



# Memorandum

**To:** Rex Blackburn, Co-Chair, Revise the Uniform Unclaimed Property Act Committee  
Michael Houghton, Co-Chair, Revise the Uniform Unclaimed Property Act Committee

**From:** Brad Fauss, President & CEO, Network Branded Prepaid Card Association (NBPCA)

**Date:** February 23, 2016

**RE:** Concerns with the Treatment of Payroll Cards under the February 9, 2016 Draft of the Revised Uniform Unclaimed Property Act ("RUUPA")

## I. Summary

The Network Branded Prepaid Card Association (the "**NBPCA**")<sup>1</sup> is providing this memorandum to the Co-Chairs of the Revise the Uniform Unclaimed Property Act Committee of the Uniform Law Commission ("**ULC**") to outline the NBPCA's serious concerns with respect to the treatment of payroll cards under the February 9, 2016 RUUPA draft (the "**February Draft**"). As further described below, the NBPCA strongly believes that:

- (i) Payroll cards should be subject to the same unclaimed property period as demand, savings or time deposit accounts (each, a "**Consumer Asset Account**") under the RUUPA, which was the treatment afforded payroll cards in the September 29, 2015 RUUPA draft (the "**September Draft**"); and
- (ii) The definition of payroll cards needs to be significantly revised to accurately describe how payroll cards actually function and to more closely align with the definition contained in Regulation E.

## II. Payroll Cards should be Subject to the Same Unclaimed Property Periods as Demand, Savings or Time Deposit Accounts under the RUUPA

Payroll cards operate in the same manner as Consumer Asset Accounts making them structurally different than wages, commissions, bonuses, or reimbursements, as those products are commonly understood to work for purposes of RUUPA. For this reason, the NBPCA and its members strongly believe that payroll cards should be subject to the same three year unclaimed property period applicable to Consumer Asset Accounts under RUUPA rather than the one year period applicable to wages, commissions, bonuses, or reimbursements. Further, because payroll cards are structured to operate like Consumer Asset Accounts, there is no rational basis for treating payroll cards in the same manner as wages/payroll checks for unclaimed property reporting purposes. Specifically, in the case of wages paid through uncashed payroll checks, the employer retains the funds in its own bank account until the check is cashed by the employee or remitted by the employer to the state as unclaimed property. The wages are never effectively "claimed" by the employee until the pay check is cashed.

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<sup>1</sup> 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.

Payroll cards do not operate in this manner. In the case of payroll cards, wages are deposited directly into a bank account (or subaccount) that is owned and controlled by the employee at the time that the wages are paid. Payroll card accounts give the employee the ability to control the wages at the time they are paid because payroll cards are generally structured in one of two ways: (i) as individual demand deposit accounts (“**DDAs**”) for each cardholder; or (ii) as a pooled custodial account for the benefit of all cardholders with subaccounts for each cardholder. As a result of either structure, loading wages onto a payroll card is no different than depositing wages into a checking account owned by the employee. In both cases, the employer enters a routing/transit number (“**RTN**”) and an account number in order to make an ACH payment of wages to the employee's payroll card account. In light of this structure, payroll cards far more closely align with other Consumer Asset Accounts than they do with wages, commissions, bonuses, or reimbursements, and should be treated accordingly. In fact, the commentary in the September Draft regarding payroll cards follows this very logic:

*“A payroll card is a specific form of stored value card used to pay wages or other monetary amounts owed to an employee who may not have or choose to use a bank account. Its use as a means by which compensation due the employee is paid discharges the employer’s obligations to the employee in the same way that making a direct deposit into the employee’s bank account does.”<sup>2</sup>*

Moreover, it is worth noting that because payroll cards are functionally equivalent to Consumer Asset Accounts and often serve as the primary transaction account for unbanked and underbanked consumers,<sup>3</sup> they are treated similarly to other Consumer Asset Accounts under applicable law. For example, both Consumer Asset Accounts and payroll card accounts are classified as “Accounts” under Regulation E.<sup>4</sup> As a result, payroll cards are subject to the same requirements as Consumer Asset Accounts with respect to consumer protections, such as account opening disclosures, error resolution (including provisional credit), transaction history, change in terms notice requirements, annual error resolution notices, periodic statements, and limitation of liability.<sup>5</sup> Payroll checks, by contrast, are not subject to Regulation E as any fund transfer originated by check is not covered under this regulation.

