

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

April 6, 2011

The Honorable Ben S. Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Dear Chairman Bernanke:

The United States Senate Committee on Finance has primary jurisdiction over health related accounts such as Health Savings Accounts (HSAs), Flex Spending Arrangements (FSAs) and Health Reimbursement Arrangements (HRAs). These are pro-consumer accounts that give families flexibility in their health care choices, and have proven effective at encouraging thoughtful utilization of health care resources. As the Ranking Republican member of this Committee, I have concerns with the impact that the Federal Reserve Board's ("Board's") proposed regulations on interchange fees may have on these accounts. I urge you to reexamine the treatment of health related accounts in this proposed rule and explicitly exempt them from the interchange fee caps, regardless of how they are structured. As currently drafted, the proposed rule could adversely affect consumers by raising the costs of health care and unduly hindering their ability to save for current and future medical expenses.

The provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law No. 111-203) ("Dodd-Frank Act"), creating the interchange fee regulation requirement did not intend to capture HSAs and other health related accounts. The sponsors of this law in the House of Representatives and the Senate, Congressman Barney Frank (D-MA) and Senator Christopher Dodd (D-CT), both expressed their intent that the caps on interchange fees not apply to cards used for health related accounts. Senator Dodd, Chairman of the Senate Committee on Banking, expressed the intent of this provision, as it applies to health related accounts, 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 . . . 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).

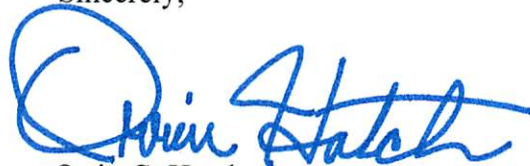
Unfortunately, the Board's proposed rule does not comport with this legislative intent. It lacks clarity with regard to the exemption of these accounts from the caps on interchange fees, and differentiates treatment of these accounts depending upon their structure.

The Electronic Funds Transfer Act ("EFTA"), and its implementing regulation, define "account" in a way that excludes accounts held by a financial institution pursuant to a bona fide trust arrangement. Under the provisions of the EFTA, health related savings accounts qualify as bona fide trusts. The Dodd-Frank Act did not change this current law definition of "account," and it is clear that they were to be excluded from the scope of the interchange provision. Unfortunately, the Board's proposed definition of "account" inadvertently captures cards used in connection with HSAs, FSAs, and HRAs in the interchange fee caps, and by differentiating treatment of accounts depending on their structure, the implementation of the Dodd-Frank Act threatens to create an uneven playing field for these health related accounts. These markets are divided between banks that choose to structure their accounts as individually based accounts and those that are structured as omnibus accounts. By denying exemptions to those accounts that are not in an omnibus structure, it will put certain health account providers at a competitive disadvantage compared to others.

In order to keep the implementation of the Dodd-Frank Act aligned with the national goal of making sure there are a variety of health care payment options for individuals and families, I urge that the proposed rule be modified to better reflect the realities of the health care market and the legislative intent of the Dodd-Frank Act.

Recognizing the valuable role HSAs play in allowing individuals and families to save for their health care needs and the importance of creating a level playing field, I ask that you revise the proposed rule to exempt all health related accounts regardless of their structure. This action will ensure that any final rule advances the interests of health care consumers and accurately reflects Congressional intent.

Sincerely,



Orrin G. Hatch
Ranking Member
Senate Committee on Finance