



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") second revised rulemaking regarding the clarification and specification as to the permissible methods of wage payment in New York, issued on June 15, 2016 (the "Third Proposal"). The Third Proposal 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 iteration of the proposed rule (Original Proposal, Second Proposal, and Third Proposal) include proposed requirements governing the payment of wages to employees through a "payroll debit card" ("Payroll Card(s)"). While we provided detailed comments on the Original Proposal and the Second Proposal, we are disappointed that many of the concerns we raised were either ignored or summarily dismissed in the Department's commentary accompanying each proposal. By singling out Payroll Cards and treating them differently than other forms of wage payment in New York, and including much more onerous requirements than are typical in other states, the Department is risking the continued availability of an extremely beneficial and consumer friendly product that serves as a lifeline for New Yorkers who are unable or unwilling to secure a bank account or who cannot afford the high costs of cashing their paychecks.

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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The NBPCA steadfastly believes 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 clear consumer 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.

While our members continue to have serious concerns with many facets of the Department's proposal, at this juncture, we believe it is most beneficial to address what our members have identified as the provisions within the Third Proposal that most threaten the continued viability of Payroll Card products in New York. The most problematic provisions include: (i) invalidation of previously obtained consents, which will be disruptive and harmful to employees; (ii) requirements to provide local access to one or more ATMs that offer employees with unlimited free withdrawals; (iii) onerous and overly burdensome fee restrictions that fail to account for the economic realities of administering a Payroll Card program; and (iv) inconsistencies with Regulation E that create material barriers to offering a nationwide product with little or no additional consumer benefit.

The Third Proposal's Written Notice and Consent Requirement Is Impractical insofar as It Invalidates Valid Consents Previously Obtained and will Likely Prove Disruptive and Harmful to New York Workers

According to the commentary accompanying the Third Proposal, previously obtained consents for receipt of wages by direct deposit and payroll card will only be valid if they comply with the requirements of the Third Proposal's written notice and consent requirements. The NBPCA has serious concerns with the impact of the Department's approach, as the NBPCA believes very few, if any, of these previously obtained consents will be able to meet this standard. As a result, employers will be required to provide written notices and obtain new consents to the payment of wages from a significant number of employees who already utilize direct deposit or payroll cards to receive their wages today, causing significant disruption and harm to those employees.

In addition to the additional burden for employers and providers who must develop processes to obtain new consents, including identifying those employees for whom consent is required, the NBPCA is concerned that there will likely remain a significant number, possibly in the thousands, of New York workers, who are currently being paid by direct deposit or Payroll Card and who will not submit their consent forms due to a variety of reasons, including,



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vacations, leaves of absence or simply assuming that it is not required because the employee already signed a different consent form when he or she was originally hired. For these employees, the result of the Third Proposal may be that their direct deposit or Payroll Card is suddenly turned off, and their wages are unexpectedly received by check, which may leave the employee unable to make time sensitive purchases or cause the employee 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. Employees who have already been receiving their wages through direct deposit or a Payroll Card will thus be left to wonder why the method of payment of her wages she has freely selected and grown accustomed to using is unavailable to her.

Further, the NBPCA believes that some employers may not be able to distinguish between which of their employees are paid via Payroll Card and which are paid via direct deposit in order to determine the type of notice that was initially provided. This fact is particularly true in the case of employers who began offering Payroll Cards as a method of wage payment to their employees before the Department's proposal was even contemplated. The NBPCA is concerned that the new notice and re-consent requirements would cause these employers to be in violation of the Third Proposal if they solicited the wrong type of consent from their employees when they initially solicited consent which, it is important to note, would have been required to be fully compliant with then existing applicable law when originally solicited.

The NBPCA respectfully requests that the Department amend the Third Proposal to state that its written notice and consent requirement apply only to new Payroll Card accounts opened after the final rule takes effect.

