WELLS FARGO

(415) 396-5461

Ted Teruo Kitada
Vice President and Senior Counsel

Law Department
633 Folsom Street, 7th Floor
San Francisco, CA 94107
415 396-5461
415 975-7865 Fax
kitadat@wellsfargo com

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Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, Northwest
Washington, D.C. 20429
Attention: Comments/Legal ESS

Re: Part 330-Stored Value Cards

Dear Mr. Feldman:

Wells Fargo & Company ("Wells Fargo") is a diversified financial services company providing banking, insurance, investments, mortgage, and consumer finance to over 23,000,000 customers through over 6,200 banking offices, the Internet ("wellsfargo.com"), and other distribution channels throughout North America, including all 50 states, and the international marketplace. Wells Fargo has over $453 billion in assets and 150,000 employees. Wells Fargo is one of the United States' top-40 largest private employers. Wells Fargo ranked fifth in assets and fourth in market value of its stock at September 30, 2005, among its peers. Wells Fargo Bank, National Association, the principal banking subsidiary of Wells Fargo, is the only bank in the United States to receive the highest possible credit rating, "Aaa," from Moody's Investors Service.

I. Background to the Proposed Rule. The Federal Deposit Insurance Corporation ("FDIC") published for notice and comment[1] a proposed rule (the "First Proposed Rule") that would clarify the meaning of "deposit" as that term relates to funds at insured depository institutions underlying stored value cards[2] or prepaid cards. The First Proposed Rule would have added a new section to part 303 of title 12 of the Code of Federal Regulations and would supersede General Counsel's Opinion No. 8 ("GC8") published by the FDIC on August 2, 1996, to the extent of any inconsistency.[3]

[1] 69 Fed.Reg 20558 (April 16, 2004)
[2] While we prefer the term "prepaid card" rather than FDIC's term "stored value card" in describing this access mechanism, for the reasons noted in our letter, dated July 7, 2004, at page 6, we shall defer to the FDIC's term for the purpose of this letter.
[3] 61 Fed Reg 40490 (August 2, 1996)

Subsequent to the publication of the First Proposed Rule, on August 8, 2005, the FDIC published a revised proposed rule[4] (the "Second Proposed Rule") to address certain issues raised by commentators in response to the First Proposed Rule. Under the Second Proposed Rule, the FDIC proposes to add a new subsection to part 330 of title 12 of the Code of Federal Regulations. The FDIC anticipates that the Second Proposed Rule would promote accuracy and consistency by insured depository institutions in reporting "deposits" for inclusion in an institution's assessment base. Under the new subsection, the FDIC seeks to provide guidance to the public about the insurance coverage of funds underlying nontraditional access mechanisms thereto. The FDIC contends that this new subsection is necessary to provide guidance to the industry and the public as to when funds underlying stored value cards will satisfy the definition of "deposit" at section 3(l) of the Federal Deposit Insurance Act (the "FDI Act"). To the extent GC8 may be inconsistent with the Second Proposed Rule, GC8 would be superseded.[5]

Wells Fargo is pleased to offer the following comments to the Second Proposed Rule. In that connection, Wells Fargo will comment specifically on the matters the FDIC expressly seeks comments in the Second Proposed Rule.

II. Comments.

A. Should the FDIC recognize a distinction between the funds underlying payroll cards and the funds underlying gift cards? The Second Proposed Rule seeks comment as to whether the FDIC should recognize a distinction between the funds underlying payroll cards and the funds underlying gift cards for FDIC assessment purposes.

1. Payroll cards. In the case of funds underlying payroll cards, the FDIC raises the possibility of creating a rule mandating satisfaction of the FDIC "pass- through" requirements so that funds underlying payroll cards always would be insured to employees.[6] For example, the FDIC might prohibit insured depository institutions from accepting funds underlying payroll cards unless (1) the employer (or agent company on behalf of the employer) maintains records reflecting the identities of the employees and the amount payable to each employee; and (2) the

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[4] 70 Fed.Reg. 45571 (August 8, 2005).
[5] 70 Fed Reg at 45576.
[6] Granting further protection to payroll cardholders is also consistent with a proposal issued by the Board of Governors of the Federal Reserve System (69 Fed Reg 55996, September 17, 2004) suggesting that payroll cardholders be granted protection under Regulation E, 12 C F R. Part 205.

