Lloyd G. Harris
Vice President and
Assistant General Counsel
Legal Department

November 19, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
Office of the Secretary
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Via e-mail (regs.comments@federalreserve.gov)

Re: Regulation E Proposed Rule; Docket No. R-1210

Dear Ms. Johnson:

The Board of Governors of the Federal Reserve System (the "Board") has requested comments on its proposed amendments ("Proposal") to the Board's Regulation E ("Regulation E"), which implements the Electronic Fund Transfer Act ("EFTA"), with respect to electronic check conversion, payroll cards, preauthorized transfers, error resolution and ATM disclosures. JPMorgan Chase & Co., on behalf of its main subsidiary bank, JPMorgan Chase Bank, National Association and its affiliates, appreciates the opportunity to submit this response.

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I. <u>Electronic Check Conversion ("ECK")</u>

The Proposal addresses two types of transactions under the general topic of ECK: (1) check conversion at the point-of-sale ("POS"), which under the National Clearing House Association ("NACHA") rules are called "point-of purchase" ("POP") transactions and (2) accounts receivable conversion ("ARC") transactions. POS transactions occur when a consumer provides a check to a merchant who electronically scans the check and captures the MICR encoding on the check for routing, account and serial number information and then enters the amount of the transaction. ARC transactions occur when a consumer mails a fully completed and signed check to the payee who converts the transaction to an electronic fund transfer ("EFT").

Recent statistics of unauthorized return activity from NACHA (3^{rd} quarter 2004) associated with these ECK transactions suggest that disclosure and authorization is not an on-going problem in the industry. ARC returns for unauthorized transactions were only 0.01% and all of these returns were associated with business check conversion errors. POP transactions resulted in a total of 0.06% unauthorized transactions, of which 0.03% was classified as unauthorized, and 0.03% was classified as business check rejects. On average, these transaction types have lower unauthorized returns than the traditional recurring payment (PPD) transactions (average of 0.07% unauthorized). Therefore, while we agree there is a need to obtain proper authorizations and proper disclosures, we question whether extending Regulation E to billers and merchants for these functions is necessary.

If "safe-harbor" language is deemed desirable, we believe that the language contained in proposed Model Clause A-6(a) satisfies the disclosure requirements. This notice informs the consumer that the consumer's check may be converted to an electronic fund transfer from the account or processed as a check. This model notice strikes an appropriate balance between informing the consumer how a payment may be processed and preserving the options available to payees and merchants as well as the financial institutions that will be part of the payment transaction. At this time, as payment systems are evolving, any disclosure to the consumer must permit sufficient flexibility to enable the payees and merchants, their banks and the payment systems to process payments in accordance with advances in technology and general trends in the industry. A notice requirement should not be so specific that it would preclude a type of payment processing, after the payment was initiated, other than the method described in the notice.

We believe the second part of Model Clause A-6(a) should be stricken. More specifically, the language "…funds may be withdrawn from your account [quickly/ as soon as the same day we receive your payment…"] is likely to confuse consumers. Some types of payments may be the same day, ACH transactions may be the next day or even possibly slower than check transactions. Once check image exchange network activity becomes more prevalent, check processing may be as fast as or possibly faster than electronic payment methodology. Consequently, a statement about the timing of a debit to the consumer's account may be misleading and inaccurate.

In addition, we are concerned about a disclosure informing the consumer that the original paid check will not be provided by the financial institution. Today, the common practice of most institutions is not to return original paid checks with periodic statements. Also, with the overall emergence of electronic check processing and the introduction of substitute checks, the industry will likely move quickly to pure truncation of checks, making this disclosure appear "dated". Perhaps the required disclosure should be that a "description of this payment will appear on your bank statement" which would be a more accurate and beneficial disclosure.

The Board has solicited comment on whether merchants or other payees should be required to obtain the consumer's written signed authorization to convert checks received in POS transactions. We recommend that there not be any signed written requirement. A clear and conspicuous notice is adequate. Consumers are becoming more attuned to EFTs, whether by ECK, ARC, consumer initiated online banking or banking by telephone transactions and other relationships entered into pursuant to the Electronic Signatures in Global and National Commerce Act.

Current NACHA rules require a signed authorization whenever the consumer is present and the voided check, or "source document", is returned to the consumer ("consumer-as-keeper" is the current rule); Regulation E is broader, allowing signage or other disclosure. To ensure that the consumer is aware a check has been converted to an EFT, requiring a signature when the consumer is present is likely the best practice. However, on the eve of massive changes in check processing resulting from the Check Clearing for the 21st Century Act ("Check 21") and image exchange processing, it is likely that electronic processing of most paper checks will begin earlier in the process, including at the POS. We believe that, over time, NACHA will likely modify its rules to allow notice via signage or other disclosures at the POS to replicate common industry practices. This would ultimately allow for what is termed as "back office capture" of check payments into an electronic form with ultimate settlement via ACH, Check 21 substitute checks or image exchange.

