued for comment a proposed rule that would clarify the meaning of “deposits” as that term relates to funds at insured depository institutions underlying stored value cards. 69 Fed. Reg. 20558 (April 16, 2004). Under the Proposal, the Board has asked whether Regulation E’s coverage should be determined by whether a payroll card account holds consumer funds that qualify as eligible “deposits” for purposes of Federal Deposit Insurance Act § 3(1). Consistent with the comment above, Wells Fargo urges the Board to confer closely with the FDIC prior to subjecting payroll card accounts to Regulation E. Because the expansion of the definition of “account” for purposes of Regulation E may have unintended regulatory consequences, Wells Fargo strongly urges the Board to have open exchanges with the FDIC and the OCC to identify specific federal goals and objectives involved in expanding coverage as to payroll card accounts.

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unarticulated goals or objectives, Wells Fargo urges the Board to engage in close dialogue with the FDIC and the OCC, to develop a rational plan relative to the federal regulation of stored value and prepaid cards, including payroll card accounts.²⁰ The Board and such other banking regulators may wish to identify common federal goals and objectives in regulating stored value and prepaid cards, if any. As and when such goals and objectives are identified, Wells Fargo encourages the regulators to define the relationship between specific regulations and such goals and objectives. In this manner, an orderly plan may be developed to address the regulatory management of stored value and prepaid cards in a much broader regulatory context.

Barring the willingness of the Board to implement a comprehensive review of the related laws and regulations as detailed above, we urge the Board through staff commentary to limit the applicability of this new definition clearly to Regulation E only.

2. Burdens of Compliance. Assuming that the Board has an appetite for subjecting payroll card accounts to Regulation E, we are particularly concerned about one apparent core misconception of this product. The Board provides the following in the Proposal: "Payroll card products are, in effect, designed, implemented, and marketed as substitutes for traditional checking accounts at financial institutions."²¹ Payroll card accounts are not offered as a substitute for checking accounts to employees; payroll cards are offered in lieu of payroll checks. That distinction is significant. Financial institutions market payroll cards to employers primarily so that employers may efficiently issue payroll. By virtue of this core purpose, payroll card accounts should not be treated as regular checking accounts. The funds in a payroll card account will normally be accessed through automated teller machines ("ATM") and point of sale facilities. The employee will generally not be able to draw items against this account. Additionally, the employer will fund the individual payroll card accounts through deposits to an omnibus payroll account, not the employee. Indeed, employees will normally not be permitted to deposit items into this account.

Given the limited nature of this account, we suggest that the Board add a new section to Regulation E similar to § 205.15 governing EFT of government benefits (rather than expanding

²⁰ We assume this evaluation has previously been commenced under Public Law 104-208, § 2601.

²¹ 69 Fed. Reg. at 55999.

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the definition of “account”).²² In this regard, we particularly indorse 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. By reducing the compliance burden to payroll card accounts, the Board will foster the wider use of this product. By encouraging employers to use payroll card accounts, employees will reap significant benefits. They will not, e.g., need to run the risk of lost or stolen payroll checks. Employees will also be able to avoid the common additional expense of cashing payroll checks at neighborhood check cashing facilities assessing exorbitant fees.

3. The Payroll Card Account. The proposed definition of payroll card account does not clearly require that the payroll card account have a “card” as an exclusive access device, though it is implicitly required by the term. Does the Board intend the payroll card account be accessed solely by a plastic card to fall within the new proposed definition? While Wells Fargo does not support the application of Regulation E to payroll card accounts (as detailed above), if the Board so elects, then Wells Fargo supports the application to payroll accounts accessible exclusively by a card.

4. Gift Cards and Regulation E. In the Proposal through a new staff interpretation, the Board suggests that a “gift card” should not be viewed as a payroll card account if it is used for a one-time EFT of a salary-related payment.²³ This interpretation is unclear. What is a “one-time only” transfer? Is the single transfer the delivery of the gift card to the consumer, even if the gift card can be used for a number of EFT transactions? Does this safe harbor turn on the purpose of the gift card? For example, if the gift card is given in lieu of a single cash bonus, is the safe harbor available, even if the gift card may be used multiple times? If the gift card can be reloaded with new value (by either the employer or employee), does it continue to enjoy this “one-time only” safe harbor, even if the card is used to pay a bonus, e.g.? In light of this

²² Indeed, we prefer the characterization of this product as a “payroll card,” rather than a payroll card account. We would prefer to strike the term “account” because of the unintended consequence detailed above.

