



The PNC Financial Services Group, Inc.
249 Fifth Avenue
One PNC Plaza, 21st Floor
Pittsburgh, PA 15222-2707

412 768-4251 Tel
412 705-2679 Fax
james.keller@pnc.com

James S. Keller
Chief Regulatory Counsel

November 22, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
regs.comments@federalreserve.gov
Attn: Docket No. R-1210

Re: Docket No. R-1210—Proposed Regulation E

Dear Ms. Johnson:

PNC Bank, National Association (“PNC Bank”), Pittsburgh, Pennsylvania, the principal bank subsidiary of The PNC Financial Services Group, Inc. (“PNC”), Pittsburgh, Pennsylvania, is grateful for the opportunity to comment on the amendments proposed by the Board of Governors of the Federal Reserve System (“Board”) to its Regulation E, Electronic Fund Transfers (12 C.F.R § 205) (69 *Fed. Reg.* 55996 (Sept. 17, 2004)), implementing the Electronic Funds Transfer Act (“EFTA”). The proposed amendments to Regulation E are intended to address new developments in electronic commerce and clarify the regulatory scheme applicable to such innovation. PNC Bank commends the Board on its efforts to provide guidance on the applicability of the Regulation to new and existing products.

PNC is one of the largest diversified financial organizations in the United States, with \$77.3 billion in total assets as of September 30, 2004. Its major businesses include community banking, corporate banking, real estate finance, asset-based lending, wealth management, and global fund processing services. PNC Bank has branches in Indiana, Kentucky, New Jersey, Ohio, and Pennsylvania. PNC also has one other bank subsidiary: PNC Bank, Delaware, Wilmington, Delaware, which has branches in Delaware.

PNC appreciates the opportunity to comment on the Board’s proposal to amend Regulation E and to revise the official staff commentary to the Regulation. The proposed revision intends to address new developments in electronic commerce and clarify the regulatory scheme applicable to such innovation. PNC Bank commends the Board on its attempt to provide guidance to the commercial sector on the applicability of the Regulation to new products. This comment expresses PNC Bank’s agreements with, recommended changes to, and suggestions for improving, the proposal.

Summary

In response to the Board's request for comment, this letter expresses PNC's agreement with, objections to, and suggestions for improving, the proposal. Our comments, in the order set forth in the Proposal, address the following:

- (1) support for applying Regulation E to payroll cards, but suggesting an alternative to the standard disclosure requirements;
- (2) strong concerns about determining Regulation E coverage by reference to FDIC coverage;
- (3) support for the proposal to permit a single authorization for multiple electronic check conversions ("ECKs");
- (4) support for proposed exception from the one-for-one rule regarding the issuance of access devices, and suggestion to permit replacing old access devices with upgraded access devices;
- (5) support for disclosures for ECK transactions, and suggestion for a one-year implementation period;
- (6) support for the withdrawal of the interpretation that consumer authorization of electronic debits be in writing and the ability of merchants to rely on consumer statements as to whether a card is a debit or credit card;
- (7) support for the proposal to permit financial institutions to rely on third parties to stop payment of recurring debits for real time processing;
- (8) support for the proposal to limit the requirement to provide notices for each transfer that varies in amount;
- (9) support for clarification when consumer reports errors after 60-day notice period, and recommendation to clarify that complying with Section 205.6 will not be deemed as imposing a liability on consumers prior to resolution;
- (10) strong concerns about excessive burdens imposed on large financial institutions from the proposal to expand significantly the error resolution requirement; and
- (11) support for the proposed changes regarding on-site ATM disclosures.

In addition, we propose that the Board consider expanding Section 205.4 to explicitly permit financial institutions to enter into agreements with non-financial institutions to apportion responsibility for complying with the requirements of Regulation E.

Discussion

1. Section 205.2(b)--Definition of Account: The Board has proposed to expand Regulation E to cover payroll cards by amending Section 205.2(b)(3) to “provide that the term ‘account’ includes a ‘payroll card account’ directly or indirectly established by an employer on behalf of a consumer to which electronic funds transfers of the consumer’s wages, salary, or other employee compensation are made on a recurring basis.” PNC Bank agrees that it would be appropriate for a payroll card account to be considered an account under Regulation E, with some exceptions as described below. PNC Bank also agrees that Regulation E should not be applicable to “gift” cards, which could impose an inappropriate regulatory burden on card issuers, not only under Regulation E, but also under other regulations and rules such as the Bank Secrecy Act, and the USA PATRIOT Act.

