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December 23, 2010

Via Email

Jennifer J. Johnson, Secretary

Board of Governors of the Federal Reserve System

20th Street and Constitution Avenue, N.W.

Washington, DC 20551

Attention: Docket No. R–1393 and RIN No. 7100–AD55

Re: Comments on Regulation Z Proposed Rule

Dear Ms. Johnson:

This letter is submitted to the Board of Governors of the Federal Reserve System ("Board") on behalf of the Network Branded Prepaid Card Association ("NBPCA") in response to the proposed rule published in the *Federal Register* on November 2, 2010 at 75 *Fed. Reg.* 67458-67509 ("Proposed Rule") relating to open-end (not home-secured) credit plans, in order to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"), and the corresponding Official Staff Commentary. Among other things, the Proposed Rule seeks to revise the definition of "credit card account under an open-end (not home-secured) consumer credit plan" in Section 226.2(a)(15) of Regulation Z, as added by the CARD Act, and the Board's Official Staff Interpretations relating thereto. These proposed revisions, particularly those in the Official Staff Interpretations, would, among other things, add examples of access devices that would be deemed "credit cards." Specifically, the proposal would add that if a line of credit can also be accessed by a card (such as a debit card or prepaid card), then that card is a credit card for purposes of Section 226.2(a)(15).

The NBPCA is a non-profit trade association representing a diverse group of organizations that take part in delivering network branded prepaid cards to consumers, businesses and governments. Network branded prepaid cards bear the logo of a payment network (American Express, Discover, MasterCard or Visa). The NBPCA's members include financial institutions, card organizations, processors, program managers, marketing and incentive companies, card distributors, law and media firms. The NBPCA is active on behalf of its members to foster an environment for the success of network branded prepaid cards and works with its members to establish and encourage best practices to benefit card users and industry participants. Since its inception, the NBPCA has devoted significant resources to educating consumers,

the media, and policymakers about prepaid card products. Clarifying the important differences between credit and prepaid cards has been among our highest educational priorities.

The NBPCA believes that if the Proposed Rule is adopted with its current language, including the proposed revision to the Official Staff Interpretations, the progress made in reducing confusion for consumers about the differences between prepaid and credit card products could be damaged.

Furthermore, millions of American consumers use general purpose reloadable prepaid cards as a substitute for traditional bank accounts (e.g. checking accounts), either because they are unable to obtain a traditional bank account, they do not desire a traditional bank account or they prefer the convenience offered by a general purchase reloadable prepaid card. General purpose reloadable prepaid card accounts function very similar to a traditional checking account with debit card access, minus paper checks. Yet the Proposed Rule discriminates against general purpose reloadable prepaid cards in two very important ways. First, the Board has determined that in some scenarios, a prepaid card can become a "credit card." However, the functionality of the general purpose reloadable prepaid card account is analogous to a checking account. By recharacterizing debit and prepaid cards as a "credit card" without doing so for paper checks or other forms of noncard-based electronic payments, the Board is creating an irrational distinction based on the composition of the payment device rather than the underlying functionality. Second, general purpose reloadable prepaid cardholders should have access to the same features and products available to checking account customers. We are concerned that the current language of the Proposed Rule creates a confusing and complex regulatory burden that undoubtedly will limit credit options for general purpose reloadable card users and prevent them from accessing credit products otherwise available without similar burdens to traditional bank account holders.

The NBPCA agrees that it would be damaging to consumers and our industry if a prepaid card was used solely as an access device for credit in order to violate the intent of the CARD Act. Such a product would be counterproductive to our efforts to educate our constituents about the unique advantages of prepaid cards. However, we draw an important distinction between such regulatory subterfuge and legitimate prepaid debit card product features and functionality. We do not believe that the Board's Proposed Rule and proposed revision to the Official Staff Interpretations make this distinction.

If the goal of the proposed revisions is to prevent intentional circumvention of the CARD Act, the NBPCA believes that the Board and all of the bank regulatory agencies already have the authority to prohibit such practices under the Federal Trade Commission ("FTC") Act to prohibit unfair or deceptive acts or practices ("UDAP"). In fact, we believe it would be more effective for the Board to exercise its UDAP authority rather than to add language to the Official Staff Interpretations under Regulation Z.

However, if the Board believes it is necessary to add language to the Official Staff Interpretations of Regulation Z to address such activity, the NBPCA has serious concerns about the current language in the proposed revisions and the practical application of such requirements. Although the NBPCA does not believe that it was the Board's intention to subject certain debit and prepaid card products to the regulatory framework of the Truth-In-Lending Act, it is our belief that the current language of the proposed revisions does just that.