²³ The Board proposes the following official staff interpretation, to 2(b) Consumer Asset Account (69 Fed. Reg. at 56010):

The term payroll card account does not include a card used for a one-time EFT of a salary-related payment, such as a bonus, or a card used solely to disburse non-salary-related payments, such as a petty cash or a travel per diem card. To the extent that one-time EFTs of salary-related payments and any other EFTs are transferred to or from a payroll card account, these transfers would be covered by the act and regulation, even if the particular transfer itself does not represent wages, salary, or other employee compensation.

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ambiguity, Wells Fargo urges that all gift card accounts be expressly excluded from Regulation E coverage through the regulation or through staff commentary, regardless of the gift card's purpose. If the Board disagrees with this approach, at least consider providing that a gift card reloadable by a consumer does not make that card a payroll card, even if the gift card is used for compensation purposes. Only a gift card reloadable by an employer will transform that gift card into a payroll card.

5. Health Savings Accounts. A health savings account ("HSA") is a tax-exempt custodial account established exclusively for the purpose of paying an employee's qualified medical expenses, provided that the employee is covered under a high-deductible health plan when contributions are made.²⁴ Contributions may be accumulated over the years or distributed tax-free to pay or reimburse the employee's qualified medical expenses. The employee may contribute to the HSA. The employer may contribute to the HSA, whether or not that contribution is because of an election the employee made to have his/her pay contributed to the HSA. A member of the employee's family may also contribute to the HSA on behalf of the employee. The total amount of contributions that may be made in a year are limited, depending on whether the employee has self-only or family coverage, the annual deductible amount, the employee's age, whether the employee has contributed to other HSAs or Archer Medical Savings Account,²⁵ and other legal restrictions. The employee may deduct contributions made by the employee or a family member to the HSA on the employee's tax return. Employer contributions are excludible from the employee's income.

The HSA may be accessed through a card. An employee thus may be a payroll card account owner and the beneficiary of an HSA, accessible by card.

Financial institutions currently collaborate with health insurance providers to offer HSAs. In such arrangements, financial institutions assume a fiduciary or custodial role to the HSA. Financial institutions have taken the position that an HSA is not an "account" for purposes of Regulation E because financial institutions act as fiduciaries or custodians under HSA arrangements, holding the HSA funds, on behalf of employees. Because such fiduciary or

²⁴ 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.

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custodial arrangements are “bona fide trust agreements,” Wells Fargo believes that they are not covered by Regulation E.²⁶ However, because the employer’s funding of an HSA may be characterized as “other compensation,” Wells Fargo urges the Board to exclude expressly HSAs from Regulation E coverage, even if the HSA is accessible through a card. If the HSA is offered by an employer with a financial institution acting as a fiduciary or custodian, the arrangement should enjoy the “trust agreement” exemption, even if the employer funds the HSA on behalf of the employee.

6. Health Flexible Spending Arrangements. Many employees maintain health flexible spending arrangements (“FSA”)²⁷ under which pretax wages or salaries are set aside to pay or reimburse employees for medical care and related expenses, including, without limitation, preventive care benefits, under a written plan document. If the employee does not use the funds set aside during a calendar year, the funds are forfeited. These funds are accessible normally through a reimbursement request; they can also be accessed through the use of a card.²⁸ Wells Fargo seeks confirmation from the Board that such FSAs are not “payroll card accounts” for purposes of Regulation E, even if the FSA may be accessed through the use of a card.²⁹ While the FSA is funded with compensation, the setting aside of these funds is a postcompensation payment event under directions of the employee. Through an affirmative election by the employee to participate in the FSA, these funds in the FSA are no longer wages, salaries, or other compensation.

7. Health Reimbursement Arrangements. Many employees also maintain health reimbursement arrangements (“HRA”)³⁰ under which employees may be reimbursed for health-related expenses, including, without limitation, preventive care benefits, pursuant to a written plan document.³¹ An HRA may not be income to the employee. To the extent that an HRA is an

²⁵ IRC § 220.

²⁶ Regulation E § 205.2(b)(2).

²⁷ IRC §§ 106 and 125.

²⁸ One common card is the “Benny Card,”TM a debit card branded with the MasterCard® or Visa® logo and accepted by merchants and other payees able to use those payment networks.

²⁹ Similar to the “Benny Card,”TM these HSA cards may also be branded with the MasterCard® or Visa® logo.

³⁰ IRC §§ 105 and 106.

