

February 10, 2005

Ms. Sandra F. Braunstein
Director, Division of Consumer and Community Affairs
Board of Governors of the Federal Reserve System
1709 New York Avenue, NW
Washington, DC 20006

Dear Sandy:

On behalf of NACHA – The Electronic Payments Association, I want to thank you for our meeting of January 27th. We appreciated the opportunity to discuss recent initiatives and the current state of consumer payments through the ACH Network. We also found it very helpful to discuss the relationship between NACHA’s Operating Rules and Regulation E.

With this marketplace in mind, it is critical that Regulation E and the NACHA Rules remain consistent and effective in protecting consumer rights, while recognizing fundamental market forces. For example, with the increase in consumer checks being converted to EFT transactions, we expect more stop payment requests to be lodged by consumers with their financial institutions. Therefore, Regulation E’s guidance on stop payment orders vs. revocation of authorization needs to be clear. As we responded in our comment letter of November 19, 2004 (see attached—pp. 8-9), we seek revisions to the Commentary to recognize that:

- A stop payment order stops a single EFT transaction and is requested by the consumer of the consumer’s financial institution;
- The stop payment order need not be maintained by the consumer’s financial institution for longer than six months, and;
- Revocation is between the consumer and the payee (and the consumer’s financial institution is not typically in a position to verify that an authorization has been revoked or to automatically return subsequent EFT transactions if received).

Likewise, our discussion of “authorization,” in the context of marketplace implications, will be extremely helpful in our consideration of a “back-office conversion” pilot. As we reported, the current Point-of-Purchase application (“POP”) is not growing appreciably and merchants have advised NACHA that this is largely due to two hurdles:

1. The current authorization process of accepting a check at checkout, swiping it for the MICR information, printing an authorization for the consumer’s signature and returning the check to the consumer is cumbersome and often confusing to the consumer; and,
2. Decisions about the eligibility of a check for conversion are more efficiently and accurately made through a central processing function (i.e., in the “back office”) and thus an application like Accounts Receivable Conversion (“ARC”), with similar notification and authorization requirements, represents a better course

A key test built into any back-office conversion pilot administered by NACHA will be an assessment of consumer acceptance. As we enter the development phase for such a pilot, we believe there is a need for an acceptable authorization standard across consumer

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check conversion applications. We believe that where the dollar amount of the ACH entry does not differ from the dollar amount of the converted check, proper notice to the consumer should be considered the authorization. Written authorization would be required in other cases. We would note that this approach is consistent with that requested by the Consumers Union in their response to Docket R-1210.¹ It would also address, for example, the collection of NSF fees as we discussed (i.e., written authorization would be required since the fee would be in addition to the original payment amount). Finally, it would be consistent with the ARC application and potentially any back-office conversion application.

On one final matter, we would like to again call your particular attention to our November 19, 2004 response (see attached—pp. 8) with respect to the proposed removal from the Commentary [Sec. 20510(b)] of the language addressing tape recorded oral conversations not constituting acceptable authorization for recurring EFT payments. We would reiterate our statement that "...this is an area where it is imperative that any withdrawal include the addition of a clear reference to the possibility that payments system rules and other laws may impose additional authorization requirements on parties subject to such rules or laws."

It is important that NACHA and your Division remain in touch and please call me if we can elaborate on any of these issues. Having the Federal Reserve Board staff involved is critical to our processes and I believe is very much welcomed by the industry. Also, I trust that Natalie and Ky's ongoing participation in the Electronic Check Council and in our rulemaking process is providing your Division an excellent opportunity to share in the development of consumer ACH applications and to remain abreast of issues important to payments system stakeholders.

Sincerely,



Elliott C. McEntee
President & CEO

Attachment: NACHA Response: Docket No. R-1210; Regulation E -- Electronic Fund Transfers;
November 19, 2004

cc: Michael Collins, Federal Reserve Bank of Philadelphia
Division of Consumer & Community Affairs:
Jane Gell
Natalie Taylor
Ky Tran-Trong

¹ The Consumers Union response states "...we seek a more explicit requirement for a signed [or similarly authenticated] written authorization for any debit from the consumer's account other than the payment of the amount which is reflected on the face of the check. However, we do not believe that a written preauthorization requirement for the conversion of the check itself (as opposed to for fees associated with the check) will serve the consumer interest."