Thus, below please find an outline of the NBPCA's concerns with the current language of the proposed revisions, along with a proposal for dealing with the Board's apparent concerns over certain entities that are using the pretext of a prepaid card or debit card to try to circumvent the requirements of the CARD Act. The NBPCA appreciates the opportunity to comment on the Proposed Rule and respectfully requests that the Board consider adopting the suggestions set forth herein.

Significant Concerns with Current Language of Proposed Revisions to the Official Staff Interpretations Relating to Section 226.2(a)(15).

A. Including debit or prepaid cards in the definition of "credit cards" will create significant confusion for consumers.

Network branded prepaid cards are relatively new payment instruments and comprise a diverse group of products that are popular with traditionally overlooked and underbanked consumers. These cards are analogous to debit cards whose main distinction from debit cards that are attached to traditional bank accounts are that the funds are pre-loaded to the card accounts, thus preventing in most circumstances, the ability of prepaid cardholders to spend more than the value loaded to the card. These cards are not and never have been "credit cards" as defined in Section 226.2. Indeed, precisely because the cards are not credit cards, prepaid cards have enjoyed tremendous growth in recent years as consumers attempt to curtail their debt load and avoid high interest rates and overdraft charges.[1]

Because prepaid cards are more like a form of debit card, entirely different legal, regulatory, and payment card association rules apply to the cards as opposed to credit cards, and there are different transaction capabilities and fundamentally different fee structures associated with them.[2] The only similarity of these cards to credit cards is that they are both tangible plastic cards that have the network brands imprinted on them.

Admittedly, the newness of these payment instruments and their physical similarities to credit cards originally created confusion in the marketplace that has not been fully eliminated. In response, media, government agencies, nonprofit groups, financial institutions, and credit, prepaid, and debit card companies have contributed news stories, financial education tools, public relations campaigns, and the

[1] See *The 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States: 2006 – 2009* (December 8, 2010). Available at http://www.federalreserve.gov/newsevents/press/other/20101208a.htm. The study found that more than 75 percent of noncash payments in the U.S. were made electronically in 2009, a 9.3 percent increase on an annual basis since 2006. Prepaid cards grew 21.5 percent annually from 2006 to 2009, according to the report - the highest rate of growth among any noncash payment type. See also 6th Annual Network Branded Prepaid Market Assessment, Mercator Advisory Group, 2009; and *One Size Does Not Fit All, A Comparison of Monthly Financial Services Spending*, Center for Financial Service Innovation (CFSI), 2008.

[2] Electronic Funds Transfer Act, 15 U.S.C § 1693 (1978); Regulation E, 12 CFR 205.

like, to help consumers understand these very important distinctions. The NBPCA fears that the progress made to educate consumers will languish if debit or prepaid cards are included in the definition of "credit card," and that the resulting confusion will: (a) create unnecessary financial and compliance burdens; (b) remove a critical access point to the financial mainstream by discouraging financially overlooked and underbanked consumers from obtaining and using prepaid cards, or even worse (c) mislead consumers into purchasing prepaid cards because they believe that they are credit cards. This would be a disservice, particularly to underserved consumers, as the anti-fraud protections afforded certain network-branded prepaid cards under Regulation E and the card association rules give these consumers protections over carrying cash and allow them to make purchases that are not available to cash only users.

B. Debit and prepaid cards should only be considered access devices (and thus, "credit cards") if the sole functionality of the device is to receive and spend loan proceeds.

As previously noted, in its proposed additions to the Official Staff Interpretations, the Board staff has proposed to include the following clarification: "[I]f the line of credit can also be accessed by a card (such as a debit card or prepaid card), that card is a credit card for purposes of § 226.2(a)(15)(i)." It is unclear what products the Board intended to capture by adding this statement. The NBPCA believes that debit and prepaid cards should only be considered credit access devices (and thus, "credit cards") if the *sole* functionality of the card is to receive and spend loan proceeds (i.e., there is no ability for the consumer to use their debit or prepaid card to access funds other than loan proceeds). The fact that a consumer opens a line of credit, makes a conscious decision to take an advance, and has the loan proceeds from that advance transferred to their prepaid card or checking account should not transform their prepaid card or debit card into a "credit card." Indeed, these transactions should not be treated any differently than those made by a customer who obtains an advance from a line of credit, receives cash, and either loads the cash onto their prepaid card or deposits it to their checking account.

C. Any time there is a transfer of loan funds into an asset account (such as a checking account or a general purpose reloadable prepaid card account), neither the account number nor any associated debit or prepaid card should be considered a "credit card."

The proposed additions to the Official Staff Interpretations of the definition of "credit card," also include the following:

> For example, if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card for purposes of §226.2(a)(15)(i).

