Financial Institutions

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Electronic Payment Transaction Developments

In recent years, the use and variety of electronic fund transfers have expanded greatly. Consumers now routinely use debit cards, payroll cards and stored value cards to transfer funds and to purchase goods and services at the point of sale, and payees use checks received by consumers to initiate one-time electronic fund transfers rather than processing the checks themselves.

To keep apace of these changes, the Federal Reserve Board recently released a final rule and interim final rule revising and clarifying Regulation E[1] (Reg E) and its official staff commentary[2] (the Commentary). Among the significant revisions:

- Merchants and other payees that engage in electronic check conversion transactions with consumers are covered by Reg E for the limited purpose of requiring provision of consumer notice and must obtain consumer authorization of such transactions.
- In a change to existing guidance in the official staff commentary, to the extent a tape-recorded authorization constitutes a written and signed (or similarly authenticated) authorization under the E-Sign Act, the authorization will be deemed to satisfy Reg E's requirement for written authorization of a preauthorized electronic fund transfer.
- Payroll card accounts established for the purpose of providing salary, wages or other employee compensation on a recurring basis will be deemed accounts covered by Reg E.

Revisions to Reg E and the Official Staff Commentary: Overview of the Final Rule

On September 17, 2004, the Board published a notice of proposed rulemaking (NPRM) principally proposing revisions to Reg E and the Commentary relating to electronic check conversion (ECK) transactions and payroll card accounts.[3] In January, the Board's final rule (the Final Rule) was published in the Federal Register.[4] The Final Rule sets forth clarifying provisions relating to the collection of service fees, issuance of access devices, error resolution procedures, preauthorized transfers, ATM disclosures and several other topics. The rule will take effect February 9, 2006, and compliance is mandatory by January 1, 2007.

1. Electronic Check Conversion Transactions

The Final Rule clarifies that ECK transactions are covered by Reg E and deemed **not** to originate by check.[5] In an ECK transaction, a consumer provides a check to a merchant or other payee, which then electronically scans and captures the routing, account and serial numbers from the MICR-encoding on the check and uses that information to initiate a one-time EFT from the consumer's account.[6] An ECK transaction is deemed covered by Reg E if the check conversion occurs at point of sale (POS) or in an accounts receivable conversion (ARC) transaction in which the consumer mails a fully completed and signed check to the payee that is then converted to an EFT. Reg E applies only when a payee uses a check as a source of information to initiate an EFT from the consumer's account, and not when the payee merely engages in the electronic collection, presentment or return of checks through the check collection system, such as through the transmission of electronic check images. In addition, the rules for ECK transactions do not apply to Internet- and telephone-initiated transactions in which the consumer provides information, including the MICR-encoding, from a check to pay for a purchase using these channels.[7]

a. Merchant and Payee Coverage

Under the Final Rule, all ECK transactions must be authorized by the consumer, and merchants and other payees that engage in ECK transactions are subject to Reg E for the limited purpose of obtaining this consumer authorization.[8] For several years, the Board has acknowledged that a merchant or other payee is

in the best position to provide notice to a consumer for the purpose of obtaining authorization for ECK transactions. However, Reg E did not previously cover merchants and other payees because they did not meet the definition of a "financial institution." The Final Rule inserts several new provisions in Reg E relating to ECK transactions that are applicable not only to financial institutions, but to "any person." For merchants or payees subject to FTC jurisdiction, the FTC will have enforcement authority of these new requirements pursuant to Section 917(c) of the EFTA and the Federal Trade Commission Act.

b. Notice and Authorization of Check Conversion

The Final Rule requires a merchant or other payee to provide notice to a consumer that a transaction will or may be processed as an EFT and to obtain the consumer's authorization prior to each transfer.[9] The Board expressly rejected the request of some commenters that merchants or other payees be required to obtain a consumer's signed authorization for an ECK transaction. Instead, a consumer is deemed to have authorized the transfer if he or she receives notice and goes forward with the transaction.[10]

– For POS transactions, notice must be posted in a clear and prominent location (e.g., on a sign that is not obscured by other information or signs) and a copy of the notice must be provided to the consumer in a form the consumer can keep at the time of the transaction, such as on a receipt. The revised commentary provides that a payee at POS does **not** violate the requirement to provide a copy of the notice to the consumer if it is unable to provide the notice because of a bona fide unintentional error (e.g., the terminal printing mechanism jams), so long as the payee maintains procedures reasonably adapted to avoid such occurrences.

