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December 21, 2009

Karen M. Neeley
kneeley@coxsmith.com
WRITER'S DIRECT DIAL: 512.703.6315

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

Re: Docket No. R-1377
Electronic Funds Transfers – Proposed Rules

Dear Ms. Johnson:

Inter National Bank ("INB") is a national bank located in Texas that is an issuer of NetSpend, Inc. prepaid cards. INB issues an array of products including reloadable prepaid stored value cards, gift cards, travel cards, and payroll cards that are marketed and distributed by NetSpend, Inc.

The purpose of this comment letter is to address the Board of Governors of the Federal Reserve System's (the "Board") Proposed Rules regarding Electronic Fund Transfers ("Proposed Rules"), which implement the gift card provisions of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the "Act").

First, INB believes that the Official Staff proposed comment 20(a)(6)-1 regarding the definition of "service fee" (set forth in proposed rule § 205.20(a)(6)) needs refinement. In particular, INB does not support the inclusion of "reload fees" under the Official Staff Interpretation of "service fees." A "reload fee" is not typically charged for the "use" of a gift certificate, store gift card, or general use prepaid card. Rather, a "reload fee" is a fee associated with replenishing funds to a card which has a zero balance. There are hard costs for a Card program associated with processing a request to reload funds to a Card, costs similar to the hard costs associated with the initial issuance of the Card. If a one-time initial issuance fee is permissible, then a one-time fee for each reload of funds onto a Card should also be permissible because both fees are typically charged to defray hard costs of the Card program for either internal or external (*i.e.* third party) costs charged to the Card program for such reload activities.

Next, still with regard to the Official Staff proposed comment 20(a)(6)-1, any third-party costs or fees that are assessed to a Card issuer and passed along to the cardholder should not be included in the definition of "service fees." Such fees include, but are not limited to, transaction fees assessed by payment card association networks against the issuer. These fees are similar to interchange fees assessed by payment card association networks against credit and debit card issuers and, similar to interchange fees, generally cannot be negotiated down or away by the Card issuer. Such third-party costs are required to participate in many Card programs, particularly those that work in conjunction with the payment card association networks. It would be inequitable to allow credit card and debit card issuers to recoup such third-party fees, or otherwise defray such third-party program costs (through having customers share in the burden of such fees), on the one hand, and on the other, to preclude Card issuers from having the same options with regard to how they handle such third-party costs and fees.

Furthermore, still with regard to the Official Staff proposed comment 20(a)(6)-1, many open loop Cards may be used at ATMs for withdrawal of card funds. Such ATM usage by cardholders may trigger the imposition of a fee by the owner of the ATM (*e.g.* a bank or financial institution other than the Card issuer), which the Card issuer has no control over. We do not think it the intent of the Board to require Card issuers to bear the burden or cost of such third-party ATM fees when such fees are triggered by cardholder usage. Therefore, the Board should issue Official Staff Interpretations making it extremely clear that these type of third-party ATM fees for Card usage are outside the definition of "service fee."

Similarly, also with regard to the Official Staff proposed comment 20(a)(6)-1, open loop Cards may also be used at ATMs or even point-of-sale terminals located in foreign countries. The payment card association networks typically assess a fee, similar to a foreign interchange fee, against the Card issuer for such use by the cardholder. Again, this type of fee should be outside the definition of service fee. Again, we do not think it the intent of the Board to require Card issuers to bear the burden or cost of such third-party foreign ATM or point-of-sale fees when such fees are triggered by cardholder usage. Therefore, the Board should issue Official Staff Interpretations making it extremely clear that these type of third-party foreign ATM or point-of-sale fees for Card usage are outside the definition of "service fee."

Second, INB would argue that the prohibition against charging a fee for issuing a replacement card when the underlying funds have not expired (contained in paragraph 20(e)(4)), commenting on both Alternative A and Alternative B for proposed rule § 205.20(e)(4)) is not supported by the Act. Again, there are hard Card program costs associated with issuing a new Card, and these are essentially the same costs associated with the initial issuance of a Card. Due to the fact that, under the proposed rules, no other service fees are permissible during the period in which Card activity has been conducted, a Card issuer will not be able to recoup any Card program costs associated with offering a gift Card or general use prepaid Card program.

It is our understanding that a Card issuer may, however, charge a fee for the issuance of a monetary instrument such as a check, cashier's check or money order, by which the balance of the funds remaining on a Card are remitted back to the cardholder. In such a scenario, there are significant costs in preparing the monetary instrument, transmitting it to the cardholder, and monitoring for the presentment of such monetary instrument. If, for example, a check sent to a cardholder for the remaining value funds on a Card is never presented for payment, then typically such check is subject to state unclaimed property/escheat laws governing checks. Thus, the Card issuer undertakes internal costs for staff time and expenses related to such return of funds, such as maintaining a log for these unpresented instruments, remitting the value of such unclaimed property to the proper state authority when required, etc. We request clarification on a Card issuer's ability to charge a fee associated with remitting the unused funds or value on a Card to the cardholder via monetary instrument, such as a check.