VIA E-MAIL

November 19, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1210; Regulation E -- Electronic Fund Transfers

Dear Ms. Johnson:

NACHA—The Electronic Payments Association¹ respectfully submits this response to the Federal Reserve Board (“Board”) on its request for comment on proposed changes to Regulation E and its Official Staff Interpretation (“Commentary”).

Summary of NACHA Comments: Overall, the proposed changes will provide greater clarity and flexibility to merchants and billers (collectively referred to as “payees”), and to their financial institutions in terms of consumer disclosure and the types of electronic check conversion applications that offer consumer protection coverage under Regulation E. We believe the Board’s approach will advance the marketplace’s ability to deploy and administer multiple consumer payment options, to the benefit of consumers, merchants, billers and financial institutions. However, there are some issues on which NACHA seeks further clarification or on which we question whether the proposed change is merited for the ACH Network.

In brief, NACHA supports the Board establishing minimum authorization/notification requirements for payees through Regulation E, though we believe there should be a single sample notice embracing the collection options available to payees (pages 3-6). We are also quite pleased that the Board intends to clarify a number of technical issues related to when authorization/notices are required – i.e., when multiple checks are received in one billing cycle, and when someone other than the billed account holder provides a check in the payment process (pages 6-7). We oppose the imposition of additional requirements on the consumer’s financial institution through the Commentary in the error resolution process (pages 7-8). We also oppose removal of the reference to tape recorded conversations in the Commentary’s clarification of authorization requirements for preauthorized transfers (page 8) and strongly recommend changes to the Commentary in how stop payment orders and revocation of authorization are addressed (pages 8-9). Finally, we point out in our response several issues raised by the request for comment where payments system rules prescribe additional consumer protections or authorization requirements for payees than the Regulation. We strongly recommend that the Board state up front in the Commentary (and where appropriate to specific issues addressed in the Commentary) that it recognizes the role of payments system rules vis-à-vis the Regulation since these rules can have a similar effect to the role of state laws in the Regulation’s interpretation.

Our substantive comments below address each of the Board’s proposed changes to the Regulation or Commentary to the extent each change would directly impact the ACH Network.

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¹ **About NACHA—The Electronic Payments Association:** NACHA is the leading organization in developing electronic solutions to improve the payments system. NACHA represents more than 12,000 financial institutions through direct memberships and a network of regional payments associations, and over 650 organizations through its industry councils. NACHA develops operating rules and business practices for the ACH Network and for electronic payments in the areas of Internet commerce, electronic bill payment and presentment (EBPP), financial electronic data interchange (EDI), international payments, electronic checks, and electronic benefits transfer (EBT). Visit NACHA on the Internet at: www.nacha.org.

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A. Electronic Check Conversion/ACH Transactions

Background: In an electronic check conversion transaction (referred to by the Board in the proposal as an “ECK transaction”), a consumer provides a check to a payee and information from the check is used to initiate a “one-time” EFT from the consumer’s account. Specifically, the payee electronically scans and captures the MICR encoding on the check for the routing, account, and check serial number, and enters the amount to be debited from the consumer’s asset account. The *Electronic Fund Transfer Act* (“EFTA”) expressly provides that transactions originated by check, draft, or similar paper instrument are not governed by the Act. In response to requests by NACHA and other industry stakeholders that the Board clarify EFTA coverage of ECK transactions, the Board’s March 2001 amendments to the Commentary to Regulation E established a bright-line test for the regulation’s coverage of these transactions [6 FR 15187 (March 16, 2001)].

The Commentary now provides that the EFTA and Regulation E cover ECK transactions if the consumer authorizes the transaction as an EFT. A consumer authorizes an EFT if notice that the transaction will be processed as an EFT is provided and the consumer completes the transaction. This is the case regardless of whether check conversion occurs at the point-of-sale (e.g., using the “POP” Standard Entry Class code for the resulting ACH entry) or in an accounts receivable conversion (e.g., “ARC” Standard Entry Class code) transaction where the consumer mails a fully completed and signed check to the payee.