The Board requests comment on whether a disclosure stating that a consumer authorizes an EFT, or in the alternative, a check transaction, may result in consumer harm or create any other risks. In particular, comment is solicited on whether payees that obtain alternative authorization 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. We believe allowing "EFT or check" language contained in Model Clause A-6(a) provides for the most flexible options for processing and will not result in consumer harm.

We support the proposed rule that permits payees that obtain an alternative authorization as to whether the payment will be processed as a check or an EFT. However, we do not believe it should be mandatory to specify the circumstances under which each type of payment will be processed. In our view, a requirement that billers disclose, when they will convert a check and when they will not convert a check will inhibit innovation and the biller's ability to work with alternative methods. Such a requirement would be particularly inappropriate at the present time given the rapid changes in this area due to Check 21 and electronic presentment developments generally. Further, the criteria used to determine the processing method is often proprietary and complex and would be difficult to explain to consumers without creating more confusion.

It appears that there may be a typographical error in the Proposal. The proposed amendment to section 205.3(b) intended to amend the definition of an electronic fund transfer appears to have omitted the following italicized language without any indication of an intended deletion: "The term electronic fund transfer *means any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing or authorizing* a financial institution to debit or credit a consumer's account". We request clarification on this point.

II. Payroll Cards

As a general proposition, we agree that Regulation E should cover payroll cards, regardless of whether the payroll card is issued or operated by a bank, a third party processor or by an employer. However, payroll cards must be very carefully defined so as to include only those types of products that are truly intended to act as an "account" and, therefore, covered by Regulation E. The Board described payroll cards as the functional equivalent of an account for the "unbanked". We agree that consumers who fit under that generic heading ought to be entitled to the general Regulation E consumer protections. However, we recommend that payroll cards not be subject to the entire breadth of Regulation E.

In particular, payroll card issuers should be exempt from the section 205.9(b) requirement to issue paper periodic statements. In our experience, reasonable alternatives are necessary given the fact that many payroll card users are transient and, as a result, a large percentage of statements are returned due to faulty addresses. The payroll card concept was devised as a low cost method for employers to provide payroll to their employees and at the same time facilitate the employee's access to his/her funds. These employees now have access to their funds at ATMs as well as the ability to make everyday purchases through debit card functionality. Generally, holders of payroll cards are provided with an "800" telephone number or a website address in order to obtain balance information. In addition, balance information is available at ATMs.

Payroll card products typically do not permit additional deposits to be made by the employee. Credits are solely in the form of payroll distribution. Since a payroll card does not possess all of the attributes of a traditional deposit account, generating a monthly paper periodic statement is not necessary. In addition, if paper periodic statements are required, the costs of this product would increase thereby making the product less attractive to consumers, employers and institutions. The payroll card information is readily available to the employee without incurring any cost or inconvenience. We recommend that financial institutions be provided with the same alternative to periodic statements as are provided to government agencies under section 205.15(c).

Section 205.2(b) of the proposed Official Commentary makes an exception to the definition of "account" by stating that a payroll card 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". We agree with this concept but are concerned that this definition of "account" still may be too broad. The payroll card product, used as a generic term, may encompass many different types of products that are currently under development as well as products yet to be designed.

The Board should be cognizant of this new and developing arena for card products to effectuate various types of payments. As these products evolve, the industry should not be constrained by regulatory compliance requirements not applicable or appropriate for such products. At this time, regulation in this area may be premature.

The Board further solicited comment on whether Regulation E coverage should be determined by whether a payroll card account holds consumer funds that qualify as "eligible" deposits for the purposes of section 3(1) of the Federal Deposit Insurance Act. We urge that this not be the case. If this were the case, then it would be unclear as to whether other Board regulations such as, D, P, CC and DD as well as the USA PATRIOT Act would apply to payroll cards. Although we agree that payroll cards should be covered by Regulation E, given the intent and purpose of payroll cards, compliance with these regulations will be unduly burdensome and not yield the consumer benefits intended by those regulations.

III. Error Resolution

We agree with the proposed commentary to section 205.11(b)(1)(7) regarding the effect of a late notice. The Proposal states that if a notice of error from the consumer is received later than 60 days from the date the periodic statement first reflecting the error is sent, the institution is not required to comply with the error resolution timing requirements set forth in section 205.11. However, the Proposal states that the institution must still comply with section 205.6 consumer liability provisions.