First, we believe this language should be clarified to provide that a general purpose reloadable prepaid card account that allows consumers to load and spend their own funds (and not solely loan proceeds) is an asset account, just like a checking account or any other asset account. The Proposed Rule states that a prepaid card can become a "credit card" in cases where loan funds from a line of credit are accessible by a prepaid card. Yet, if loan funds from a line of credit are accessible by an account number and transferred to a traditional bank account, the account number used to access such funds is not a credit card. Presumably this would also be the case if the loan funds could be accessed by paper check. Whether it's a general purpose reloadable prepaid card account or a checking account, in both of these cases, funds from the line of credit are being transferred from a loan account to an asset account. Yet, the general purpose reloadable prepaid card account in this case is being treated differently from the checking account.

Second, the above language seems to make clear that where there is a transfer of funds between accounts with the same creditor, the account number is not a credit card. However, the NBPCA believes that whenever there is a transfer of loan funds into an asset account, the account number or debit or prepaid card should not be a credit card, regardless of whether the loan account and asset account are with the same or different creditors. Consider the following example:

> Bank A opens a line of credit for a consumer. The Consumer takes an advance and has the advance transferred via ACH to their prepaid card account or checking account at Bank B. Under the current language of the Board's proposed rule, Bank B's prepaid card or debit card could be reclassified as a "credit card" (a product which Bank B neither disclosed for, or even intended to offer).[3]

If a customer transfers loan proceeds to a checking account at the same or a different financial institution and that checking account is accessible with a debit card, the debit card should not be transformed into a "credit card." Similarly, if a consumer transfers loan proceeds into a general purpose reloadable prepaid card account and the prepaid card account is at a different financial institution, that prepaid card should not become a "credit card."

[3] Such an example becomes even more complex if the debit card is "decoupled," and issued by a third financial institution. For additional information on how decoupled debit cards work, see *http://www.americanbanker.com/usb_issues/118_2/-343006-1.html* and *http://www.tempo.com/Press/20080226-american-banker.pdf*.

However, the current language of the proposed addition to the Official Staff Interpretations would arguably make debit cards and prepaid cards "credit cards" in these instances. To avoid a situation in which a consumer can obtain a financial product from one institution and then use it in a manner which causes another financial institution's product to become something it never intended, the NBPCA urges the Board to clarify that any time there is a transfer of funds to a general purpose reloadable prepaid card account, checking account, or other asset account, the account number is not a "credit card."

D. A transfer of loan funds from a line of credit to a debit card or prepaid card to the account underlying the debit card or prepaid card should not transform that debit card or prepaid card into a "credit card."

Many checking accountholders and, increasingly, prepaid card accountholders, obtain lines of credit in which funds either are automatically transferred, or can be affirmatively transferred, into an accountholders' checking account or prepaid card account in the event transactions presented against the account would otherwise create a negative balance. These lines of credit are typically designed to transfer funds from the line of credit to the accountholder's account in preset amounts, such as $20-200 increments, or to transfer an amount sufficient to cover the negative balance.

The last line of the Official Staff Interpretations provides, "Furthermore, if the line of credit can also be accessed by a card (such as a debit card or prepaid card), that card is a credit card for purposes of § 226.2(a)(15)(i)." This calls into question whether a transaction that either triggers an automatic transfer of funds to the accountholder's asset account, or where the consumer affirmatively requests such a transfer of funds, would change the debit card or prepaid card into a "credit card." For the type of advances where the transfers are triggered by the use of a debit card or prepaid card, however, and the amount of the advances: (1) are not *always* equal to the amount of a purchase, and (2) are transferred to the accountholder's checking account, prepaid card or other asset account, the Official Staff Interpretations should be clarified to make it clear that the use of such a line of credit would not cause the debit card or prepaid card to be classified as a credit card for purposes of the CARD Act.[4]

E. It is unclear which disclosures would apply and what the content of such disclosures would look like if a prepaid card is reclassified as a "credit card."

As indicated above, we believe that the proposed additions to the Official Staff Interpretations create confusion as to when a prepaid card could fall within the definition of a "credit card." Moreover, when a

[4] See footnote 4. Again, the application of the proposed language to "decoupled" debit cards becomes very complex.

prepaid card does fall within the definition of "credit card," several additional, potentially more confusing, questions arise:

1. Which disclosures should be provided (the prepaid card disclosures, the credit card disclosures, both[5])?

2. What is the triggering point when the credit card disclosures must be provided (when the consumer purchases the prepaid card, even if no loan account exists, or at some later time)? Is it possible that a prepaid card is not a "credit card" at the time of purchase, but later becomes one?

3. How should the periodic statements distinguish credit balances from the consumer's own funds? Is it possible for the billing cycles and due dates to change based upon whether or not there is a credit balance?

