



American Payroll Association

Government Relations • Washington, DC

November 19, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551-0001
By e-mail: regs.comments@federalreserve.gov
And via facsimile: 202-452-3819

Re: Proposed rule to amend Regulation E to apply to bank accounts established for the deployment and use of payroll debit cards; **Docket No. R-1210**

Dear Ms. Johnson:

This letter contains the American Payroll Association's specific comments and perspectives concerning the Board of Governors' recent proposal to amend Regulation E by applying consumer protections to payroll debit cards used by employers for the purpose of more effectively paying wages to some U.S. workers.

The APA is a non-profit professional association representing over 21,000 companies and individuals in all 50 states and Canada. APA's central mission is to educate its members and the entire payroll industry about the best practices associated with paying America's workers their wages while successfully complying with all federal, state, and local wage payment, employment tax withholding, and information reporting laws. APA's secondary mission is to work with legislative and executive branches of all levels of government to find ways for employers to meet their requirements under law and support government objectives, while minimizing administrative burden for government, employers, and individual workers/taxpayers.

In reaction to the growing employer interest in the use of payroll debit cards in the United States, the APA formed a Payroll Card Subcommittee of its Government Affairs Task Force to monitor the development and use of these cards within the employer community and to help educate policy makers and regulators about the benefits and uses of these cards before they issue regulations governing their use. This subcommittee is made up of 40 active and knowledgeable APA members representing large and mid-size employers, payroll service providers, and other third-party vendors specializing in the deployment of payroll debit card programs.

In general, APA and its Payroll Card Subcommittee are pleased with the overall concept of officially applying consumer protections to payroll debit card use. Employers and their payroll professionals are extremely sensitive about ensuring that wages earned by their workers are paid accurately and timely so they are in compliance with the many individual state labor laws and regulations that govern the payroll process.

In fact, many employers and payroll debit card vendors already deploy payroll debit card programs as if Regulation E consumer protections already applied to them. These employers are well aware of public concerns about consumer protections for this specific type of stored value card since the funds being loaded onto them are a worker's hard-earned wages.

However, after reviewing the Board's proposal to amend Regulation E in more detail, APA would like to offer the following comments:

Payroll Debit Cards Should Not Fall Under the Traditional Definition of 'Account'

Under Section 205.2(b)(3) the Board's proposal would define the term "account" to include a payroll card account. APA believes that it would be more appropriate to either address payroll debit cards as a type of "consumer asset account" in the official staff interpretations to section 205.2(b)(1) or to address the applicability of Regulation E to payroll debit cards in a separate section similarly to how the electronic transfer of government benefits is addressed in section 205.15.

Most employers view payroll debit cards as an alternative to a paper paycheck. Payroll cards provide workers with the ability to receive their pay on a card with enhanced access and convenience in lieu of a paper paycheck. Most employers **do not** market payroll debit cards as substitutes for traditional checking accounts at a financial institution but as a payment method and a program enhancement over a paper paycheck.

Our concern is that the Board's proposal could be interpreted by states in such a way as to make payroll debit cards subject to the same state-level regulations that apply to direct deposits, including requirements that workers be given a choice of financial institution where an account would be created to facilitate the use of their employer-sponsored payroll debit card program. As one can imagine, this would be quite problematic for employers to accommodate and manage if they must deal with fluctuating state regulations and obtain special authorization from employees to receive wages with a debit card. For this reason, section 205.10(e)(2) of Regulation E on compulsory use should not apply to payroll debit cards.

From APA's perspective, payroll debit cards (and their associated accounts) **are not** true substitutes for traditional checking or savings accounts at a financial institution. In fact, it should be noted that some U.S. workers actually choose to receive their pay via payroll debit cards because they **do not** want an electronic payment that includes the establishment of a checking or savings account. With this in mind, APA recommends that the Board strike this definition from the proposal and instead address payroll debit cards in the official staff interpretation of a "consumer asset account" or in a separate section of Regulation E. If the Board were to consider this idea as an option, it would then need to explore which of the specific Regulation E requirements would actually apply to this type of new hybrid account designation.

Employers Should Not Fall Under the Definition of 'Financial Institution'

APA also strongly objects to language in the Board's analysis of the proposal (Section 205.2(b)) indicating that employers may be "financial institutions" subject to Regulation E requirements because they may be viewed as entities controlling accounts associated with payroll debit cards.

