



Network Branded Prepaid Card Association
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July 15, 2016

Michael Paglialonga
New York State Department of Labor
Building 12, State Office Campus, Room 509
Albany, NY 12240

Re: Methods of Payment of Wages
(I.D. NO. LAB-21-15-00009-RP)
Filed via e-mail to regulations@labor.ny.gov

Dear Mr. Paglialonga:

This letter is submitted on behalf of the Network Branded Prepaid Card Association (the "NBPCA")¹ in response to the New York Department of Labor's (the "Department") revised rulemaking regarding the clarification and specification as to the permissible methods of wage payment in New York, issued on June 15, 2016 (the "Revised Rule"). The Revised Rule follows the previous versions of the proposed rule released by the Department on May 27, 2015 (the "Original Proposal") and October 28, 2015 (the "Second Proposal"). Each of the Original Proposal, Second Proposal, and Revised Rule include proposed requirements governing the payment of wages to employees through a "payroll debit card" ("Payroll Card(s)"). Despite changes to the Revised Rule from the Original Proposal and Second Proposal, the NBPCA remains concerned with certain provisions of the Revised Rule that are impractical and likely to cause Payroll Card issuers to significantly reduce or possibly stop offering these products in New York to the detriment of unbanked and underbanked workers in the state. For this reason, the NBPCA asks the Department to further revise its Revised Rule and continue to work with industry participants to create common sense regulations that properly balance consumer protections for New York workers with the continued ability of employers and Payroll Card providers to offer their products in the New York market. The NBPCA appreciates the opportunity to share its comments and concerns regarding the Revised Rule with the Department.

¹ The NBPCA is a nonprofit, inter-industry trade association that supports the growth and success of network branded prepaid cards and represents the common interests of the many participants in this new and rapidly growing payments category. The NBPCA's members include banks and financial institutions, the major card networks, processors, program managers, marketing and incentive companies, card manufacturers, card distributors, payment industry consultants and law firms. The comments made in this letter do not necessarily represent the position of all members of the NBPCA.



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A. Payroll Cards Offer Numerous and Substantial Benefits to Employees and Employers in New York

At the outset, the NBPCA again points out that electronic methods of wage payment, and Payroll Cards in particular, offer numerous benefits to employees and employers in New York, especially those underserved workers who are unable to participate in direct deposit because they lack access to traditional banking services. These benefits include increased security, convenience, and cost savings. In addition, electronic wage payment allows employers to deliver wages to their employees in a timely manner even when an employee is away from the work place and when faced with unexpected contingencies such as severe weather conditions and natural disasters.

For a full discussion on the myriad benefits afforded to New York employees and employers by electronic wage payment and Payroll Cards in particular, we direct you to our previous correspondence filed in response to the Original Proposal and Second Proposal.

B. If the Revised Rule is Not Modified, Payroll Card Providers Will Likely Stop Offering Products and Services to Workers in New York

While the Department incorporated some changes between the Second Proposal and Revised Rule, the NBPCA believes that given the impracticality of several provisions remaining in the Revised Rule, absent further revisions, providers may determine that they cannot provide an economically viable or operationally feasible product in New York, and they may eliminate the product altogether. As a result, workers without access to checking accounts will likely have to rely on check cashers and be exposed to the significant costs imposed by a cash based economy.

The NBPCA's specific concerns with the Revised Rule are described below. As we have noted in our previous correspondence with the Department, the Revised Rule remains, in some cases, inconsistent with federal law, specifically Regulation E, which will make it operationally difficult and much more expensive to offer a nationwide program with marginal (if any) incremental benefit to consumers. The NBPCA urges the Department to amend the Revised Rule to make it generally consistent with Regulation E, by, for example, revising its definition of "payroll debit card" to conform to definition already in place under Regulation E, and by making the other specific changes discussed below. In particular, the NBPCA notes that the Revised Rule requires employers to provide 30 days' notice of any change in the terms and conditions of a Payroll Card, which conflicts with Regulation E's 21-day notice requirement of certain adverse changes to the terms and conditions. While the proposed New York requirement may appear reasonable on its face, it would significantly increase the burdens and costs for multi-state



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employers who have work locations in New York. Further, the Revised Rule continues to impose prohibitions on certain fees that do not relate to the access to wages and that are easily avoidable by cardholders. These and other key concerns are discussed in more detail below. For these reasons, the NBPCA urges the Department to work with employers and industry participants to develop common sense regulations that properly balance the need to protect the interests of New York workers with the continued ability of employers and providers to offer Payroll Card products in New York.

