



November 7, 2005

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Re: 12 CFR Part 330
Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional
Access Mechanisms

Dear Mr. Feldman:

The Association for Financial Professionals (AFP) welcomes the opportunity to comment on the Federal Deposit Insurance Corporation's (FDIC) proposed rule to clarify the insurance coverage of funds subject to transfer or withdrawal through the use of stored value cards and other nontraditional access mechanisms.

AFP represents about 14,000 finance and treasury professionals who, on behalf of over 5,000 corporations and other organizations, are significant participants in the nation's payments system. Organizations represented by its members are drawn generally from the Fortune 1,000 and the largest of the middle market companies. AFP members' companies use stored value cards for a variety of purposes. They include payroll cards issued by employers for pay and related functions such as bonuses, commissions and expense reimbursements, and gift cards issued by merchants for customer purchases. Stored value cards are useful corporate tools for promoting the migration from checks to electronic payments and managing payment costs. Many of AFP's members play a significant role in implementing stored value card programs at their companies. They thus have a sizeable stake in FDIC regulations governing these payment mechanisms.

AFP's comment letter will address the following issues:

- Qualification for "pass-through" deposit insurance coverage
- Mandatory "pass-through" coverage for funds underlying payroll cards
- Mandatory disclosure of FDIC insurance.

Definition of Deposits

The FDIC proposes to amend its regulations on deposit insurance coverage so that insurable “deposits” would include “funds subject to transfer or withdrawal solely through the use of nontraditional access mechanisms, including cards, codes, computers or other electronic means, to the extent that such mechanisms provide access to funds received and held by an insured depository institution for payment to others.”

The expanded scope of this revised rule, compared with the FDIC’s proposal issued in 2004, recognizes the proliferation of electronic options for accessing funds and would likely encompass future electronic payment innovations without requiring further modification. AFP agrees with this general approach, which is both consistent with, and a logical extension of, the FDIC’s long-standing regulatory treatment of funds underlying traditional access mechanisms.

However, AFP believes that this same long-standing regulatory treatment of traditional deposit accounts and payment mechanisms is sufficient to address the question of when and whether “pass-through” insurance coverage is available to the underlying holders of nontraditional access mechanisms and we are opposed to carving out separate rules in this area.

Deposit Insurance Coverage Relating to Nontraditional Access Mechanisms

FDIC proposal

The FDIC recognizes that, in some cases, the funds underlying stored value cards or other access mechanisms are placed at an insured depository institution by one party for transfer or withdrawal by other parties. The funds underlying payroll cards are an example. These funds are placed at the bank by an employer (or its agent), but employees hold the payroll cards and transfer or withdraw the funds. Gift cards are another example. The funds may be placed at the bank by a retail store (or its agent), but the store’s customers hold the cards and transfer or withdraw the funds.

Under the proposed rule, the funds would be insured to the party that placed the funds at the insured depository institution, e.g., the employer or retailer. In order for the funds to qualify for pass-through insurance—that is, to be insured to the persons holding the access mechanisms, e.g., the employee in the case of payroll cards or the customer for gift cards—the FDIC proposes two conditions.

- The depository institution’s records must reflect the fact that the first party—e.g., employer or retailer— “is not the owner of the funds.”
- The first party, or an agent, or the depository institution maintains records reflecting the identities of the persons holding the cards or other access mechanisms and the amount payable to each person.

In the example involving payroll cards that would qualify for pass-through coverage, the proposed language states that the “funds in each such account or subaccount cannot be recovered by the employer.” The Supplementary Information states that the party placing funds at the bank must relinquish ownership. 70 Fed. Reg. 45571, 45578 at n. 10 (emphasis added).

AFP Recommendation

AFP believes that the existing provisions in 12 C.F.R. Part 330, and particularly in Section 330.5(a) and (b), are sufficient to address the insurable interests of parties involved in nontraditional access mechanisms. The FDIC has extensive experience with determining the insurable interests of accounts held in an agency and fiduciary capacity, for example, a large account holding the security deposits of hundreds of tenants. If the account title sufficiently reflects the nature of the account, and the bank, the landlord, or an agent of either of them maintains records to reflect the interests of the underlying tenants, the requirements of Section 330.5(b) have been met and there is pass-through coverage. AFP does not believe that the situation differs in any material way for nontraditional access mechanisms.

Nor is there a requirement in the existing regulations that the landlord in this example must relinquish all rights to the security deposits in order for the deposit to qualify for pass-through coverage at the time the bank is placed in receivership. In fact, the landlord may in the future have a clear right to keep a security deposit if the tenant later defaults under the lease. If a separate state law requires that the landlord relinquish all rights, that matter becomes the landlord’s duty and obligation but should not be the basis for an FDIC regulation stating that all ownership rights in all cases must be relinquished. Similarly, the Association does not agree with the condition that actual ownership of funds by a cardholder requires the party that deposits the funds to surrender all rights to recover them.