In addition, the Federal Deposit Insurance Corporation (the “**FDIC**”) recognizes payroll cards as separately insured accounts eligible for FDIC insurance coverage up to the statutory limits (currently \$250,000). In the case of pooled custodial accounts, the FDIC has recognized the existence of pass through insurance for each cardholder. FDIC General Counsel Opinion No. 8 provides that *“all funds underlying stored value cards and other nontraditional access mechanisms will be treated as ‘deposits’ to the extent that the funds have been placed at an insured depository institution. If the FDIC’s standard recordkeeping requirements are satisfied, [cardholders] will be treated as the insured depositors for the purpose of applying the insurance limit”<sup>6</sup>*. In contrast, unless and until an employee deposits a payroll check, the employee does not enjoy the benefits of FDIC insurance coverage under the check; the employee only enjoys such coverage through the account associated with the payroll card.

Further complicating the approach taken in the February Draft is the fact that, unlike wages, commissions, bonuses, or reimbursements, many payroll cards are portable, which means following the termination of the employment relationship, the payroll card converts to a general purpose reloadable card (another form of primary transaction account) and can receive loads from a variety of sources. In addition, many payroll cards can receive third party loads at any time, which results in a payroll card holding both wages and other types of property that will likely have a different unclaimed property period than wages under the February Draft. The ability of payroll cards to receive loads from various sources will create an

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<sup>2</sup> Revised Uniform Unclaimed Property Act – Redline Comparison Between 2015 Annual Meeting Draft and Current Draft (September 29, 2015); Page 19; Lines 10-14.

<sup>3</sup> According to the Federal Reserve Board, “[f]or ‘unbanked’ consumers, payroll card products can serve as substitutes for traditional transaction accounts at a financial institution.” 71 FR 51438 (August 30, 2006).

<sup>4</sup> 12 CFR §1005.2(b)(1) and (2).

<sup>5</sup> 12 CFR Part 1005.

<sup>6</sup> FDIC General Counsel Opinion No. 8, 73 FR 67157 (November 13, 2008).

account that will be almost impossible to address for unclaimed property law compliance purposes because there will be no way to determine which funds on deposit in a payroll card should be subject to the proposed one year unclaimed property period applicable to wages and which funds should be subject to a longer unclaimed property period for other types of property.

### III. Definition of Payroll Card Account Should be Corrected and Should Align More Closely to Regulation E Definition

The NBPCA is also concerned with several aspects of the definition of payroll card contained in the February Draft. The definition of payroll card in the February Draft reads as follows:

#### SECTION 102. DEFINITIONS.

- (20) "Payroll card" means a stored-value card that:
- (A) is issued to or held by an employee by or at the direction of the employer, into which monetary value has been placed to pay wages, commissions, bonuses, or reimbursements to the employee; (*emphasis added*)
  - (B) evidences an account over which the employer retains control; and
  - (C) does not discharge the employer's obligation to the employee until withdrawn by the employee.

The NBPCA has several concerns with this definition:

- (1) Once a Payroll Card, Always a Payroll Card (Clause (A)): Because of the phrase "*has been placed*", Clause A dictates that once a prepaid card is classified as a payroll card through the loading of wages, commissions, bonuses or reimbursements, it is forever considered a payroll card. If wages are ever placed onto a payroll card, it will always carry the designation of a payroll card despite the fact that, as noted above, some payroll cards are portable and convert into general purpose reloadable cards following termination of the employment relationship. In addition, some payroll cards allow third party loads from sources other than employers for the payment of wages (and similar payments).
- (2) ULC Should Harmonize the Payroll Card Definition in RUUPA with Regulation E (Clause (A)). Under Regulation E, a payroll card is defined as "*an account that is directly or indirectly established through an employer and to which electronic fund transfers of the [employee's] wages, salary or other employee compensation (such as commissions), are made on a recurring basis, whether the account is operated or managed by the employer, a third party payroll processor, a depository institution or any other person (emphasis added).*"<sup>7</sup> This definition is already used in a wide variety of state and federal laws governing payroll cards, and the NBPCA believes it would be beneficial to the industry for the UCL to harmonize the definition in the RUUPA with Regulation E. The harmonizing impact of adopting the pre-existing Regulation E definition would be bolstered by the fact that, because there has been in widespread use of this definition since 2006, there is a large body of industry practice interpreting the meaning and nuances of the definition. One of the key clauses in the Regulation E definition of "payroll card" is the reference to "on a recurring basis," which helps to address the concerns described in (1) above by clarifying that if a payroll card is no longer receiving the deposit of wages on a recurring basis, then it is no longer considered a payroll card.

