UMB Bank, n.a.
1010 Grand Blvd
Kansas City, MO 64106
816.860.7000
umb.com

Member FDIC

February 15, 2011

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

Re: Proposed Rules on Debit Card Interchange Fees, Docket No. R-1404

Dear Ms. Johnson:

UMB Bank, n.a. ("UMB") is an issuer of cards used in connection with health care and employee benefit programs like Flexible Spending Arrangements (FSAs), Health Reimbursement Arrangements (HRAs), Transportation Spending Arrangements (TSA) and Health Savings Accounts (HSAs) (collectively, "Benefit Cards"). We are writing to express our concern about the application to Benefit Cards of the rules proposed (the "Proposed Rules") by the Board of Governors of the Federal Reserve System (the "Federal Reserve") to implement the debit interchange fee and network exclusivity and routing restrictions (the "Durbin Amendment") of Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1]

Because no congressional hearings were held on the Durbin Amendment, there has been a delayed realization in the marketplace about some of its unintended consequences, particularly in regard to Benefit Cards. For the reasons set forth below, we believe that the "one size fits all" approach adopted in the Proposed Rules is wholly inappropriate for Benefit Cards. As a result, the Proposed Rules should be revised to reflect the intent of Congress and exclude Benefit Cards from coverage. At a minimum, in light of instructive legislative history, any proposed application of the Proposed Rules to Benefit Cards should be delayed until the Federal Reserve and Congress have had an adequate opportunity to evaluate and fully consider the particularly negative impact of the Proposed Rules on Benefit Cards in light of the unique administrative challenges that arise in connection with health and related employee benefit programs.

[1] Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722 (proposed Dec. 28, 2010) (to be codified at 12 C.F.R. pt. 235).

As an initial matter, we note that approximately 13 million Americans participate in HSA arrangements for which HSA cards are issued, and more than 30 million working Americans participate in employee benefit arrangements that are administered using FSA, HRA, and/or TSA Benefit Cards. We believe that more than 20 million cards have been issued in connection with such arrangements. UMB alone has issued more than 1.8 million Benefit Cards, and those cardholders spent over $1.2 Billion in 2010.

Unlike traditional debit card transactions, which serve only as a mechanism for effecting a payment transaction from an underlying asset account, Benefit Cards perform the additional task for employee benefit plan and HSA participants of electronically adjudicating and/or substantiating health and similar employee benefit claims. The operating rules for such arrangements were carefully crafted by the Internal Revenue Service (IRS) in a series of IRS Notices and are codified in proposed regulations issued under Section 125 of the Internal Revenue Code. Indeed, the IRS requirements provide that the cards must substantiate at the time and point of sale whether an expense is an eligible health benefit expense that can be reimbursed under such an employee benefit plan. In order to facilitate such plan adjudication an industry standards organization (SIGIS) has evolved which maintains a list of over 40,000 approved products that are eligible for reimbursement through a carefully established and regulated auto substantiation process. Unlike other areas of health plan administration (where administrative costs can exceed 20% or more of the value of medical services rendered) automatic adjudication through health and related Benefit Cards provides for tax-compliant health plan administration for a fraction of the cost otherwise incurred.

In addition to direct cost savings, Benefit Cards provide consumers with convenient and immediate access to benefits, eliminating the need to pay out of pocket while submitting paper requests and waiting for reimbursement. Because of these, and related reasons associated with the unique functionality of Benefit Cards, we believe that such cards should be excluded from the Proposed Rules (or at least treated differently under the Proposed Rules) or, at a minimum, any proposed effective date for such arrangements should be delayed until the unique issues related to such arrangements have been properly explored and addressed by the Federal Reserve.

More specifically, we note the following concerns:

First, while legislative history surrounding Section 920 of the Electronic Fund Transfer Act (the "EFTA"), as added by the Dodd-Frank Act, is limited, the Congressional Record clearly reflects that key members of Congress intended that Benefit Cards would be exempted from Section 920. Specifically, Senator Dodd affirmed on the floor of the Senate that Benefit Cards were not intended to be covered by Section 920.[2]

[2] 156 *Cong. Rec.* S5927 (2010) (emphasis supplied).

> 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).***

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.[3]

> **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 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).***

---

[3] 156 *Cong. Rec.* H5225-226 (2010) (emphasis supplied).