³¹ An HRA is an arrangement that: (1) is paid solely by the employer and not provided pursuant to a salary reduction election or otherwise under an IRC § 125 cafeteria plan; (2) reimburses the employee for medical care expenses (as defined by IRC § 213(d)) incurred by the employee and the employee’s spouse and dependents (as defined by IRC § 152); and (3) provides reimbursement up to a maximum dollar amount during a coverage period

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employer-provided accident or health plan, coverage and reimbursements of medical care expenses of an employee and the employee's spouse and dependents are generally excludable from the employee's gross income under IRC §§ 105 and 106.³² To qualify for that exclusion under §§ 105 and 106, an HRA may only provide benefits that reimburse expenses for medical care as defined in IRC § 213(d). Wells Fargo urges that accounts established under HRAs fall outside the purview of Regulation E's new proposed definition of payroll card accounts, because generally the benefits thereunder do not constitute income. Again, a specific commentary to that effect would be helpful.

8. Six-Month Implementation Period. In the event the Board determines that payroll card accounts are subject to Regulation E, the Board has solicited specifically comment as to whether a six-month period following the adoption of the final rules is sufficient to enable financial institutions to implement the necessary changes to comply therewith. Wells Fargo believes that a period of up to one year may be necessary. New products and services are created regularly by the financial services industry. When and if new rules under Regulation E relating to payroll card accounts are issued, new products and services may have been offered or under consideration by financial institutions relating to the payment of wages, salaries, and other compensation through card-based products and services. Such products or services may require further refinements and enhancements to comply with the new rule.

Further, when and if a final rule is issued, then existing products or services, or new products or services under consideration, may require further enhancements or refinements if the Board takes an unduly expansive view of the meaning of wages, salaries, and other compensation for purposes of Regulation E's coverage. For example, if the Board determines that the meaning of wages, salaries, and other compensation include remotely related products and services, such as HSAs, FSAs, and HRAs, financial institutions must not only conform existing products and services relative thereto, but also consider other related products or services then under consideration in light of the expansive definition.

and any unused portion of the maximum amount is carried forward to increase the maximum reimbursement amount in subsequent coverage periods. Notice 2002-45, 2002-2 CB 93, 06/26/2002.

³² *Ibid.*

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In addition, even the relatively common payroll card account may proceed through further development. These developments may present novel and challenging compliance issues if a final rule were adopted by the Board bringing payroll card accounts within the purview of Regulation E. By way of example, one new product under consideration would enable third parties (such as a spouse or dependent) to access a payroll card account through another linked card. The Proposal appears to contemplate exclusively one card associated with the payroll card account. Under current consideration, to enhance the appeal of the payroll card, innovators are promoting the possibility of having another card (a "user" card) also access the payroll card account.³³ That card could be held by a spouse or dependent of the payroll card account owner. That card could access the entire balance in the account or be subject to a restricted amount. The financial institution issuing the original payroll card may or may not know the identity of that third party, depending on the features of the user card. That third party may be able to access the funds in the account with or without a personal identification number, depending on the features of the user card product offered by the financial institution.

Given the foregoing, if the Board were to conclude that Regulation E covers payroll card accounts, what rights, if any, does the third party holder of the user card enjoy thereunder? Is that third party a "consumer" for purposes, e.g., of Regulation E § 205.6, or a mere "user"? Does that third party enjoy the limitations of liability for unauthorized transactions under that section? Is the payroll card account the consumer's account for purposes of Regulation E § 205.6? If the payroll card account is solely the employee's account, then what rights does that third party enjoy under Regulation E, if any? Perhaps through staff commentary, the Board can provide that a mere user of a payroll card account is not a consumer for purposes of Regulation E.

9. Financial Institution. In the Proposal, the Board suggests that one or more parties involved in offering payroll card accounts may meet the definition of a "financial institution" under Regulation E.³⁴ Wells Fargo is troubled by this observation by the Board. If Wells Fargo

³³ This additional card feature is colloquially called a "purse."

³⁴ In the Proposal the Board notes (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.

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were merely the depository of the employer's payroll account and the employer issues³⁵ and administers its employees' payroll cards directly or through a vendor, Wells Fargo should not be deemed a "financial institution" for purposes of Regulation E. The employer ought to be solely responsible for compliance with Regulation E; the mere maintenance of the payroll deposit account 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.

B. Section 205.3 Coverage.

1. **3(a) General.** Wells Fargo offers no comment on this proposed change.