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<sup>7</sup> 12 CFR §1005.2(b)(2).

- (3) Under Applicable Law, Employers Cannot Retain Control of a Payroll Card Account (Clause (B)). Clause (B) should be deleted because it does not describe we are not aware of any payroll cards sold in the U.S. where the employer retains control of the account in which wages are deposited.<sup>8</sup> As described above, in a payroll card program, the employee's wages are either deposited (i) in an individual demand deposit account (DDA) directly for each cardholder; or (ii) in a pooled custodial account for the benefit of all cardholders with subaccounts for each cardholder. Once the ACH payments are made to the payroll card account, the employer has no right to access the applicable account in the future as those funds are owned and controlled by the employee under applicable banking laws and payment network rules. The employer's inability to control the payroll card account is reinforced by FDIC General Counsel Opinion No. 8, which clearly states that the cardholder is the owner of the subaccount for FDIC pass through insurance purposes.<sup>9</sup> Furthermore, while not necessary because existing law prohibits the practice, there are several states, including Kansas, Michigan, and Minnesota, that expressly prohibit employers from accessing funds that are deposited into an employee's payroll card account.<sup>10</sup> For example, Kansas law provides that "[e]mployers shall retain no interest in wages paid by electronic funds transferred to an employee's payroll card account, other than the right to correct inadvertent overpayments in accordance with the rules governing direct deposit."<sup>11</sup>
- (4) Payment of Wages to a Payroll Card Discharges the Employer's Obligations to the Employee Under State Wage and Hour Laws When the Load is Made to the Payroll Card and Not When the Funds are Withdrawn (Clause (C)). Regulation E, the FDIC pass through insurance rules, and other state and federal legislation/regulation make it clear that, in the case of payroll cards, an employer discharges its obligation to pay an employee wages whenever the employer makes a deposit to the employee's DDA account, or the pooled custodial account. The language contained in Clause (C) of the February Draft strongly implies that an employer cannot satisfy its obligation to pay an employee wages until the employee withdraws her wages from her payroll card. If that were the case, then payroll cards would not be a viable form of wage payment in any state because the employer would not be able to comply with state wage and hour laws. This is obviously not the case because many state statutes/regulations expressly permit the payment of wages by payroll card.

#### IV. Conclusion

The NBPCA appreciates the opportunity to present its serious concerns with the treatment of payroll cards under the February Draft with the ULC. As discussed above, payroll cards are functionally equivalent to Consumer Asset Accounts and therefore operate differently than wages, commissions, bonuses, or reimbursements. For this reason, payroll cards should be subject to the same unclaimed property period as a Consumer Asset Account under the RUUPA. Further, the NBPCA strongly recommends that the definition of payroll cards contained in the February Draft be significantly revised to accurately describe how payroll cards actually function and to more closely align with the definition in Regulation E.

We appreciate your consideration of these important concerns and remain available to answer any questions you have regarding payroll cards.

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<sup>8</sup> As further evidence that employers do not control payroll card accounts, the Federal Reserve Board, in its rulemaking that subjected payroll cards to Regulation E, stated "[u]nlike the approach set forth in the interim final rule, the final rule would generally not cover employers and third-party service providers as "financial institutions" under the regulation because they typically do not hold payroll card accounts, or issue payroll cards and agree to provide EFT services to payroll card holders. (71 FR 51439 (August 30, 2006)).

<sup>9</sup> FDIC General Counsel Opinion No. 8, 73 FR 67157 (November 13, 2008).

<sup>10</sup> See Mich. Admin. Code R 408.9035 - Rule 35(c); and Minn. Stat. 177.255 - Subdiv. 3.

<sup>11</sup> See Kansas Rev. Stat. § 44-314(f)(1).