We are concerned that the proposal will include the requirement to provide periodic statements in connection with payroll cards. The Board has indicated that payroll cards are actively marketed to employers and service providers as a means of providing wages to individuals, many of whom lack a traditional banking relationship. As such, payroll cards are effectively substitutes for traditional checking accounts. While we generally agree that there are similarities between the products, there are significant differences between them that mitigate in favor of limiting the Regulation E’s applicability to payroll cards. For example, the owner of a payroll card may not add to the balance on the card; withdrawals from the card may be made only through the use of the card and not through the use of checks or tellers or telephone transfers; third parties such as banks crediting interest payments, are not able to load value onto the cards, and many employees paid by this method are transient.

We also believe that a requirement to provide periodic statements could severely reduce the use of payroll cards since the structure of payroll card programs makes it impractical to deliver periodic statements. For example, the payroll cards may be issued by financial institutions or third party processors that track cards by number, without having the consumer’s name or address. In the absence of such personally identifying information, providing periodic statements could prove to be difficult. While the employers have such information, we believe requiring employers to provide periodic statements to employees could severely reduce the use of such cards.

We request that the Board consider Section 205.15 of Regulation E as a model for the alternative that we recommend. Section 205.15 permits government issuers of Electronic Benefit Transfer devices (“EBT”) to provide an alternative to the periodic statement. A periodic statement required under Section 205.9 need not be provided to consumers by government agencies if the agencies make the consumer’s account balance available through telephone or at an ATM and if a written history of transactions is provided upon oral or written request. Section 205.15 requires initial and error resolution disclosures, but the required disclosures are also modified to reflect the alternative to periodic statement provisions.

Recommendations:

- a) The Regulation E compliance requirements for payroll cards should be consistent with the provisions governing EBT transactions. For example, a consumer could call a customer service number and follow the security access procedure, and the financial institution could then match the cardholder to the card number and provide the transaction history for the previous 60 days.
 - b) It is recommended that the Board explicitly permit both financial institutions and non-financial institutions that participate in the issuance of payroll cards to apportion among themselves, by contract, the responsibility for compliance with the provisions of Regulation E. Depending on the method by which the cards are loaded, issued and tracked, there may not be a single party to the payroll card process. Also, please see PNC's Comment 13 below, which further addresses this recommendation.
2. Federal Deposit Insurance Corporation ("FDIC") Stored Value Card Proposal: The Board is soliciting comment on whether Regulation E coverage should be determined on the basis of whether a payroll card account holds consumer funds qualifying as eligible deposits for purposes of Section 3(l) of the Federal Deposit Insurance Act ("FDIA"). PNC Bank strongly opposes the use of the FDIC definition of what constitutes a deposit for FDIC insurance purposes as a litmus test for the types of cards that will be subject to Regulation E. A decision to require financial institutions to insure the value on a stored value card bears no relationship to the purposes or protections that are the purview of the EFTA and Regulation E. Many stored value card programs are structured in a way as to make it impossible for a financial institution to apply Regulation E obligations to them. This is especially true of single-use or non-reloadable cards.

PNC Bank submits that there is no commonality of purpose between the EFTA and the FDIA insurance provisions, and therefore strongly urges the Board to dissociate any determination of coverage of Regulation E from the FDIC's determination of what constitutes a deposit under the FDIA.

3. Section 205.3(b)--Electronic Fund Transfer: PNC Bank is already required to treat ECK transactions as subject to Regulation E. PNC Bank supports the proposed changes to permit a single authorization for multiple ECKs for a single billing cycle and to obtain the consumer's authorization to use the check as the initiation of an EFT or as a regular check. In addition, we believe that notifying consumers that their account may be debited faster than with payment by paper check will help reduce overdrafts on consumers' accounts.

