HSA COUNCIL

A joint effort of the American Bankers Association and its insurance subsidiary, the American Bankers Insurance Association

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Jennifer J. Johnson
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C 20551

RE: Comments on Regulation II; Docket No. R-1404 and RIN No 7100 AD63

By e-mail: *regs.comments@federalreserve.gov*

Dear Governors:

On behalf of the members of the ABA's HSA Council, thank you for the opportunity to comment on proposed new Regulation II governing price controls and administrative procedures for Interchange Fees and Routing Systems connected to debit card transactions.

Our interpretation of the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law No. 111-203) with respect to health care financing products is different than the interpretation in the Federal Reserve Board's (The Board) proposal in several areas. A discussion of those differences is below.

The treatment of Health Savings Accounts (HSAs) and other health care financing products is contrary to congressional intent.

On the eve of the bill becoming law, the Senate author of this legislation, Senator Chris Dodd (D-CT), Chairman of the Senate Committee on Banking, made the following comments on the floor of the United States 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[1], 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).*** *(emphasis added)*

It seems clear that Congress did not intend to starve the banks, insurers and technology providers that service the millions of Americans who fund their health care with HSAs of the revenue necessary to operate their businesses. In fact, the Senate Banking Committee Chairman made it expressly clear that imposition of price controls on Interchange Fees and restrictions on choice of Routing Networks associated with FSAs, HSAs and HRAs would lead to higher administration costs and that higher costs would hurt consumers.

Therefore, the absence of any provisions exempting FSAs, HSAs and HRAs from the requirements of proposed regulation II appears contrary to Congressional intent. More to the point, subjecting transactions associated with FSAs, HSAs, and HRAs to the requirements of the proposed regulation appears to exceed the authority of the Board as described in the statute.

Accordingly, we respectfully request that the proposed regulation be amended to exempt transactions associated with health care generally and FSAs, HSAs, and HRAs in particular.

The exemption for *bona fide* trust agreements from the requierments of the Electronic Funds Transfer Act and its implementing regulation - Regulation E – should be preserved.

The Electronic Funds Transfer Act ("EFTA")[2] and its implementing regulation, Regulation E, defines "account" in such a way as to exclude accounts held by a financial institution pursuant to a *bona fide* trust arrangement. HSAs qualify as *bona fide* trusts under the provisions of the EFTA and so fall outside the definition of "account".

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[1] Flexible Spending Arrangements (FSAs), Health Reimbursement Arrangements (HRAs)
[2] 15 USC 1693.

The Board has previously confirmed, through interpretation, that Regulation E[3] does not apply to electronic payment cards used with HSAs. Specifically, the Board said 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."[4]

The EFTA definition of "account" is limited to accounts "established primarily for *personal, family, or household* purposes".[5] 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)".

The proposed rule's definition of "account" is broader than what the EFTA permits. It defines "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*. The proposed definition will apply to accounts established primarily for personal, family, or household purposes, accounts established for business purposes, and accounts held by a financial institution under a *bona fide* trust arrangement.

We believe this is contrary to congressional intent. Congress intended Section 920 to apply to accounts set up for purposes besides personal, family or household purposes but not those specifically tied to health care. By including *bona fide* trust arrangements in the new definition of "account," the proposed rule will expand Section 920 to also include health care and employee benefit programs such as HSAs, FSAs, and HRAs.

We believe that if Congress had intended to include HSAs and other health care related cards within the scope of the Dodd-Frank Act, it would have expressly done so. As noted above, the opposite is true: 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.[6]

Similarly, we believe that if Congress wanted the Board to create a new definition of "account" they would have directed the Board to do so through legislation. Absent a congressional mandate to change the definition, the Board appears to lack the authority necessary to issue the broad definitions contained in the proposed rule.

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[3] Regulation E, 12 CFR 205.2, issued pursuant to the EFTA.
[4] Preamble to 2006 amendments to Regulation E, 71 Fed. Reg. 51437, 51441 (Aug. 30, 2006).
[5] EFTA Section 920(2).
[6] 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), 56 Cong. Rec. S5927 (2010), 156 Cong. Rec. H5225-226 (2010).

Accordingly, we respectfully request that the proposed rule be revised, at the least, to conform to the legislative intent of the Dodd-Frank Act and preserve the EFTA's current exemption for *bona fide* trust accounts.