2. **3(b) Electronic Fund Transfer.**

a. **New Commentary 3(b)-3.** New proposed commentary 3(b)-3 provides: "If an EFT or a check is returned unpaid due to insufficient funds in a consumer's account, an EFT from that consumer's account to pay a NSF fee charged is covered by Regulation E and, therefore, must be authorized by the consumer." This commentary raises the following.

- This proposed commentary contemplates an instance where a merchant or other payee engages in an ECK transaction or a regular check deposit transaction and the paying bank dishonors the ECK transaction or the check. In order to collect a fee triggered by the return of the dishonored transaction or check, the merchant or payee engages in an EFT. That fee assessment must be authorized by the consumer. However, if the paying bank assesses a fee against the consumer in connection with the dishonoring of the ECK transaction or the check, we understand that this commentary is not intended to cover that assessment of the fee. Please confirm this understanding.

³⁵ 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 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.

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- Wells Fargo currently converts credit card payment checks into a one-time ECK transaction. If the ECK transaction is dishonored by the paying bank, Wells Fargo assesses a fee against the consumer's credit card account. Provided the fee is disclosed to the consumer through the terms and conditions of the credit card agreement, Wells Fargo assumes that the obligation to secure the consumer's authorization to debit the consumer's account is addressed thereby, inasmuch as the "consumer's account" referenced in this commentary is an account covered by Regulation E. Please confirm that assumption.

b. Electronic Check Conversion. In an ECK transaction, the consumer provides a check to a merchant or other payee for the purpose of permitting the information from the check to be used to initiate a single EFT from the consumer's account. Specifically, the merchant or payee electronically scans and captures the magnetic ink character recognition ("MICR") information on the check for routing, account, and serial numbers, and enters the amount to be debited from the consumer's asset account. The EFTA expressly provides that transactions originated by check, draft, or similar paper instrument are not covered thereby.³⁶ In response to an industry request that the Board clarify EFTA's coverage of ECK transactions, the Board on March 16, 2001, issued amendments to official staff commentary to Regulation E, establishing clear guidance for Regulation E's coverage of these transactions.³⁷

The current staff commentary provides that ECK transactions are covered by the EFTA and Regulation E if the consumer provides the check for the purpose of initiating an EFT and authorizes the transaction. The regulatory impact is the case whether the consumer's check is blank, partially completed, or fully completed and signed. This coverage is afforded regardless of whether the check conversion occurs at point-of-sale ("POS") or in an accounts receivable conversion ("ARC") transaction where the consumer mails a fully completed and signed check to the payee that is converted to an EFT. The staff commentary provides that a consumer authorizes an EFT if notice that the transaction will be processed as an EFT is provided to the consumer and the consumer completes the transaction by providing a check to a merchant or other payee for the MICR encoding information.

³⁶ 15 USC § 1693a.

³⁷ 66 Fed. Reg. 15187 (March 16, 2001).

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The Proposal would address Regulation E's coverage of ECK services and those providing the services. The proposed rule would provide additional guidance regarding rights, liabilities, and responsibilities of parties engaged in ECK transactions. In sum, the Proposal provides that when a check, draft, or similar paper instrument is used as a source of information to initiate a one-time EFT transaction, including ARC and POS transactions, from a consumer's account, that transaction is covered by Regulation E, and is deemed not to be a transfer originated by check.

Currently, under Regulation E, a merchant or other payee engaging in ECK transactions is not covered by the regulation, because it does not satisfy the definition of "financial institution," if the merchant or other payee does not directly or indirectly hold a consumer's account, or issue an access device and agree to provide EFT services. However, since the issuance of the March 2001 commentary, concerns have been raised about the uniformity and adequacy of some of the notices provided to consumers about ECK transactions by merchants and other payees. Accordingly, the Board is proposing to require merchants and other payees initiating one-time EFT using information from a consumer's check, draft, or similar paper instrument, to provide notice to secure a consumer's authorization for the transfer. In order to foster consistency and clarify of such notices, the Board in the Proposal is providing model clauses, to be used by merchants and other payees of checks subject to ECK transactions.

