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Via Email (BrokeredDepositFAQs@fdic.gov)

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The Federal Deposit Insurance Corporation
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Comments of the Network Branded Prepaid Card Association in Response to
Financial Institution Letter FIL-51-2015 Regarding the FDIC's Proposed
Frequently Asked Questions Regarding Identifying, Accepting and Reporting
Brokered Deposits

Dear Ms. Eberley:

This Comment Letter is submitted to the Federal Deposit Insurance Corporation (the "FDIC") on behalf of the Network Branded Prepaid Card Association (the "NBPCA")¹ in response to Financial Institution Letter FIL-51-2015 (the "Revised FAQ Answers"), released by the FDIC on November 13, 2015, which modified Financial Institution Letter FIL-2-2015 (the "Initial FAQ Answers") released by the FDIC on January 5, 2015.

As the leading trade association representing participants in the market for prepaid financial products, the NBPCA appreciates the opportunity to share its comments on the Revised FAQ Answers. We believe that the diversity of the NBPCA's membership uniquely positions us to provide comprehensive commentary on the impacts of the Revised FAQ Answers with respect to prepaid accounts and related businesses.

¹ The NBPCA is a non-profit trade association representing a diverse group of organizations that support network branded prepaid cards and other forms of prepaid access used by consumers, businesses, and governments. Network branded prepaid cards are those carrying the logo of a payment network including American Express, Discover, MasterCard or Visa. The NBPCA's members include prepaid access providers and sellers, in addition to financial institutions, card manufacturers, processors, program managers, marketing and incentive companies, card distributors, and law and media firms. The NBPCA is active on behalf of its members to inform and educate government officials, the media and consumers about these important payment products that provide critical access to financial services for millennials, and the underbanked and underserved, as well as convenience, security and efficiency to users.

The NBPCA greatly appreciates the FDIC’s decision to provide an opportunity to comment on the Revised FAQs. We also appreciate the time the staff has taken to meet with representatives from the NBPCA to discuss these important matters. As we have discussed in person and describe in detail in our comments below and in our accompanying white paper appended to this letter as Appendix A (the “White Paper”), the facts and circumstances surrounding prepaid cards are complex due to the wide variety of prepaid products in the market and the fact that features, functionality and program structures have rapidly evolved over the past several years. The potential treatment of the deposits associated with prepaid cards as brokered deposits requires a careful review of these facts and circumstances to identify, as required by the statute, whether any of the participants in the prepaid industry is in the business of placing or facilitating the placement of deposits, and, if they are, whether such participants have a different primary purpose than the placement of deposits with insured depository institutions.

In our comments below and in our White Paper, we provide detailed descriptions of the types of facts and circumstances that demonstrate that most participants in this industry are either not in the business of placing or facilitating the placement of deposits or have a different primary purpose than the placement of deposits. At a bare minimum, the Revised FAQ Answers should be revised further to make clear that the same facts and circumstances test applies to participants in the prepaid card industry as it does in all other contexts. We understand from our discussions that this is the staff’s position, but there remains uncertainty around this question based on some of the Revised FAQ Answers, as detailed in our comments below and in our White Paper. We greatly appreciate the opportunity to work with the FDIC on these important questions and look forward to our continued dialogue.

The facts, as shown in the White Paper, which we request be considered in full and be made a part of the agency record, are that prepaid accounts are a valuable product used by a number of types of organizations (*e.g.*, state and federal government agencies, universities and corporations) to make a wide variety of disbursements (*e.g.*, government benefits, payroll, healthcare reimbursements, transit reimbursements, disaster relief, rebates and incentives, insurance claim payments, student loan disbursements, and corporate expense reimbursements) to consumers.

Prepaid cards are offered by innovative companies to serve a wide-range of consumers, including millennials as well as the unbanked and underbanked, for specific purposes such as budgeting, travel, and remittances as well as to obtain an economical and convenient substitute for a traditional bank account.² For example, general purpose

² See 2014 Philadelphia Federal Reserve Discussion Paper: Millennials with Money: A New Look at Who Uses GPR Prepaid Cards, <http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2014/D-2014-Millennials.pdf>.

reloadable prepaid cards (“GPR Cards”) provide consumers who cannot qualify for or afford traditional checking accounts with safe, reasonably priced, secure access to their funds in a manner functionally similar to traditional banking products. GPR Cards are available in hundreds of thousands of retail locations, bank branches, and other locations, making them convenient to consumers in all neighborhoods, including areas not serviced by traditional bank branches. The primary purpose of all of these firms and organizations is not deposit-placement but is instead providing consumers with cost-effective methods of receiving disbursements and making payments outside of traditional bank account models.