The proposed rule fails to consider the market effects of defining "account" without reference to the different approaches to HSA administration financial institutions may take.

By including *bona fide* trust accounts in the definition of "account" under the proposed rule, the Board has handed a market advantage to financial institutions (and other qualified HSA custodians/trustees that are non-depositories) that administer HSAs through omnibus account structures instead of through individual asset accounts. Omnibus structured HSAs qualify for the omnibus account (prepaid card) exemption provided in Section 920[7]; accordingly, cards issued by these institutions for the purposes of managing HSAs will be exempt from the proposed rule.

By contrast, financial institutions that provide HSAs directly to the consumer typically structure HSAs as individual *bona fide* trust accounts. The proposed rule's broad definition of "account" would include HSA-related cards issued by these institutions and they would not be exempt from the proposed rule.

It should not be the case that the proposed rule creates an unequal market environment for financial institutions simply because the proposed rule exempts HSA cards associated with omnibus accounts and does not exempt HSA cards associated with *bona fide* trust accounts. To allow this disparity to survive would mean that HSA administrators organized differently, but that provide the same service, would suffer disparate revenue outcomes.

We believe disparate market treatment of HSA Trustees/Custodians is an unintended consequence that can be attributed to drafting this rule absent knowledge of the HSA marketplace and, in any event, contrary to the legislative intent with respect to the treatment of health care accounts under the legislation. If the goal is to reduce health care administration costs, the proposed rule fails; it will simply introduce additional technical complications and their associated costs into the HSA marketplace.

More to the point, financial institutions utilizing the *bona fide* trust account model would have a strong incentive to migrate operations to the omnibus model in order to meet the exemption in the proposed rule. Such a migration would be burdensome, both financially and operationally, and would serve no purpose other than to qualify for the Section 920 exemption.

In addition, we are concerned that financial institutions that choose to undergo a migration to an omnibus platform would have no option other than to raise monthly service fees in order to offset the costs.

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[7] Proposed Section 920 (c) fails to recognize the distinction between trust accounts and common "asset accounts."

We do not believe the framers of the Dodd-Frank Act intended to arbitrarily punish one HSA administration model but favor another for the same type of account. We respectfully request that the Board comply with 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.

The proposed rule does not consider the technological complexity of health care "Multi-purse" cards and their role in cost control/access for consumers.

In the employer environment, where employers sponsor not just traditional major medical plans but a variety of consumer-directed plans, which can either stand alone or be stacked, depending on the scope of services each provides, the proposed rule would treat these products differently depending on the card structure. For example, many employer benefit plans provide access to multiple benefit programs through a single card, including FSA, HRA, TSA (transportation benefits) and HSA, as well as dependent care, wellness and retiree account-based programs ("multi-purse cards").

The Board's proposal appears to have been issued without any consideration of the functioning of multi-purse cards.

When an employer's program offers a single "purse" card such as a FSA, the card may qualify for the general-use prepaid card exemption. If that same card can *also* access a HSA, where the HSA administrator offers *bona fide* trust accounts pursuant to a trust agreement, 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. For example, were an employee to select a stand-alone HSA-qualifying plan, the card would operate one way; were the employee to select a HSA-qualifying plan and limited purpose FSA together, the card would operate differently. At the transaction level it is even possible for funds from multiple purses to be used in a single transaction.

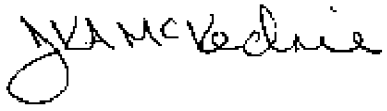
In its proposed rule, the Board linked the meaning of "Electronic Debit Transaction" to the meaning of "debit card" and did not base its proposal on the transaction, but rather on the card (*e.g.*, transactions conducted with a general-purpose card are not subject to the interchange fee limitations because 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 exemption due to the HSA purse.

Conclusion

Collectively, it is our opinion that the proposed rule fails to consider the operational complexity inherent within the HSA marketplace and the efficiencies achieved through the technology powering health care related cards. In addition, we note that the proposed rule does not reflect Congress' intent to absent health care related card products from the scope of the Dodd-Frank Act. We would like to work with you to correct these problems.

At a minimum, we respectfully request that the Board acknowledge that HSA 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 Board delay the effective date until the unique issues related to such arrangements have been properly explored and addressed.

Sincerely,



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