Joshua L. Peirez
Senior Vice President &
Associate General Counsel

MasterCard International
Law Department
2000 Purchase Street
Purchase, NY 10577-2509
914 249-5903
Fax 914 249-3648
E-mail joshua_peirez@mastercard.com
www.mastercard.com

MasterCard International

November 7, 2005

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

Re: Part 330—Stored Value Cards

To Whom It May Concern:

MasterCard International Incorporated ("MasterCard")[1] submits this comment letter in response to the Proposed Rule ("Proposal") issued by the Federal Deposit Insurance Corporation (the "FDIC") regarding the definition of "deposit" under section 3(l) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(l) (the "FDI Act"), as it relates to funds at an insured depository institution underlying stored value cards and the insurance coverage of such funds under the FDI Act. *See* 70 Fed. Reg. 45571 (Aug. 8, 2005). MasterCard appreciates the opportunity to comment on the Proposal.

Role of Stored Value Card Programs in the Financial System

Many types of stored value card programs have become mainstream financial services programs as their issuance, acceptance and use has increased in recent years. Many financial institutions issue stored value cards, and increasingly those cards provide cardholders with access to established networks of merchants and ATMs, such as via the MasterCard, Cirrus, and Maestro networks.

Many types of stored value cards have become important tools by which financial institutions can serve the needs of the "unbanked," *i.e.*, people without traditional banking relationships. Stored value cards that access widespread networks such as the MasterCard network provide cardholders ready access to their funds. These cards are also more secure than carrying cash. In the case of stored value cards used for payroll, the cards eliminate the need for, and expense of, visiting a check casher to cash a weekly or biweekly

[1] MasterCard is an SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems, including stored value cards.

paycheck. Payroll cards also result in savings to employers, who can reduce the expense of issuing and monitoring paper payroll checks.

Given these benefits and the increasing issuance and use of stored value cards, we welcome the FDIC's ongoing effort to address stored value cards and the important issue of insurance coverage under the FDI Act. At the same time, we urge the FDIC to exercise caution and restraint in this area. The past few years have demonstrated the benefits that stored value card programs can bring to the marketplace, and it would be unfortunate for regulatory burdens to inhibit the growth of these important programs.

We believe that there are significant questions as to whether the Proposal is necessary or beneficial and that careful consideration should be given to its broader implications. If the Proposal is adopted, we believe the FDIC must ensure that it does not impede the development of stored value programs. Furthermore, if the Proposal is adopted, we believe that several changes should be made to the Proposal. In particular, we believe that the Proposal should exclude certain funds underlying stored value cards from the definition of "deposit" under the FDI Act.

Proposed Amendments to 12 C.F.R. Section 330.5

The FDIC has proposed to amend Section 330.5 of its regulations to recognize that the term "deposit" includes all funds subject to transfer or withdrawal through the use of nontraditional access mechanisms, such as stored value cards, to the extent that such mechanisms provide access to funds received and held by an insured depository institution for payment to others. In our view, the proposed amendment to Section 330.5 creates an overly broad definition of "deposit."

Breadth of Definition of "Deposit." As an initial matter, we renew the concerns expressed in our comments regarding the April 16, 2004 proposed rule that such a broad definition of "deposit" is inconsistent with the FDI Act. In particular, with respect to funds in hybrid systems, we respectfully disagree with the FDIC's interpretation of paragraph 3(l)(3) and with the FDIC's alternative reliance on paragraph 3(l)(5) of the FDI Act. Consistent with prior FDIC interpretations, we believe that creating a subaccount for a particular cardholder is not a sufficient "special or specific purpose" under paragraph 3(l)(3) when the cardholder may use the card for a number of different transactions.

Moreover, we believe that use of paragraph 3(l)(5) as a means to define all stored value card funds as deposits for purposes of the FDI Act may have the unintended effect of triggering various laws and regulations that would be burdensome to participants in the stored value programs market. This, in turn, may raise the costs associated with stored value programs and could inhibit the growth of such programs. In this regard, we do not dispute the FDIC's assertion in the Proposal that the definition of "deposit" under the FDI Act is not explicitly incorporated into other laws and regulations. However, an explicit cross-reference is not necessary for the Proposal, if adopted, to affect the interpretation of other laws and regulations. We believe that the FDIC's view on the definition of "deposit" will strongly influence the views of other agencies and state Attorneys General with

respect to issues surrounding stored value programs, and that this should be taken into consideration by the FDIC in the Proposal.