employer surrenders ownership of the funds to the employees so that the employer cannot recover the funds under any circumstances.[7] Thus, e.g., even if the payroll card expires or even if the funds underlying a payroll card were to remain unclaimed, the employer would not be able to claim the funds.[8] The purpose of such a rule would be to protect the wages and salaries of employees. In the event of a failure of a depository institution, the FDIC would be able presumably to pay up to the amount of FDIC insurance benefits the deposit obligations running in favor of payroll card holding employees. By providing that the funds underlying payroll cards constitute "deposits" for purposes of the FDI Act, payroll cardholders would be granted assurance that their funds would be protected under FDIC insurance

We support providing FDIC insurance protection to funds underlying payroll cards. Nevertheless, we do not support requiring that all funds underlying payroll cards satisfy FDIC pass-through requirements. Payroll cards are relatively new as a financial product. These cards frequently provide a safe and secure means to access payroll, especially to the unbanked or underbanked If the FDIC were to forbid insured depository institutions from accepting funds underlying payroll cards unless (1) the employer (or its processor) maintains records reflecting the identities of the employees and the amount payable to each employee and (2) the employer relinquishes ownership of such funds, the FDIC may have an adverse impact on further development of this convenient product. If a depository institution could not accept funds underlying payroll cards except under such limited circumstances, innovation associated with this product could be significantly impaired.

Because payroll cardholders frequently maintain a regular and continuous relationship with their employer and the depository institution providing the payroll card service to the employer, the institution has an interest in fostering security to the payroll funds of the employee. Consequently, if FDIC insurance were afforded to the funds underlying payroll cards satisfying pass-through requirements, employers and their affiliated institutions would have an incentive to

[7] We are unclear on this restriction. We would assume that in the event the employer erroneously credits a payment, the employer would be able to recover the payment. For example, if the employer inadvertently causes a double credit of payroll, the employer would be able to recover that credit.
[8] Presumably, such funds would nevertheless continue to be subject to escheat under a state's unclaimed property law subsequent to the running of the applicable escheat period. See, e g., California Code of Civil Procedure §§ 1513(a) and 1513(g), as applicable.

structure their payroll card products to conform to such requirements.[9] Employers and their affiliated institutions would be able to market the payroll card product as FDIC insured and such institutions would be able to offer additional products and services to payroll cardholders, leveraging off of the ongoing payroll card relationship. In sum, overriding market forces would foster FDIC insured payroll cards satisfying pass-through requirements. However, if the FDIC were to require pass-through features as a condition precedent to accepting funds for this payroll product, the product developers may lose their appetite to add enhancements and refinements to this product. Further, for these reasons, we would oppose the application of this rule as a condition to accepting funds on other similar products, such as cards issued to access public benefits or health or medical benefits [10] Such similar products should also be afforded an opportunity to develop further free of burdensome regulatory restraints.

With regard to the interplay between state law and pass-through requirements, if our understanding of FDIC's inquiry is correct we would agree that some state laws appear to mandate the satisfaction of certain conditions not dissimilar to pass-through requirements. For example, under California Labor Code § 2052, an employer is required to maintain, among other information, the following for a three year period:

- The names and addresses of all employees rendering actual services for any business of the employer.
- The wage and wage rate paid during each payroll period.

Such information reflects, of course, the identities of the employees and the amount payable to each employee, in satisfaction ostensibly of pass-through requirements. However, while a correlation may exist between the wages paid and the amount payable under a payroll card, the amounts may not be accurate and correct. Assuming that this is the type of law under

[9] As discussed, below, to an extent employers currently probably satisfy record requirements applicable to pass-through standards regardless

[10] Cards issued in this regard would be used to access health savings accounts and health flexible spending arrangements Section 1201 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub L. No 108-173, added § 223 to the Internal Revenue Code ("IRC"), to permit eligible individuals to establish health savings accounts for taxable years beginning after December 31, 2003 Health flexible spending arrangements are authorized under IRC §§ 106 and 125 One common card is the "Benny Card,"™ a debit card branded with the MasterCard® or Visa® logo and accepted by merchants and other payees able to use those payment networks.

consideration by the FDIC in the Second Proposal, this law would not appear to satisfy completely the pass-through requirements.

