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Submitted via the Federal eRulemaking Portal at www.regulations.gov.

February 22, 2011

Honorable Ben S. Bernanke, Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Regulation II; Docket No. R-1404; Notice of Proposed Rulemaking - Debit Card Interchange Fees and Routing

Dear Chairman Bernanke:

OptumHealth Bank ("Bank") is a Utah chartered FDIC insured financial institution that provides health savings accounts ("HSAs") and other health-related banking services to more than one million individuals nationwide. The Bank is owned by UnitedHealth Group ("UHG") and is part of the of the financial services division of OptumHealth, a health and wellness company servicing more than sixty million people. In addition to helping individuals and families save for their out-of-pocket healthcare expenses, the Bank processes electronic healthcare claim payments, provides specialized credit to the healthcare industry, and issues MasterCard® cards that facilitate the use of HSAs, Flexible Spending Arrangements ("FSAs") and Health Reimbursement Arrangements ("HRAs"). The products and services provided by the Bank simplify and lower the cost of healthcare.

Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111-203) ("Dodd-Frank Act") added Section 920 ("Section 920") pertaining to debit transaction interchange to the Electronic Fund Transfer Act ("EFTA"). On December 16, 2010, the Board of Governors of the Federal Reserve System (the "Federal Reserve") released a proposed rule to implement the requirements of Section 920 ("Proposed Rule"). As currently drafted, the Proposed Rule would adversely affect consumers by raising the costs of healthcare and unduly hindering their ability to save and pay for current and future medical expenses. The Bank is extremely concerned that the Proposed Rule may also have other unintended consequences since it (i) inadvertently includes small industrial banks as large issuers, (ii) does not allow for the full recognition of issuer costs, (iii) includes HSAs in the definition of "account", (iv) does not mandate the creation of a two-tiered payment system, which undermines the statutory exemption created for cards when issued by exempt issuers, and (v) applies network and routing restrictions to FSAs, HRAs, and HSAs thereby removing healthcare payment options from consumers and increasing costs.

In order to keep the final rules aligned with Congressional intent, the national goal of increasing access to and lowering the cost of healthcare and preserving a level playing field in the HSA market, the Proposed Rule should be modified to better reflect the realities of the healthcare market, conform with healthcare reform and comply with the legislative intent of the Dodd-Frank Act. The Proposed Rule should continue to exclude Health Savings Accounts, Flexible Spending Arrangements and Health Reimbursement Arrangements.

1. Proposed Rule Inadvertently Includes Small Industrial Banks as Large Issuers.

Section 920 provides an exemption from the interchange fee restrictions for any issuer that "together with its affiliates" has assets of less than $10 billion ("small issuers"). This exemption was premised on the understanding that small issuers are not able to benefit from the economies of scale available to larger issuers. Unfortunately, the strict construction of "together with its affiliates" sweeps in certain institutions like registered Industrial Loan Companies that, while part of a large corporate entity that may exceed $10 billion in assets on a consolidated basis, are in fact small issuers that lack the economies of scale of large issuers or conglomerates of small issuers. The Bank requests clarification in the Proposed Rule that "together with its affiliates" should be interpreted to mean "together with its affiliates under common control with the same bank holding company or financial holding company" to avoid the unintended consequence of eliminating the exemption from the interchange fee restrictions for industrial banks that would otherwise be considered small issuers.

2. Proposed Rule Does Not Allow for the Full Recognition of Costs.

The Bank agrees with the general arguments of large and small issuers with respect to the restriction on interchange fees. In particular, the Proposed Rule will have a profound impact on the Bank and HSAs. The Proposed Rule sets an arbitrarily low $0.12 cap on debit interchange that does not reflect the true costs of providing debit card access to an HSA. The Bank is a custodian of over 675,000 tax-advantaged HSAs and does not have demand deposit accounts. HSAs qualify as health benefit trust accounts under the Internal Revenue Code ("IRC")[1] and the Internal Revenue Service has specifically issued guidance stating that an HSA is not considered a fund or welfare benefit fund under the IRC.[2] As a result, HSAs are not considered an "account" under the EFTA.

Due to the complexity and unique nature of an HSA, the Bank provides many additional services to consumers beyond those provided on a traditional bank account. For instance, the Bank provides HSA account holders with healthcare planning tools, specialized customer support, detailed educational resources, calculators, and other information to help customers understand the complex eligibility and tax requirements of their HSAs. Consequently, HSAs have higher indirect costs due to the level of education, expertise, fraud monitoring and prevention, and IRS tax reporting required in providing a high quality and legally compliant financial healthcare product.

Similar to most financial institutions, the Bank utilizes interchange fee revenue to subsidize the cost of providing HSAs at a low cost to the consumer, including issuing debit cards, providing customer service and preventing fraud. If the Proposed Rule remains unaltered, the resulting reduction in revenue would negatively impact the Bank's ability to provide these services and remain competitive with other small issuers in the HSA market since it would require the Bank to raise its account fees by more than 50% to remain revenue neutral.