With regard to the foregoing concerning ECK transactions, Wells Fargo offers the following comments:

- The Board solicits comments on whether merchants or other payees should be required to obtain the consumer's written, signed authorization to convert checks received at POS. This proposal is extraordinarily burdensome. If the merchant or other payee is required to secure a consumer's written, signed authorization to convert each check at POS, payment transactions would be unduly delayed, as merchants and other payees endeavor to explain the purpose of the authorization. This result would be particularly acute for merchants with high check volume. Wells Fargo strongly objects to this proposal.³⁸

³⁸ We are mindful that National Automated Clearing House Association ("NACHA"), in its 2004 Operating Rules, at Subsection 2.1.2, generally requires that debit entries to a Consumer Account "must be in writing and signed or similarly authenticated by the consumer." However, as to ARC and RCK transactions, that authorization may be satisfied by a notice under such NACHA Rules; each authorization need not be signed by the consumer. The Board proposes to expand this signed authorization requirement to all ECK transactions, not simply POP transactions.

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- The language in proposed Regulation E § 205.3(b)(2)(i) is overly broad. The proposed language provides that Regulation E “applies where a check, draft, or similar paper instrument is used as a source of information to initiate a one-time electronic fund transfer from a consumer’s account.”³⁹ This language fails to limit the coverage to those instances where a consumer has provided a check solely for the purpose of initiating an EFT. This broad language may result in Regulation E coverage of transactions arising from the exchange of electronic check information or images through electronic information or image files, since an electronic information or image of a check is created using a check as a “source of information.” While electronic check presentment transactions would normally be governed by the Uniform Commercial Code (“UCC”)⁴⁰ (with the “presentment notice” the legal equivalent of “item” or “check” for purposes of the UCC), the proposed language may bring such presentment notice within the purview of Regulation E inadvertently. Financial institutions would not therefore have a bright line to determine when UCC coverage ends and Regulation E coverage begins. Wells Fargo recommends that the Board expressly provide through the regulation or a commentary that this part does not apply to items or checks presented under a presentment notice under UCC § 4110.
- In model clause, A-6(a), “Sample Notice About Electronic Check Conversion,” the Board proposes that the merchant or other payee obtain authorization to process the transaction as an ECK transaction, or, in the alternative, to process it as a check transaction. In the Proposal,⁴¹ the Board solicits comment on whether a disclosure stating that a consumer authorizes an EFT or, alternatively, a check transaction, may result in any consumer harm or create any other risks. Specifically, the Board seeks comment on whether payees obtaining alternative authorizations should be required to specify the circumstances under which a check that can be used to initiate an EFT will be processed as a check. One risk in providing a notice for alternative payment processing is that the consumer may not

Further, even if NACHA were to amend or modify this requirement for written, signed authorization, the requirement, if adopted by the Board, would remain to encumber financial institutions under Regulation E.

³⁹ 69 Fed. Reg. at 56008.

⁴⁰ Uniform Commercial Code § 4110.

⁴¹ 69 Fed. Reg. at 56001.

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know whether the transaction will be governed by Regulation E or the UCC.⁴² However, this risk is remote, because consumers as a practical matter will unlikely recognize that one payment method triggers Regulation E coverage and another triggers UCC coverage; they may not have the sophistication to draw this legal distinction. Another risk is that the consumer may not appreciate fully that an ECK transaction will post more rapidly than a regular check, notwithstanding the express terms of the model clause. With regard to the solicitation about disclosing the specific circumstances under which an EFT will be processed as a check, Wells Fargo objects to this proposal because it would be highly detailed and complex; moreover, if circumstances change, further disclosures would be necessary presumably. If a consumer were to review such disclosures, processing of payment transactions could be seriously delayed. Further, it may not be practical to list all the circumstances where a transaction may be processed by check.

- Wells Fargo has concerns about proposed commentary 3(b)(2)-2 providing: "If a payee obtains a consumer's authorization to use a check solely as a source document to initiate an EFT, the payee cannot process the transaction as a check."⁴³ The model clause for this option is A-6(b), "Optional Notice Where Checks Are Converted."⁴⁴ In some instances, an ECK transaction may be rejected by the paying bank for one or more reasons. The payee may be required to use the original check to complete the transaction. Under the Proposal, absent further authorization from the consumer, the payee cannot proceed to so complete the transaction. If the payee proceeds to use the original check in lieu of the ECK transaction, the consumer is not harmed; indeed, the posting of the transaction may be delayed, to the benefit of the consumer enjoying the "float." While the payee could use model clause A-6(c), "Optional Notice Where Checks Would Not Be Converted Under Specified Circumstances,"⁴⁵ the risk is that the payee may not list entirely all specific circumstances under which the payment could be processed as a check. If an

⁴² See comment above at page 14.

⁴³ 69 Fed. Reg. at 56010.

⁴⁴ 69 Fed. Reg. at 56009.

