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February 20, 2011

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

RE: Comments on the Durbin Amendment; Docket No. R-1404 and RIN No 7100 AD63

Dear Ms. Johnson:

I am writing to request that the Federal Reserve preserve the bona fide trust exemption to the Electronic Funds Transfer Act (EFTA). I request this on the grounds that failing to do so will subvert congressional intent and bring about the very situation legislators sought to prevent in the colloquy.

On July 15, 2010, Senator Chris Dodd of Connecticut, the Chair of the Senate Banking Committee, read the following statements into the Congressional Record (please see Congressional Record, page S5927):

CONGRESSIONAL RECORD (Senator Dodd): *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). (emphasis added)

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Further, statements were made by Congressional Representatives, Republican John Larson and Democrat Barney Frank, to support the exemption of healthcare-related cards from the interchange fee provisions of the Durbin amendment. These statements may be found in the Congressional Record at pages H5225-6 and page H5226, respectively.

The clear intent of their comments was to prevent higher administrative costs being passed to consumers. They erroneously assumed HSA accounts utilize prepaid cards. In fact, they do not. Indeed, the very act of loading a prepaid card from an HSA would trigger a penalty under IRS regulations as it represents an unqualified disbursement from the HSA. Therefore, the remedy prescribed in the colloquy AND in the Fed's proposed modifications to EFTA subverts the congressional intent of exempting HSAs from the Durbin amendment. Without the exemption HSA administrators will have no choice but to raise their administrative fees to recover lost revenues.

EFTA, Section 903 (2) currently defines an account as follows:

"the term 'account' means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 103(i) of this Act), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement." (emphasis added)

The OCC has ruled that an HSA is a bona fide trust account. Therefore an HSA is exempt from EFTA. The Fed's proposed revisions to EFTA eliminates this exemption as follows:

12 CFR Part 235, Page 146
Office Board Commentary on Reg II - Section 235.2 Definitions
2(a) Account:

"The term 'account' includes accounts held by any person, including consumer accounts (i.e., those established primarily for personal, family or household purposes) and business

accounts. Therefore, the limitations on interchange transaction fees and the prohibitions on network exclusivity arrangements and routing restrictions apply to all electronic debit transactions, regardless of whether the transaction involves a debit card issued primarily for personal, family, or household purposes or a business-purpose debit card. For example, an issuer of a business-purpose debit card is subject to the restrictions on interchange transaction fees and is also prohibited from restricting the number of payment card networks on which an electronic debit transaction may be processed under § 235.7. The term 'account' also includes bona fide trust arrangements." (emphasis added)



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The proposed language explicitly changes the established definition of account under EFTA. If enacted the elimination of the bona fide trust exemption will include HSAs under EFTA when Congress clearly intended for them to be exempted. Such action is contrary to Congressional intent. Furthermore, because the definition of "account" was set through Congressional action; the Fed is overstepping its authority by changing the definition without explicit direction from Congress to do so. The Durbin Amendment includes no such direction.

All of the above can be avoided by simply preserving the bona fide trust exemption that exists in the current, Congressionally set definition of 'account' under EFTA, Section 903 (2):

"the term 'account' means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 103(i) of this Act), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement." (emphasis added)

If the Fed must change the definition of account, then at a minimum, the definition of account must exempt "health savings accounts held by a financial institution pursuant to a bona fide trust agreement".

Thank you for your time and consideration in reviewing the issues outlined in this letter. I am pleased to make myself available for meeting either in person or via the telephone to discuss these concerns with you in more detail.

If you have any questions, please give me a call. My direct telephone number is (920) 452-6117.

Very truly yours,

D. Dean Mason
Chief Executive Officer