As discussed in the White Paper, these products save payers millions of dollars each year in disbursement costs and also provide consumers with a safe and reliable access point to the financial system. If the Revised FAQ Answers are finalized in their current form, the NBPCA is concerned that costs associated with these products may increase unnecessarily and consumers will have less economical access to many of the beneficial prepaid products in the market. Most importantly, the NBPCA has serious concerns that the Revised FAQ Answers are inconsistent with the statute governing brokered deposits and in certain respects are internally inconsistent and unclear.

I. General Comments

The NBPCA respectfully submits that the approach taken in the Initial FAQ Answers, as amended in the Revised FAQ Answers, is not consistent with the statutory definition of “deposit broker” under the Federal Deposit Insurance Act (the “FDIA”). Under the relevant provisions of the FDIA, which were added by Section 224 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. No. 101-73, 103 Stat. 183, 274, deposits are considered brokered if they are placed by a “deposit broker.” Congress defined a “deposit broker,” in pertinent part, as “any person in the business of placing deposits, or facilitating the placement of deposits, of third parties with insured depository institutions[.]” 12 U.S.C. § 1831f(g)(1). The use of the phrase “*in the business*” of placing deposits or facilitating the placement thereof evidences a desire to limit the impact of the statutory term to the types of “business” Congress believed contributed materially to the savings-and-loan crisis, that is, entities whose sole or principal purpose was to collect and place (or facilitate the placement of) funds into insured deposits, and whose principal compensation was the “brokerage” fee associated with that placement.

To make this point clear, Congress exempted from the definition of “deposit broker” “an agent or nominee whose primary purpose is not the placement of funds with depository institutions.” *Id.* § 1831f(g)(2)(I). The primary purpose exception is the last of the originally-enacted exceptions to the deposit broker definition and ensures that the

deposit broker legislation itself remains “a narrowly drawn provision that specifically targets the most flagrant abusers.”³

In promulgating regulations implementing these statutory provisions, the FDIC did not expand on the definition of “deposit broker” or reduce the scope of the “primary purpose” exception set forth in the FDIA. *See* White Paper, *infra*, at pp. 8-9 (discussing the statute and the incorporation of statutory terms without elaboration or interpretation in the operative rules promulgated by the FDIC). In the FDIC’s own words, the original regulations related to the definitions of deposit broker, which have never been revised or amended, simply “tracked the statute.”⁴

Both the Initial and the Revised FAQ Answers in certain places state that “[t]he definition of deposit broker applies to third parties engaged in ‘placing deposits’ and ‘facilitating the placement of deposits,’”⁵ without also containing the statutory and regulatory requirement that such third party must be in “the business” of doing so. To the extent this omission was intended to broaden the scope of the statute and regulation to cover parties that are not in such a business, the FAQ Answers are not consistent with the statute, and could be misinterpreted as attempting to broaden the scope of who is a deposit broker beyond the clearly defined parameters in the statute.

Similarly, to the extent the Initial and Revised FAQ Answers could be read to suggest that a third party becomes a deposit broker simply by taking actions “to connect insured depository institutions with potential depositors” or to provide “access” to a deposit account, they are simply not consistent with the statute.⁶

These concerns are amplified by certain other aspects of the Initial and Revised FAQ Answers. Although the Revised FAQ Answers generally emphasize “that brokered deposit determinations are very fact-specific, and are influenced by a number of factors,” and “the FDIC always views these determinations on a case-by-case basis,”⁷ the Revised FAQ Answers could be read categorically to bar any company “that sell[s] or distributes general purpose prepaid cards” from even seeking a fact-specific determination that they

³ Insured Brokered Deposits and Federal Depository Institutions, Hearings before the Subcommittee on General Oversight and Government Investigations of the House Committee on Banking, Housing, and Urban Affairs at 10, Cmte. Print 101-28, 101st Cong., 1st Sess. (May 17, 1989) (remarks of Sen. Murkowski).

⁴ 55 Fed. Reg. 28884, 28885 (July 16, 1990).

⁵ *See, e.g.*, Revised FAQ Answer A5.

⁶ *Id.* Answers A5, E9.