2. Gift cards. In the case of gift cards, in the event the gift card is issued by a retailer the FDIC proposes to draw a distinction between gift card funds held in an account solely in the name of the retailer[11] (i.e., the party placing the funds into the bank) as opposed to funds held in a custodial account satisfying the FDIC's requirements for pass-through insurance coverage (i.e., insurance that passes through the retailer, to the gift cardholders).

In the event the gift card is issued by a depository institution (rather than by or through a retailer or other sponsoring business), the FDIC suggests the possibility of creating a *de minimis* rule. For example, the FDIC could create a rule providing that the funds underlying gift cards with a modest balance (e.g., $100.00) are not "deposits" for purposes of the FDI Act.

As another option, in the event the gift cards have been issued directly by a bank (and not by or through a retailer or other sponsoring business), another possibility might be to create a rule under which the funds underlying gift cards are not "deposits" if the insured depository institution maintains no records as to the identities of the cardholders or any other party.

We do not support having FDIC insurance coverage for funds underlying gift cards, regardless of the features of the gift cards or the identity of the issuer.[12] In contrast to payroll cards, gift cards, especially nonreloadable gift cards, do not contemplate a regular, continuous relationship with their issuer, whether that issuer is a retailer or a depository institution. Gift card purchasers do not normally expect the funds underlying gift cards to have FDIC insurance. Unlike consumers (especially sophisticated consumers) considering FDIC insurance when placing regular deposits with depository institutions in contemplation of a continuing banking relationship, consumers do not normally consider FDIC insurance when considering the purchase of a gift card. Deposit risk considerations do not come into play when buying these convenient payment access mechanisms. Further, depending on the features of a gift card product, if the funds underlying some gift cards benefit from FDIC insurance and the funds underlying other

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[11] Presumably, the retailer solely would be the beneficiary of FDIC insurance as to these funds.

[12] Needless to say, if the issuer (e g., retailer) were to deposit the funds it receives for the gift card with a depository institution, those funds would be subject to FDIC assessment and would benefit from FDIC insurance coverage in favor of the issuer similarly to any other deposit.

gift cards do not so benefit (even if cards bearing such features are issued by the same depository institution), such a practice would lead to consumer confusion about the products and services of depository institutions

B. The FDIC wishes to learn whether any depository institution is selling stored value cards to the public without maintaining any records as to the identity of any parties. By way of example, we sell gift cards under the following portals:

- We conduct retail sales of gift cards online at our Website and through our offices. In connection with online sales, we would secure the name to be embossed on the card and the value to be prepaid to the card. The purchaser may have his or her name embossed on the gift card and use it. The purchaser may also cause the name of a third party, presumably an intended recipient of the gift card, to be embossed on the card. The record of that named person on the card and value prepaid to the card is maintained by a third party service provider to the card. We do not maintain this information.
- Through our offices, the gift cards we sell do not have a name embossed on the cards. While sales are limited to our customers, we do not know the identity of the ultimate user of the card. We do not maintain a record of the purchaser of the gift card.
- We also sell gift cards on a bulk basis, normally to businesses. Again, no name may be embossed on the cards under such sales. In the alternative, the purchaser could request that names of the recipient be embossed on the card.

In sum, while some stored value cards, such as payroll cards, normally are associated with a named employee and that employee's identity is recorded by us, other cards, such as gift cards, are commonly issued with no party identified thereto. Even if a party is identified, that party may not be a cardholder because the named party may have transferred the card to a third party as a gift. As provided above, we urge that the funds underlying all gift cards not be considered deposits for purposes of the FDI Act. If some funds underlying gift cards were FDIC insured and other cards were not, subject to the characteristics or features of a gift card product, consumers would become confused. Further, for Call Report purposes, such a system would be difficult to administer. A depository institution would be required to create multiple general ledger accounts for the same product, requiring possibly further refinements to automated reporting systems Additionally, further refinements to card systems may become necessary to facilitate compliance in the reporting process by depository institutions.