> **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.

Second, consumers will be substantially harmed if Benefit Cards are required to comply with the network exclusivity requirements under the Proposed Rules because the burden and costs to issuers, merchants, payment processors and benefit plan administrators of adding and supporting a second signature-based debit network on each of these cards could be substantial, increasing program expenses and potentially causing issuers and plan administrators to cease issuing the cards, merchants to stop accepting the cards and payment processors to stop supporting the cards. In its presentation of the Proposed Rules, the Federal Reserve acknowledged the unique challenges that would be presented by their application to employee benefit card arrangements, and additional time is needed to carefully evaluate the consequences of imposing such requirements on the unique infrastructure of existing Benefit Card arrangements. Unlike generic debit cards in the marketplace today, which support both signature debit and PIN debit authorization methodologies, FSA, and HRA cards, and the vast majority of HSA cards (especially those using IRS IIAS methodology) are required under IRS regulations to leverage health expense adjudication technology, such as the IIAS standard.[4] In addition, unlike generic debit cards, the vast majority of UMB HSA cards employ merchant category code filtering which prohibits use of the cards at stores other than medical providers and drug stores. This practice helps HSA account holders avoid the potential 20% excise tax that would apply for using HSA funds at non-medical merchants. Neither of these technologies are currently supported by PIN debit networks. Consequently, to satisfy network exclusivity requirements under the Proposed Rules, issuers of these FSA, HRA, TSA and HSA cards would either need to enable a second signature-debit network on these cards or would need to enable PIN-debit functionality on these cards (which would be viable only after a PIN-debit network enabled its systems to support or accept IRS imposed expense adjudication capabilities).

While the Federal Reserve acknowledged the challenges created by the application of the network exclusivity requirement to Benefit Cards, it did not exempt these products from that requirement of the Proposed Rules. Benefit Cards operate in an environment of high

[4] We recognize that the IRS IIAS requirements do not mandatorily apply to HSA cards, but note that a significant number of such cards comply with IRS IIAS requirements to help facilitate account holder tax substantiation and reporting requirements. In addition, while TSA cards are not subject to the IIAS requirements, the IRS may impose similar point-of-sale restrictions on such cards in the future.

volume/high speed transactions. In many cases, implementation of a PIN-based network is incompatible with the current uses of such cards. By way of example, Benefit Cards used for transportation expenses (i.e., transportation spending accounts or "TSAs") must operate in an environment where crowds of people must quickly swipe their cards during high volume "commuter rush" periods. Current transit authorities do not have (and likely would not implement) PIN key pads at their turnstiles. Likewise, individuals who use their FSA/HRA/HSA cards at pharmacy "drive though" windows will, in many cases, be unable to use PIN key pads because the drive through windows are not equipped to handle such transactions.

Third, in some instances employer plan sponsors offer employee benefit plans that provide access to multiple types of benefit programs through a single card, including FSA, HRA, TSA and HSA, as well as dependent care, wellness and retiree account-based programs ("multi-purse cards"). The Federal Reserve's proposal does not appear to contemplate multi-purse cards. When an employer's program offers a single "purse" card such as FSA, the card may qualify for the general-use prepaid card exemption from the interchange fee restrictions under the Proposed Rules. If that same card can *also* access an HSA "purse" that accesses an "account held by or for the benefit of the cardholder," that card would appear *not* to qualify for the exemption. Without additional clarification on HSA exemption eligibility, it is possible that FSAs could inadvertently become ineligible for the general-use prepaid card exemption due to the HSA purse. In addition, within an employer program, individual cards may function differently when each employee selects benefits to meet their personal needs (e.g. stand alone FSA, stand alone HSA, HRA and TSA, HSA and limited purpose FSA, etc.) At the transaction level it is even possible for funds from multiple purses to be used in a single transaction. Current card processing technologies do not differentiate between purses at the point of sale so it will be impossible to determine whether the transaction is accessing a purse (such as an FSA) that qualifies for the general-use prepaid card exemption or whether it is accessing another purse (such as an HSA) that might not qualify for the exemption, and therefore impossible to know whether the interchange fee is limited.