⁷ *See* Revised FAQ Answers at 1.

are not a “deposit broker.”⁸ This response, and others likewise indicating categorical reasoning imposing the “deposit broker” status on various sector actors, should be revised by the FDIC to clarify that the same facts and circumstances test applies here as in other contexts. The facts surrounding prepaid programs are complex, have changed significantly over time, and may well change further in the future. As the FDIC appropriately recognized in its new treatment of certain government disbursement card programs in Revised FAQ Answer E12, IDI’s need to have the flexibility to make individualized determinations regarding whether deposits associated with different types of prepaid card programs should be considered brokered based on the specific facts and circumstances of the particular prepaid card program without the virtually categorical conclusion in the Revised FAQ Answers that most prepaid card programs are brokered and do not fall within the primary purpose exception. We identify in our comments the types of facts and circumstances that demonstrate when prepaid industry participants should not be viewed as deposit brokers.

In sum, the NBPCA believes that the FDIC should clarify the Revised FAQ Answers to avoid a suggestion that it has conclusively designated, without regard to facts and circumstances, that all, or even specific, companies in the prepaid distribution chain, or companies that use prepaid cards as an alternative form of disbursement of their own funds, are “deposit brokers,” and to assure that the FAQ Answers will be consistent with the statutory language governing brokered deposits. Properly viewed in light of the facts and circumstances pertaining to this sector of the financial services industry identified in the attached White Paper, such companies are not “*in the business* of placing deposits, or facilitating the placement of deposits.”⁹ While one *activity* of entities in the prepaid card sector may result in connecting depositors to a depository institution, such entities are not in the “business” of deposit placement, and, at a minimum, those entities are independently entitled to exemption from the law’s strictures relating to brokered deposits because “the placing of deposits” is not their “primary purpose.”¹⁰ The NBPCA believes, and the statutory language and legislative history supports the conclusion, that the definition of deposit broker was intentionally limited, and that the approach taken in the Initial and Revised FAQ Answers with regard to the prepaid sector exceeds these limits.¹¹

⁸ See Revised FAQ Answer E9 (“Does the primary purpose exception apply to companies that sell or distribute general purpose prepaid cards? No.”).

⁹ 12 U.S.C. § 1831f(g)(1)(A) (emphasis added).

¹⁰ *Id.* § 1831f(g)(2)(I).

¹¹ See White Paper, *infra*, at pp. 9-10, 19-22 (discussing statutory text and legislative history).

The FDIC’s approach in its proposed answer to FAQ E12, in fact, demonstrates the validity of the NBPCA’s concerns. In the response to FAQ E12, the FDIC states that the primary purpose exception applies to certain government programs because the primary purpose of such programs is not to place funds with a depository institution, but instead to fulfill the underlying purpose of distributing benefits. By focusing on the objective of the product, and the specific “business” in which the economic actor facilitating the placement of deposits operates, rather than one narrow “activity” (*i.e.*, “facilitating” the placement of deposits) involved in effectuating the product’s utility, the FDIC’s approach in FAQ E12 illustrates compellingly why other kinds of deposits associated with prepaid card programs similarly do not fall within the definition of “brokered deposits.”

Indeed, whether or not they fall within the safe-harbor created by the three-part test set forth in the response to Revised FAQ E12,¹² the accounts associated with many prepaid products are structured in a manner that is intended to procure pass-through insurance for individual cardholders as required by various Federal and State regulations. As a result, under the general approach taken in Revised FAQ Answers E7 – E11, many of these products are structured in a manner that would lead to the deposits associated with such products being classified as “brokered” solely because regulations require such structures. For example, certain Treasury Department rules require that cardholders receiving federal benefits receive pass-through FDIC insurance, which can be obtained only through a depository institution. As a result, and as discussed further in the White Paper,¹³ to enable cardholders to receive their federal payments, most major GPR prepaid card account providers set up accounts using a custodial structure in order to offer FDIC pass-through insurance and comply with the Treasury Department rules. As the FDIC has advised in the past, this compliance with a government-imposed requirement does not make the entity that does so a “deposit broker” in the first instance, nor does it make that entity’s “primary purpose” the placement or the facilitation of the placement of

¹² Under the three-part test set forth in Revised FAQ Answer E12, however, some types of state benefits programs could be considered to be brokered deposits because of, among other things, the fees that are paid by various program actors to certain state agencies under the applicable contractual arrangements, which can be commonplace in these markets. This constricted reading of the law ignores the primary purpose exception entirely and misconstrues the statutory language defining “deposit broker” in the first instance by equating the mere receipt of a fee in connection with one activity that is part of a larger business with being in “the business” of engaging in just that one activity. At a minimum, this indicates that more detailed study of the market facts underlying payment programs and, in particular, the structures of state benefits programs, is required before the agency takes final regulatory action in this complex market. The NBPCA believes that full notice and comment rulemaking provides the most appropriate and fair opportunity to consider these issues.

¹³ See White Paper, *infra*, pp. 20-21.

deposits.¹⁴ The FDIC's Revised FAQ Answer E12 seeks to deal with this issue, but does so at best incompletely.