Employers do not have Control over Employee or ATM Locations and therefore a Requirement to Provide Employees with Local Access to One or More ATMs in Reasonable Proximity to the Employee's Place of Work or Residence is Infeasible

The NBPCA remains concerned that the Department is seeking to impose a requirement that the NBPCA believes is beyond the control of employers and Payroll Card issuers. Specifically, the Third Proposal requires employers to provide employees "local access" to "one or more automated teller machines" within a reasonable travel distance of the employee's work or home and that "offer withdrawals at no cost to the employee." The NBPCA has several concerns with this requirement. First, the NBPCA believes that basing such a requirement on "one or more ATMs" proximately located to an employee's work or home in place of a requirement to offer a network of fee-free ATMs is inappropriate. Many ATMs are independently owned and operated and the owners of those ATMs have the ability to move the location of their ATMs without any notice to the employer or Payroll Card. Thus, employers and Payroll Card providers that do not own ATMs have no way of identifying which ATMs provide free services and which do not and further, have no control over the location of specific ATMs. Thus, any geographical obligation imposed in relation to ATM locations



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and features would be infeasible and the NBPCA believes a requirement to provide an employee with access to an ATM network is a more realistic and beneficial feature to the employee.

Second, the NBPCA believes that providing unlimited ATM withdrawals would be very costly for both employers and Payroll Card providers, and, coupled with the substantial fee restrictions and other costs imposed by the Third Proposal, will essentially make offering Payroll Cards to New York workers uneconomical. If Payroll Card providers are unable to recover their costs, they simply will not be able to offer the Payroll Cards any longer to New York workers. Further, the NBPCA believes this requirement in the Third Proposal is unnecessary given that employees can generally access their full net wages without cost at any financial institution that is a member of the payment brand on the front of the card.

For these reasons, the NBPCA steadfastly believes the better policy is for employers to explain to their employees how they can access their full wages each pay period without fees, along with a method for determining physical ATM locations, such as through a website from an ATM provider or an ATM network that is continually updated.

The Third Proposal's Fee Restrictions remain Onerous and Overly Burdensome and will likely make it Uneconomical to Offer Payroll Cards to New York Workers

The Third Proposal continues to impose onerous fee restrictions that are not present in other jurisdictions and that will significantly undermine the ability of employers and providers to offer Payroll Card products to New Yorkers.² 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 Third Proposal as the primary reason for their exit from the New York market. 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.

² The NBPCA understands that a primary basis of the Department's Third Proposal, 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"). 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.



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The NBPCA believes it is important to bear in mind that, unlike debit cards, for many Payroll Card programs the only revenue stream for Payroll Card providers is from the Payroll Card itself, which, at a minimum, must recoup the costs of making the product available to consumers. By contrast, debit cards are often "loss leaders" for issuing banks and are used to market other products to the consumer. The majority of Payroll Card programs do not operate in this manner. As such, these programs must be able to cover their costs in order to remain economically viable. The fee restrictions under the Third Proposal go well beyond providing employees with full and free access to their wages each pay period and effectively treat Payroll Cards less favorably than any other wage payment mechanism in New York. As a result, the Department's proposed fee restrictions would actually harm unbanked and underbanked New Yorkers who need access to relatively low-cost, mainstream banking products. If Payroll Cards are not available, unbanked and underbanked New Yorkers will be forced to seek out more expensive options such as check cashing services in order to access their wages.

Particularly concerning to the NBPCA is the fact that the Third Proposal 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 providers from charging reasonable fees for services unrelated to full and free access to wages effectively mandates that one group of employees be provided with free banking services. Thus, the NBPCA believes more changes to the Third Proposal are necessary to allow Payroll Card providers to continue to offer Payroll Cards in New York at a relatively low cost. Absent further revision, we are concerned that small providers will discontinue serving the New York market, leaving only the largest providers, who may be better able to absorb the loss of revenue continuing to provide Payroll Cards to New Yorkers. Over time, this will lead to a reduction of providers in the marketplace, and reduced choice for employers to the detriment of their employees.

We further note 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 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



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overdraft services consistent with the current federal regulations governing the use of Payroll Cards rather than eliminating a valuable option some cardholders have today.³

The Third Proposal Remains Inconsistent with Regulation E and will Cause Providers to Incur Substantial Expenses which Outweigh the Consumer Benefit

The NBPCA believes that providing a 21-day notice of adverse changes under Regulation E adequately addresses concerns raised by the Department and consequently, the NBPCA urges the Department to remove this provision from any final rule as it is overly burdensome and unnecessary, and will require a substantially different compliance standard which will leave New York out of step with the rest of the country.

In the commentary accompanying the Third Proposal, 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 to determine whether or not a particular change is "adverse." The NBPCA 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 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 impacts an accountholder and that the accountholder is not given prior notice of. The Third Proposal, by contrast, fails to appropriately balance these concerns by requiring providers to incur significant expense in both providing prior notice to cardholders of any change to the terms and conditions of their Payroll Card and in maintaining separate compliance requirements for New York as compared to the other states in which they operate.