– For ARC transactions, a payee obtains a consumer's authorization when it provides notice of intent to convert checks received as payment (e.g., on a monthly billing statement or invoice) and the consumer provides or mails a check as payment.

Two model notices are provided in an appendix to the Final Rule to assist merchants and other payees in complying with the notice requirements. Under these model clauses, notice may be provided in the alternative where a merchant or payee may process the check as a check or may convert the transaction into an ECK transaction. Payees may also choose, at their option, to disclose the circumstances under which they will not process a check as an EFT, such as when it is impossible for technical or other processing reasons.

Notice must be provided and an authorization must be obtained from the consumer for **each** ECK transaction. For example, a consumer must receive notice for each transaction at POS or on each billing statement or invoice in an ARC transaction. If, however, a payee provides a coupon book to a consumer, then the payee may provide a single notice that payments will be processed as ARC transactions in the book. The notice must be placed on a conspicuous location of the coupon book that the consumer can retain, such as on the first page or inside the cover.[11]

c. Imputed Notice

Notice to the consumer listed on the billing account constitutes sufficient notice to convert all checks provided in payment for the billing cycle or the invoice for which notice has been provided, whether the check(s) is received from the consumer or someone else.[12] Service fee notices may also be imputed to other consumers in this way. Thus, for example, a notice to the consumer on the billing account informing the consumer that a service fee for insufficient funds will be debited via an EFT from the consumer's account also constitutes notice to any other consumer who may provide a check for the account for the same billing cycle or invoice.

d. Other Required ECK Disclosures

A merchant or payee must also disclose that: (1) when the transaction is processed as an EFT, funds may be debited from the consumer's account as soon as the same day payment is received; and (2) the consumer will not receive the check back from the bank, if applicable.[13] Payees in POS transactions may provide these disclosures on posted signage and need not also provide them on the consumer's receipt. Payees in ARC transactions must provide the disclosures with the general notice to obtain consumer authorization for the ECK transaction, which the Board expects will result in a combined notice on the consumer's billing statement. The Board notes that while these additional disclosures are appropriate for now, as consumers become more familiar with ECK transactions, the need for such disclosures will decrease. Therefore, the requirement for these disclosures will sunset on December 31, 2009.

2. Notice and Authorization of Collection of Service Fees Via EFT for Insufficient or Uncollected Funds

The Final Rule clarifies that an EFT from a consumer's account to collect a service fee due to insufficient or uncollected funds is covered by Reg E and must be authorized by the consumer.[14] A payee must obtain consumer authorization for the debit regardless of whether the underlying transaction is an EFT or a check transaction, as long as the payee intends to collect the service fee via an EFT to the consumer's account. As with the check conversion notice, provision of notice to the consumer coupled with the consumer's decision to proceed with the transaction is deemed to constitute authorization for the debit. In addition, service fee notices must include the specific amount of the fee to be imposed.[15]

3. Issuance of Access Devices

Existing Section 205.5 generally prohibits financial institutions from issuing debit cards or other access devices except (1) in response to requests or applications or (2) as renewals or substitutes for previously accepted devices. In addition, the Commentary contains a "one-for-one rule," which generally provides that a financial institution may not issue more than one access device as a renewal of or substitute for an accepted device.[16] Section 205.5(b) provides, among other things, that any access device issued on an unsolicited basis must not be validated at the time of issuance.