The NBPCA agrees with the conclusion in Revised FAQ Answer E12 that the primary purpose exception should be construed to exclude application of the brokered deposit mandates to government disbursement cards, but we believe that the FDIC should, at a minimum, broaden the applicability of the facts and circumstances test utilized in this Revised FAQ Answer to cover all government disbursement card programs and other prepaid card programs in the market, including without limitation, prepaid cards designed to pay wages, healthcare expenses, transit costs, and other workplace-provided benefits. Again, in the language of the statute, “the business” of entities offering these cards is not the placement of deposits or facilitation of that activity, but rather a larger economic purpose which is the “primary purpose” of these entities. For example, the primary purpose of companies in the business of marketing payroll cards is to enable employers to pay their employees (as they are required to do under state labor and wage and hour laws). Even beyond the cards listed above, other prepaid products and the companies involved in their sale, marketing, and service, have a larger economic purpose that should qualify them for the primary purpose exception. For example, the primary purpose of companies in the business of offering GPR cards is to enable their customers to accomplish a similar, but broader, range of payment transactions, and, in many cases provide a primary transaction account substitute for all of their customers' financial services needs. In sum, the logic underpinning Revised FAQ Answer E12 (as well as prior FDIC precedent) requires revisiting and reversing the conclusion reached in Revised FAQs E7 through E11 that (i) the deposits associated with most prepaid card programs should be treated as “brokered deposits”; and (ii) the “primary purpose” exception does not apply to most businesses involved in bringing prepaid card programs to market.

In this regard, we urge the FDIC to consider the underlying purpose of the brokered deposit statute and the role of the brokered deposit provisions of the FDIA to the entire statutory scheme utilizing the same approach taken by the Supreme Court in its very recent decision in *King v. Burwell*. In the *Burwell* case, the Supreme Court analyzed language in the Patient Protection and Affordable Care Act (the “ACA”) that limits certain tax credits to those individuals who secure healthcare insurance through exchanges “established by the State,” and determined that the language in question applies to both state and federal healthcare exchanges because of the underlying purpose

¹⁴ See Advisory Opinion No. 94-39 (Aug. 17, 1994) (applying the primary purpose exception to a broker-dealer's deposit of client funds into a custodial account at a bank in order to satisfy a reserve requirement by the SEC); see also Advisory Opinion No. 94-13 (Mar. 11, 1994) (applying the exception to funds deposited for the purpose of obtaining a security interest in collateral).

of the ACA.”¹⁵ While the nature, structure, purpose, and effect of fees being paid to various service providers involved in bringing prepaid card programs to market could conceivably be one of many factors in determining whether the service provider is in “the business” of placing or facilitating the placement of deposits, or whether the service provider has that activity as its “primary purpose,” the analysis of whether a service provider is a “deposit broker” should always be undertaken with congressional intent and the entire structure of the brokered deposit law in mind. That purpose, here, was not to burden every business that might earn a fee, no matter how small, from an economic activity that could be deemed to play a role in “connecting” depositors to an insured institution with the status of being a “deposit broker” and the underlying deposits being considered brokered deposits. As the Court observed in *Burwell*, “[i]t is implausible that Congress meant the Act to operate in this manner.”¹⁶

Rather, Congress’s intent was to restrain the *business* of placing “hot money” deposits, and the risks to safety and soundness that resulted. The deposits associated with prepaid card programs are not in the nature of hot money deposits Congress intended to regulate when it enacted FIRREA. Prepaid deposits are the antithesis of hot money. As it is common industry practice for prepaid deposits to be held in a custodial or trust account in a bank’s name for the benefit of the cardholders, regulators typically require a Bank Merger Act application through which the insured depository institution must obtain written approval from its primary regulator before assuming “any liability to pay any deposits made in, any other insured depository institution”¹⁷ Deposits associated with prepaid card programs are stable and transfers of these deposits are typically predicted on receipt of permission from the primary regulator. The deposits associated with prepaid card programs are thus of a different nature than those intended to be addressed by FIRREA and should not be viewed as brokered.¹⁸

¹⁵ See *King v. Burwell*, 135 S. Ct. 2480, 2488-96 (2015).

¹⁶ *Id.* at 2494.