Since revising the Commentary in March 2001, several issues have arisen relating to ECK transactions. The Board indicates it has concerns about the uniformity and adequacy of some of the notices provided to consumers about ECK transactions. Also, some in the industry would like the flexibility to obtain a consumer’s authorization to process a transaction as either an EFT or as a check. Board staff has also received inquiries from financial institutions and other payments industry participants concerning their obligations under Regulation E in connection with ECK services. For example, merchants and other payees have inquired whether a single authorization is sufficient to convert multiple checks submitted as payment after receiving an invoice or during an individual billing cycle. Banks and credit unions have asked about the extent of their disclosure obligations to both existing and new consumers about the addition of ECK services to the terms of consumer accounts. NACHA has also heard similar concerns from the industry.

*Proposed Revisions:*²

A1. Regulation E Coverage of ECK Transactions: The regulation would be revised to incorporate the guidance on Regulation E coverage of ECK transactions that is currently contained in the Commentary [Sec. 205.3(b)(2)(i)]. Where a check, draft, or similar paper instrument is used as a source of information to initiate a one-time EFT from the consumer’s account (i.e., as a “source document”), that transaction is not deemed to be a transfer originated by check and thus is covered by Regulation E.

New paragraph 3(b)(2) would be added to the related Commentary. This Commentary would clarify that an ECK transaction covered by the regulation is one in which “a consumer authorizes a one-time EFT (by providing a check to a merchant or other payee for the MICR encoding, that is, *the routing number of the financial institution, the consumer’s account number and the serial number*), where the consumer receives

² Bracketed citations in NACHA’s response reference the relevant proposed changes to the Regulation and its Appendices or Commentary unless otherwise indicated.

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notice that the transaction will be processed as an EFT and goes forward with the transaction ... [emphasis added].”

NACHA Comment: NACHA supported the March 2001 clarification in the Commentary whereby a check could be used as a source document to initiate an ACH transaction with proper consumer authorization. This clarification represents a significant underpinning of the legal foundation upon which ECK payment products are offered. The *NACHA Operating Rules* (“*NACHA Rules*”) reflect this legal clarification and enhance it through the rules applicable to ECK transactions that are processed through the ACH Network. Moving the clarification from the Commentary to the Regulation can only strengthen this legal foundation on which so many consumer payment options are now being offered or envisioned.

We also support the additional clarification proposed in Commentary paragraph 3(b)(2) noted above. Our interpretation of this Commentary is that coverage of transactions under the regulation as “ECK transactions” would be limited to cases in which a physical check is provided to or received by a payee for the purpose of capturing the full MICR line (i.e., routing number, account number and check serial number) to originate an EFT. In the ACH Network, this would embrace POP and ARC entries, for example, since these entries contain the MICR line as captured from a physical check. On the other hand, WEB (Internet-Initiated entries), TEL (Telephone-Initiated entries) and other “one-time” ACH transactions, in which a consumer may rely on the MICR-encoded information on the check to provide the correct routing and account number information to the payee, would not trigger coverage under the regulation as “ECK transactions” subject to the proposed notice requirements, etc. (They would, of course, continue to be covered by other provisions of Regulation E as applicable.)

A2. Notices; Consumer’s Financial Institution: The Commentary would also clarify that electronic check conversion transactions are a new type of transfer requiring new disclosures to the consumer (to the extent applicable) by the consumer’s financial institution [Comments 7(b)-4 and 7(c)-1]. Model clauses for initial disclosures would be revised to reflect that one-time EFTs may be made from a consumer’s account using information from the consumer’s check and to instruct consumers to notify their financial institution when an unauthorized EFT has occurred using information from their check [Appendix A, Model Clauses in A-2].

NACHA Comment: With sufficient time provided for financial institutions to implement, we believe the proposed Commentary 7(b)(4) and related model clauses in Appendix A-2 for initial disclosures would be helpful to consumers. Since this change (as well as other proposed changes to the notice requirements) would require financial institutions to modify and reissue their Regulation E disclosure statements, we believe at least one year should be provided from the date of adoption to comply with the revised notice requirement.