⁴⁵ *Ibid.*

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unlisted circumstance occurs, the payee is thereby barred from processing the payment as a check; the payee would need to seek specific "clear" authorization from the consumer.⁴⁶

- With regard to the model clauses generally, Wells Fargo is concerned that a merchant in some cases may use multiple portals for presentment of the original check, an EFT (based on using the check as a source of information), or an image of the check, including, but not limited to, ACH debit entries; debit card networks; image exchange; substitute check; or automated intrafinancial institution debit, if the check is "on-us." If a merchant has a payment election based on the most economical, efficient, and prompt available portal, the merchant should not be required to detail such portals in the notice to the consumer. In addition, as and when new payment portals become available through technological development, a merchant should not be required to amend such notice, to set forth the newly available portal. Wells Fargo suggests the following notice in such cases:

When you provide a check, you authorize us (a) to use information from your check to make a one-time electronic fund transfer from your account; (b) to process this transaction as a check; or (c) to present electronically information about this payment transaction to effect payment. When we use your check to make an electronic fund transfer or other electronic means of payment, funds may be withdrawn from your account quickly, and you will not receive your check back from your financial institution.

3. 3(c) Exclusion From Coverage. Wells Fargo has no comment on this proposed revision.

C. Section 205.5 Issuance of Access Devices. If an employer wishes to require its employees to use a card to access funds in a HSA, FSA, or HRA, it should be able to do so free of the restraints of Regulation E § 205.5. As detailed above, Wells Fargo contends that such arrangements are not subject to Regulation E. If the Board were to determine that HSAs, FSAs and HRAs are payroll card accounts, employers would face difficulty in efficiently administering these arrangements. An employer would, among other compliance requirements, be required to secure a request from each and every employee wishing to participate in a HSA, FSA, or HRA arrangement, if the funds in such arrangements were accessible principally or solely by the use of a card. Further, if an employee uses an existing payroll card account, would the issuance of

⁴⁶ See proposed comment 2 to paragraph 3(b)(2).

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another card to access a HSA, FSA, or HRA violate the "one-for-one rule"? Please clarify this point through additional commentary, if appropriate.

D. Section 205.7 Initial Disclosure.

1. **7(a) Timing of Disclosure.** Wells Fargo offers no comment on this proposed change to the commentary.

2. **7(b) Content of Disclosures.** Wells Fargo offers no comment on this proposed model disclosure.

3. **7(c) Addition of Electronic Fund Transfer Services.** Wells Fargo offers no comment to this proposed relocation of the commentary.

E. Section 205.10 Preauthorized Transfers.

1. **10(b) Written Authorization for Preauthorized Transfers from Consumer's Account.** With continuing innovation in the industry, one troubling compliance issue is when a card has both a debit card and credit card features. A single card may be used as a debit card, and when the funds in the associated deposit account are completely consumed, the credit feature of the card is invoked. Even if a merchant were to inquire of the card owner, the card owner may not have knowledge as to whether the debit or credit feature of a card is in effect. In such circumstances, requesting the consumer to specify whether the card to be used for the authorization is a debit card or a credit card, using those terms, may not be adequate, because the card holder may not have knowledge. Nevertheless, Wells Fargo seeks confirmation from the Board that requesting the consumer to specify whether the card to be used for the authorization is a debit or credit card is adequate due to the likelihood that the consumer may not have information at the time of such inquiry.

2. **10(c) Consumer's Right to Stop Payment.** Wells Fargo has no comment to this proposed change to commentary 2 and addition of commentary 3.

3. **10(d) Notice of Transfers Varying Amount.** Wells Fargo supports the proposed commentary 3.

F. Section 205.11 Procedures for Resolving Errors.

1. **11(b) Notice of Error from Consumer.** Under proposed commentary 7 to paragraph 11(b)(1), an institution is not required to comply with the requirements of this section for any notice of error from a consumer that is received by it later than 60 days from the date on which

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the periodic statement first reflecting the error is sent to the consumer. With regard to proposed commentary 11(b)-7, Wells Fargo is unclear on the following sentence: "Where the consumer's assertion of error involves an unauthorized EFT, however, the institution must comply with § 205.6 before it may impose any liability on the consumer."⁴⁷ Does the Board merely mean in this sentence that the institution must discharge the requirements of subsection 205.6(a) referencing the disclosures required by § 205.7(b)(1), (2), and (3)? The reference to the entire § 205.6 is confusing because of § 205.6(b)(1), outlining the limitation of liability when timely notice of an unauthorized EFT is given by the consumer. Does the Board intend merely to reference § 205.6(b)(2), referencing instances in which the consumer fails to provide timely notice? Please confirm the intent of this sentence in an amendment to the proposed commentary.