¹⁷ See 12 U.S.C. § 1828(c) (requiring an IDI to receive written approval from the responsible agency before receiving transferred deposits); see also 12 C.F.R. § 5.33 (requiring OCC review and approval of an application for a “business combination” resulting in a national bank or a Federal savings association. “Business combination” is defined to include “the assumption by a national bank or Federal savings association of any deposit liabilities of another insured depository institution or any deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or Federal savings association.”); see also FDIC Statement of Policy on Bank Merger Transactions (Jul. 7, 1998) (insured institutions must file an application for approval by the FDIC before assuming “any deposit liabilities of another insured depository institution if the resulting institution is to be a state nonmember bank,” or assuming “liability to pay any deposit or similar liabilities of . . . or transfer . . . deposits to . . . a noninsured bank or institution.”).

¹⁸ See White Paper, *infra*, at pp. 9-10; 25-26.

II. Conclusion

The NBPCA appreciates the opportunity to share its concerns with the Revised FAQ Answers. The NBPCA respectfully requests that the FDIC consider both this letter, and the appended White Paper, and revise the Revised FAQ Answers accordingly.

Sincerely,



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Appendix A

Brokered Deposits and Prepaid Products: An Analysis of the FDIC's Responses to Frequently Asked Questions

**Debevoise
& Plimpton**



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Introduction

The Network Branded Prepaid Card Association¹ (the “**NBPCA**”) is a non-profit trade association representing a diverse group of organizations that support network branded prepaid cards and other forms of prepaid access used by consumers, businesses, and governments. Network branded prepaid cards are those carrying the logo of a payment network including American Express, Discover, MasterCard or Visa. The NBPCA’s members include prepaid access providers and sellers, in addition to financial institutions, card manufacturers, processors, program managers, marketing and incentive companies, card distributors, and law and media firms. The NBPCA seeks to inform and educate government officials, the media and consumers about these innovative payment products that provide access to financial services for millennials, and those less connected to the financial system (*i.e.*, the underbanked and underserved), as well as convenience, security and efficiency to all users.

Prepaid card use in the United States has increased significantly over the past decade, particularly as the digital economy has grown. Between 2006 and 2012, prepaid cards were the fastest growing segment of noncash payments, growing 18.5% per year in transaction volume from 2006 to 2012 and 15.9% per year from 2009 to 2012.² Insured depository institutions (“**IDIs**”) have been key participants in the prepaid card market throughout this period.

In August 2013, 27 percent of U.S. consumers said they owned a General Purpose Reloadable (“**GPR**”) card.³ With respect to government programs, federal and state disbursements via prepaid cards totaled approximately \$140 billion in 2013 and rose to nearly \$150 billion in 2014.⁴ In the employment context, in 2013 employers loaded

¹ For more information about the NBPCA, please visit the NBPCA website at <http://www.nbpc.org>.

² Fed. Res. Sys., The 2013 Federal Reserve Payments Study: Recent and Long-Term Trends in the United States: 2000 – 2012: Detailed Report and Updated Data Release, 36 (2014), *available at* https://www.frb.org/services/files/communications/pdf/general/2013_fed_res_paymt_study_detailed_rpt.pdf.

³ *See* the Consumer Payment Research Center’s 2013 Prepaid Card Experiment, *as cited by* the Fed. Res. Bank of Boston, How Are U.S. Consumers Using General Purpose Reloadable Prepaid Cards? Are They Being Used as Substitutes for Checking Accounts? (June 1, 2015).

⁴ *See* Fed. Res. Sys., Report to the Congress on Government Administered, General-Use Prepaid Cards, (Jul. 2014), *available at* <http://www.federalreserve.gov/publications/other-reports/files/government-prepaid-report-201407.pdf>; *see also* Fed. Res. Sys. “Report to the Congress on Government-Administered General-Use Prepaid Cards (Jul. 2015), *available at* <http://www.federalreserve.gov/publications/other-reports/files/government-prepaid-report-201507.pdf>.

\$30.6 billion onto more than 5 million payroll cards.⁵ For millions of Americans, payroll cards have become a familiar means of receiving wages and making payments as well as a substitute for traditional checking accounts. In many cases, they have become a primary transaction account substitute for consumers to handle most or, in some cases, all of their financial services needs. Providing an innovative, low-cost, effective payment product for consumers is an important – and indeed the principal – function of the prepaid industry.

On January 5, 2015, the Federal Deposit Insurance Corporation (the “FDIC”) issued Financial Institutions Letter 2-2015 and associated responses to Frequently Asked Questions (“FAQs”) concerning the identification, acceptance and reporting of brokered deposits (the “Initial FAQ Answers”).⁶ The Initial FAQ Answers addressed a range of issues relevant to IDIs, including the treatment of deposits placed with IDIs in connection with prepaid card programs. For example, the Initial FAQ Answers indicated that, going forward, deposits associated with GPR cards sold at retail would generally be considered brokered deposits, and the companies that sell or distribute these products would generally not be eligible for the primary purpose exception to the brokered deposit definition.⁷

On November 13, 2015, the FDIC issued Financial Institutions Letter 51-2015 and associated responses to FAQs concerning the identification, acceptance and reporting of brokered deposits (the “Revised FAQ Answers” and, together with the Initial FAQ Answers, the “FAQ Answers”).⁸ The Revised FAQ Answers amend many of the responses in the Initial FAQ Answers and also seek comments from the public.