A3. Consumer Authorization & Notices; Payees: The Board would use its authority under the EFTA to require parties, such as merchants and other payees, that make ECK services available to consumers to obtain a consumer’s authorization for the EFT [Sec. 205.3(a) and (b)(2)(ii)-(iii); and Comment 3(b)(2)-1]. Generally, a “clear and conspicuous” notice for authorization would have to be provided for each ECK transaction. The notice could be a generic statement posted on a sign or a written statement at the POS, or provided on or with a billing statement or invoice with respect to an ARC transaction. To help consumers understand the nature of an ECK transaction, the regulation would require the party initiating the EFT to notify the consumer that when the transaction is processed as an EFT (1) funds may be debited from the consumer’s account “quickly,” and (2) as applicable, the consumer’s check will not be returned by the consumer’s financial

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institution. Further, the Board proposes several model clauses for notices to protect payees from liability under Sections 915 and 916 of the EFTA (i.e., a “safe harbor”), if the payee uses the clauses accurately to reflect its services [Appendix A, Model Clauses in A-6].

The Board believes the proposed requirements and model clauses would enable it to promote consistency in notices provided to consumers by merchants and other payees. Additionally, the Board seeks comment on whether payees should be required under Regulation E to obtain the consumer’s “written signed authorization” to convert checks at the point-of-sale (e.g., for POP entries in the ACH Network).

NACHA Comment: We concur with the Board that basic minimum authorization requirements and the related notice and safe harbor provisions for payees will lead to consumers being better informed on a consistent basis about their ECK transactions. We do not believe the authorization/notice requirement would pose a significant or immediate compliance burden on payees engaged in ECK transactions through the ACH Network since the *NACHA Rules* already address authorization requirements for Originators. However, payees may require some period of time to adopt whatever specific sample notice(s) the Board approves if they choose to do so and thereby take advantage of the safe harbor provision.

Payee notices. We question the Board’s approach of establishing a “sample” notice [Appendix 6(a)] and two “optional” notices [Appendix A-6(b) and (c)] and believe that limiting the model disclosure language for ECK transactions to one sample notice would be sufficient and of great value to payees and consumers. With respect to adopting a single sample notice, we generally support consolidating the relevant language across the three types of proposed model notices (to address the various options that would be available to payees for ECK transactions) and believe that adopting a single notice would result in greater consumer familiarity with check conversion.

While supporting a single sample notice, we strongly recommend eliminating the specific language related to proposed Sec. 205.3(b) (2)(iii) regarding (1) the timeframe in which an EFT may clear (“quickly”), and (2) the statement that consumers will not receive their checks back from their financial institution. Generally, we believe the proposed regulatory and notice language we seek to eliminate from the final rule would be more confusing than helpful to the consumer for the following reasons.

1. Clearing timeframe. We object to the proposed regulation and model disclosure language that would inform consumers that when their transaction is processed as an EFT, funds may be debited from the consumer’s account “[quickly/as soon as the same day we receive your payment].” We do not believe there is absolute validity to the claim when it is compared to existing check collection timeframes. In some instances, the EFT may indeed clear more quickly than the check, particularly if the check is non-local and has to be physically transported to the paying bank for collection. However, in many -- if not most -- instances, the check will clear in roughly the same period of time, if not quicker.

The large majority of checks used for payment in the U.S. are considered local items and generally clear locally. Local clearing timeframes can run from same-day to next-day, depending on such factors as the means used by the Bank of First Deposit to collect the item (e.g., deposit with its Federal Reserve Bank, exchange through a local clearing house, etc.) and the time of day the item is deposited by the payee. For example, a check used for payment at a retailer in the morning could be

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deposited in the afternoon and, if the check is drawn on the same institution (“on us” check) or takes advantage of accelerated clearing means (e.g., electronic check presentment or a local clearing house late exchange), could even post to the consumer’s account before the end of the day. Rarely would a local check take longer than the next day to clear. Further, with the onset of Check21, even non-local checks may clear much more quickly to the point of having the same timeframe as local checks.