There are circumstances in which funds may be transferred to cardholders not legally entitled to receive them, and which the party that transferred the funds is entitled to recover. In the case of payroll, for example, a duplicate payroll file may have been transmitted by the company or the bank as the result of an operational error, resulting in double pay to employees. If the transfer is an electronic ACH credit like direct deposit of payroll, companies and banks routinely reverse the duplicate pay amounts by initiating an ACH debit to the employee’s account. Under the FDIC’s proposal, the employer would be unable to reverse erroneous transactions without sacrificing pass-through FDIC deposit insurance coverage. This example would be true for any pay-related compensation to employees, including bonuses, commissions and expense reimbursement. AFP believes that the rules for nontraditional access mechanisms should be no different than the rules that apply to traditional access mechanisms.

The language in proposed Section 330.5(c)(1) may also be interpreted to provide that only the provisions of Section 330.5 are applicable to nontraditional access mechanisms whereas all of the provisions of Part 330 should apply to the extent that the funds are “deposits” under the regulations. For example, to the extent that funds placed with an

insured depository institution as part of a gift card program are insurable to the merchant only, those funds should not be combined with any balances that the merchant holds at a separate, but affiliated, bank pursuant to Section 330.3(b).

To ensure consistency in coverage and treatment between deposits as long covered by the regulations and for nontraditional access mechanisms as proposed, AFP recommends that proposed subsections (2) and (3) of Section 330.5(c) be eliminated and that proposed subsection (1) be revised as follows:

(c) Nontraditional access mechanisms—(1) Purpose. ~~This paragraph. Part~~ shall apply to funds subject to transfer or withdrawal solely through the use of nontraditional access mechanisms, including cards, codes, computers or other electronic means, to the extent that such mechanisms provide access to funds received and held by an insured depository institution for payment to others. In determining the ~~owners~~ insurance coverage of such deposits, the FDIC shall apply the general rules in this section ~~as well as the special rules in this paragraph (e).~~

Mandate of Pass-Through Coverage

The FDIC requests comment on whether the rule should mandate that employers satisfy the FDIC's "pass-through" requirements so that the funds underlying payroll cards are always insured to the employees.

AFP recommends against requiring "pass-through" coverage for payroll cards. States differ in their labor laws, lien laws and escheatment requirements. The relationship between state laws and the pass-through provisions of FDIC rules should be thoroughly explored prior to any decision regarding a mandate. The complexity and variability of state laws also argues against a mandate, as changes in state law may impact qualification for "pass-through" coverage. Just as there is no mandate in the current regulations for traditional payroll accounts from which employers may process payments to employees by ACH credit and/or checks, there should be no mandate simply because another payment mechanism, such as a payroll card, may be used.

In addition, we believe that such a mandate could stifle innovation. For example, in the wake of Hurricane Katrina, employers have issued pre-activated payroll cards that are not embossed with an employee's name. Such a card could be transferred by the employee to a family member or other party. The use of stored value cards for such purposes is likely to increase. However, it is not clear that all requirements for pass-through insurance coverage could be met in such programs, despite their clear usefulness.

Mandatory Disclosure of FDIC Insurance

The Office of the Controller of the Currency (OCC) has advised depository institutions under its supervision that they should clearly and conspicuously disclose to customers the insured or non-insured status of the payroll cards they offer to the public. The FDIC

issued similar guidance for stored value cards in its earlier proposal. The FDIC now asks for comment on whether disclosure of deposit insurance coverage should be mandated.

AFP does not recommend that the FDIC mandate disclosure of FDIC insurance for stored value cards through this regulation. The complex provisions and conditions under which stored value cards are issued are likely to increase consumer confusion about insurance coverage and may change over time. To the extent that a particular banking regulator wishes to publish guidance in this area, as the FDIC and OCC have done, they remain free to do so and to allow regulated banks to respond to changes or innovations accordingly.

Summary of AFP Recommendations

- AFP recommends that long-standing rules regarding the treatment of traditional deposit accounts and payment mechanisms also be used to address the question of whether pass-through coverage would apply to the funds underlying nontraditional access mechanisms. The existing rules are time-tested and have been proven practical and effective. AFP recommends that no new or different standards be applied to nontraditional access mechanisms than to traditional access mechanisms.
- AFP recommends against requiring pass-through coverage for payroll cards
- AFP does not recommend that the FDIC mandate disclosure of FDIC insurance for stored value cards through this regulation.

AFP thanks the FDIC for the opportunity to comment on its proposed rules for stored value cards. If you have any questions about this comment letter, please call Arlene Chapman of AFP at 301-961-8825.

Sincerely,



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