As discussed in more detail below, the NBPCA is concerned that the FAQ Answers will negatively and unduly affect prepaid products and the customers who utilize them, and represents an incorrect application of the underlying brokered deposit statute. In support of this view, NBPCA has prepared this white paper to analyze prepaid

⁵ See The Center for Financial Services Innovation, The Compass Guide to Payroll Cards, *available at* <http://www.cfsinnovation.com/Document-Library/The-Compass-Guide-to-Payroll-Cards>.

⁶ FDIC, FIL-2-2015, Guidance on Identifying, Accepting, and Reporting Brokered Deposits: Frequently Asked Questions (Jan. 2, 2015), *available at* <https://www.fdic.gov/news/news/financial/2015/fil15002a.pdf>.

⁷ *Id.* at FAQ Answers E7 and E8.

⁸ FDIC, FIL-51-2015, FDIC Seeking Comment on Frequently Asked Questions Regarding Identifying, Accepting, and Reporting Brokered Deposits (Nov. 13, 2015), *available at* <https://www.fdic.gov/news/news/financial/2015/fil15051.pdf>.

programs and their function and describe why deposits associated with these products should not be treated as brokered deposits under applicable federal law.

The NBPCA stands ready to work with the FDIC to establish a robust brokered deposits framework that achieves the requirements of the relevant provisions of the Federal Deposit Insurance Act (“FDIA”), without unnecessarily harming prepaid consumers, payment product innovation, and other stakeholders in the prepaid card market.

I. How These Programs Work

A. Participants

Prepaid card programs can involve a number of parties. The following list describes the principal roles and functions of the parties generally involved in the development and administration of prepaid products. Depending on the structure of the program and products at issue, several or even all roles may be performed by one party, many of the described roles might not be performed at all, or there may be additional roles not identified in this list.

The descriptions in this white paper are generally geared to the issuance, sale and distribution of prepaid card products involving third parties as opposed to prepaid card products sold directly by financial institutions to consumers, which we believe in most, if not all, cases, would not be considered brokered deposits under the FAQ Answers and existing FDIC precedent. If our understanding of the agency’s position on these prepaid card products, which are issued and distributed directly by financial institutions, is not correct, please let us know and we can modify the analysis in this white paper accordingly.

All of the roles described below are geared toward a business whose primary purpose is not the collection of deposits for a depository institution, but rather providing a product that allows for the facilitation of payments to consumers (such as wages and government benefits) or by consumers (such as point of sale transactions, online purchases or ATM withdrawals). In some cases, prepaid products also serve as a consumer’s primary transaction account for handling all of the consumer’s financial services needs in the same manner that many people use checking accounts. While the funds underlying prepaid card accounts are deposited into bank accounts (typically pooled custodial accounts), this function is incidental to the purpose of offering a product which provides a consumer with all of the functionality described above.

In brief, all of the actors in the prepaid market, whether performing one or multiple roles in this sector, have a “primary purpose” related to facilitating payments to or from consumers. Their primary purpose is not facilitating the making of deposits at insured depository institutions.

- **Issuer:** This party issues the card used in a prepaid program to cardholders and is typically a financial institution. In some cases, the issuer also manages its own card programs and thus does not contract with a program manager.
- **Program Manager:** Except in cases in which the issuer serves in this capacity, this party contracts with the issuer to establish, market, and operate a prepaid card program. The program manager is also typically responsible for contracting with third parties for various elements of program operation. The program manager’s role may vary according to the program. Government agencies and private corporations can both serve in this role. In many cases, the issuer also serves as program manager, including cases in which a financial institution sells prepaid products (*e.g.*, GPR cards or gift cards) directly to consumers through its own branches and where the financial institution sells payroll cards programs directly to its corporate treasury customers (*e.g.*, payroll cards).
- **Processor:** This party facilitates payment transactions, by performing functions such as: establishing card creation files, card activation, account set-up, payment authorization, processing load values, processing reload values, customer service, chargeback processing, cardholder error and dispute resolution, and provision of settlement services with payment networks. This role is often provided by third parties who specialize in payment processing, but there are some issuers that continue to provide this role in house.
- **Payment Network:** This party provides a nationwide card acceptance network and serves as a conduit to connect retailers/ATMs to the issuer for purposes of authorizing, clearing, and settling card transactions (the payment network is oftentimes referred to as the card brand, *i.e.*, MasterCard, Visa, Discover or American Express).
- **Distributor:** In some programs, there may be a separate party that markets and distributes the card to consumers. In many programs, the program manager will also serve as the distributor, and in other programs, the issuer distributes prepaid cards directly through its branch network.
- **Loading/Reloading Service Provider:** This party accepts funds from cardholders for loading/reloading prepaid cards and acts as an agent of the issuer or a licensed money transmitter. Not all programs allow consumers to reload their cards through