Collecting the payment via an ECK ACH transaction involves the payee batching its ACH transactions, sending to a third-party or directly to its financial institution for further processing, and collection via the interbank ACH Network. Typically, this will result in the transaction clearing as an ACH entry in 1-2 days from the point of conversion. Consequently, we do not believe it would be appropriate for the Board to infer in its model disclosures any reference to check vs. EFT clearing timeframes.

2. Return of check to consumer. NACHA recognizes the Board’s intent in requiring payee notices to indicate that if used to initiate an ECK transaction, the check itself will not be returned to the consumer, as applicable. However, in practice, we believe such required disclosure would confuse consumers that already do not receive checks back from their financial institutions with their monthly statements. Today, about two-thirds of consumers do not receive their original checks back with their statements (and Check 21 will further reduce the number of checks returned in consumer statements).

We believe the proposed model clause may also result in confusion in relation to consumer experiences in the new Check21 environment. With respect to this latter point, consumers may tend to equate a statement that they will not receive their check back from a payee authorizing an ECK under Regulation E, with similar statements from their financial institution with respect to check handling under Regulation CC as amended to implement Check21. In such cases for example, if a consumer has a dispute about a payment processed as an ECK transaction, the consumer may inadvertently seek to dispute the transaction as a check transaction under Regulation CC.

We believe a better approach in the model clause would be notice to the consumer that the transaction (including the amount) will be reported on the consumer’s financial institution account statement.

Requiring a written signature at point-of-sale? While NACHA supports a minimum authorization standard for ECK transactions, we would point out that individual EFT Network rules (e.g., the *NACHA Rules* for the ACH Network) may establish additional authorization requirements. While consistent with the Board’s existing and proposed minimum authorization standard, these Network rules may, in fact, provide superior consumer protection and are typically structured such that they reflect the unique qualities of the specific type of EFT application being used for the ECK transaction. For example, the *NACHA Rules* currently apply specific and distinct authorization requirements in the origination of POP, RCK, ARC and other ACH Network applications. In all cases, these authorization requirements reflect the unique operating, risk, and transactional characteristics associated with each application. In fact, one of the primary reasons why the *NACHA Rules* establish unique SEC codes to distinguish between multiple types of ECK transactions using the ACH is the different authorization (and authentication) requirements deemed necessary for each type of transaction by the industry. We believe this payments system rules-driven approach is far preferable to a “one size fits all” regulatory approach.

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Accordingly, NACHA believes the Board should not require “written signed authorization” at the point-of-sale through Regulation E. Instead, we believe the Board should recognize the flexibility offered by payments system rules that provide additional requirements to the Board’s minimum standard when the features of a particular payments system application merit this. Therefore, we believe the Board should make very clear through the regulation or its Commentary that the Board’s authorization requirements and standards are minimum requirements upon which any consumer EFT application must rely, **but payment network and other applicable rules and laws may result in additional authorization requirements as applicable.**

As the deployment of existing consumer EFT products increases and as new applications are developed, such clarity by the Board of the regulation’s application vis-à-vis other relevant rules and laws is absolutely necessary to avoid marketplace confusion and, potentially, legal challenges that do not look beyond Regulation E for determining the rights and obligations of the parties involved. Moreover, such formal recognition by the Board in Regulation E of the efficacy of payments system rules would be entirely consistent with the Board’s objective of balancing consumer protection obligations with technology- and application-neutral regulation of the marketplace. As NACHA administers the rules for current consumer payment applications and seeks to develop new applications, retaining the flexibility to address issues related to consumer authorization through the *NACHA Rules* can only be to the benefit of consumers, business and financial institutions.

A4. Consumer Disclosure Addressing Multiple Collection Scenarios: A proposed revision to the Commentary would explain that a payee may obtain the consumer’s authorization to process a transaction as an EFT or as a check [Comment 3(b)(2)-2]. This Commentary recognizes cases where (1) an EFT could not post due to processing or technical errors (i.e., an administrative return), wherein the payee could use the original check or create a substitute check to collect the returned EFT, and (2) the payee would have the discretion to initiate collection of the payment as either an EFT or as a check (including substitute checks allowed under Check21/Regulation CC), depending on which process is the most efficient.