On a related topic, we note that Regulation E does not contain a time limitation that would preclude a consumer from asserting a claim of an unauthorized EFT. We recommend that a new provision similar to the one year statute of limitations contained in EFTA § 915(g) be added to Regulation E. This addition would be consistent with the expedited recredit provisions of the Check Clearing for the 21st Century Act ("Check 21")⁴⁸ and Regulation CC § 229.56(c). These provisions are modeled after the error resolution structure of Regulation E. Under Check 21 § 11(a)(1) and Regulation CC § 229.56(c), a one-year statute of limitations within which a claim must be enforced is applicable. Similarly, under UCC § 4406(f), a customer must notify its bank about any unauthorized signatures or alterations within a one-year period subsequent to the availability of the periodic statement. We urge the Board to adopt a new one year statute of limitations provision to Regulation E consistent with the laws and regulations set forth above.

2. 11(c) Time Limits and Extent of Investigation. With regard to proposed commentary 11(c)(4)-4, given the extraordinary volume of unauthorized transactions under review regularly by Wells Fargo and other national and regional financial institutions, the expansion of the investigation burden is highly unreasonable. Currently, where the allegation pertains to a transfer to or from a third party with whom Wells Fargo has no agreement for the type of EFT involved, Wells Fargo is permitted to review "its own records" under Regulation E § 205.11(c)(4). This duty is commonly described as the "four walls" rule.

⁴⁷ 69 Fed. Reg. at 56001.

⁴⁸ Pub. L. No. 108-100, 117 Stat. 1177 (codified at 12 U.S.C. §§ 5001-5018).

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Proposed commentary 11(c)(4)-5 would be added to provide that a “financial institution must review all information within the institution’s own records relevant to resolving the consumer’s particular claim.” For instances, if the claim involves an allegedly unauthorized ACH transaction, Wells Fargo would not be permitted “to limit its investigation to the payment instructions where additional information within its own records could be dispositive of the consumer’s claim.” Currently, when Wells Fargo investigates an allegedly unauthorized ACH transaction, it normally reviews the transaction record and the periodic statement of the consumer for a prior 90-day period, to determine if the transaction falls outside a regular pattern. This transaction and periodic statement review may not cover “all information within the institution’s own records relevant to resolving the consumer’s particular claim.” How many periodic statements must Wells Fargo review to satisfy this new requirement to review “all information”? Wells Fargo cannot know if any records relevant to resolving a consumer’s particular claim exists unless and until it conduct a review. That review could be highly burdensome, because records could be located in a number of locations, especially for a substantial enterprise, such as Wells Fargo. Wells Fargo urges that this commentary not be adopted.

G. Section 205.16 Disclosures at Automated Teller Machines. The Proposal would amend the staff commentary,⁴⁹ to clarify the current Regulation E requirements for notices posted on or at the ATM. Specifically, the Proposal would clarify that if an ATM fee will not be imposed under certain circumstances, ATM operators may disclose in the notice posted on or at the ATM that a fee “may” be imposed. Wells Fargo strongly supports the proposed clarification and applauds the Board’s effort to assist ATM operators in understanding and complying with the ATM fee disclosure requirements of Regulation E § 205.16(b)(1).

We believe that the Proposal is fully consistent with EFTA § 904(d)(3)(A) and (B), providing that an ATM operator, charging a consumer for EFT services, must provide notice to the consumer indicating “that a fee is imposed” for the service in a prominent and conspicuous location on or at the ATM and through an ATM on-screen disclosure accompanied by the fee amount. We believe that it is important to clarify that the current regulatory language of

⁴⁹ Current staff commentary 16(b)(1)-1.

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Regulation E § 205.16(b)(1) should not be read to require a notice stating that a fee will be charged. Such an interpretation ignores current ATM fee practices that may benefit consumers.