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 always have access to their then current terms and conditions through other means, such as their provider's website. By contrast, the proposed requirement to provide advance notice of any change an

³ 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>.



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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 changes which help the consumer.

Finally, the NBPCA remains concerned regarding the requirement under Section 192-2.3(f) of the Third Proposal 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 as 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 Third Proposal's requirement to send money to Payroll Card accountholders within seven days is therefore unnecessary in light of existing state requirements for holding, reporting and escheating unclaimed property. Moreover, the NBPCA is concerned that the Third Proposal's requirement to refund unclaimed funds to cardholders within seven days may result in increased instances of fraud because, in order to comply with this requirement, providers would have to remit payment of the unclaimed funds to the cardholder through a written check to the employee address they have on file, which in many cases may be outdated if the employee does not update the employee's Payroll Card provider when he or she changes address. For these reasons, the NBPCA urges the Department to strike this provision.

NBPCA's Concerns with other Aspects of the Third Proposal

In addition to the concerns detailed above, the NBPCA wishes to again highlight for the Department the significant concerns our members have with other aspects of the Third Proposal, which have been raised in greater detail in earlier comment letters to the Department.

The Requirement to Wait Seven Business Days after Obtaining Written Consent before Wages can be Deposited to a Payroll Card Harms the Interests of Employees

The NBPCA believes that the Third Proposal'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 Third Proposal 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 Third Proposal continues to impose an unnecessarily burdensome and arbitrary seven business day waiting period that harms the interests of employees.



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Under the requirements of the Third Proposal, 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 wages via her chosen method of payment. 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. In addition, 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 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, an employee receiving her wages by Payroll Card soon after consenting to this wage payment method during orientation, can immediately use the card for transactions, pay necessary bills online and have 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 that Payroll Cards are a disfavored and unreliable method of payment, given that no other method of payment is subject to a similar requirement. Such a result harms the interests of employees by potentially causing them to elect a method of wage payment that may be less convenient, perhaps more expensive, and not in their best interests.

Finally, the NBPCA notes that the commentary accompanying the Third Proposal indicates that the seven business day waiting period is intended to give employees the opportunity to evaluate and assess the Payroll Card method of wage payment in a meaningful way without limitation on the employee's ability to immediately withdraw their consent. The NBPCA notes that this rationale assumes that the employee will be able to assess, in a meaningful way, a Payroll Card as a method of wage payment, without having had any experience using the card itself. Additionally, the NBPCA points out that, should an employee who receives their wages via a Payroll Card decide to accept another form of payment, the employee has the ability to easily move to an alternative method of wage payment without penalty, and within two pay periods. The NBPCA believes giving employees the chance to use the product and then, should they so choose, withdraw their consent without penalty is a far better solution than expecting employees to assess the Payroll Card method of wage payment without any basis for evaluation.



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The Third Proposal's Language Requirements Remain Unclear, Extremely Subjective, and Difficult to Administer and Enforce

NBPCA continues to be concerned by the Third Proposal's requirement that the written notice and consent must be in both English and in the "*primary language of the employee, when a template notice and consent in such language becomes available from the Department.*" The written notice must include a description of the employee's options for wage payment, a statement that the employer cannot require the employee to accept a Payroll Card for the payment of wages, a statement that the employee may not be charged a fee for services necessary to access his or her wages in full, and a list of locations in reasonable proximity to the employee's place of work or residence where he or she can access and withdraw wages at no charge. The NBPCA believes these requirements remain subjective and unclear and it will therefore be impractical for employers and providers to comply.

Further, NBPCA is concerned that, while the commentary accompanying the Third Proposal appears to make the use of the templates optional, a plain reading of the text of the Third Proposal indicate that the templates are mandatory. By contrast, the language in "Response 8" of the Commentary appears to provide additional flexibility by expanding beyond the language appearing in §192-1.3(d) of the Third Proposal and providing three permissive options in which to provide notice including (i) the "employee's primary language;" OR (ii) "in a language that the employee understands;" OR (iii) "through a template prepared by the Department of Labor in accordance with the instructions contained therein." Again, the NBPCA respectfully requests that the Department give employers and providers the flexibility to comply with the language provisions by electing to use the Department's templates when they are available, but not making the use of such templates mandatory.