Although employers may facilitate the creation of accounts for the purpose of deploying and using payroll debit cards, they do not control the flow of payroll funds after depositing them into the program's account(s), nor do they desire to do so. In essence, employers only want to successfully comply with various wage payment laws and regulations that are enforced by state labor agencies. Payroll debit cards

provide employers another cost effective option to electronically pay their workforce and meet their wage payment obligations.

If enacted in its current form, this position that an employer may be a “financial institution” may influence employers to think twice before adopting payroll debit cards as a method of electronically paying their unbanked workforce. As well, some employers with existing payroll debit card programs may elect to shut down their programs as a response to the direct employer costs and potential civil liabilities associated with Regulation E compliance. The unfortunate result would be a return for unbanked workers to paper paychecks and the many costs and inconveniences associated with exclusive participation in a cash economy.

Should the Board elect to have the new definition of “financial institution” apply to some types of employers, APA would suggest that the final revisions of Regulation E include specific criteria that employers can understand so that they know when indeed they would be defined as such an entity. This will require the Board’s staff to evaluate the various financial structures of payroll debit card programs that can be established by employers and the varying degrees in which they control the funds associated with payroll debit cards issued to their workers.

Disclosure and Periodic Statement Requirements Should Permit Electronic or Paper Distribution to Workers

APA is in agreement with the Board that workers who participate in their employer’s payroll debit card program should have access to disclosure and periodic statements. However, employers and/or their third-party service providers should have the option of providing workers access to these documents in an electronic or paper format. Should a worker wish to have a paper disclosure and/or periodic statement, they should be able to request them via a toll-free number provided by the employer, third party-service provider, or financial institution. This approach is similar to the one taken regarding the electronic transfer of government benefits under Section 205.15 of Regulation E. It should be noted that many employers with payroll debit card programs offer their workers the ability to check on payroll debit card balances and transactions electronically via ATMs, the Internet, and/or toll-free voice activated response systems.

As well, many unbanked participants in payroll debit card programs are transient workers. With this in mind, a mailing address that is initially provided to an employer for input into the payroll system to deliver paper periodic statements may not be accurate for the long-term. This means that these workers may never actually obtain their periodic statements if they do not contact their employer about any future change of address. This in turn creates a situation in which these workers may become more susceptible to violations of personal data privacy and identity theft if these statements fall into the wrong hands. By having a transient worker access their periodic statements via the Internet using a computer in a secure environment at the work site, in the comfort of their current residence, or other Internet access entry point of their choice, they do not need to worry about their statements being delivered and opened by an unknown individual at their old address.

Issuance of Payroll Debit Cards

The Board’s analysis of the proposed regulations states that for "purposes of the access device issuance rule in [section] 205.5, a payroll card would be considered a solicited access device so long as a consumer must elect to have his or her salary credited to a payroll card account."

The Board should clarify that a consumer's application for employment and acceptance of employment-related terms that inform the consumer that compensation will be provided by means of a payroll card,

rather than a paper paycheck, should be deemed to be a request for an access device. This approach is consistent with section 205.15 of Regulation E where an application for benefits is deemed to be a request for an access device.

One-Time Payroll Payments

Some payroll professionals who have launched payroll debit card programs within their employer's organization sometimes issue payroll cards to workers to quickly facilitate one-time payroll payments, such as adjustment pay, so that they may correct any previous payroll disbursement errors. Frequently, the workers issued these one-time payroll cards are actually enrolled in direct deposit. However, these workers can actually receive their wage correction payments faster than a direct deposit via the deployment of an instant issue payroll debit card that is provided to them at their work site by their payroll department.

Another example of payroll debit card one-time payments is termination pay. In this scenario, debit cards are used to facilitate same-day wage payments in accordance with state wage payment laws. In these types of situations, employers and workers benefit through the deployment and use of this type of payroll debit card. With this in mind, APA recommends that the Board should not apply Regulation E to these types of one-time instant-issue payroll cards.

As well, the Board should take this recommendation into consideration for those employers that employ short-term temporary workers. There are many employers that hire workers for only weeks or days at a time (seasonal workers) and entities whose sole business is to place workers in temporary jobs. It would not make sense to apply Regulation E provisions to payroll debit cards issued to workers in these specific scenarios.