The Final Rule makes several clarifications in the Commentary regarding these rules. First, the Final Rule clarifies that where additional access devices are issued unsolicited, whether in connection with the issuance of a replacement or substitute device or otherwise, the additional access device must not be validated at the time it is issued, and the institution must comply with the other requirements contained in Section 205.5(b), including the requirement to provide new initial disclosures.[17] Second, the Commentary is revised to clarify that either the replacement access device or the additional access device (or both) may provide expanded or contracted functions compared to the existing device, but that if such changes are made to the functionality, a change-in-terms notice or new disclosures must be provided.[18] Finally, an institution issuing an access device to replace an existing accepted access device may choose to issue the replacement device in a validated or unvalidated form and may choose to link the validation of one access device with the validation of another one.[19]

4. Initial Disclosures

The Board has added a new provision in Section 205.7 on initial disclosures to provide that ECK transactions are a new type of transfer requiring new disclosures to the consumer, to the extent applicable.[20] Industry commenters generally favored including information about ECK transactions, especially since most have already adjusted their disclosures to reflect the fact that ECK transactions may be made to or from the consumer's account.

Under the Final Rule, for customers opening accounts after the mandatory compliance date of January 1, 2007, institutions must include in initial disclosures that ECK transactions are among the types of transfers that a consumer can make. If institutions have already amended their disclosures to notify their customers that ECK transactions may be made from their account, they are not required to make additional disclosures about such transactions to those customers. However, new disclosures to existing customers would be required after the compliance date if an institution has not disclosed to those consumers that ECK transactions may be made, even if other terms of the underlying account agreement would equally apply to the new type of transfer. To assist institutions in implementing the new disclosure requirements, model initial disclosure language is provided.

The Board also revises Comment 7(a)-1 to state that an institution may choose to provide disclosures about ECK transactions early, i.e., prior to the first ECK transaction involving the consumer's account. This means that institutions could give the disclosure when the consumer opens an account and do not then have to repeat the disclosure when the consumer later enters into an agreement with a third party to initiate preauthorized transfers to or from the consumer's account, unless the terms and conditions differ from the earlier disclosure. In supporting this modification, industry commenters noted that early notification is a cost-effective way of enabling institutions to establish a single means of notifying and educating consumers about their rights concerning EFTs.

5. Preauthorized Transfers

a. Removal of Prohibition on Taped Telephone Authorizations

Under the EFTA and Reg E, special rules apply to preauthorized transfers that involve recurring debits from a consumer's deposit account over time. These rules require that recurring electronic

debits be authorized "only by a writing signed or similarly authenticated by the consumer."[21] The Commentary currently states that a tape recording of a telephone conversation with a consumer who agrees to preauthorized debits does not constitute valid written authorization of the transfers under Reg E. This has meant that consumers could not give their authorization to initiate recurring debits over the telephone. In the Final Rule, the Board has withdrawn this comment in response to industry concerns that the existing guidance may conflict with the E-Sign Act.[22] The E-Sign Act provides, in general, that electronic records and electronic signatures may satisfy legal requirements for traditional written records and signatures if certain conditions are met.

While the Board has withdrawn the existing guidance regarding whether a tape recording satisfies the written authorization requirement, it leaves to industry to interpret whether a recorded telephone conversation is sufficient under the E-Sign Act.[23] The Board states, "**if**, under the E-Sign Act, a tape recorded authorization, or certain types of tape-recorded authorizations, constitute a written and signed (or similarly authenticated) authorization, then the authorization would satisfy the Regulation E requirements." (Emphasis added.)

In addition to complying with the E-Sign Act, payees will still need to ensure that they comply with the requirements of Section 205.10(b). For example, the authorization must be readily identifiable as such to the consumer, the terms of the preauthorized debits must be clear and readily understandable to the consumer, and payees must provide the consumer a copy of the authorization.[24]

