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February 22, 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:

As a third party administrator that utilizes cards used in connection with Qualified Transportation Fringe Benefits (QTFs) ("qualified transportation fringe benefits" is the statutory name for this benefit, however other organizations may refer to these benefits as "Transportation Spending Arrangements" or "TSA), we are writing to express opposition to the rules proposed (the "Proposed Rules") by the Board of Governors of the Federal Reserve System (the "Federal Reserve") to implement the debit interchange and network routing and exclusivity provisions (the "Durbin Amendment") of Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[1] Because no public hearings were held on the Durbin amendment, there was not the opportunity to present to the Federal Reserve the unintended consequences of the Proposed Rules, particularly in regard to prepaid cards issued and used in conjunction with health card and related employee benefit programs such as FSAs, HRAs, QTFs and HSAs. For the reasons set forth below, we believe that the "one size fits all" approach applied to debit cards in the Proposed Rules is inappropriate for prepaid cards that support health and related employee benefits programs such as FSAs, HRAs, QTFs and HSAs. As a result, the Proposed Rules should be revised to reflect the unique requirements of these cards and the intent of Senator Dodd and Representatives Larsen and Rep. Frank and exclude employee benefit cards from coverage under the Durbin Amendment.

As an initial matter, we note that more than 40 million working Americans participate in employee benefit arrangements that are administered using FSA, HRA, QTF and/or HSA benefit accounts and tens of millions of cards have been issued in connection with such arrangements. Unlike traditional debit cards, which merely facilitate a payment transaction, employee benefit cards perform an invaluable task by 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 and Section 132(f) specifically for QTFs. Indeed, unlike other areas of health plan administration (where

[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).

administrative costs can exceed 20% or more of the value of medical services rendered) automatic adjudication through health benefit cards provides for tax-compliant health plan administration for a fraction of the cost otherwise incurred. Compliant QTF benefit cards, as well, provide commuter benefit administration for a nominal fee that represents a fraction of the value of the actual transit fare purchased. In addition to direct cost savings, employee 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 and, in the case of commuter benefits, the need for cumbersome bona fide reimbursement arrangement.

More specifically, we note the following concerns:

First, while the history surrounding Section 920 is limited, the Congressional Record clearly reflects that key members of Congress intended that employee 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] and Representatives Larson and Frank engaged in an instructive 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]

Second, the Federal Reserve appears to misunderstand the nature of FSA, HRA and QTF card program structures in presuming (as indicated in the Proposed Rules) that these products are "asset accounts" that are subject to the Interchange Provisions of the Proposed Rules. In fact, FSA, HRA and QTFs are employer-sponsored benefit arrangements that generally do not involve the establishment of individual "asset accounts" for covered employees. As a result, FSA, QTF and HRA cards are not "debit cards" as defined in Section 920. Instead, FSAs, QTFs 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. Regarding HSA and QTF cards specifically, while a number of HSA and QTF card programs are structured so that each cardholder's HSA and QTF card accesses an individual account held for the benefit of the cardholder, there are many that utilize an omnibus (pooled) account structure with subaccounts to track individual cardholder's funds. As a result, some HSA and QTF cards may qualify for the exemption (those utilizing an omnibus account structure) while other HSA and QTF cards (those that access an individual account held for the benefit of the cardholder) would likely not. Separately, care must be taken to ensure that any omnibus (pooled) account structure does not raise compliance concerns under the "commingling" prohibition applicable to HSAs under the Internal Revenue Code.

Section § 235.2(i) notes "Congress Congress did not intend the interchange fee restrictions to apply to other types of prepaid cards that are accepted only at a single merchant or an affiliated group of merchants. These cards are generally used in a closed environment at a limited number of locations and are not issued for general use. Similarly, QTF cards specifically are required under Revenue Ruling 2006-57 to be useable only as fare media for a particular transit system, or terminal restricted so that it can only be used at merchant terminals at point of sale at which only fare media can be purchased. The effective date of Revenue Ruling 2006-57 will be January 1, 2012.