We believe that the current ATM disclosure scheme, as clarified by the Proposal, adequately informs consumers of fees that will be imposed by ATM operators. Specifically, Regulation E § 205.16(b)(1) provides that “[a]n [ATM] operator that imposes a fee on a consumer for initiating an [EFT] or a balance inquiry shall . . . provide notice that a fee will be imposed for providing [EFT] services or a balance inquiry.”⁵⁰ This notice must be posted in a “prominent and conspicuous location,” either on or at the ATM and serves as an alert to the consumer that a fee may be imposed.⁵¹ In addition, before the consumer is committed to paying such a fee, the ATM operator is required to provide notice of the fee and its amount, either on the ATM screen, or on paper.⁵² Only after the consumer is provided these required notices, and elects to continue with the transaction or balance inquiry, may the ATM operator impose a fee.⁵³

With regard to the passage of the Gramm-Leach-Bliley Act (“GLBA”), Representative Marge Roukema, the sponsor of the ATM fee disclosure bill that was incorporated into the GLBA, publicly stated that “Federal Reserve regulations and industry rules already require that surcharges be disclosed. This bill simply puts existing practice into law. Since agency regulations and industry rules are subject to change, this sets a uniform standard that consumers will be able to count on.”⁵⁴ At the time that this requirement was enacted, many banks notified consumers through signage on or at the ATM machine that a fee may be imposed and through an ATM on-screen disclosure that specified the amount of the fee, if any, that would apply to the particular transaction before the consumer elected to proceed. Thus, it is consistent to clarify that existing Regulation E § 205.16(b)(1), stating that an ATM operator that imposes a fee for a specific type of transaction shall “provide [a] notice [statement] that a fee will be imposed for providing electronic fund transfer services or a balance inquiry,”⁵⁵ is satisfied by a statement that a fee may be imposed.

⁵⁰ Regulation E § 205.16(b)(1) (emphasis added).

⁵¹ *Ibid.* at § 205.16(c)(1).

⁵² *Ibid.* at § 205.16(c)(2).

⁵³ *Ibid.* at §§ 205.16(e)(1)-(2).

⁵⁴ Press Release, Office of Representative Marge Roukema, Banking Committee OKs Roukema ATM Fee Disclosure (Mar. 10, 1999) at <http://financialservices.house.gov/banking/31099rou.htm>.

⁵⁵ Regulation E § 205.16(b)(1) (emphasis added).

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In addition, permitting ATM operators, who do not universally charge consumers for EFT services, to use language indicating that a fee may be imposed, is consistent with EFTA § 904(d)(3)(A) and will serve to alert consumers to the more consumer-specific on-screen disclosures provided after card insertion. The more detailed on-screen notice, which will use the explicit language of Regulation E to notify consumers of the precise fee amount, if any, will ensure that a consumer receives adequate disclosure before he or she proceeds with an ATM transaction.

Although comment 205.16(b)(1)-1 explains that an ATM operator may “specify the type of EFT for which a fee is imposed,” in lieu of providing a general blanket statement that a fee will be imposed, ATM fee structures are sufficiently complex that a specific listing of every potential fee would result in a lengthy, detailed statement on or at the ATM that would be costly and would not add any practical value to a more general statement.

Further, we urge the Board to make clear in the supplemental information accompanying the final rule that the proposed revisions merely clarify the current ATM fee disclosure requirements. The failure to make such a clarification could lead to the misinterpretation that the revisions are only prospective in nature and do not reflect the current state thereof.

Wells Fargo also believes that it is important that the Board clarify that compliance with Regulation E’s ATM fee disclosure requirements can be satisfied in multiple ways. ATM operators that do not universally impose fees on consumers for EFT services should be permitted to post signs indicating that they may or that they will impose a fee. For example, ATM operators commonly apply fees to some types of ATM transactions, but not others. Types of transactions for which ATM operators may choose not to impose fees, include, but are not limited to: (1) ATM operator issued cards; (2) foreign bank cardholders; (3) cardholders of banks that are corporately affiliated with the ATM operator; (4) cardholders issued cards under governmental electronic benefit transfer programs; and (5) cardholders whose nonaffiliated card issuer has entered into a special contractual relationship with the ATM operator regarding surcharges.

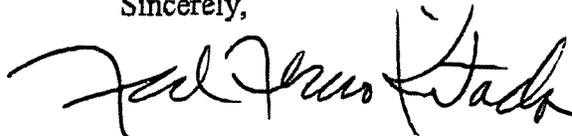
We urge the Board to clarify that ATM signs stating that “a fee will be imposed” and “a fee may be imposed,” both comply with Regulation E § 205.16(b)(1). The deletion of the word “will” in the commentary should not be construed to make the use of the term will inappropriate,

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even if a fee is not charged in all cases. The choice of may versus will should be a customer relations issue that is left to the ATM operator.

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

Sincerely,



Ted Teruo Kitada
Vice President &
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cc: James M. Koziol
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