Third, many of the fees and charges described above (reload fees, transaction fees, ATM fees, foreign ATM or point-of-sale fees, etc.) are more commonly associated with reloadable stored value Cards. These Cards typically always have either Card inserts with more complete cardholder terms and conditions, or full cardholder terms and conditions posted on a web site where the Cards are activated by the cardholder prior to use. In either event, the consumer/cardholder receives full disclosures of the fees and the triggering events for such fees.

Fourth, once there has been inactivity with respect to the Card for a one-year period, the number of dormancy, inactivity, or service fees per month should not be limited to one fee only, but rather to one fee type only. (See Official Staff Interpretations paragraph 20(d)(3) commenting on proposed rule § 205.20(d)(3)) We believe that this interpretation that no more than one fee type can be charged per month is consistent with the legislative history of the Act and state laws applicable to gift cards and stored value cards (where states have chosen to specifically address this issue). For example, there are hard Card program costs associated with a consumer making each separate balance inquiry, and Card program costs with holding Card funds in a dormant/inactive state. A cardholder who does not regularly keep up with their Card purchases or funds withdrawals could make repeated balance inquiries. If only one individual balance inquiry fee can be charged by the Card issuer to the Card, but the cardholder makes 20 separate balance inquiries over the course of one month, with a separate fee charged to the issuer for each separate balance inquiry, then the Card issuer is again facing a scenario in which it cannot recoup the overhead and functional costs associated with its Card program. Also, some third-party ATM owners or operators charge for balance inquiries, charges separate from issuer charges, and over which the issuer has no control. The issuer similarly should not have to absorb these third-party balance inquiry costs.

Fifth, with regard to Official Staff Interpretation contained in paragraph 20(a)(4) (commenting on proposed rule § 205.20(a)(4)), the exception for loyalty, award, and promotional gift cards is not clear and needs to be refined. The proposed rules define *loyalty, award, or promotional gift card* as "a card, code, or other device that: (i) is issued in connection with a loyalty, award, or promotional program; (ii) is redeemable upon presentation at one or more merchants for goods or services, or usable at automated teller machines; and (iii) sets forth the disclosures" relating to fees and expiration dates required by the proposed rules. However, under the Act, Congress expressly excluded cards issued as part of a loyalty, award, or promotional gift from the definitions of a general-use prepaid card, gift certificate, and store gift card. Requiring the same disclosures for these loyalty, award or promotional program cards as those required for general-use prepaid cards, gift certificates, and store gift cards effectively eviscerates the exclusion expressly provided by Congress in the Act. Also, it will be difficult for Card issuers to know or determine whether Cards it issues will be given pursuant to a loyalty, award, or promotional gift by the ultimate end-purchaser of the Cards. We suggest that a safe harbor be added to the proposed rules whereby if the Card issuer obtains a representation from the purchaser (whether a distributor, Card reseller, or Card end-purchaser) of a group of cards that the cards will be distributed pursuant to a loyalty, award, or promotional gift program, the Card issue is deemed to have complied with the Act and the proposed Board rules.

Sixth, with respect to the Official Staff Interpretation in paragraph 20(f) regarding the disclosures required proposed rules § 205.20(f), INB suggests that a modification of these requirements be made to account for the fact that a reloadable Card may involve a long-term relationship between the issuer and the cardholder, and the terms and conditions of such relationship might change and be amended over time. If all the fees that a Card issuer will ever impose, now or in the future, are required to be disclosed on or with the Card, it would be difficult for the issuer to modify its fee structure at any point in the future based upon program changes, added services or features, changes in Card program costs, etc. INB suggests that Card issuers should be allowed to periodically announce modifications to the terms and conditions of the Card, including the fees. The consumer cardholder's consent to the modified terms would be a condition of being allowed to reload the Card after such modified terms go into effect. Consumers who do not agree to the modified terms and conditions would not be allowed to reload their cards, and could then just use the then-current balance on their Card in accordance with the original terms and conditions set by the Card issuer. We request that the Board take such a "modification of original cardholder terms" scenario into consideration and issue such modifications to the proposed rules as are appropriate to allow for such future changes in terms and conditions, including fees, of a Card issuer's program.