NACHA Comment: This clarification is necessary and will advance the use and acceptance of EFT as an alternative to check collection for consumer payments. Again, with several years’ experience with ECK applications using the ACH Network, and particularly with the implementation of Check21 in mind, NACHA believes that the merchant and biller communities require greater flexibility in terms of how consumer checks may be used in the payment process. By clarifying that -- with appropriate authorization -- a check may either be collected as a check, or used as a source document to initiate an EFT, payees will have much greater latitude in determining at the transaction level the most efficient and practical means for collection.

A5. Receipt Of Multiple Checks: The Board proposes to clarify for payees that obtaining authorization from a consumer holding the account on which a check will be converted is sufficient to convert multiple checks submitted as payment for a particular invoice or during an individual billing cycle [Comment 3(b)(2)-4]. This would include multiple checks received from a single accountholder during a billing cycle and/or someone other than the accountholder (or in addition to the accountholder) providing a check(s) for payment owed during a billing cycle.

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NACHA Comment: With several years of experience with various ECK applications using the ACH Network, NACHA has sought clarification through Regulation E and/or its Commentary of practical matters related to consumer-payee payment relationships and practices. In general, the proposed changes regarding EFT authorization and disclosure should be quite beneficial to consumers, merchants and billers. Specifically, clarifying in the regulation that only one EFT authorization would be necessary for a payee to convert multiple checks received in a single billing period represents a very practical recognition of a common payment practice.

A6. Authorization for Collecting Fees for Insufficient Funds: The Board proposes to clarify that payees may electronically debit a consumer's account for a fee for insufficient funds when the consumer goes forward with a transaction, it is returned for insufficient funds, and the consumer has received notice that such a fee could be collected electronically [Comment 3(c)(1)-1].

NACHA Comment: The *NACHA Rules* currently require that an ACH debit to a consumer's account to collect a fee for insufficient funds must be authorized by the consumer in writing. While the Board's proposal is not inconsistent with this ACH Network requirement (as on other matters governed by Regulation E that involve the ACH Network, the *NACHA Rules* may prescribe additional requirements), we reiterate our request made elsewhere in this response that the Board state in the Commentary that payments system rules may provide additional requirements when those systems are used to process an EFT otherwise covered by Regulation E.

B. Error Resolution

Sec. 205.11(c)(4) currently provides that a financial institution may satisfy its obligation to investigate an alleged error by reviewing its own records if the alleged error concerns a transfer to or from a third party and there is no agreement between the institution and the third party for the type of EFT involved. The Commentary would be revised to state that, under these circumstances, the financial institution would not satisfy its error resolution obligations by merely reviewing the payment instructions if there is additional information within the institution's own records that would assist in resolving the alleged error [Comment 11(c)(4)-5].

NACHA Comment: NACHA believes the proposed clarification raises more questions than it answers and could impose additional requirements on RDFIs that they are not necessarily in a position to meet. An RDFI that is requested to investigate an ACH transaction that its consumer customer states is unauthorized will review the transaction details and, if the consumer executes a written statement under penalty of perjury, will promptly re-credit the consumer and return the transaction if within the prescribed timeframe (i.e., unauthorized consumer ACH entries may be returned up to 60 days from the settlement date). The RDFI is unlikely to have readily available and concrete additional information in its records that would assist in the review of the particular transaction (the consumer's authorization is with the Originator), yet seeking such additional information could be a time consuming and costly process. Moreover, engaging in a more extensive investigation than that currently required in the Regulation could put the consumer and the consumer's financial institution in an adversarial position to the degree that such investigation might call into question issues raised by other transactions, but not specifically related to the disputed transaction. For example, a consumer may have legitimately authorized a prior payment, but not necessarily the specific payment being disputed. Therefore, we would view the proposed Commentary as confusing, potentially

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onerous and redundant given the fact that the consumer is made whole in a timely manner under the *NACHA Rules*.