b. Specifying Debit or Credit Card

Under Reg E, a payee must obtain written authorization for recurring transactions charged to a debit card but not to a credit card. Comment 10(b)-7 currently provides that if a consumer indicates use of a credit card when in fact a debit card is being used to make the transfer, the payee does not violate the requirement to obtain a written authorization if the failure to obtain the authorization was not intentional, resulted from a bona fide error and occurred despite the payee's reasonable procedures to avoid any such error. Industry had sought clarification from the Board about what procedures would be deemed reasonably adapted to avoid any such error. In response, the Board has revised Comment 10(b)-7 to clarify that reasonable procedures will depend on the circumstances. Given the growth of debit card use, the Board explains that it believes that reasonable procedures should include interaction with the consumer specifically designed to elicit information about whether a debit card is involved, but declined to impose an express requirement of inquiring whether a card provided is a debit card or a credit card because the determination of whether a procedure is reasonably adapted to avoid error may vary with the circumstances. Instead, the Final Rule retains in Comment 10(b)-7 the safe harbor principle example of a reasonable procedure of asking the consumer to specify whether the card to be used for the authorization is a debit card or a credit card.[25] In the NPRM, the Board requested comment regarding whether merchants should be required to verify card numbers presented by consumers against BIN tables as a reasonable procedure to avoid error. The Final Rule, however, declines to implement any such requirement in the absence of real time, online availability of the necessary data.

c. Consumer's Right to Stop Payment

Section 205.10(c)(1) gives consumers the right to stop payment of a preauthorized EFT from the consumer's account by notifying the financial institution orally or in writing at least three business days before the scheduled date of the transfer. In the Final Rule, the Board adopts Comment 10(c)-3 to permit an institution, upon receiving a consumer's stop payment order, to use a third party to block a preauthorized transfer if the institution does not have the capability to block the preauthorized debit from being posted to the consumer's account, as long as the consumer account is not debited for the payment.[26] The new comment is intended to address problems in stopping recurring debits that take place over debit card networks, where the account-holding institution may not be able to timely block a debit from being posted to the consumer's account. If a consumer revokes authority for all further payments from a particular payee, the institution (through its own procedures or through a third party) must make arrangements so that no further debits originated by that payee are made to the consumer's account.[27]

d. Notice of Transfers Varying in Amount

When a preauthorized EFT from a consumer's account will vary in amount from the previous transfer, or from the preauthorized amount, existing Section 205.10(d) requires the designated payee or the

consumer's financial institution to send written notice of the amount and date of the transfer at least 10 days before the scheduled date of the transfer. Under the existing regulation, payees and institutions may also give the consumer the option of receiving notice only when a transfer falls outside a specified range of amounts or only when a transfer differs from the most recent transfer by more than an agreed-upon amount. The Final Rule adopts Comment 10(d)(2)-2 to give institutions a limited exception from the notice requirements for transfers of funds between accounts held by the same consumer at different institutions.[28] The exception would not be applicable to transfers to repay loans, including payday loans, which are not accounts under Reg E. New comment 10(d)(2)-2 provides that a financial institution may elect to provide notice only when a preauthorized transfer falls outside a specified range, or differs by more than a specified amount from the most recent transfer, without providing the consumer the option of receiving notice of all varying transfers, if the funds are transferred and credited to an account of the consumer held at another financial institution.

6. Error Resolution

a. Notice of Error from Consumer

Section 205.11 gives consumers 60 days after a financial institution sends a periodic statement on which an alleged error is reflected to provide notice of the error. The Board has added Comment 11(b)-7 to provide that a financial institution does not have to conduct an investigation when a consumer provides a notice of error more than 60 days after the institution has sent the periodic statement that first reflected the alleged error.[29] Where the error involves an unauthorized EFT, however, liability for the unauthorized transfer may not be imposed on the consumer unless the institution satisfies the requirements contained in Section 205.6, which detail consumer liability for the loss or theft of an access device. Some industry commenters had urged the Board to conform the time frame for reporting an error in Section 205.11(b)(1) from 60 days after the date of availability of the periodic statement to 60 days after the settlement date of the transaction consistent with the NACHA rules. However, the Board declined to make this conforming change because the time frame provided in the regulation is statutory.

b. Four Walls Rule

Pursuant to existing Section 205.11(c)(4), a financial institution may limit the investigation of an alleged error to "a review of its own records" when investigating an alleged error where the EFT involves a third party and there is no agreement between the financial institutions and the third party. This rule is commonly referred to as the "four walls" rule. The Final Rule adds Comment 11(c)(4)-5, which requires that the financial institution review any relevant information within the institution's own records for the particular account to resolve the consumer's claim.[30] The Board explains, "for ACH and ECK transactions . . . the Board believes that an institution's review of its 'own records' should not be confined to a mere confirmation of the payment instructions when other information within the institution's 'four walls' could also be reviewed." The revised Commentary provides examples of information that an institution might review including the transaction history of the particular account for a reasonable period of time immediately preceding the allegation of error, whether the check number of the transaction in question is notably out-of-sequence, and the location of either the transaction or the payee in question relative to the consumer's place of residence and habitual transaction area. To the extent that an account-holding institution has outsourced relevant aspects of its operations, the investigation must also include a review of service provider records if such records could help to resolve the consumer's claim.