While it is the understanding of the Bank that the Proposed Rule suggests that issuers can recover sufficient revenue from other sources to cover the costs of debit-card systems plus a reasonable rate of return, the Bank believes that any increase in account fees is contrary to the legislative intent of the Dodd-Frank Act and the goals of healthcare reform since it would directly impact the cost of healthcare for over a million consumers, including individuals employed by the merchants that benefit from the Proposed Rule.

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[1] IRC Section 223(D)(1).
[2] Notice 2004-2 Q&A #36.

The one-size-fits-all cap incorrectly assumes uniformity of cost across all financial products and services. Therefore, the Bank urges the Federal Reserve to establish guidelines with respect to interchange fees rather than set a fixed and arbitrary amount that does not consider the full range of costs associated with providing a debit card program.

3. HSAs Are Not Exempted by the Proposed Rule Contrary to the Statute and Consumers' Interests.

a. Definition of "account" should not be modified to include HSAs

The definition of "account" in the Electronic Funds Transfer Act ("EFTA")[3] is limited to accounts "established primarily for personal, family, or household purposes".[4] Notably, it expressly excludes an account held by a financial institution pursuant to a bona fide trust arrangement. HSAs qualify as bona fide trust under the provisions of the EFTA and so fall outside the definition of "account". The Federal Reserve confirmed that Regulation E[5] does not apply to electronic payment cards used with HSAs. Specifically, the Federal Reserve stated that "cards used solely for health-related expenses—such as cards linked to flexible spending accounts, health savings accounts, or health reimbursement arrangements—are not covered by the regulation, whether funded by the employer or the employee."[6]

The Dodd-Frank Act did not modify or replace the definition of "account" in the EFTA. Rather it defined "debit card" to include cards "issued or approved for use through a payment card network to debit an asset account (regardless of the purpose for which the account is established)". However, the Proposed Rule revises the definition of "account" to mean "a transaction, savings, or other asset account (other than an occasional or incidental credit balance in a credit plan) established for *any purpose*"[7]. The proposed definition expands the EFTA definition to include accounts established for business purposes and accounts held by a financial institution under a bona fide trust arrangement. By including bona fide trust arrangements in a new definition of "account", the Proposed Rule exceeds the scope of authority granted by the Dodd-Frank Act by inappropriately expanding Section 920 to include healthcare and employee benefit programs such as HSAs which are bona fide trust arrangements.

The Bank does not agree that Congress intended for the Federal Reserve to redefine "account" to include HSAs and other healthcare related cards within the scope of the Dodd-Frank Act. On the contrary, the Congressional Record clearly shows that key members of Congress specifically intended that cards used in connection with FSAs, HSAs and HRAs would remain exempt from Section 920 of the EFTA.[8] Without explicit direction to change the definition, the Proposed Rule is overreaching. The Bank requests that the Proposed Rule be revised to conform to the legislative intent behind the Dodd-Frank Act by retaining the EFTA's current definition of "account", which excludes bona fide trust accounts held by a financial institution pursuant to a bona fide trust arrangement.

b. Current language creates a market disparity

Inclusion of bona fide trust accounts in the definition of "account" also creates an undesirable form-over-substance market disparity based upon HSA structure. If the definition of "account" in the

[3] 15 USC 1693.
[4] EFTA Section 920(2).
[5] Regulation E, 12 CFR 205.2, issued pursuant to the EFTA.
[6] Preamble to 2006 amendments to Regulation E, 71 Fed. Reg. 51437, 51441 (Aug. 30, 2006).
[7] 75 Federal Register 81721, 81755.
[8] Congressional Record Statements of Former Senate Banking Committee Chairman Chris Dodd (D-CT) and Representative Larson (D-CT) and Chairman of the House Financial Services Committee, Representative Barney Frank (D-MA), 156 Cong. Rec. S5927 (2010), 156 Cong. Rec. H5225-226 (2010).

Proposed Rule is not deleted or at lease modified to exclude bona fide trust accounts (as explained above), the exemption for general-use prepaid cards will create an artificial distinction that prevents a significant number of HSAs from meeting the exemption simply because of how they are structured.

HSAs may be offered by financial institutions and other qualified HSA custodians/trustees that are not depositories. Qualified non depository HSA custodians generally utilize an omnibus account structure and do not establish individual asset accounts. Omnibus structured HSAs easily fit within the omnibus account (prepaid card) exemption provided in Section 920 and as such, HSA debit cards issued by these institutions will be exempt from the Proposed Rule.

Conversely, financial institutions that provide HSAs directly to the consumer typically structure HSAs as individual bona fide trust accounts. Under the new definition of "account", HSA debit cards issued by these institutions would not be exempt from the Proposed Rule. Because the Proposed Rule exempts HSA cards associated with omnibus accounts and does not exempt HSA cards associated with individual bona fide trust accounts, the Proposed Rule would create an unequal playing field for HSA providers that are organized differently but provide the same services. This is contrary to the legislative intent with respect to healthcare accounts and introduces additional complication and cost into the HSA marketplace.

