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**CSBS ACCREDITED 1993**  
**NASCUS ACCREDITED 2000**

November 19, 2004

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

By email: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)

Re: Docket No. R-1210

Dear Ms. Johnson:

The North Dakota Department of Financial Institutions (“NDDFI”) provides the following comments in response to the Federal Reserve Board’s (“Board”) request for comments on proposed amendments to Regulation E. NDDFI is the state agency charged with the responsibility for chartering banks and credit unions as well as licensing collection agencies, money brokers, consumer finance companies, deferred presentment service providers, and sale of checks.

#### Section 205.3(b) Electronic Fund Transfer

The Board is proposing to subject merchants and other payees to Regulation E for the purposes of initiating an Electronic Check Transaction (“ECK”). NDDFI supports this extension of Regulation E to merchants and other payees. This extension will allow regulators to take prudent action to enforce regulation E against merchants and payees who initiate ECKs and complete an Electronic Funds Transfer (“EFT”) without proper notice to and authorization from consumers. As is noted in the request for comment a written signed authorization may be viewed as a more effective means than a mere sign for informing a consumer their checks are being converted. It is difficult, if not impossible to determine whether signs posted at the point of sale are clear and conspicuous. Also, the question as to whether the consumer ever saw and or *read* the sign is not determinable. Further as is footnoted in your request for comment, the NACHA rules require a merchant to obtain a written signed or similarly authenticated authorization from the consumer for an ECK transaction from a consumer’s account. It is the position of the NDDFI that the current conflict between Regulation E and the NACHA Operating Rules creates the potential for a fine against a financial institution which originates an ACH transaction for a merchant that has not obtained the written authorization from the consumer. For these reasons we would strongly encourage

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and support the amendment of Regulation E requiring the merchants and payees to obtain written signed authorization from a consumer at the POS before initiating an ECK. It is paramount that Regulation E and the NACHA rules are consistent in this matter.

NDDFI is very concerned whereby signage at the POS allows a merchant to recover an NSF fee through an EFT. The Board is proposing to require merchants and other payees that initiate an ECK transaction to disclose that the consumer authorizes the payee to charge a fee if there are insufficient funds and that the payee may collect that fee as an EFT. NASCUS supports this disclosure. The Official Staff Interpretation treats the initial ECK and the subsequent EFT for NSF as two separate transactions. NDDFI agrees with this interpretation and furthermore urges the Board to require distinct disclosures and written authorizations for both transactions.

I would like to thank the Board for the opportunity to comment on proposed amendments to Regulation E. Please do not hesitate to contact NDDFI if you have any questions.

Sincerely,

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Robert J. Entringer  
Assistant Commissioner