C. The Requirements and Fee Restrictions in the Revised Rule Remain Overly Burdensome and Impractical

1. The Revised Rule's Requirements for Change in Terms Notices Remain Inconsistent with Regulation E and the Department's Revised Rule is Overly Burdensome and Unnecessary

The NBPCA believes the change in terms notice requirements afforded under Regulation E adequately address concerns raised by the Revised Rule and consequently, the NBPCA urges the Department to strike this provision from any final rule as it is overly burdensome and unnecessary, and will require a substantially different compliance standard in New York than the rest of the country.

As noted above, the requirements of the Revised Rule for 30-day advance written notice of changes in terms are inconsistent with Regulation E's 21-day advance written notice requirement.² In addition, the Regulation E requirement to provide a change in terms notice is limited to an adverse change in terms and conditions, such as those that would result in increased fees, liability, fewer electronic fund transfers, or stricter limitations on the dollar amount or frequency of transfers.³ By contrast, the proposed requirement to provide advance notice of any change an issuer makes to the terms and conditions of a Payroll Card may have the unintended consequence of leading Payroll Card providers that continue to offer the product in the state to avoid making any changes to the program, including beneficial ones.

In commentary accompanying the Revised Rule, the Department states that the purpose of requiring 30 days prior notice of any change to the terms and conditions of a Payroll Card account is to allow the employee themselves determine whether or not a particular change is "adverse." The NBPCA respectfully believes that such a position fails to appropriately balance the interests of consumers with those of providers of financial products and services, for whom providing prior notice of any change to the terms and conditions of an account, no matter how

² 12 CFR § 1005.8 (2016).

³ *Id.*



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small, will be overly burdensome and unnecessary. The NBPCA points out that the change in terms requirements under Regulation E are intended to protect consumers from the very situation the Department appears to be concerned about, a change in terms and conditions that adversely impact an accountholder that the accountholder is not given prior notice of. The protections afforded under Regulation E, however, also appropriately balance the interests of consumers with those of providers by not imposing unnecessary and overly burdensome requirement to give prior notice of any change made to the terms and conditions of an account. Moreover, given that the Department removed other provisions from the Proposed Rule on the grounds that Regulation E already addressed the particular issue, it is not clear why the Department retained the proposed change in terms notice requirement in the Revised Rule given the limited benefit and potential unintended consequences.

In addition to being inconsistent with Regulation E, the change in terms requirements included in the Revised Rule would be extremely onerous and difficult to comply with, would result in Payroll Card providers following different rules for employers in New York compared to the remainder of the United States and would likely result in Payroll Card providers leaving the New York market due to the inconsistent compliance requirements and significantly increased costs when operating a nationwide program.

Further, changes to the terms and conditions governing Payroll Cards are common. Most of these changes have no impact on consumer fees, liability, or limitations on electronic fund transfers, and, in many instances, the changes are to the cardholders' benefit. It is worth noting that, while cardholders may not receive prior written notice of every change, they receive notice of changes to their terms and conditions through other avenues and cardholders retain access to their current terms and conditions at all times through other means, such as their provider's website. Requiring providers of Payroll Cards to provide New York employees with 30-days' prior written notice before making any change in terms and conditions negatively impacts Payroll Card providers by effectively forcing them to offer a separate product with completely different operational processes and disclosures in the New York market than they offer in any other jurisdiction. Rather than undertaking such efforts, the NBPCA is concerned that many Payroll Card providers will simply stop offering their products to employers and consumers in the New York market. Moreover, the requirement may also force providers to rethink and avoid making beneficial changes to Payroll Cards in New York, while making those beneficial changes to Payroll Card programs offered in the rest of the country. Thus, the requirement could effectively create a two-tier system where New York Payroll Card users are actually worse off than Payroll Card users elsewhere for those companies who decide that operating such a multi-tier system is viable.



