WageWorks

1100 Park Place
San Mateo, CA 94403

PHONE 650-577-5200
TOLL-FREE 888-990-5099
FAX 650-577-5201

www.wageworks.com

February 22, 2011

The Honorable Jennifer Johnson
Secretary, Board of Governors
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Comments on Proposed Regulation II, Debit Card Interchange Fees and Routing ("Regulation II")

Dear Madam Secretary:

WageWorks, Inc. is the nation's leading independent provider of consumer-directed spending solutions and services. WageWorks represents 1.7 million flexible spending accounts ("FSAs"), health reimbursement arrangements ("HRAs"), health savings accounts ("HSAs"), and qualified transportation accounts ("QTAs"). More than 1.1 million of our accountholders access their funds through the use of a health benefits payment card that utilizes sophisticated technology and algorithms to adjudicate nearly 80% of payment card transactions at the point of sale—an extremely efficient and cost-effective manner of providing health care and other tax-advantaged benefits.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, including the Durbin amendment ("Dodd-Frank"), is a set of sweeping reforms that are intended to promote the financial stability of the United States by improving accountability and transparency in the financial system, including debit cards. Payment cards used in connection with FSAs, HRAs, HSAs, and QTAs provide a valuable method of paying for health care and transportation expenses on a pre-tax basis. These benefit plans, and the payment cards that are used with them, are already heavily regulated by the Internal Revenue Service and U.S. Department of Labor -- and were never intended to be swept under the Dodd-Frank reforms. In fact, Senator Dodd, then Chairman of the Committee on Banking, Housing, and Urban Affairs specifically affirmed to the Senate: "Hence, we intend that prepaid cards associated with these types of programs [FSAs, HRAs, HSAs, and QTAs] would be exempted within the language of section 920(a)(7)(A)(ii)(II) [related to interchange fees] as well as from the prohibition on use of exclusive networks under section 920(b)(1)(A)."[1]

WageWorks appreciates the opportunity to provide comments to the Board of Governors of the Federal Reserve System on proposed Regulation II, particularly as the Regulation relates to payment cards used in connection FSAs, HRAs, HSAs, and QTAs. (See 12 C.F.R. Sections 235.1 to 235.9.) Proposed Regulation II is intended to implement and interpret new section 920

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[1] 156 *Cong. Rec.* S5927 (2010).

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of the Electronic Funds Transfer Act, which has been added by the Durbin amendment to Dodd-Frank. Specifically, Regulation II: (1) establishes standards for determining whether an interchange fee received or charged by an issuer with respect to an electronic debit transaction is reasonable and proportional to the cost incurred by the issuer with respect to the transaction; and (2) prohibits issuers and networks from restricting the number of networks over which an electronic debit transaction may be processed. As discussed in further detail below, WageWorks requests that specific regulatory language be issued to clarify that payment cards used in connection with FSAs, HRAs, HSAs, and QTAs are exempt from both the interchange and network-exclusivity rules under Regulation II. Further, WageWorks requests clarification that the exemption from these rules applies to multi-purse cards (i.e., cards that provide access to multiple employee plans, e.g., an FSA, HSA and a QTA).

Regulation II expressly provides in 12 CFR 235.5(c) that the requirements regarding reasonable and proportional interchange transaction fees do not apply to certain, reloadable prepaid cards, as long as the cards are not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis), and are not marketed or labeled as a gift card or certificate. We believe that payment cards for FSAs, HRAs, HSAs, and QTAs should be exempt from the interchange rules based on this language (and the legislative history). Therefore, we request that the final regulations include language that expressly states that FSA, HRA, HSA and QTA payment cards are exempt from the interchange rules and, in particular, that payment cards for HSAs are exempt – regardless of whether an HSA uses omnibus or separate accounting methods.

In addition, we request a specific exemption for FSA, HRA, HSA and QTA payment cards from the network-exclusivity rules set forth in Regulation II. Under Regulation II, an issuer may comply with the network-exclusivity rules in two ways, both of which require at least two unaffiliated networks to be available. Specifically, an issuer may either enable a PIN-debit network or two signature-based networks. Neither of these alternatives will, however, work for payment cards that are issued in connection with health care FSAs, HRAs, or HSAs because the IIAS network (required under IRS guidelines for health FSAs and HRAs[2] and also widely used for HSAs) operates under two separate signature-based card networks, depending on the Bank Identification Number (" BIN"), and there is no framework in place to enable a second signature-based network to be used for each payment card. Further, developing the infrastructure for health care payment cards to operate on two unaffiliated signature networks, or both a PIN-based and signature-based network, creates enormous challenges and will require costly and lengthy development by merchants, networks, issuers, processors, and third party administrators to ensure that cards process health care transactions in a compliant manner as required by IRS regulations. The changes necessary to make this process possible would result in a significant increase in costs that would negatively impact accountholders. Moreover, the utilization of a PIN-based network for health FSAs and HRAs would likely result in the violation of IRS

[2] IRS Notices 2006-69 & 2007-02.

guidelines because it would permit cardholders to access cash from these plans at the point-of-sale or at an ATM, which is strictly prohibited.