Depository Institutions and Payment System References

Throughout the proposed regulation, there are a number of references made to depository institutions and EFT services. As a point of information to the Board, APA would like to comment on these references.

Some payroll debit card programs actually operate outside of the depository institution framework. With this in mind, the Board should consider inserting the phrase, "*or other financial institution*", directly after where the phrase, "*maintained by a depository institution*" appears within the proposal. It is the opinion of APA that the Board should clarify that payroll debit cards are covered by Regulation E regardless of whether payroll debit card funds are held at a depository institution.

As well, the Board should be aware that some employer loading of payroll debit cards may not always go through the ACH network and may very well be wire transfers. Some payroll debit card providers actually allow employers to fund payroll cards directly instead of going through their bank. With this in mind, APA would like the Board to consider whether or not these transactions would fall under the spirit of the definition of EFT and if Regulation E would apply to them.

Regulation E Coverage Should Not Be Determined by Whether Funds Are Eligible for Deposit Insurance

Within the proposal, the Board solicited comment on whether Regulation E coverage should be determined by whether a payroll card holds consumer funds that qualify as eligible "deposits" for purposes of the Federal Deposit Insurance Act ("FDIA").

APA believes that Regulation E coverage should not be tied to whether the funds accessed by payroll cards are eligible for deposit insurance. The policy implications driving Regulation E are different than the policy implications underlying deposit insurance coverage. As a result, it may be appropriate to cover certain products under Regulation E, but not under the FDIA, and vice versa.

Coverage of Payroll Cards Under Regulation E Should Not Affect Other Regulatory Requirements

Any regulatory coverage of payroll cards by the Board should be carefully limited to Regulation E. Other existing regulatory requirements, including Regulations D (Reserve Requirements of Depository Institutions), CC (Availability of Funds and Collection of Checks), DD (Truth in Savings) and the requirements under section 326 of the USA PATRIOT Act, raise different policy and practical issues than those raised by the application of Regulation E to payroll cards and, thus, a determination of coverage of payroll cards under Regulation E should not affect the coverage of such cards under any other regulatory requirements. For example, compliance with section 326 of the USA PATRIOT Act for the recipients of certain prepaid cards would be impossible in many instances.

Conclusion

In recent years, the growing use of payroll debit cards by employers has shown that they can be a wonderful tool in the payroll professional's tool box to more effectively pay members of their workforce electronically instead of by a more costly, less secure, and fraud-prone paper paycheck process. Payroll debit cards promote our society's conscious and practical migration toward electronic payment systems while providing those workers who would unlikely be able to participate in these systems the opportunity to engage in convenient and safe electronic commerce.

APA would also like to point out that workers employed by the entities where our members are responsible for payroll operations truly enjoy and value the benefits associated with holding a branded or non-branded payroll debit card. These workers no longer have to wait for their paycheck to be delivered to them in the mail, do not have to come into their worksite to pick up their paycheck on their day-off or while they are on vacation, do not have to pay outrageous fees to cash their paper paycheck each and every pay period, do not have to carry all their cash wages on their person, can more conveniently access their funds via ATMs and POS terminals, and now have a way to purchase goods and services electronically in a retail store or online environment.

In addition, APA would like to point out to the Board that unlike other types of stored value cards, payroll debit cards are already held to a higher standard regarding how they are to effectively operate for the card holder. This is because payroll debit cards do hold a worker's wages and are a payment vehicle governed by state-level labor laws and regulations. If an employer's payroll program does not operate properly and in the best interest of workers, they know that they can expect state labor regulators to come down hard on them should workers complain about any significant program malfunction. With this in mind, employers have an incentive to deploy payroll debit card programs that function properly as well as add value to the lives of their workers.

APA hopes that the Board takes a balanced approach when considering all of the implications associated with applying Regulation E consumer protections to payroll debit cards. We believe that wages loaded onto payroll debit cards held by employees should be afforded adequate legal protection while minimizing barriers for employers and their payroll professionals in effectively and inexpensively deploying the cards.

Should you, the Board members, or your staff require any clarification about points raised within this letter or have any questions about its content, please do not hesitate to contact me directly at 202-661-7690. I will be more than happy to field any queries.

Thank you for allowing APA and its Payroll Card Subcommittee to comment on this important payroll matter.

Sincerely,

Andrew J. McDevitt
Manager, Government Relations
American Payroll Association