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Finally, the NBPCA remains concerned regarding the requirement under Section 192-2.3(f) of the Revised Rule that, if a Payroll Card account is closed due to inactivity, the issuer must notify the employee and refund any remaining funds within seven days. The NBPCA believes such a requirement is unnecessary in light of state abandoned property laws and could have the effect of increasing fraud. Today, if a cardholder's account becomes dormant due to the cardholder taking no action for a specified period of time, providers are obligated to follow individual state abandoned property laws regarding notification to the accountholder and the reporting and escheatment of the funds to the appropriate abandoned property office in the applicable state. The Revised Rule's requirement to send money to Payroll Card accountholders within seven days is therefore unnecessary in light of the preexisting state laws, which include detailed requirements for holding, reporting and escheating unclaimed property. Moreover, the NBPCA is concerned that the Revised Rule's requirement to refund unclaimed funds to cardholders within seven days may result in increased instances of fraud in light of the fact that, in order to comply with this requirement of the Department's Revised Rule, providers would have to remit payment of the unclaimed funds to the cardholder through a written check to whatever address is on file for the employee and such address is often not updated by the employee with the Payroll Card provider. For these reasons, the NBPCA urges the Department to amend the Revised Rule to strike this provision.

2. Onerous Fee Restrictions

The Revised Rule continues to impose onerous fee restrictions that are not present in other jurisdictions and that will significantly undermine the ability of providers to offer their products to New York workers. Specifically, the prohibitions on ATM withdrawal fees, certain declined ATM transaction fees, card replacement fees, and inactivity fees would collectively make already thin margined Payroll Card programs in New York financially unviable and cause Payroll Card issuers to leave the New York market if they cannot operate a sustainable business model. In fact, after speaking with our members, we can unequivocally state that the fee prohibitions alone may cause several Payroll Card providers to cease offering Payroll Cards in the State of New York and, if they decide to exit the New York market, they will likely point to the Revised Rule as the primary reason for their exit from the New York market. This will effectively leave New York workers who don't have access to bank accounts with only one expensive option – check cashers – rather than the relatively low-cost Payroll Card products that so many consumers need and desire.

Particularly concerning to the NBPCA is the fact that the Revised Rule continues to impose restrictions on fees that are wholly unrelated to an employee's full and free access to her wages each pay period and that can easily be avoided by the employee, including prohibitions on fees for overdrawn accounts and inactive accounts. Prohibiting employers and issuers from charging reasonable fees for services unrelated to full and free access to wages effectively



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mandates that one group of employees be provided with free banking services. Thus, the NBPCA believes more changes to the Revised Rule are necessary to allow Payroll Card providers to continue offering their products in the New York market.

For instance, overdraft services can be a valuable resource for unbanked and underbanked Payroll Card users who may need access to short-term liquidity that they cannot otherwise easily obtain. For unbanked and underbanked employees, overdraft services on Payroll Cards with fully disclosed terms and conditions can provide much needed short-term liquidity and serve as an important alternative to other financial services, including demand deposit accounts with opt-in overdraft services, which are not readily available to these unbanked and underbanked employees. For this reason, the NBPCA urges the Department to continue to permit overdraft services consistent with the current federal regulations governing the use of Payroll Cards rather than eliminating a valuable option some cardholders have today.⁴

Finally, the NBPCA understands that a primary basis of the Department's Revised Rule, and, in particular, the Department's apparent concern regarding fees charged to workers under Payroll Card programs, is a report issued by the New York State Attorney General in June 2014, entitled "*Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers*" (the "Report").⁵ The NBPCA refers the Department to our previous letters filed in response to the Original Proposal and Revised Proposal for a discussion of why we believe the information included in this Report is inaccurate and does not adequately portray the many benefits, features, and consumer protections afforded by Payroll Cards.

3. Lack of Clarity Regarding Treatment of Incentive Payments

The Department's commentary notes that the requirements of the Revised Rule do not apply to some non-wage payments, such as bonuses and holiday payments, but may nevertheless apply to many incentive payments that qualify as "wage payments." Troublingly, the Department fails to provide any further detail or guidance as to which incentive payments constitute "wage payments" for purposes of the Revised Rule and which do not. The NBPCA is concerned that the Department's lack of clarity on this issue will make the provisions of the Revised Rule even more difficult and confusing for employers and Payroll Card providers. Under the Revised Rule, when making any non-recurring payment to an employee, an employer or Payroll Card provider will not know whether the requirements of the Revised Rule apply. The employer and Payroll

⁴ For further discussion and information regarding the benefits and importance of overdraft services for unbanked and underbanked consumers, please see the NBPCA's comment letter responding to the Consumer Financial Protection Bureau's (the "CFPB") proposed rule for prepaid accounts, available at:

<http://www.nbpc.com/en/~media/Files/Public%20Comment%20Letters/NBPCA%20Comment%20Letter%20on%20CFPB%20Prepaid%20Accounts%20NPRM.ashx>.