The Bank utilizes the individual bona fide trust account model and it is one of the nation's largest custodians of HSAs. The Bank currently provides financial products and services to over one million people and has approximately 675,000 health savings accounts. It has also issued 755,000 HSA cards, 460,000 FSA cards and 210,000 HRA cards. In order to meet the exemption in the Proposed Rule, the Bank would be required to change the structure of all of its HSAs to an omnibus model. Due to the large number of HSAs at the Bank, modifying the Bank's account structure to fit within the omnibus exception would be unduly burdensome, both financially and operationally. The change would serve no beneficial purposes other than to qualify the Bank for the Section 920 exemption. It would cause significant confusion to the Bank's customers and result in a significant increase to their monthly fees to capture the costs incurred by the Bank in effecting this change.

The Bank does not believe that Congress intended to create two different treatments under the Dodd-Frank Act for HSA providers based solely on the banking model. By re-defining "account" to include bona fide trust accounts, the Proposed Rule inadvertently distinguishes the form of the two models rather than making a meaningful distinction based on any substantive difference. It is the Bank's hope that the Federal Reserve will honor Congress' intent with regard to HSAs and exclude bona fide trust accounts from the definition of "account", thus eliminating the distinction between HSA providers based upon account structure.

4. **Proposed Rule Does Not Mandate the Creation of a Two-Tiered Payment System And as a Result Undermines Any Exemption Created for Healthcare Related Cards Issued by Exempt Financial Institutions.**

The Proposed Rule fails to recognize that a two-tier debit card fee structure would be required to appropriately compensate both large and small banks. While the capped fee included in the Proposed Rule will make debit cards issued by large financial institutions more attractive for merchants to accept, it creates a disadvantage for small issuers that qualify as exempt financial institutions. Since there is no mandate to create a two-tier debit card payment system, a payment card network may choose to compensate all issuers, regardless of size, at the interchange rate for large regulated financial institutions.

Such a decision by a payment card network would render any small issuer exemption or exclusion provided in the Dodd-Frank Act or the Proposed Rule devoid of effect. Furthermore, the routing and exclusivity provisions allow the retailer to choose a network that does not utilize a two-tier debit card interchange fee system, thus negating any distinction between non-exempt transactions, exempt small-issuer and exempt health benefit transactions.

5. Proposed Rule Applies Network and Routing Restrictions to FSAs, HRAs, and HSAs Thereby Removing Healthcare Payment Options from Consumers and Increasing Costs.

Consumers will be substantially harmed if FSAs, HRAs and HSAs are required to comply with the network exclusivity requirements under the Proposed Rule because the burden and costs to issuers, merchants, and payment processors of adding and supporting a second signature-based debit network on each of these cards could be substantial, increasing program expenses and potentially causing the Bank and other issuers to consider whether to even provide these cards, merchants to stop accepting the cards and payment processors to stop supporting the cards.

In its presentation of the Proposed Rule, the Federal Reserve acknowledged the unique challenges that would be presented by their application to health benefit card arrangements, and the Bank believes that additional time is needed to carefully evaluate the consequences of imposing such requirements on the unique infrastructure of existing health 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 are required under IRS regulations to leverage health expense adjudication technology, such as the IIAS standard. This technology is not currently supported by PIN debit networks. Consequently, to satisfy network exclusivity requirements under the Proposed Rule, issuers of FSA and HRA 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 HRA, FSA and HSA cards, it did not exempt these products from that requirement of the Proposed Rule. Such cards operate in an environment of high 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, 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.

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, 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 a limited purpose FSA, the card may qualify for the general-use prepaid card exemption from the interchange fee restrictions under the Proposed Rule. 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 a limited purpose FSA 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, 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 a limited purpose 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.

Implementation of the Proposed Rule will also have a significant adverse impact on employee benefit card arrangements. Costs associated with processing employee claims are higher than processing ordinary debit transactions, and the costs of benefit claim processing 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 Rule will have a particularly negative effect on the Bank, employers, 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 the Bank believes that this is exactly what will happen if the Proposed Rule is reflexively applied to HSA, FSA and HRA cards.

Conclusion

The Bank appreciates this opportunity to express its concerns, and those of its customers, and hopes that you will find this information helpful. As you craft the final rules, please fulfill the legislative intent of the law and (i) clarify that "together with its affiliates" does not include small industrial bank issuers, (ii) establish guidelines with respect to interchange fees rather than set an arbitrary fee cap that does not consider the full range of costs associated with providing a debit card program, (iii) comply within the statutory constraints and uphold Congress' intent to keep bona fide trust accounts outside the definition of "account", (iv) mandate the creation of a two-tiered interchange fee system so that the exemptions in the Proposed Rule will not be rendered meaningless, and (v) preserve healthcare payment options for healthcare expenses by removing FSAs, HRAs, and HSAs from the network exclusivity and routing restrictions. These changes will help keep healthcare costs down and protect consumers.

The Bank would welcome the opportunity to discuss any of its concerns with representatives of your agency as they move ahead with their mandate to faithfully execute the law. In addition, please do not hesitate to contact us if any information is needed from the Bank as you finalize this rule. Thank you for your consideration.

Sincerely,

Charles L. Wilkins, CEO
OptumHealth Financial Services

cc: Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551