Seventh, the Official Staff Interpretation in paragraph 20(b)(4) (commenting on proposed rule § 205.20(b)(4)) clarifying when a Card is not marketed to the general public need additional examples and clarification. For example, many community banks in Texas only sell certain instruments (money orders and gift cards) to their own customers rather than to the general public. For example, such a community bank will market and sell a Card to one of its depository customers, but will not sell a Card to an individual who is not a bank customer and happens to walk into a bank branch to attempt to buy a Card. This business decision is largely driven due to the significant record keeping and risk issues under the Bank Secrecy Act associated with sales of such instruments. Further, we would argue that sales of Cards limited to existing bank deposit customers only is not marketing or sale to the "general public" due to the significant steps required to become a bank deposit customer, and, therefore, become eligible to purchase a bank-issued Card. Generally, an applicant for depository services is reviewed by the bank via a credit bureau to determine whether their risk profile is acceptable to the bank. A depository applicant must also agree to a bank depository account agreement that incorporates numerous state and federal laws, as well as contractual terms. Finally, the depository applicant must go through identity verification as mandated by the USA PATRIOT Act and the Customer Identification Program of the bank in order to become a bank customer. In short, we do not believe that marketing or sales of Cards to bank customers under the conditions described above would qualify as marketing to the "general public" as defined under Act and as interpreted by the Board, but we request that the Official Staff Interpretation be amended to specifically address the scenario described above to clarify that it does not constitute marketing Cards to the "general public."

Eighth, INB requests that Official Staff Interpretation in the proposed rules regarding preemption of state law be clarified. In Texas, the state unclaimed property/escheat laws require that funds which have been abandoned (*e.g.* generally no card activity for three years from issuance or date of last Card activity) for three years be remitted to the Texas State Comptroller's office. However, the proposed rules require that gift certificates, gift cards, and general use prepaid cards have at least a five year expiration date and that the funds underlying such gift certificates and cards remain valid and do not expire for a period of five years (from the date of issuance or the date on which funds were last loaded onto the Card). Thus, a Card holder could use a Card after funds had escheated and the bank would be required to honor the Card. Then the bank would need to recover the funds from the State. While this is recovery is feasible in Texas, there is a significant cost related to the timing of the usage and the recovery of funds.

The proposed rules in § 205.12 clarify that state law is preempted with respect to expiration dates. However, state unclaimed property/escheat laws do not explicitly govern expiration dates. If the funds on a Card are presumed abandoned under Texas unclaimed property/escheat laws for inactivity after three years, but the Card funds cannot expire for five years pursuant to the Act and the proposed rules, are the state law requirements for remitting funds to the State of Texas under unclaimed property/escheat preempted if a Card has not yet expired? In other words, Texas, and many other states, have unclaimed property/escheat laws with an abandonment period of two, three or four years – well below the five year "valid and available funds" requirement of the Act and the proposed rules. Furthermore, the definition of "inactivity" under the Board's proposed rules specifically excludes a balance inquiry as an event that would prevent "inactivity" from occurring. This definition of "inactivity" is inconsistent with the Texas (and many other state's) unclaimed property/escheat law that provides that a communication from the cardholder/customer prevents intangible property in the possession of a holder (a bank account, for example) from being considered inactive. Would such state law provision be preempted for purposes of Cards by the Act and proposed rules?

Ninth, Cards which have been issued prior to the effective date of the rules should be entirely exempted from proposed rules. Card issuers are unlikely to have the contact information of those who either purchased or received the Cards and would be unable to provide the required disclosures to those individuals who purchased the Cards prior to the effective date of the proposed rules.

Tenth, we note that all of the extensive disclosure and other requirements of these proposed rules will trigger revisions to numerous forms, contracts and procedures that are involved in running a Card program. More particularly, the existing relationships between Card issuers, service companies, distributors, marketers, and payment card associations will need review, and most likely extensive legal review and re-negotiation. In some cases, this means re-negotiation of complicated, long term relationships among such Card program participants. All of this will take time and resources, including significant legal costs. This commitment of resources by all parties involved in currently operating Card programs is in addition to the specific costs and burdens stated in the proposed rules under the Paperwork Reduction Act.

Eleventh, INB supports the proposed Official Staff Interpretation stated in paragraph 20(c)(2) (commenting on proposed rule § 205.20(c)(2)), which interpretation states that disclosures provided electronically in order to comply with the Act are *not* subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and

National Commerce Act ("E-SIGN"). Providing electronic disclosures in compliance with E-SIGN involves a multi-step process that requires the affirmative consent of the consumer to receive disclosures electronically, which would make providing the required disclosures excessively burdensome and cost prohibitive. In addition, we do not perceive an additional customer benefit from any E-SIGN compliance requirement due to the fact that the majority of sales of cards regulated under the proposed rules (the "Cards") are conducted in person where the Card purchaser has the opportunity to review the terms and conditions or cardholder agreement applicable to the Card prior to purchase. We encourage the Board to adopt this interpretation of non-applicability of E-SIGN to electronic Card disclosures.

Thank you for this opportunity to comment.

Sincerely,

Karen M. Neeley

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