⁵ <http://www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf> (last visited July 15, 2016).



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Card provider will therefore be forced to comply with the Revised Rule's notice and consent requirements and other obligations for any payment made to an employee, including any incentive payments other than bonus or holiday payments. Such ambiguity is in stark contrast to the requirements applicable to Payroll Cards under Regulation E, where the staff commentary clearly states that a Payroll Card does not include a card used to disburse payments for isolated incidences or for situations in which the payment is unlikely to be a consumer's primary source of salary or other compensation.⁶

For these reasons, the NBPCA urges the Department to amend the Revised Rule to clearly state when the requirements of the Revised Rule will apply to incentive based payments. The NBPCA believes that, consistent with Regulation E, the requirements of the Revised Rule should only apply to incentive payments that are likely to be an employee's primary source of salary or compensation, such as commission payments.

D. The Requirement to Wait Seven Business Days after Obtaining Written Consent before Paying Wages by a Payroll Card Harms the Interests of Employees

The NBPCA believes that the Revised Rule's requirement to wait for a period of seven business days after receiving an employee's consent before taking action to issue a wage payment through a Payroll Card remains not only impractical for employers, but harmful to the interests of the employee. Specifically, the Revised Rule requires employers to wait for a period of seven business days after obtaining written consent from employees, prior to taking action to pay wages by a Payroll Card. While the NBPCA fully supports the right of employees to choose the method of wage payment that best meets their needs, the NBPCA believes the Revised Rule continues to impose an unnecessarily burdensome and arbitrary seven business day waiting period that harms the interests of employees.

Under the requirements of the Revised Rule, if the first wage payment date occurs within seven business days of the employee's hire date such as cases where the employer pays wages weekly, the employer will be forced to pay the employee by paper check even if the employee consents to using a Payroll Card after receiving all the necessary and required disclosures. Such a result will be confusing to the employee, who will not understand why she cannot receive her wage payment via her chosen method. The unbanked or underbanked employee will then have to go to a bank branch or check casher to cash her first paycheck, and incur other costs in order to use that cash to pay bills, make online purchases and engage in other financial transactions. Moreover, once the employee makes any necessary payments, the employee is then forced to carry the remainder of her wages in cash. If those wages are lost or stolen, there is no protection for the employee. Furthermore, the employee will likely be confused when she receives her

⁶ 12 C.F.R. Pt. 1005, Supp. I, 2(b)(2) (2016).



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initial wages by another means than her selected method of wage payment, and uncertain as to how she will be paid after that first wage payment. By contrast, if the employee had the ability to elect to receive her wages by Payroll Card after consenting to this wage payment method during orientation, she could have received those initial wages on the Payroll Card, paid necessary bills online and had the remainder of the wages protected against loss and unauthorized use by both federal regulation and the applicable card network rules. The NBPCA believes this is a far better result for the employee.

The NBPCA continues to be concerned that a seven business day waiting period will also stigmatize Payroll Cards by leading employees to assume, since no other method of payment is subject to a similar requirement, that Payroll Cards are a disfavored and unreliable method of payment. Such a result harms the interests of employees by potentially causing them to elect a method of wage payment that may be less convenient and not in their best interests.

Given the strong potential for employee confusion and unnecessary expenses that could be incurred through the seven-business day waiting period requirement in the Revised Rule, the NBPCA again suggests that alternatively, employees be given a clear list of options for wage payment along with all terms and conditions and be allowed to choose the method of wage payment that best meets their individual needs, plus the ability to opt out at any time, without any minimum waiting period imposed on employers and issuers prior to acting upon the employee's consent.

E. Retroactive Application of the Revised Rule's Written Notice and Consent Requirements is Impractical

The Department's commentary accompanying the Revised Rule indicates that existing payment authorizations for employees received prior to the effective date of the Revised Rule will only be valid if they comply with the requirements of the Revised Rule. As a result, employers will be required to provide written notice and obtain written consent to the payment of wages through direct deposit or a Payroll Card from all employees selecting one of these methods of payment, even those already receiving their wages through one of these methods. The NBPCA has serious concerns with the Revised Rule's written notice and consent requirements applying retroactively. Forcing employers and providers to comply with written notice and consent requirements for all employees, even those who are already receiving their wages through a method other than cash or check, will be extremely expensive and difficult to manage.

