EMPLOYERS COUNCIL
ON FLEXIBLE COMPENSATION
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February 22, 2011

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

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

Dear Sir or Madam:

The Employers Council on Flexible Compensation (ECFC) is grateful for the opportunity to submit comments on the Federal Reserve's proposed rules on debit card interchange fees ("proposed rules"). ECFC is a membership association dedicated to maintaining and expanding employee benefit programs offered on a pre-tax basis including health care, transportation, dependent/child care assistance and retirement plans. ECFC's more than 100 members include employers who provide these important benefits, as well as insurance, accounting, consulting, third party administration and actuarial companies. Together, ECFC member companies design, offer, or administer flexible benefits for tens of millions of working Americans.

ECFC appreciates the magnitude of the task before the Federal Reserve in issuing the proposed rules. We are deeply troubled, however, that the Federal Reserve has proposed applying the interchange fees and network exclusivity and routing restrictions included in Section 1075 of the Wall Street Reform and Consumer Protection Act (P.L. 111-203) to health and other benefit cards. This approach is squarely counter to Congressional intent, which Representative Barney Frank and Senator Chris Dodd, in their capacities as Chairman of the Financial Services and Banking Committees respectively, clearly expressed during deliberations on the legislation.[1] Excerpts from this discussion are included on Appendix A.

The Federal Reserve's proposal fails to consider the unique aspects of health and other benefit cards that support the electronic adjudication and/or substantiation of employee benefit claims. In addition to lowering employers' benefit administration costs, these benefit card features offer employees immediate and convenient access to their benefit dollars. Given these distinct features, and for the additional grounds explained in greater detail below, we respectfully urge the Federal Reserve to reconsider its proposed approach. We firmly believe that failure to do so will have significant unintended consequences for employers who utilize

[1] 156 Congressional Record, H5225-5226 and S5927 (2010)

benefit cards, and who administer employee benefits, and more importantly, for the approximately 30 million employees and their families who use them.

Health and other benefit cards differ from traditional debit cards, which permit signature debit and PIN debit authorization methodologies. Specifically, Internal Revenue Service (IRS) regulations require that flexible spending accounts (FSAs) and health reimbursement arrangements (HRAs) employ health expense adjudication technology (e.g., the IIAS standard). In addition, most HSA debit cards use technology that prevents the use of cards at non-eligible merchants. This feature helps HSA account holders avoid tax penalties assessed when HSA funds are used at non-medical merchants.

We note that today, health and other employee benefit cards are not equipped to operate on a PIN based network. The current systems were built to ensure compliance with complex IRS substantiation requirements and currently use signature based cards. Moreover, the debit card industry does not have the infrastructure in place to support a second "signature based" network. The required changes to ISO standards, network operating rules, and issuer and processor implementation requirements to support a second signature-based debit network on each benefit card will increase costs and program expenses for card issuers, payment processors, merchants and plan administrators. These higher costs undermine the administrative efficiencies gained by benefit cards and will likely lead issuers to stop issuing benefit cards and processors from supporting benefit card transactions. This outcome ultimately will have a negative impact on consumers.

In addition, ECFC is very concerned that the Federal Reserve has seemingly determined that FSAs, HRAs and transit spending accounts (TSAs) are "asset accounts." FSAs, HRAs and transit benefits are in fact employer-sponsored benefit arrangements that in general do not entail creation of individual asset accounts for employees. For this reason, ECFC disagrees with the Federal Reserve's view that FSAs, HRAs and TSAs are debit cards and thus should fall under the proposed rules.

ECFC also is troubled that the Federal Reserve did not take into consideration the fact that processing health and other benefit cards costs more than regular debit transactions. As mentioned previously, health and other benefit cards require electronic adjudication and/or substantiation of benefit claims. Capping interchange fees will result in employers, issuers and plan administrators absorbing these costs, while decreasing interchange revenue at the same time. In response, plan sponsors may discontinue offering benefit cards in conjunction with employee benefits or pass the increased costs along to employees.

Lastly, ECFC encourages the Federal Reserve to reconsider its decision to include bona fide trusts under the proposed rules. The law defines "accounts" as those "established primarily for personal, family or household purposes." In our view, this definition taken in tandem with

language in Section 920, which 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*, should be interpreted as limiting the application of Section 920 to accounts used for purposes other than personal, family or household purposes. Since HSAs qualify as bona fide trusts under the EFTA, we disagree that Section 920 should apply to HSAs.

Again, the ECFC appreciates the Federal Reserve's work in developing the proposed rules. We respectfully disagree that Section 920 should apply to health and other benefit cards for the reasons presented in this letter and reiterate our request that the Federal Reserve reconsider its approach in finalizing the rules.

Sincerely,

Dennis Triplett

Dennis Triplett
Board Chair

Appendix A: Excerpts From Floor Discussions By Chairman Dodd and Chairman Frank

Senator Dodd affirmed on the floor of the Senate that Benefit Cards were not intended to be covered by Section 920.[2]

> 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.
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> 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.

[2] 156 *Cong. Rec.* S5927 (2010) (emphasis supplied).
[3] 156 *Cong. Rec.* H5225-226 (2010) (emphasis supplied).

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).***

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.