third-party sources and not all programs provide access to a third-party reloading network.

- **Merchant:** This party (*e.g.*, a retail store, doctor's office) accepts a prepaid card for the payment of goods or services and in turn accesses the applicable payment network in order to connect to the issuer for the purposes of determining whether to authorize the transaction and later debiting funds from the prepaid account associated with a card to apply such funds as payment.

B. Program Structures

Below we describe some common types of prepaid card programs. Given the wide variety of prepaid card products, the description below comprises only a fraction of the product structures in this industry. In many cases, underlying funds are held in a pooled account at a financial institution in the name of the institution, but the account is typically titled to indicate that it is held in a trust or custodial capacity for the benefit of each cardholder, in accordance with FDIC policy for pass-through insurance. In this scenario, policies and procedures are maintained to demarcate each cardholder's funds within the pooled account.

Appendix 1 graphically depicts these program structures in a way that identifies the primary purpose of each market participant when fulfilling its specific role.

- **General Purpose Reloadable or GPR Cards:** These products are often used by consumers as primary transaction account substitutes. They are generally acquired from financial institutions, or from money service businesses or retailers who act as agents on behalf of the issuer. Consumers generally obtain the cards by buying a temporary card from a money services business or retailer, or by applying directly to an issuer or program manager online or over the phone. When procuring a GPR card at a bank branch, a retail location or online, consumers typically pay an upfront purchase fee, but the issuer or the program manager may waive this fee in connection with various marketing promotions. A newly purchased GPR card is usually loaded at the time of purchase with funds provided by the consumer. To receive a permanent card, consumers are usually required to contact the card issuer or program manager to undergo a customer identification program verification process and register the card. For some GPR card products acquired online, the only card that a consumer will receive is a personalized card following completion of required CIP processes. Depending on the requirements of the particular program, funds can be loaded onto the cards via ACH loads (*e.g.*, direct deposit of wages), cash loading at a bank branch or through a program manager or licensed money transmitter (*e.g.*, cash reload network at a grocery store), and paper checks can be sent to, or credit card loads received by, the issuer, a licensed money transmitter or its agent. Sometimes these

cards are marketed for specific purposes, such as travel or receipt of tax refunds, or for specific users, such as teenagers or students.

- **Government Disbursement Cards:** Because of the lower cost of distribution as compared to paper checks, increased security, and improved access for individuals without access to traditional bank accounts who receive government payments, government agencies also disburse various benefits onto prepaid products, through government benefit card programs they administer or by direct deposit to payroll cards or GPR cards procured by consumers through bank branches or retail channels. The features of and fees charged in connection with these cards vary. Listed below are some of the government benefit programs that use prepaid cards.
 - Social Security: The U.S. Department of the Treasury, recognizing that electronic payments provide a safer, more cost-effective way for people to receive their benefits, offers prepaid cards through its Direct Express program. Consumers can also elect to receive social security benefits through GPR cards procured by consumers through bank branches or retail channels.
 - Unemployment Insurance Benefit Programs: Most states distribute a prepaid card for disbursement of employment compensation benefits, or in some cases, permit consumers to receive these payments via GPR cards procured by consumers through bank branches or retail channels.
 - Child-Support Systems: Although funded by individuals, child support programs are administered by government entities to insure timely payment to custodial parents. As the federal government requires that custodial parents have access to their funds within two days of the government receiving payment from a non-custodial parent, prepaid cards are a particularly important mechanism for meeting this obligation.
 - Tax Refunds: Several states sponsor their own income tax refund cards, which are used for the disbursement of state tax refunds in cases where consumers do not have access to traditional bank accounts or who choose not to use their traditional bank accounts to receive the disbursements. Taxpayers can also receive state and federal tax refund payments onto GPR cards that they acquire on their own through bank branches, retail channels or tax preparation companies.
- **Payroll Cards:** Payroll cards are issued by financial institutions and typically marketed by the financial institutions themselves, by payroll processing firms, by program managers or by distributors. The cards are typically marketed to employers.