7. ATM Disclosures

Currently, Section 205.16 requires an ATM operator that imposes a fee on a consumer for initiating an EFT or a balance inquiry to provide notice to the consumer that a fee will be imposed for providing such services and to disclose the amount of the fee. Notice of the imposition of the fee must be provided in a prominent and conspicuous location on or at the ATM, and the ATM operator must also provide notice that the fee will be charged and the amount of the fee either on the ATM screen or on paper, before the consumer is committed to paying a fee.

The Final Rule revises this requirement to clarify that ATM operators may disclose on ATM signage that a fee will be imposed or, in the alternative, that a fee **may** be imposed on consumers initiating an EFT or a balance inquiry if there are circumstances under which some consumers

would not be charged for such services.[31] ATM operators that impose an ATM surcharge in all cases, however, must still provide notice on the ATM signage that a fee **will** be charged.

Overview of the Payroll Card Accounts Interim Final Rule

In response to the growing use of payroll card accounts, the Board issued the Payroll Card Accounts Interim Final Rule.[32] Payroll cards have become increasingly popular with employers as a way to reduce payroll check processing costs and more economically pay employees who lack checking accounts. The Interim Final Rule is effective July 1, 2007, and comments must be received on or before 60 days after the date of publication of the rule in the Federal Register.

1. Definition of "Account"

The EFTA and Reg E apply to any EFT that authorizes a financial institution to debit or credit a consumer's asset "account." The EFTA broadly defines an "account" as a "demand deposit, savings deposit or other asset account . . . as described in regulations of the Board, established primarily for personal, family or household purposes."[33] Relying on this broad definition, the Interim Final Rule provides that payroll card accounts that are established directly or indirectly by an employer on behalf of a consumer for the purpose of providing wages, salary or other employee compensation on a recurring basis are "accounts" covered by Reg E.[34]

According to the Board, payroll card accounts are appropriately classified as "accounts" for purposes of Reg E because they are assigned to an identifiable consumer and represent a recurring stream of payments that is likely the primary source of the consumer's income. They are replenished on a recurring basis and are designed for ongoing use at multiple locations and for multiple purposes. They also utilize the same kinds of access devices, electronic terminals and networks as do other EFT services historically covered by the EFTA.

As interpreted by the Board, a payroll card account would be subject to Reg E irrespective of whether it was operated or managed by the employer, a third-party payroll processor or a depository institution. The definition includes a payroll card account by which an employer regularly pays the employee's salary or other form of compensation and would include, for example, card accounts for seasonal workers or employees who are paid on a commission basis.[35] However, cards to which only one-time transfers of salary-related payments are made (such as to pay an annual bonus) or used exclusively to disburse non-salary related payments (such as petty cash or travel per diem) are not covered under the rule.[36] In addition, if an employer pays an employee's salary or other compensation to an account accessible by card only in isolated or limited circumstances (such as in final paycheck or emergency situations), but otherwise intends to regularly pay the employee by another method, then the card account would not fall within the definition of a "payroll card account" under Reg E.

Payroll card accounts are covered under the Interim Final Rule whether the funds are held in individual employee accounts or in a pooled account with some form of "subaccounting" maintained by a depository institution (or by a third party) that enables a determination of the amounts of money owed to particular employees. In including this interpretation, the Board recognized there is no substantive difference between a subaccount and an individual account for purposes of determining whether Reg E coverage is appropriate.