C. Preauthorized Transfers

C1. Tape recording of telephone conversations: Sec. 205.10(b) requires that recurring electronic debits from a consumer's account be authorized "only by a writing signed or similarly authenticated by the consumer." The March 2001 Commentary update clarified that the writing and signature requirements of this section could be satisfied by complying with the *Electronic Signatures in Global and National Commerce Act* ("E-Sign Act") [See current Comment 10(b)-5]. The Commentary currently provides that a tape recording of a telephone conversation with a consumer who agrees to preauthorized debits does not constitute written authorization under Sec. 205.10(b) [Comment 10(b)-3]. However, the Board proposes to withdraw this interpretation in the Commentary "to address industry concerns that the existing guidance may conflict with the E-Sign Act."

NACHA Comment: NACHA is concerned that withdrawing the reference to a tape recorded telephone conversation not constituting written authorization, without additional guidance with respect to the E-Sign Act, will only further confuse the issue and call into question business models currently employed in the marketplace. For example, the *NACHA Rules* governing the PPD application (preauthorized consumer entries) rely on the current Commentary's guidance in this regard and Originators take this into account in their authorization procedures to ensure that the consumer has a tangible written copy (or displayed and printable copy) of the authorization. Therefore, instead of merely withdrawing this clarification from the Commentary, we believe it is incumbent upon the Board to clearly address whether a recorded telephone conversation is or is not consistent with the E-Sign Act and therefore considered an acceptable form of written authorization for the purposes of Regulation E compliance. Regardless of which approach is taken by the Board, we also believe this is an area where it is imperative that any withdrawal include the addition of a clear reference to the possibility that payments system rules and other laws may impose additional authorization requirements on parties subject to such rules or laws.

C2. Stop Payment Orders: Sec. 205.10(c) requires a financial institution to honor a consumer's oral stop-payment order for a preauthorized transfer from his or her account if it is made at least three business days before a scheduled debit. The Commentary would be revised to clarify that an institution that does not have the capability of blocking a preauthorized debit from being posted to the consumer's account (for example, when debits are made on a real-time system), may instead use a third party to block the transfer(s), as long as the recurring debits are in fact stopped [Comments 10(c)-2 and -3].

NACHA Comment: In reviewing this proposed change, NACHA has received inquiries as to whether it would also apply to the ACH Network (despite of the Board's reference to real-time systems as an example in the proposal). To ensure there is no confusion if this change is adopted, NACHA encourages the Board to include in the Commentary to Sec. 205.10(c)(3) that the provision specifically does not apply to preauthorized debits in batch EFT systems like the ACH Network.

More importantly, NACHA seeks clarification of a long-standing issue related to the Commentary's treatment of stop payment orders and its reference to revocation of authorization [current Comments 10(c)-1

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and -2, respectively].

1. Stop payment orders. NACHA seeks revisions to Comment 10(c)-1 to recognize that a stop payment order stops a single EFT transaction and is requested by the consumer of the consumer's financial institution. Further, under the current Commentary, it may be inferred that financial institutions are required or expected to maintain a stop payment order in perpetuity. We strongly believe that Comment 10(c)-1 should also be revised to clearly recognize that stop payment orders on EFTs – an industry practice and regulatory approach which reflects traditional check collection practices and laws – need not be maintained by the consumer's financial institution for longer than 6 months. This time period is specifically prescribed for stop payment orders on checks per Article 4-403 of the Uniform Commercial Code, and is the basis on which industry stop payment systems are built.

2. Revocation of authorization. As noted above, a stop payment order is intended to stop a single payment transaction, not a stream of subsequent transactions. We believe the EFTA and the regulation support this and find no foundation in either for Comment 10(c)-2. Therefore, we believe the comment should either be removed or modified so that it clearly recognizes industry practices – i.e., revocation is between the consumer and the payee, and that the consumer's financial institution is not typically in a position to verify that an authorization has been revoked (or to automatically return subsequent EFT transactions if received).

* * * * *

NACHA appreciates the opportunity to comment on this proposal. If you have any questions regarding our comments, I may be reached at (703) 561-3929, or by e-mail at: imacoy@nacha.org.

Sincerely,

Ian W. Macoy
Senior Director