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February 22, 2011

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

Re: Debit Card Interchange Fees and Routing: Proposed Rule
(Docket No. R-1404)

Submitted electronically: www.regulations.gov

Dear Secretary Johnson:

America's Health Insurance Plans (AHIP) is writing to provide comments regarding the proposed rule on debit card interchange fees and routing published in the *Federal Register* on December 28, 2010. The proposed rule, which implements Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), establishes requirements for debit transactions between consumers, merchants, and financial institutions. Our comments address the unintended and potentially negative impact of the proposed rule on debit cards issued in connection with health spending accounts such as a health Flexible Spending Arrangement (FSA), Health Reimbursement Arrangement (HRA) or Health Savings Account (HSA). The rule inadvertently sweeps in health account debit cards which were never intended to be subject to the Dodd-Frank Act provisions.

AHIP is the national association representing approximately 1,300 health insurance plans that provide coverage to more than 200 million Americans. Our members, including health insurance plans and financial institutions, offer a broad range of health insurance products in the commercial marketplace and provide administrative services for, or insurance coverage in connection with, health FSAs, HRAs, and HSAs.

As discussed below, we believe the Dodd-Frank Act provisions regarding interchanges were never intended to apply to health spending account debit cards. In addition, HSAs established pursuant to bona fide trust arrangements are specifically excluded from the definition of "account" for purposes of the Electronic Funds Transfer Act (EFTA) and are therefore not subject to the Dodd-Frank Act requirements which are nonetheless incorporated into the EFTA.

In addition, health spending account cards are administered entirely differently from other debit transactions. As a result, the proposed rule raises administrative challenges for health spending account debit cards by increasing costs and red tape that will negatively impact consumers and

employers that use FSAs, HRAs, and HSAs. **AHIP recommends the exclusion of health spending accounts from the proposed rule, or in the alternative, that the Federal Reserve suspend application of the rule to health spending accounts until further study regarding the use debit cards in connection with such accounts.**

Background on Health Spending Accounts

Health spending accounts provide consumers with the ability to save tax-free funds to pay for medical care. In general, the accounts are subject to the following requirements under the Internal Revenue Code (IRC):

- Health FSAs – Employers may establish health FSAs for their employees to pay for qualified medical expenses. Employees make annual contributions up to a specified dollar limit established by the employer (effective in 2013, annual contributions will be subject to a $2,500 limit). FSA funds that are not spent at the end of the plan year (which may include a grace period) are forfeited.

- HRAs – Employers may establish and fund HRAs for payment of medical costs. Most employers also provide health coverage along with the HRA. Unused HRA funds are typically rolled-over at the end of the plan year.

- HSAs – Individuals or employers may establish and fund HSAs which must be set up in connection with a qualified high deductible health plan. The health plan is subject to limits on annual deductibles and out-of-pocket expenses. The HSA is owned by the individual who may take the funds with them if they change jobs or health coverage.

These accounts are becoming increasingly popular with consumers and employers. Over 10 million individuals were enrolled in HSA qualified health coverage as of January 2010.[1] Among employers, thirty-four percent of firms with 1,000 or more employees offer an HRA or HSA option for their employees.[2]

Health spending accounts, whether established through an employer or by an individual consumer, are almost always administered through a debit card arrangement issued by a financial institution. In some cases the debit card may be used to administer multiple accounts, such as a joint health FSA and HSA. The debit card facilitates easy administration and account access,

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[1] AHIP Center for Policy and Research, "January 2010 Census," (May 2010), accessed at: http://www.ahipresearch.org/pdfs/HSA2010.pdf

[2] Kaiser Family Foundation/HRET, "Employee Health Benefits: 2010 Annual Survey," (September 2010), accessed at: http://ehbs.kff.org/pdf/2010/8085.pdf

allowing individuals to use their FSA, HRA or HSA funds to reimburse prescription drug costs, medical office co-payments, and other qualified medical expenses.