In Section 205.3(b)(2)(ii), the Board proposes to require entities initiating an EFT using information from a customer's check to provide notice that when the transaction is processed as an EFT, funds may be debited from the consumers account quickly. There are many circumstances today, and there will be more in the future as Check 21 related transaction processes grow, in which paper checks will clear as quickly, or even more

quickly, than electronic transactions. Accordingly, we recommend that this language be omitted.

4. Section 205.5--Issuance of Access Devices: PNC Bank endorses the amendment to proposed Comment 5(b)-5 that would permit financial institutions to issue more than one access device provided that they comply with the provisions of 205.5(b) regarding unsolicited devices. PNC Bank believes, however, that the amendment should be expanded to afford financial institutions the flexibility to replace access devices having limited capabilities with those that have greater capabilities, provided that appropriate disclosures accompany the replacement access devices. This would permit banks to replace, for instance, ATM-only cards with debit cards. It is important to note that in many instances, point of sale transactions executed with debit cards frequently have more favorable liability standards with respect to consumers than Regulation E affords for unauthorized ATM withdrawals.

Recommendation: PNC Bank requests an additional amendment to permit the issuance of a substitution access device with greater capabilities than that of the device it is replacing. We recommend that the new access devices be required to be accompanied by a disclosure explaining the expanded capabilities of the card and, if applicable, any differences in error resolution or consumer liability.

5. Section 205.7--Disclosures: The proposed amendment to section 205.7 would require financial institutions to amend their disclosures to include electronic check conversion transactions. We anticipate that this would be an expensive and time-consuming process. In PNC Bank's opinion, six months is insufficient time to draft, review and finalize disclosures. While PNC Bank does not object to amending its disclosures, it strongly urges the Board to permit banks one year within which to provide these new disclosures to all depositors having EFT capability on their accounts.
6. Section 205.10--Written Authorization for Preauthorized Transfers from Consumer's Account: PNC Bank supports withdrawal of Comment 10(b)-3, which requires written authorization of preauthorized transfers from a consumer's account. Permitting authorization to be obtained by telephone is appropriate in light of the passage of the E-Sign Act, which gives status to electronic records that is equal to that afforded paper records.

PNC also supports the proposal to modify Comment 10(b)-7 to permit merchants to rely upon a consumer's statement as to whether a card is a credit card or a debit card, and the flexibility to select procedures reasonably adapted to avoid error. We support this proposal as it would relieve financial institutions that process such transactions from the administrative burdens of determining whether the consumer device used was a credit or debit card. We agree with the proposal's important acknowledgement of the various circumstances under which consumers make purchases other than in person (e.g., "card not present" transactions) and the differing nature of merchant operations. Asking a consumer whether the card used for the transaction is a debit card or a credit card is a reasonable procedure. We believe merchants will devise appropriate security methods in an effort to

reduce losses on card transactions, and that the proposal allows for an appropriate level of flexibility.

7. Section 10(c)—Consumers’ Right to Stop Payment: PNC Bank supports the Board’s proposed Comment 10(c)-3 addressing procedures for stop payment of recurring debits for real time processing. It is difficult for a financial institution to block the ACH payments where the third party continues to present them to the bank for payment. Comment 10(c)-3 would permit institutions to use third parties to block such transfers. This approach has the potential for improving service to consumers and reducing the information, technology time and resources of banks that are required to develop and implement such automated services.
8. Section 10(d)—Notice of Transfers Varying In Amount: PNC Bank supports proposed Comment 10(d)(2)-2, which would relieve financial institutions of the obligation to give a consumer notice of varying amounts for transfers of funds from the consumer’s account at the institution to the consumer’s account at another institution, and instead provide the consumer with notice of a range of varying amounts for such transfers. The procedure would also apply regardless of whether the transfers are to or from jointly held accounts where the consumer is one of the joint account holders. This process has the potential for reducing expense and administrative burden on institutions while continuing to provide consumers with information required under the EFTA.
9. Section 205.11(b)—Notice of Error from Consumer: PNC Bank supports the proposed Comment 11(b)-7, which would clarify that if a consumer fails to provide timely notice to an institution of an error that institution need not comply with Section 205.11(b)(7). The regulation provides certain time limits with which the consumer must comply, thus requiring the consumer to be vigilant about her accounts, and also affords financial institutions a greater opportunity to obtain information pertaining to the error within the 10- and 45-day investigation time limits. However, requiring institutions to comply with Section 205.6 prior to imposing liability could present questions where an institution does not recredit an account. Compliance would require the institution to conduct an investigation to determine whether or not an error occurred and, if so, to recredit the consumer’s account.
10. Section 205.11(c)(4)—Time Limits and Extent of Investigation: PNC Bank disagrees with proposed Comment 11(c)(4)-5, which would require an institution to check every record anywhere in the institution when investigating an allegation of error with respect to an EFT transaction. Large institutions have numerous lines of business and groups within departments that efficiently operate various payment systems, some for consumers and some for commercial clients. Because of security restrictions, not every person in the financial institution will have access to information in every department. In addition, not every employee will be familiar with how to research records in various departments, many of which will have systems designed to conduct effectively that department’s functions.