Moreover, such a requirement will be extremely confusing to employees, who will not understand why they are being required to consent to the payment of their wages in the manner

Commented [A1]: I'm struggling to figure out how to include the fact that employers don't know whether an employee is paid via PC or DD. Because the consent / notice requirements apply to both of these methods of payment, I assume the DOL's response would be to say that it does not matter because you have to re-disclose / get consent from all of the employees anyway.



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that they are already receiving their wages and have been receiving them, in many cases, for years. It becomes even more troublesome when employees unexpectedly receive their wages by check because they failed to turn in their written consent form at least seven business days before their first pay day following the effective date of the final rule. When coupled with the seven business day waiting period, an employee who was previously receiving her wages through a Payroll Card could reaffirm her desire to be paid by through a Payroll Card and yet be denied this option for one or more pay periods while her employer is forced to wait the required seven business days. Such a result is both harmful and confusing to the employee who is left to wonder why the method of payment of her wages she has freely selected and grown accustomed to using is now unavailable to her. The unexpected receipt of wages by check might also cause some employees to default on the payment of bills that are then being paid from the direct deposit account or Payroll Card account where wages were previously remitted.

The NBPCA urges the Department to amend the Revised Rule to state that its written notice and consent requirement apply only to new Payroll Card accounts opened after the final rule takes effect.

F. Any Final Rule issued by the Department Should Include an Appropriate Implementation Period so that Industry has Sufficient Time to Comply

The NBPCA and its members continue to have serious concerns about the Revised Rule's proposed effective date, which would occur six months after adoption of any final rule as published in the state register. For those providers that decide to continue to offer Payroll Card products in New York, the Revised Rule will require substantial changes to their operations. Such providers will, at a minimum, need to (i) create new disclosures, (ii) implement procedures – which differ from and appear to be inconsistent with current requirements under Regulation E – for change in terms notices, and (iii) implement procedures to prevent the assessment of prohibited fees on Payroll Card accounts offered to New York workers. As noted above and in our previous correspondence with the Department, the Revised Rule, if adopted as proposed, will ultimately cause providers to create entirely separate processes and procedures for New York workers than such providers have implemented for every other jurisdiction in which they offer Payroll Cards. Creating entirely separate disclosures and operations for New York cardholders will take significant time and resources to implement and such an implementation process cannot even commence until final rules are issued by the Department. In light of this fact, having the final rules effective six months after publication in the state register is impractical, and could cause the removal/suspension of Payroll Cards in the New York market for several months, while employers and providers develop compliant Payroll Card products, operational processes and procedures.



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Moreover, the NBPCA again points out that even the CFPB's proposed rule for prepaid accounts issued late last year (which will impact Payroll Cards) is proposed to have an effective date of nine months following the date any final rule is published in the Federal Register, and many commenters, including the NBPCA, have recommended that a minimum period of 18-24 months will be needed in order for the industry to be able to comply with that proposed rule.⁷ The NBPCA further notes that, similar to the Revised Rule, the CFPB's proposed rule also poses substantial operational changes for Payroll Card providers. Additionally, it should be noted that the industry is already undergoing significant change related to the nationwide roll-out of EMV-enabled POS terminals and EMV enabled cards and a longer implementation period should be provided to ensure that the industry has time to comprehensively implement any system and operational changes required under the final rule. Consequently, given all of these dynamics, the NBPCA believes that the Department should refrain from issuing any final rule of its own before the CFPB has issued its final rule, and then include an extended effective date which gives employers and providers of Payroll Cards the time necessary to comply with both the CFPB proposed rule and the final version of the Revised Rule. Alternatively, the NBPCA requests that the Department provide an implementation period of at least 12 months from the date of publication of the final rule.

Conclusion

The NBPCA appreciates the opportunity to once again provide comments on the Department's Revised Rule. The NBPCA reiterates that Payroll Cards offer substantial and numerous benefits to workers in New York including increased security, convenience, and cost savings. The NBPCA continues to believe that the Revised Rule contains serious challenges for issuers and Payroll Card providers to continue to offer Payroll Cards to New York workers. Moreover, the NBPCA reiterates that several laws, including Regulation E, already contain substantial employee protections in connection with the use of Payroll Cards. The end result of the Department's Revised Rule will likely be that employers and card issuers will be unable to offer Payroll Cards in New York thus decreasing consumer choice and leaving employees with more expensive and less convenient options for the receipt of their wages.

⁷ 79 Fed. Reg. 77256.



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