Exception for De Minimis Cards. If the FDIC determines to adopt the proposed amendments to Section 330.5, we strongly encourage the FDIC to incorporate an exception for cards with a "de minimis" value.

The Proposal requests comments on whether funds underlying gift cards issued by depository institutions "and not issued by or through a retail store or other sponsoring company" with balances under one hundred dollars should be treated as not constituting deposits under a "de minimis" rule. 70 Fed. Reg. at 45577. As an initial matter, we believe that funds represented by depository institution-issued gift cards should not be treated as deposits. We are concerned that imposing new burdens on depository institution-issued gift cards will discourage depository institutions from issuing such cards, to the ultimate detriment of consumers. In this regard, consumers benefit from depository institution-issued gift cards because such cards generally can be used at multiple retailers and, consequently, have greater utility than retailer-issued gift cards. Moreover, a consumer's funds are safer when the issuer of a gift card is a regulated depository institution rather than an unregulated retailer.

However, if the FDIC determines to treat gift card funds as deposits, we support the concept of a "de minimis" rule, and have several suggestions for refining any potentially forthcoming rule on this issue.

The Proposal states that a potential "de minimis" rule would apply to "gift cards [that] have been issued by the bank itself and not issued by or through a retail store or other sponsoring company." We request that the FDIC clarify that the issuer of a gift card is the party obligated to fund card transactions. The Proposal does not define the term "issuer." However, the FDIC's April 16, 2004 stored value card proposal indicated in the Supplementary Information that issuance of stored value cards includes "the distribution of cards to cardholders (directly or through an agent)." 69 Fed. Reg. 20558 (April 16, 2004). Inclusion of the element of distribution in the "issuer" definition introduces uncertainty into the equation. For example, is a gift card distributed by a depository institution if it contracts with a retailer to distribute the card? Must the contract characterize the depository institution and retailer as principal and agent? Is the retailer also an issuer of the gift cards, such that there are two issuers? We believe that this uncertainty does not serve any policy objective. Moreover, treating the party obligated to the consumer for funding gift card transactions as the "issuer" avoids the need to determine whether a card is issued by multiple parties. Also, this approach is consistent with the treatment of other card products, such as credit cards. To our knowledge, the federal banking agencies have never suggested that a retailer involved in the marketing and distributing of co-branded or private label credit cards, but not obligated to the consumer to extend credit on such cards, is the issuer of such cards.

We believe that the matter of card issuance would be further clarified by excluding from a proposed "de minimis" rule any reference to the issuance of cards by or through a retailer, sponsoring company or other third party. In our view, a card issued by a

depository institution cannot also be issued by a third party. Hence, a reference to issuance by third parties would be superfluous. Moreover, the concept of issued "through" seems to suggest that a depository institution-issued gift card could not be offered at a retail location. This is the most common manner in which gift cards are offered. Again, co-branded and private label credit cards typically are offered at a retailer location without any suggestion by the FDIC that this practice undermines the status of the depository institution as the issuer of such cards. We see no basis for distinguishing between gift cards for purposes of the "deposit" definition based on the involvement of a third party in the marketing or distribution of the card.

Additionally, we request that the FDIC apply a "de minimis" rule to stored value cards generally, not only to gift cards. The Proposal acknowledges that, "[i]n some cases, the gift card may be used to purchase goods or services wherever a major credit card may be used." 70 Fed. Reg. at 45573. Because gift cards can be used at numerous merchants, there is little, if any, difference between a low-balance gift card and a low-balance stored value card of another type. We believe that the label or name that a depository institution applies to the card should not be the basis for a distinction for "deposit" definition purposes.