Recommendation: The Board should provide factors that institutions may consider in conducting a reasonable investigation, as the OCC has done in Administrative Letter 2001-9 (*Electronic Fund Transfer Act—Investigation of Unauthorized Transactions*). Such an

approach would be more helpful than requiring financial institutions to review all records, wherever they may be within their institutions, in order to resolve errors asserted.

11. Section 205.16--Disclosures at ATMs: PNC Bank supports the proposed revisions to Section 205.16, which would provide flexibility to ATM operators to more accurately reflect whether fees will be assessed. Section 205.16 requires operators of ATMs to provide notice to consumers that a fee will be imposed for certain transactions and to disclose the amount of the fee. Most ATM network rules contain similar requirements. The notice of the imposition of the fee must be prominent and conspicuous and a consumer must be given notice of the fee prior to being committed to paying the fee.

This proposal recognizes that many institutions have policies with respect to ATM surcharges that exempt certain categories of their cardholders from paying the fees, but not others. In addition, some institutions have entered into contractual relationships with other card issuers that permit the cardholders of a third party card issuer to use the ATMs without payment of a surcharge to the ATM owner. Because of these policies, which vary the imposition of surcharges, the disclosure on the ATM that a fee “will” be imposed can be misleading to consumers who will not incur a fee for use of the ATM. Accordingly, PNC Bank supports the proposal to revise Comment 205.16(b)(1) to clarify that an ATM fee “may” be imposed. If an ATM operator imposes a fee for all users, the ATM disclosure must continue to state that a fee “will” be imposed for the transaction. In those instances where the disclosure states that a fee “may” be imposed, ATM operators will still be required to disclose to the consumer any fee that would be imposed prior to the consumer being committed to paying the fee. This proposal will both enable institutions to represent their policies correctly and provide clarification to cardholders.

Additional Comment

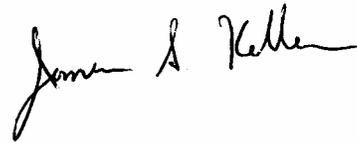
Section 205.4--General Disclosure Requirements; Jointly Offered Services: PNC Bank proposes that the Board expand the applicability of Section 205.4. The proposals under consideration herein extend to merchants and employers the obligation to comply with Regulation E for ECK and payroll cards, respectively. Consequently, PNC Bank suggests that the Board amend Section 205.4(e) to permit banks and non-bank parties with whom they may contract to offer electronic services to enter into agreements for complying with the Regulation. This will assure that the party in the best position to comply with a particular provision will have the responsibility for doing so, and relieve the other party to the contract of liability for failing to do so. As an example, depending upon the manner in which payroll cards are issued, it may not be possible for one party to comply with all aspects of Regulation E without substantial cost, administrative burden and coordination of effort with the other party to the service.

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Conclusion

PNC appreciates the opportunity to comment on the proposed amendments to Regulation E and the official staff commentary. Please feel free to contact us with any questions related to the matters discussed in this letter.

Sincerely,

A handwritten signature in black ink that reads "James S. Keller". The signature is written in a cursive style with a large, stylized initial "J".

James S. Keller

cc: Michael Carroll
Federal Reserve Bank of Cleveland

Drew J. Pfirman
Roberta G. Torian
John J. Wixted, Jr.
The PNC Financial Services Group, Inc.