Fourth, the Federal Reserve appears to misunderstand the very nature of FSA, HRA and TSA card program structures in presuming (as indicated in the Proposed Rules) that these products are "asset accounts" that are subject to the Proposed Rules. In fact, FSA, HRA and TSAs are employer-sponsored benefit arrangements that generally do not involve the establishment of individual "asset accounts" for covered employees. As a result, we believe that FSA, TSA and HRA cards are not debit cards because they do not access asset accounts. Instead, FSAs, TSAs and HRAs are employer sponsored and administered arrangements under which employees have an unsecured right to have up to a specified amount of health care expenses or transportation expenses reimbursed by their employer. The employer is not required to keep any funds on hand or to fund a specific legal account associated (on an omnibus or other basis) with FSA, TSA or HRA cards.

Fifth, implementation of the Proposed Rules will have a perverse impact on employee benefit card arrangements. Costs associated with processing employee claims are higher than processing of ordinary debit transactions, and those benefit claim processing costs will increase due to recent changes in law (e.g., as a result of adding duplicative processing networks and/or readjusting costs associated with performing IRS required substantiation). Consequently, the Federal Reserve's cap on interchange fees under the Proposed Rules will have a particularly negative effect on employers, issuers and plan administrators, who will be required to absorb higher costs even as interchange revenues are substantially decreased. As a result, employer plan sponsors may decide not to offer such benefit arrangements or may attempt to offset some of the increased costs and reduced Interchange Fee revenue by passing the costs on to individual employees. Consumers certainly do not benefit from a loss of payment options, and we believe that this is exactly what will happen if the Proposed Rules are reflexively applied to Benefit Cards.

Finally, HSAs (and some other employee benefit arrangements) qualify as bona fide trusts under the provisions of the EFTA. We believe that the Federal Reserve misconstrued Congress's intent by including such bona fide trust arrangements within the scope of the Proposed Rules. While we believe that Congress intended Section 920 of the EFTA to apply to a broader range of debit card products than are necessarily subject to other provisions of the EFTA, we believe that the Federal Reserve misconstrued and misapplied the statutory text in re-defining "account" for purposes of the Proposed Rules. More specifically, Section 920 provides that a card, code or device that accesses an asset account is a debit card "regardless of the *purpose* for which the account is established."[5] The plainest meaning of the phrase "regardless of the *purpose* for which the account is established," when juxtaposed to the definition of "account" Congress included in the EFTA (which provides that "accounts" are limited to those "established primarily for personal, family, or household *purposes*"[6]) is that Congress intended Section 920 to include business and commercial accounts otherwise excluded from the EFTA under Section 920. In other words, Congress intended Section 920 to apply to accounts set up for purposes besides personal, family or household purposes. The exemption in the EFTA definition of "account" for bona fide trust accounts at a financial institution does not describe the *purpose* of an account (i.e., a personal purpose or a commercial/business purpose); rather it describes an account characteristic that is not determinative of the account's purposes (e.g., a trust account may be established for any number of purposes). Consequently, the Federal Reserve, in re-defining "account" in the Proposed Rules, should have honored the existing exemption for bona fide trust accounts in the EFTA, thereby exempting HSAs (and similarly structured employee benefit arrangements) from the scope of the Proposed Rules.

For all of the reasons identified above, we believe that cards associated with FSAs, HRAs, TSAs and HSAs should, as was intended by Congress, be exempt from the application of Section 920

[5] EFTA Section 920(c)(2).
[6] EFTA Section 903(2).

and we strongly urge the Federal Reserve to reconsider the Proposed Rules. At a minimum, we respectfully request that the Federal Reserve delay the effective date of the Proposed Rules for FSA, HRA, TSA and HSA cards given the unique challenges this requirement poses for these card types until the unique issues related to such arrangements have been properly explored and addressed by the Federal Reserve. We realize that the Federal Reserve has limited time to address issues raised under the Proposed Rule, but given the more than 40 million consumers that could be adversely affected if IRS approved IIAS cards are not able to operate, we believe that further discussion and study are warranted. We would like to request a meeting with appropriate members of The Federal Reserve to discuss these issues further.

Sincerely,

Dennis Triplett
CEO Healthcare Services
UMB Bank, n.a.
Dennis.Triplett@umb.com
Office: 816.860.8230
Cell: 913.961.1498