Although some consumer group commenters urged the Board to apply Reg E to all card products to which an individual might transfer some portion of his or her wages, the Board declined to expand the Interim Final Rule accordingly. The Board reasoned that payroll cards differed in significant respects from general spending cards. Payroll cards are likely to be used as a consumer's principal transaction account, and may hold significant funds for an extended period of time. In contrast, general spending cards may be used like gift cards or other stored-value or prepaid cards that are used on a limited, short-term basis and may hold minimal funds. The Board reasoned that consumers would derive little benefit from receiving full Reg E protections for general spending cards while the costs of providing Reg E initial disclosures, periodic statements and error resolution rights would be significant to the issuer.

In many cases, payroll card products may also carry deposit insurance. As discussed below, the FDIC is currently considering the circumstances under which funds underlying stored-value cards would qualify for deposit insurance.

2. Scope of Coverage

Entities that must comply with the payroll card account requirements include financial institutions subject to the regulation if they directly or indirectly hold a payroll card

account, or if they issue an access device to a consumer for use in initiating an EFT from a payroll card account.[37] Unlike under Section 205.2(i), the definition does not require that a person issuing an access device for a payroll card account also agree with a consumer to provide EFT services.[38]

To the extent more than one party is a "financial institution" under the rule with respect to a particular payroll card account, such parties may contract among themselves to ensure compliance with the Interim Final Rule.[39] For example, if an employer 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 draw on funds by using the card, then both the employer and the bank would qualify as financial institutions with respect to that particular consumer's payroll card account. Similarly, if an employer contracts with a third party processor or service provider to issue the access device for the payroll card account, the third party processor or service provider would also be a financial institution vis-à-vis that consumer's payroll card account. Disclosure requirements need only be satisfied by one party in such instances.

3. *Alternatives to Periodic Statements*

One of the numerous consumer protections generally required under Reg E is the provision of paper periodic statements to consumers with "accounts." Although a payroll card account is defined as an "account" in the Interim Final Rule, the Board determined that providers of payroll card accounts should be given the flexibility to use alternative means of providing account information to consumers.[40] The Board noted that requiring paper statements would impose a significant burden on financial institutions offering payroll card accounts. The Board reasoned that there are sufficient alternative methods of providing account transaction information, and it noted that focus group participants who received paper periodic statements for their payroll card accounts stated that they rarely used those statements to track transactions or to look for errors. Instead, the participants generally monitored their payroll account information using the telephone or over the Internet. Moreover, the Board pointed out that information obtained via the telephone or over the Internet is typically updated on a daily basis, in contrast to periodic statements that only provide information as of the end of each statement cycle.

Under the Interim Final Rule, financial institutions may elect to provide periodic statements to consumers or to use alternative means of providing account information. A financial institution that elects to use the alternative means must:

1. Make available to the consumer the account balance through a readily available telephone line. (A readily available telephone line is a local or toll-free line available at least during standard business hours, which may be automated.);

2. Make available to the consumer an electronic history (such as via an Internet web site) of the consumer's account transactions that covers at least 60 days preceding the date the consumer electronically accesses the account; and

3. Promptly provide, upon the consumer's oral or written request, a written history of the consumer's account transactions that covers at least 60 days preceding the date of receipt of the consumer's request. The Board anticipates that to "promptly" provide a written history of the consumer's account history, financial institutions will generally send them the same day or soon after the consumer makes an oral request, and within a few days after a consumer's written request is received by an institution (to allow for internal routing delays). However, the Board is soliciting further comment as to whether the option to obtain a written history of account transactions is necessary or appropriate.

To ensure that consumers are able to review their account transactions and to effectively exercise their error resolution rights, Section 205.18(b)(2) of the Interim Final Rule requires the same type of account transaction information to be provided to consumers that is set forth under Section 205.9(b)(1)-(6), such as information about fees incurred in connection with EFTs and payroll card accounts. The Board is soliciting comments as to whether additional transaction information should be provided to payroll card users, or whether certain information should be excluded from the history of account transactions. Comment is also solicited regarding the feasibility of providing consumers with a rolling history of 60 days' worth of transactions.