4. Will consumers receive the disclosures twice – from both the entity extending credit and the issuer of the card (if different)? If the originator of the loan and the issuer of the card are the same entity, can the disclosures be combined without confusing customers?

The Regulation Z credit card rules and model forms associated therewith are not suited for application to prepaid card products and will undoubtedly result in increased consumer confusion. If the Board intends to make such rules applicable to prepaid cards, additional rules and clarification as to how to apply the Truth-In-Lending Act and its implementing regulations will apply to prepaid card products must be proposed and comment sought prior to any mandatory compliance date. We believe our proposal represents a better approach.

I. NBPCA's Alternative Proposal in Light of Concerns Noted Above

We support the Board's efforts to stop entities from circumventing the CARD Act provisions on open-ended credit by issuing a "loan access device" which may be labeled a debit card or prepaid card, but functions essentially the same as a credit card. We believe it would be deceptive to call a product a debit or prepaid card when the card does not act in any way like a debit or prepaid card, but instead functions exactly like a credit card. However, as demonstrated from the concerns of the current language of the proposed revisions, the NBPCA believes that it would be more appropriate for the Board to use its UDAP authority to prevent such intentional circumvention of the CARD Act rather than to risk creating substantial consumer confusion associated with providing credit card disclosures with the issuance of a

[5] Regulation Z, 12 C.F.R. §§ 226.5a, 226.6.

debit or prepaid card. Such an approach would eliminate the potential to create consumer confusion about whether certain debit and prepaid card products are also "credit cards." Plus, it avoids the "slippery slope" created by recharacterizing some spending devices (i.e. prepaid cards, debit cards and account numbers) as a "credit card" and not others (i.e. a paper check or ACH), when the underlying ability for the consumer to make purchases at a point of sale is the same. Finally, it avoids placing the Board in a position where it must constantly monitor innovation in the marketplace as the lines between payment devices continue to blur.[6]

If, however, the Board believes that it is necessary to add language to Regulation Z to clarify that certain types of "debit" or "prepaid cards" are credit cards if the only funds that may be accessed using such cards are funds from a line of credit, the NBPCA would propose the following changes to the current language of the proposed changes to the Official Staff Interpretations, along with the necessary changes to the Section-by-Section Analysis in light of the concerns outline above.

Subpart A—General

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Section 226.2—Definitions and Rules of Construction

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2(a)(15) Credit card.

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2. Examples.

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ii. In contrast, credit card does not include, for example:

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[6] The bank regulatory agencies have long admitted to the struggle of keeping regulations in step with technology. The Board's apparent desire to recharacterize certain payment devices as "credit cards" may already be antiquated given the release of the MultiAccount™ card by Dynamics, Inc. The device includes two buttons on the face of a card. Next to each button is a printed account number and a light source. A user can select an account by pressing one of the buttons. The card visually indicates the selection by turning ON the light source associated with the selected account. See http://www.poweredcards.com/products_multi.php and http://blog.unibulmerchantservices.com/credit-card-2-0-hides-sensitive-data-links-multiple-accounts/

C. An account number or an account access device (such as a check, debit card, general purpose reloadable prepaid card, or other access device associated with the account number) that accesses a credit account, unless the ~~account number~~account access device can access an open-end line of credit solely to purchase goods or services at the point of sale. For example, if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number, debit card, general purpose reloadable prepaid card, check, or other account access device in order to transfer funds into ~~another~~ an asset account (such as ~~an asset account~~ a checking account, general purpose reloadable prepaid card account, or other account established primarily to hold consumer funds, whether or not such account is held with the same creditor), the account number or account access device is not a credit card for purposes of § 226.2(a)(15)(i). However, if the account ~~number~~ access device can ~~also~~ access the line of credit to use loan funds only in order to purchase goods or services ~~(such as an account number that can be used to purchase goods or services on the Internet),~~ at point of sale, including the Internet, and not to transfer funds into an asset account, the account ~~number~~ access device is a credit card for purposes of § 226.2(a)(15)(i). ~~Furthermore, if the line of credit can also be accessed by a card (such as a debit card or prepaid card), that card is a credit card for purposes of § 226.2(a)(15)(i).~~

If this approach were adopted, an issuing bank would know at the outset whether its product was a prepaid card or a credit card and could tailor its disclosures accordingly.

Conclusion

We respectfully urge the Board to consider our comments and suggestions. If you have any questions, or would like to discuss any of the matters outlined above in further detail, please do not hesitate to contact us at (201) 746-0725. [7]

Sincerely,

Kirsten Trusko

NBPCA President and Executive Director

[7] *This comment letter does not necessarily express the views of every member of the NBPCA.*