Finally, the NBPCA is also concerned with the potential inconsistencies of a requirement to provide the written notice and consent disclosures in the employee's primary language. In particular, employers providing the required written notice and consent have no ability to control the language the issuing financial institution uses in providing its other services related to the Payroll Card. The NBPCA believes it may be confusing for employees to have the written notice and consent provided by their employers in the employee's primary language when all of the disclosures provided by the issuing bank are provided in English. In fact, issuing banks typically provide disclosures in only one or two languages due to the significant legal risk that providing required legal disclosures in multiple languages could have a different legal meaning (even if translated word for word) and potentially expose the issuing bank to liability.



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

Finally, the NBPCA and its members continue to have serious concerns about the six-month implementation period provided by the Third Proposal. For those providers that decide to continue to offer Payroll Card products in New York, the Third Proposal will require substantial changes to their operations. Such providers will, at a minimum, need to (i) create new disclosures unique to New York workers, (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 technological and operational 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 Third Proposal, 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. Further, if the Department moves forward with invalidating previously obtained consents, the NBPCA points out that employers and providers will need a much longer implementation period in order to comply. The NBPCA believes a six-month implementation period is inadequate for this purpose as employers and Payroll Card providers will need at least that amount of time to simply identify those employees from whom consent is necessary and required and to put the processes in place to obtain such consent.

In light of the significant time and resources that will be necessary to implement the Department's final Rule, 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.

The NBPCA again points out that even the Consumer Financial Protection Bureau's ("CFPB") proposed rule for prepaid accounts issued in late 2014 (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.⁴ Similar to the Third Proposal, the CFPB's proposed rule also poses substantial operational changes for Payroll Card providers.

⁴ 79 Fed. Reg. 77256.



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According to the CFPB's Spring 2016 Rulemaking Agenda, the CFPB "expects to issue a final rule this summer to create a comprehensive set of consumer protections for prepaid financial products."⁵ Taking also into account that the industry is already undergoing significant change related to the nationwide roll-out of EMV-enabled POS terminals and EMV enabled cards, the NBPCA believes 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. Given all of these factors, the NBPCA urges the Department to refrain from issuing any final rule of its own until after 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 final rule and the Department's final 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. In short, coordinating the timing of the Department's final rule with the CFPB's final prepaid account rule will minimize the impact New Yorkers who use Payroll Cards may encounter as the industry moves quickly to comply with both sets of rules.

The Third Proposal Lacks Clarity with regard to the Treatment of Incentive Payments

The Department's commentary notes that the requirements of the Third Proposal 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." More troubling, the Department fails to provide any further detail or guidance as to which incentive payments constitute "wage payments" for purposes of the Third Proposal and which do not. The NBPCA is concerned that the Department's lack of clarity on this issue will make the provisions of the Third Proposal even more difficult and confusing for employers and Payroll Card providers, because when employers make any non-recurring payment to an employee, they will not know whether the requirements of the Third Proposal apply. 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 Third Proposal to provide clarity regarding what payments from an employer constitute wage and non-wage payments. More specifically, the NBPCA believes the Department should clarify, consistent with

⁵ Consumerfinance.gov, *Spring 2016 Rulemaking Agenda*, May 18, 2016, available at <http://www.consumerfinance.gov/about-us/blog/spring-2016-rulemaking-agenda/>.

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



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Regulation E, that an incentive payment to an employee is covered by the Third Proposal only when that payment is likely to be a consumer's primary source of salary or compensation.

Conclusion

The NBPCA appreciates the opportunity to once again provide comments on the Department's Third Proposal. The NBPCA reiterates its disappointment that the Department has ignored or summarily dismissed the numerous concerns we have raised in our prior correspondence on this important issue. Payroll Cards offer substantial and numerous benefits to workers in New York including increased security, convenience, and cost savings. The NBPCA believes that the Third Proposal continues to threaten the continued viability of Payroll Card products in New York by making it infeasible for employers and Payroll Card providers to continue offering them to New York workers. Moreover, the NBPCA reiterates that several laws, including Regulation E and the forthcoming CFPB final rule on prepaid accounts, already contain substantial employee protections in connection with the use of Payroll Cards. The NBPCA hopes that rather than single out Payroll Cards for adverse and different treatment, the Department will 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.

Sincerely,

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