4. Modified Requirements for Financial Institutions That Do Not Furnish Periodic Statements

a. Initial Disclosures and Annual Error Resolution Notice

Financial institutions that opt not to furnish periodic statements must provide modified disclosures in addition to or in lieu of the required initial disclosures under existing Section 205.7(b).[41] For example, financial institutions must include in the initial disclosures for payroll card accounts:

- The means by which a consumer can access information about his or her account, including the telephone number that the consumer may call to obtain his or her account balance and information on how the consumer can electronically obtain a history of account transactions, such as an Internet website address;
- A summary of the consumer's right to obtain a written history of account transactions upon request, including a telephone number to call to request a history; and
- A notice explaining the error resolution rights associated with payroll card accounts.

b. Limitations on Liability and Error Resolution

The Interim Final Rule also explains the application of the limitations on liability and error resolution procedures when a financial institution opts not to provide paper periodic statements.[42] Under that circumstance, there are two triggers for beginning the 60-day period for limiting liability for unauthorized EFTs, depending on when and how the consumer has obtained a history of his or her account transactions:

- If the consumer obtains an account transaction history electronically, the 60-day period begins on the date the account is electronically accessed by the consumer. A consumer will not be deemed to have "electronically accessed" an account by merely visiting an Internet website where his or her account information and other information can be retrieved. Rather, "electronic access" occurs when he or she enters a user identification code, password or other security measure used to verify identity. Entry of the code, password or security measure is all that is required, however, and an institution need not determine that a consumer has **actually** accessed information about specific transactions involving the consumer's payroll card account.
- If the consumer requests a written account history, the 60-day period begins on the date the institution sends the written history.

If a consumer accesses account information by requesting both a written statement as well as electronically accessing the account, the 60-day period begins to run on the earlier of the two dates. However, in each of the above cases, the 60-day period does not begin to run unless information regarding the unauthorized transfer was available for the consumer to review when the consumer obtained the transaction history. Moreover, in contrast to the EBT rule, the 60-day period does not begin to run when a consumer obtains balance information via the telephone.

Similar rules apply with respect to the 60-day period for reporting an error. A financial institution must comply with error resolution requirements set forth in Section 205.11 if it receives a consumer's oral or written notice of error no later than 60 days after the earlier of: (1) the date the consumer electronically accesses his or her account; or (2) the date the institution sends a written history of the consumer's account transactions in which the error is first reflected. As above, "electronic access" occurs when the consumer enters a user identification code, password or other security measure to verify identity, and the 60-day period does not begin to run if information regarding the EFT for which the consumer asserts an error was not available when he or she accessed the account (whether electronically or otherwise) or if the consumer merely calls to obtain balance information.

The Board is seeking comment regarding a number of issues relating to these time frames including: the feasibility of determining when a consumer has accessed his or her account; whether other means of triggering the 60-day time periods may be appropriate; and the feasibility of determining when a consumer has accessed specific transaction information about his or her payroll card account where the consumer can also access other personal information connected to his or her employment (e.g., health benefits or insurance) on the same Internet website.

NOTES

1. 12 C.F.R. part 205.

2. 12 C.F.R. part 205, Supplement I.

3. 69 Fed. Reg. 55996 (Sept. 17, 2004).

4. 71 Fed. Reg. 1638 (Jan. 10, 2006). A second release, resulting from the September 2004 NPRM—an interim final rule on payroll card accounts (the "Payroll Card Accounts Interim Final Rule" or the "Interim Final Rule")—was also published in the Federal Register in January. 71 Fed. Reg. 1473 (Jan. 10, 2006). The Interim Final Rule is discussed following the summary of the Final Rule.

5. 71 Fed. Reg. 1640.

6. Under the revised Commentary, although a check is used to initiate an EFT, the check is not considered an access device.

7. However, any electronic fund transfers from the consumer's account that result from the Internet or telephone-initiated transaction would be covered by Reg E.

8. 71 Fed. Reg. 1639.

9. 71 Fed. Reg. 1639.

10. Prior to the revision, the Commentary stated that a consumer authorizes an ECK transaction when the consumer receives notice that the transaction will be processed as an EFT and **completes** the transaction. The revision was intended to clarify that a transaction does not need to clear or settle in order for authorization to occur.