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 provision similar to the one year statute of limitations set forth in section 915(g) of the EFTA be added to Regulation E. This would be consistent with the expedited recredit provisions of Check 21 and Regulation CC section 229.56(c) which are modeled after the error resolution structure of Regulation E. Under Check 21 section 11(a)(1) and Regulation CC section 229.56(c), there is a one year statute of limitations within which a claim may be enforced. Similarly, under Uniform Commercial Code section 4-406, a customer must notify the bank about any unauthorized signatures within one year after the account statement is made available. We recommend that Regulation E be consistent with these other statutes and regulations, which essentially cover the same concept as the of Regulation E error resolution provisions.

The proposed Commentary to section 205.11(c)(4) expands the "four walls" rule regarding the scope of an investigation conducted by an institution. The current requirement is a "review of its own records", which typically is a review of the payment instructions. We believe that this proposed revision is unclear and has the potential to be unreasonably burdensome on an institution.

The Proposal adds a new section 11(c)(5) to the Official Commentary. This would require an institution to "…review all information within the institution's own records relevant to resolving the consumer's particular claim. The investigation may not be limited to the payment instructions where additional information within its own records could be dispositive of the consumer's claim." We believe this provision is unduly vague and raises numerous questions. To what extent would an institution be required to review all of the information about a customer? Would this require an institution to review other accounts maintained by the same consumer? What if other accounts and records for a particular consumer are maintained at an affiliate? If a consumer had prior transactions with a particular merchant, do prior statements and transactions need to be reviewed and, if so, how many? Given the ambiguities noted, compliance with this standard could prove to be unduly burdensome, costly and impractical. We believe any investigation should be limited to the transaction and the account in question.

IV. Disclosures at Automated Teller Machines

The proposed modification to the Official Commentary for section 205.16(b)(1) seeks to address the issue of ATM signage depending on whether an institution "will" or "may" impose a service charge when a consumer uses a card not issued by that ATM operator. While section 904(d)(3) of the EFTA requires an ATM operator to provide notice that a fee will be imposed, the statute is silent with respect to instances when the ATM operator may not charge a fee in all circumstances. The Board has expressed a concern that a sign on the ATM stating that a fee will be charged may be misleading if, in fact, a fee is not charged. We share that concern but suggest this can be addressed without requiring institutions to change existing ATM signage, causing institutions to incur substantial expenses which may not yield a corresponding benefit to consumers.

If an institution must state on the ATM sign that a fee "will" or "may" be charged, a subsequent change in an institution's policy would require a likewise change in the ATM sign. The result would be another significant cost to change the ATM signs across an institution's ATM network, which may include thousands of ATMs. Since there is a twofold notice requirement regarding the imposition of a fee, we recommend that the issue of specificity as to whether or not the fee will be imposed can be addressed on the ATM screen or the paper notice that is provided before the consumer is committed to paying a fee.

The critical disclosure to the consumer is the second part of the notice requirement when either a screen appears or a paper notice is provided before the consumer continues with the transaction. This disclosure is more conspicuous to the consumer and frequently requires an affirmative response from the consumer before continuing with the transaction. In the event an institution changes its policy about fees, a change to the ATM screen or paper notice can be done without the institution incurring the significant costs that would be otherwise incurred if the ATM signs need to be changed.

Consequently, we recommend that institutions be permitted to maintain their current ATM signs. We believe that consumers are not mislead if the ATM sign states that a fee "may" or a "will" be charged. As previously stated, the subsequent ATM screen or paper notice would be quite clear as to whether a particular transaction would incur a fee. If all transactions do not trigger a fee, it would be very impractical to have an ATM sign state the types of transactions that will incur a fee. Such a notice may be lengthy and cumbersome and potentially cause consumer confusion that currently does not exist. Subsequent changes to an institutions policy would then trigger costs that will not result in tangible consumer benefit. We are not aware of consumer complaints on this issue.

V. Adoption Timeframes

We believe that six months is not a sufficient time following adoption of the final rule to enable financial institutions to make the necessary revisions to policies, procedures and disclosures to comply with the rule. We recommend a period of 12 months. Twelve months is reasonable if new disclosures must be developed and if any notices need to be mailed to customers. Notices to customers usually are programmed into regularly scheduled mailings of periodic statements.

JPMorgan Chase & Co. appreciates the opportunity to comment on this subject and would be pleased to discuss any of the points raised in this letter in more detail. Should you have any questions, please contact Lloyd Harris at 212-552-1785.

Sincerely,