One of the key features of health spending accounts is that the use of funds must be "substantiated" to prove that the reimbursement is for qualified medical expenses that meet federal IRC requirements. In the case of health FSAs and HRAs, the plan administrator is responsible for substantiation. Individual taxpayers must be able to demonstrate that HSA funds were used for a qualified purpose in connection with their federal tax return or pay a 20% excise tax on the amount. As a result, merchants and financial institutions, in their capacity as health spending account administrators, have established extensive inventory control systems that are used to review and approve each debit card transaction to make certain the funds are only used for a qualified medical expense. This approval process is always operational with FSAs and HRAs and in some cases with HSAs.[3]

Application of the Dodd-Frank Act to Health Account Debit Cards

During debate on the Dodd-Frank Act, the sponsors of the legislation made clear that the interchange provisions were not intended to apply to health spending accounts. In the House, Representative Barney Frank, who was at that time Chairman of the Financial Services Committee, and Representative John Larson made the following statements:

> 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)(ii)(II).

[3] For example, participating pharmacies will include a notation on the store receipt for items that are "FSA qualified" to assist with this function. Cashiers will typically ask the cardholder for another form of payment when non-qualified items are presented at the point of sale.

> 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 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. H5225-5226 (June 30, 2010), *emphasis added.*

Senator Christopher Dodd, then Chairman of the Committee on Banking, Housing, and Urban Affairs, made a similar statement for the record during the debate in the Senate:

> 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 (July 15, 2010), *emphasis added.*

It is a well settled principle of law that agencies, "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). Congress clearly intended that health spending account debit cards, including cards used in connection with health FSAs, HRAs, and HSAs would not be subject to rulemaking with respect to interchanges. **AHIP recommends that the proposed rule be revised to make clear that health spending account debit cards are not included.**

Application of the Dodd-Frank Act to certain HSAs

In addition to the stated Congressional intent with respect to health care debit transactions, the interchange requirements are not applicable to HSAs when established pursuant to a bona fide trust arrangement. The interchange provisions of the Dodd-Frank Act amended the EFTA by imposing new legislative requirements on certain financial institution "accounts." That term is defined by the EFTA "to not include an account held by a financial institution under a bona fide trust agreement." (15 U.S.C. §1693a(2)).

Although the Dodd-Frank Act defines a "debit card" it did not change the underlying definition of an account through which such cards are issued. As a result, HSAs established pursuant to a bona fide trust arrangement – which are specifically excluded from the EFTA – should not be subject to the Dodd-Frank Act's requirements. **If the proposed rule is not amended to exclude health spending account debit cards, the rule should clarify that HSAs established pursuant to a bona fide trust agreement are not subject to the interchange requirements.**

Consideration of the Unique Features of Health Account Debit Cards

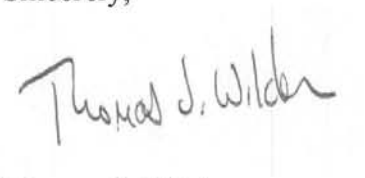
As noted above, health spending account cards are administered differently from other debit transactions. The proposed rule, however, fails to adequately account for these differences. For example, the proposed rule requires that "electronic debit transactions made using such cards must be capable of being processed on at least two unaffiliated payment card networks . . . ." (12 CFR §235.7). As a result, the debit card transaction would have to be configured so that it can be processed by either: (a) two unaffiliated PIN-based card networks; (b) two unaffiliated signature-based card networks; or (c) separate (and unaffiliated) PIN-based and signature-based networks.

Most health spending account cards are not currently supported as PIN-based networks. Adding PIN networks for such cards is an unnecessary and administratively burdensome requirement (e.g., asking physician offices, ambulatory surgical centers, pharmacies, and other providers to add PIN enabled technology to their billing process). The alternative approach of adding a second signature network would also require significant time and expense which will add to the cost and complexity of account administration. In the case of HSAs, these costs will be directly born by consumers, taking away funds that could be used to reimburse medical expenses.

If the rules are made applicable to health spending account debit cards, we believe additional study is necessary to understand the unique features and requirements of such accounts. **AHIP recommends that if health spending account debit cards are not excluded from the proposed rule, the Federal Reserve delay application of the proposed rule to such accounts pending further study.**

We appreciate the opportunity to provide our views on this important issue. Please feel free to contact me at (202) 778-3255 or twilder@ahip.org if you have any questions.

Sincerely,



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