11. If a coupon book is issued before the effective date of the Final Rule and will cover a time period when notice would otherwise be required, payees may provide a one-time notice such as a separate mailing to obtain the consumer's authorization to convert each check submitted with a coupon.

12. 71 Fed. Reg. 1644. *See* Official Staff Comment 3(b)(2)-4.

13. 71 Fed. Reg. 1640. Official Staff Comment 3(b)(2)-5 clarifies that the statement that a check will not be returned by the consumer's financial institution is not required at POS, if, as is typically the case, the merchant returns the check to the consumer.

14. 71 Fed. Reg. 1640. The Board noted that this provision is not intended to address fees assessed on a consumer's account by the consumer's financial institution (so-called "NSF" fees) but rather is to address service charges assessed by a **payee** because the consumer's check or EFT was returned unpaid.

15. In addition, the Board notes that other federal or state laws such as the Fair Debt Collection Practices Act as well as payment system rules may impose additional substantive requirements.

16. 71 Fed. Reg. 1647. Official Staff Comment 5(a)(2)-1.

17. Official Staff Comment 5(b)-5.

18. Official Staff Comment 5(b)-5.

19. An institution choosing to link the validation of the replacement and supplemental devices should disclose to the consumer in a clear and readily identifiable manner that the single validation will validate both access devices, to ensure that the consumer will not, for example, improperly discard the additional, now validated, device.

20. 71 Fed. Reg. 1647. 12 C.F.R. § 205.7(c).

21. *See* Section 907(a) of the EFTA, 15 U.S.C. §1693e(a), and Section 205.10(b) of Reg E, 12 C.F.R. §205.10(b).

22. The Electronic Signatures in Economic and Global Commerce Act of 2000 (the E-Sign Act), 15 U.S.C. § 7001 et. seq.

23. 71 Fed. Reg. 1649.

24. The Board does not provide any additional guidance on how (or when) payees must provide the consumer a copy of the authorization when the authorization will be tape-recorded.

25. 71 Fed. Reg. 1650-51.

26. 71 Fed. Reg. 1651.

27. The Board notes that under Comment 10(c)-2, institutions may require the consumer to provide a copy of a written notice sent to the payee, revoking authority for the payee to originate debits to the consumer's account. If the consumer does not provide the copy within 14 days, the institution is not required to continue stopping payments to the payee.

28. 71 Fed. Reg. 1651-52.

29. 71 Fed. Reg. 1652-53.

30. 71 Fed. Reg. 1653-54. An investigation must be reasonable, but the Board notes that given the potential size and complexity of institutions and their many different relationships with a single consumer, it may be impractical and burdensome for an institution to look throughout its entire operation for potentially relevant records. Therefore, the information reviewed should pertain to the account for which the assertion of error is made and cover a reasonable period of time.

31. 71 Fed. Reg. 1655

32. 71 Fed. Reg. 1473.

33. Section 903(2) of the EFTA.

34. 71 Fed. Reg. 1474-75. The Board noted that the definition of "payroll card account" in the Interim Final Rule was not intended to address the definition of "account" for purposes of any other statute or regulation including, without limitation, the USA PATRIOT Act, the Truth in Savings Act and the Board's Regulation D.

35. The fact that an employee may only remain on an employer's payroll for a short period of time—even just one pay cycle—does not negate coverage, so long as the employer intended to make recurring payments to the payroll card account.

36. If a payroll card account serves a dual function where part of the account holds employer-funded "corporate expense funds," and the remaining segregated portion of the card holds employer-transmitted wages belonging to the employee, then only the funds consisting of the employee's wages would qualify as funds held in a payroll card account. According to the Board, the segregated portion of the dual function account that held "corporate expense funds" would not be a "payroll card account" because the funds are not primarily for personal, family or household purposes.

37. 12 C.F.R. 205.18(a).

38. Section 205.2(i) defines a "financial institution" as a "bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services." 12 C.F.R. § 205.2(i).

39. *See* 12 C.F.R. § 205.4(e) for the jointly provided services provision.

40. 71 Fed. Reg. 1477-78.

41. 71 Fed. Reg. 1478.

42. 71 Fed. Reg. 1478-79.

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