C. The FDIC proposes to treat all stored value products and other nontraditional access mechanisms as deposits, regardless of the access mechanism. Provided the funds have been placed with a depository institution, the FDIC as one proposal suggests that the funds underlying all stored value products and other nontraditional access mechanisms be treated categorically as deposits. This proposal appears to be the approach embraced by the FDIC with regard to traditional mechanisms. One unintended consequence of this "shotgun" approach to regulatory enforcement is that the cost associated with this product may increase, due to applicable FDIC assessments. If the costs escalate, nondepository institutions issuing gift cards would gain a competitive advantage. Further, if the costs increase, the appeal of some stored value products may dissipate. The profit margin associated with these products is already paper thin. If the appeal dissipates, traditional depository institutions may reduce their role in offering these products. Other stored value card issuers may take their place. They may be subject to fewer regulatory restraints than traditional depository institutions. Consequently, consumers may suffer indirectly as less regulated issuers replace closely regulated traditional depository institutions. Further, the unbanked and the underbanked may be adversely impacted because depository institutions may be less willing to offer stored value products generally, limiting the availability of these products to such groups

D. In those cases where the depository institution sells stored value cards and other nontraditional access mechanisms directly to cardholders, should the funds underlying such cards and mechanisms be considered "nondeposits" in those cases (if any) in which the insured depository institution does not maintain records of the identities of the cardholders or any other party? While ostensibly this proposal may have some appeal, we object to it. As shown by the example of the gift card detailed above, some gift cards may be subject to FDIC deposit insurance under the pass-through principle, while other cards would not be subject to such insurance. If some gift cards were subject to FDIC insurance and other cards were not so subject, such a result would lead to consumer confusion. Further, the cost to administer a gift card system may rise significantly due to system enhancements such a requirement may precipitate. Due to reasonable consumer expectations, we do not object to characterizing the funds underlying payroll cards as deposits under the FDI Act; however, other common stored value products, such as gift cards, should not be so classified. We urge the FDIC to permit the marketplace to further develop these other card products freely without new restraint or costs.

E. Do secondary systems exist? In a secondary system, the insured depository institution collects funds from cardholders, but does not hold the funds for the cardholders. Rather, the depository institution either forwards the funds to a sponsoring company[13] or retains the funds as reimbursement for funds previously paid to the sponsoring company.[14] In either case, the sponsoring company plays no significant role in the payment process. When the cardholders use their card, funds are transferred or withdrawn from the sponsoring company and not from the depository institution. We have no substantial familiarity with this secondary system; thus, unfortunately we are unable to comment on secondary systems as described in the Second Proposed Rule.

F. Should stored value cards disclose whether the funds underlying such cards are insured by the FDIC? While we support having the funds underlying payroll cards subject to FDIC insurance, we do not indorse specifically mandated FDIC insurance disclosures for stored value cards in general, to the extent FDIC insurance is afforded. Because payroll cards contemplate a regular, continuous banking relationship among the employer, the employee, and the depository institution, that relationship is highly similar to a regular deposit relationship. Under such a relationship, the parties, including the employee, may have a reasonable expectation that funds associated with payroll cards enjoy FDIC insurance protection. Currently, the FDIC has general mandated disclosures regarding the advertising statement.[15] Payroll cards should not be treated differently. If they were, consumers may become confused about the FDIC insurance protections afforded to other similar products.

In addition, as detailed above, if implementation of some of the ideas in the Second Proposed Rule result in some gift cards enjoying FDIC insurance and other gift cards not so

[13] See 61 Fed Reg. at 40490.
[14] *Id*
[15] 12 C.F.R. Part 328

enjoying, consumer confusion would be compounded by having depository institutions disclose that some types of gift cards enjoy FDIC insurance and other gift cards do not so enjoy.

III. Conclusion. Wells Fargo wishes to express its appreciation for the opportunity to offer its comments to the Second Proposed Rule. If you have any questions to the foregoing, please do not hesitate to contact me.

Sincerely,

Ted Teruo Kitada

Ted Teruo Kitada
Vice President &
Senior Counsel

cc: James M. Koziol
Katherine M. Yee