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

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

Third, unlike generic debit cards in the marketplace today, which support both signature debit and PIN debit authorization methods, FSA, HRA and QTF cards and many HSA cards do not, as they use health expense or other adjudication technology, such as the IIAS standard. QTF cards specifically are required under Revenue Ruling 2006-57 to be useable only as fare media for a particular transit system, or terminal restricted so that it can only be used at merchant terminals at point of sale at which only fare media can be purchased. The effective date of Revenue Ruling 2006-57 will be January 1, 2012. The technology for FSA, HRA and QTF cards and many HSA cards is not supported by PIN debit Networks and yet to satisfy Network Exclusivity requirements under the Proposed Rules, issuers could be required to enable a PIN-debit Network. This requirement needlessly makes the use of the cards more difficult and increases costs to issuers, merchants, employers and benefit plan administrators with no apparent benefit.

In addition to the PIN-debit routing issue, today neither payment cards, ISO standards, networks, issuers, acquirers, processors nor merchant terminals are designed to accommodate "two signature" cards, and it is unclear what would be required to do so, who would pay for it, how long such modifications to the U.S. debit infrastructure might take, and whether it could be done without impacting interoperability with other payment products, or non-U.S. cards or merchants. While the Federal Reserve acknowledged the challenges created by the application of the Network Exclusivity Prohibition to health benefit cards and that additional time was needed to carefully balance the pros and cons of imposing such requirements on the unique infrastructure of existing employee benefit card arrangements, it did not exempt these products from that requirement of the Proposed Rules. We believe that such an exemption is warranted.

Fourth, HSAs (and some other employee benefit arrangements) qualify as bona fide trusts under the provisions of the EFTA. We believe that the Federal Reserve misunderstood Congress's intent by including such bona fide trust arrangements within the scope of the Proposed Rules. While Congress may have intended Section 920 to apply to a broader range of debit card products than are necessarily subject to other provisions of the EFTA, 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 count is a debit card "regardless of the *purpose* for which the account is established,"[4] when juxtaposed to the definition of "account" Congress included in Section 903 of the EFTA (which provides that "accounts" are limited to those "established primarily for personal, family, or household *purposes*"[5]) is that Congress intended Section 920 to include business and commercial accounts otherwise excluded from the EFTA under Section 920. 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.

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[4] EFTA Section 920(c)(2).

[5] EFTA Section 903(2).

Fifth, 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, QTF 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 (GPR) exemption. 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. 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 together, etc.) At the transaction level it is even possible for funds from multiple purses to be used in a single transaction. As discussed above, the Federal Reserve tied the meaning of "EDT" to the meaning of "debit card" and did not base its proposal on the transaction (*e.g.*, transactions conducted with a general-purpose card are not subject to the interchange fee limitations because the *card* is exempt, not because the *transaction* is exempt). Without additional clarification on HSA exemption eligibility, it is possible that FSAs could inadvertently become unable to qualify for the general-use prepaid card (GPR) exemption due to the HSA purse.

Finally, costs associated with processing employee benefit cards are higher than ordinary debit transactions, and those benefit card processing costs will only increase under the Proposed Rules (e.g., adding duplicative processing networks). 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 attempt to offset some of the increased costs by passing them on to individual employers or 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 employee benefit cards.

For all of the reasons identified above, we believe that cards associated with FSAs, HRAs, QTFs, and HSAs should be exempt from the application of the Interchange and Network Routing and Exclusivity Provisions of Section 920 and we strongly urge the Federal Reserve to reconsider the Proposed Rules. At a minimum, we respectfully request that the Federal Reserve acknowledge that QTF cards are exempt from the Interchange provision under the General Use Prepaid Exemption and/or the existing "bona fide trust" exception in Section 903 and, given the unique challenges that the Network Routing and Exclusivity requirements pose for these card types that the Federal Reserve delay the effective date until the unique issues related to such arrangements have been properly explored and addressed by the Federal Reserve.

Sincerely,

TRANSITCENTER, INC.

By: Dan Neuburger, President and CEO