Based on the legislative history of Dodd-Frank, it is evident that Congress intended to create a specific exemption from both the interchange rules and the network exclusivity rules for payment cards used in connection with FSAs, HRAs, HSAs, and QTAs. Chairman Dodd of the Senate Committee on Banking, Housing and Urban Affairs and Chairman Frank of the House Financial Services Committees both made statements during the legislative process to explain that payment cards for these types of plans would be exempt from the rules under Dodd-Frank.[3]

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[3] Excerpts From Statements of Chairman Dodd and Chairman Frank

Senator Dodd affirmed on the floor of the Senate that payment cards used in connection with FSAs, HRAs, HSAs, and QTAs were not intended to be covered by Section 920:

> Mr. President, I would also like to clarify the intent behind another of the provisions in the conference report to accompany the financial reform bill, H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Section 1075 of the bill amends the Electronic Fund Transfer Act to create a new section 920 regarding interchange fees. This is a very complicated subject involving many different stakeholders, including payment networks, issuing banks, acquiring banks, merchants, and, of course, consumers. Section 1075 therefore is also complicated, and I would like to make a clarification with regard to that section.
>
> Since interchange revenues are a major source of paying for the administrative costs of prepaid cards used in connection with health care and employee benefits programs such as FSAs, HSAs, HRAs, and qualified transportation accounts--programs which are widely used by both public and private sector employers and which are more expensive to operate given substantiation and other regulatory requirements--we do not wish to interfere with those arrangements in a way that could lead to higher fees being imposed by administrators to make up for lost revenue. That could directly raise health care costs, which would hurt consumers and which, of course, is not at all what we wish to do. ***Hence, we intend that prepaid cards associated with these types of programs would be exempted within the language of section 920(a)(7)(A)(ii)(II) as well as from the prohibition on use of exclusive networks under section 920(b)(1)(A).***

156 Cong. Rec. S5927 (2010).

Likewise, Representatives Larson and Frank engaged in a colloquy in the House of Representatives in which they expressed their belief that these types of card products would not be burdened under Section 920:

> **Mr. LARSON of Connecticut:** Madam Speaker, I rise for the purpose of engaging in a colloquy with Chairman Frank to clarify the intent behind section 1076 in this bill. The section amends the Electronic Fund Transfer Act to create a new section 920 regarding interchange fees. Interchange revenues are a major source of funding for the administrative costs of prepaid cards used in connection with health care and employee benefits programs like FSAs, HSAs, HRAs and qualified transportation accounts.
>
> These programs are lightly used by both the public and private sector employers and employees and are more expensive to operate because of substantiation than other regulatory requirements. Because of this, I would like to clarify that Congress does not wish to interfere with those arrangements in a way that could

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There is legal support that the statements of the committee chairmen are to be considered in construing the meaning of a bill – in fact, these statements are to be accorded the same weight as formal committee reports.[4] Statements of a committee chair in charge of a bill are not, however, given effect to override a clear and unambiguous meaning in the language of the statute[5], but Dodd-Frank does not clearly and unambiguously cover FSA, HRA, HSA and QTA payment cards. Consequently, we request that the Board expressly set forth in the final regulations a specific exemption for payment cards used in connection with FSAs, HRAs, HSAs, and QTAs in accord with legislative intent.

In the alternative, if the Board does not specifically exempt payment cards for FSAs, HRAs, HSAs, and QTAs from the network exclusivity rules, we respectfully request that the effective date of these rules be delayed for at least five years, in order to provide the IRS with sufficient time to reevaluate current IRS guidance that governs these types of payment cards in light of the network-exclusivity rules, and to give the industry time to adapt to the new requirements.

> lead to higher fees being imposed by administrators to make up for lost revenue, which would directly raise health care costs and hurt consumers. This is clearly not something that was the intent that we'd like to do.
>
> ***Therefore, I ask Chairman Frank to join me in clarifying that Congress intends that prepaid cards associated with these types of programs should be exempted within the language of section 920(a)(7)(A)Ð(ii)(II).***
>
> Mr. FRANK of Massachusetts: If the gentleman would yield, he's completely correct. The Federal Reserve has the mandate under this, which originated in the Senate, to write those rules. We intend to make sure those rules protect a number of things: smaller financial institutions from being discriminated against since they're exempt from the regulation, State benefit programs, and these.
>
> So the gentleman is absolutely correct, and I can assure him that I expect the Federal Reserve to honor that. And if there is any question about it, I am sure we will be able to make sure that it happens.

156 Cong. Rec. H5225-226 (2010).

[4] *See Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 475 (1921); *United States ex rel. Patton v. Tod*, 297 F 385, 394 (CCA2 1924); *Kansas City, Missouri v. Fed Pacif Elec. Co.*, 310 F. 2d 271 (CA8 1962); *Kuehner v. Heckler*, 778 F. 2d 152 (CA3 1985); *U.S. v. Tackett*, 113 F. 3d 603 (6th Cir. 1997), *cert. denied*, 522 U.S. 1089 (1998).

[5] *See Railroad Comm'n of Wisconsin v. Chicago, B.&Q.R. Co.*, 257 U.S. 563,589 (1947); *Monterey Coal Co. v. Federal Mine Safety & Health Review*, 743 F2d 504 (CA8 1974).

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We appreciate the opportunity to comment on proposed Regulation II. Please contact me at 760-509-4656 if you have any questions or would like for us to can provide any additional information regarding this matter.

Sincerely,

Jody L. Dietel
Chief Compliance Officer
WageWorks, Inc.