We also believe that the FDIC should adopt a higher dollar amount threshold for a "de minimis" rule. One hundred dollars is a relatively modest level given the ever-increasing cost of consumer goods and products. A threshold of at least five hundred dollars would give a "de minimis" rule greater utility.

Exception for Anonymous Cards. If the FDIC determines to adopt the proposed amendments to Section 330.5, we also strongly encourage the FDIC to incorporate an exception for anonymous cards *(i.e.*, cards with respect to which the issuing depository institution has no cardholder identification records).

The Proposal requests comments on whether funds underlying gift cards issued directly by depository institutions, "and not by or through a retail store or sponsoring company or any other party," should be treated as not constituting deposits if the card-issuing depository institution "maintains no records as to the identities of cardholders or any other parties." 70 Fed. Reg. at 45577. As discussed above, our view is that funds underlying depository institution-issued gift cards should not be treated as deposits under any circumstances. If the FDIC does not adopt this view, we nonetheless support the concept of an anonymous card exception. However, we renew here our comments expressed above in the context of the "de minimis" rule regarding the need to (1) define the term "issuer" and clarify the interplay between card issuance and marketing/distribution efforts; and (2) treat gift cards and other stored value cards equally.

Payroll Cards

The FDIC has requested comments regarding whether depository institutions should be prohibited from issuing payroll cards unless they satisfy the recordkeeping requirements for pass-through deposit insurance. The FDIC indicates that one approach would be to prohibit the issuance of payroll cards by a depository institution, unless (1) the

employer maintains cardholder identification records and records of amounts payable to cardholders, and (2) the employer relinquishes control of the funds to the employees.

We discourage the FDIC from imposing special requirements for payroll cards. The issue of ownership of funds for payroll cards may be affected or determined by state wage payment laws and state laws dealing specifically with payroll cards. An FDIC rule in this context may be redundant of state laws or otherwise complicate this area of law.

Also, we believe that the FDIC's suggested approach would create an untenable situation in which no depository institution could issue payroll cards without risk of violating FDIC regulations. Depository institutions cannot ensure that employers maintain records or take actions with respect to the payment of wages because there are no practical means for depository institutions to manage this compliance obligation. Imposing such a requirement, we believe, will effectively put an end to payroll card issuance by depository institutions. Rather, if the FDIC determines to treat payroll card funds as deposits, it should subject such funds to the general rules regarding deposit insurance.

Because of the difficulty of ensuring compliance with the pass-through insurance requirements, we discourage the FDIC from requiring pass-through insurance for other types of stored value card as well, such as those associated with welfare and medical benefits.

Disclosures

We understand and appreciate the FDIC's concern that depository institutions that issue stored value cards must accurately disclose whether such funds are covered by FDIC insurance. The Proposal appears to contemplate that disclosure should be provided on the card itself. Given the small size of most cards, which are less than 3" x 2" or smaller in most cases, we suggest that providing disclosure regarding the applicability of FDIC insurance in a terms and conditions document would be sufficient and would be consistent with disclosure for other depository institution card products, such as credit cards.

Furthermore, we agree with the FDIC's suggestion that such disclosure should not be mandated when pass-through coverage is unavailable to cardholders. However, the Proposal states that disclosure should be mandatory when a depository institution has a good faith belief that the FDIC's requirements for pass-through coverage have been satisfied. This language suggests that a depository institution has an affirmative duty to inquire as to whether pass-through coverage requirements have been satisfied. This would require depository institutions to actively inquire from first parties (such as employers) about the accuracy of their records reflecting the identities of cardholders and the amounts payable to each. Because of the burden associated with managing such a compliance obligation, we encourage the FDIC not to mandate disclosures regarding pass-through insurance.

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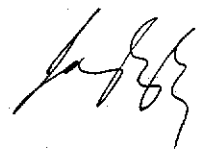
Once again, we appreciate the opportunity to comment on the Proposal. If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Joel D. Feinberg at Sidley Austin Brown & Wood LLP, at (202) 736-8473, our counsel in connection with this matter.

Sincerely,



Joshua L. Peirez
Senior Vice President &
Associate General Counsel

cc: Joel D. Feinberg, Esq.