If an employer offers payroll cards as an option for the receipt of wages and an employee selects this option, cards are usually distributed by the employer, although they may be distributed by the financial institution, or a third-party service provider. Third-party service providers might also process transactions, administer services, and offer customer support. During each pay period, salaries, commissions and other wages are typically transmitted electronically via the automated clearinghouse system into pooled accounts and/or sub-accounts established for each employee at the applicable financial institution although, it is our understanding, that there may be a few payroll card programs that still use an individual demand deposit account structure. Once a payroll card is funded, an employee can typically access cash via an ATM or via a bank teller and can make point of sale transactions.

- **Tuition Refund Cards or Campus Cards:** Similarly, institutions of higher education may partner with certain entities to disburse student financial aid proceeds onto network-branded prepaid products. Typically, a campus card will be loaded with student financial aid proceeds whenever received by the institution. Once a card is funded, the student can make point of sale purchases or access funds via an ATM or a bank teller. Campus cards often serve other purposes such as student identification, or dormitory, meal plan, or library service access.
- **Health Care and Employee Benefits Cards:** Some employers provide for health benefits or reimbursements via prepaid cards. Health insurers or employers (or their service providers) typically offer these products in connection with a consumer's health care or employee benefits plan. Card use is governed by the terms of that plan and related regulations, including restrictions on the amount of funds that can be loaded onto them. These programs include Flexible Savings Accounts, Health Savings Accounts, and transit reimbursement programs.
- **Insurance/Workers' Compensation/Disaster Relief Cards:** Some insurance providers pay certain insurance claims such as those related to a property or casualty loss via a prepaid card. In addition, where permitted by state law, workers' compensation payments are often made on prepaid cards. Likewise, after a natural disaster, when disbursement by check may be impractical, funds to pay insurance claims or provide aid from relief organizations or government agencies may be loaded onto prepaid cards for use by those in need.

II. Background on Brokered Deposits

A. Overview

In the wake of the savings-and-loan crisis, Congress enacted legislation, principally in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”),⁹ providing definitions and authorizing the FDIC to regulate so-called “brokered deposits.” As explained by Senator Murkowski, one of the chief proponents of the law, the goal was “to prevent the flagrant abuse of the deposit insurance system by troubled institutions that take excessive risks and leave the taxpayers to suffer the consequences.”¹⁰ As described by Senator Murkowski, the transactions Congress sought to regulate in FIRREA involved entities whose principal role involved “gather[ing] all these funds and shopping throughout the nation for a thrift offering the highest interest rates,” and then “dump[ing] many hundreds of thousands of dollars overnight into that thrift.”¹¹

The legislative record makes clear that Congress was chiefly concerned that so-called deposit brokers had facilitated volatile “hot money” deposits that posed undue risk to the safety and soundness of the banking system.¹² Deposit brokers, as understood by the members of Congress who drafted the key FIRREA provisions, were not independent providers of a separate payment product (like a card for distribution of payroll or government benefits), but, rather, were entities with no role other than collecting a fee to bundle funds for placement at insured institutions.

Accordingly, when Congress enacted the brokered deposit provisions of FIRREA, it used the term “*the business of placing deposits, or facilitating the placing of deposits, of third parties,*” in recognition of the specific kind of “business” that was to be regulated.

⁹ Pub. L. No. 101-73, 103 Stat. 183 (1989). Although in subsequent legislation Congress modified the circumstances in which various kinds of financial institutions could accept brokered deposits, the fundamental definition of a “deposit broker” has remained that set forth in FIRREA. Accordingly, the legislative history pertinent to FIRREA is critical to understanding Congress’s intent in this arena.

¹⁰ See “Insured Brokered Deposits and Federal Depository Institutions,” Hearings before the Subcommittee on General Oversight and Government Investigations of the House Committee on Banking, Housing, and Urban Affairs at 10, Cmte. Print 101-28, 101st Cong., 1st Sess. (May 17, 1989) (remarks of Sen. Murkowski).

¹¹ *Id.* at 15; see also *id.* at 16-20, 43, 50 (in each case describing the types of businesses sought to be regulated); see also *id.* at 69 (panel of individual representatives from the deposit broker industry).

¹² *Id.* (*passim*).

And, importantly, to make clear that Congress did not intend to regulate every single business that conducted as part of its service the *activity* of facilitating deposits, Congress provided that “the term ‘deposit broker’ does not include . . . an agent or nominee whose primary purpose is not the placement of funds with a depository institution.”¹³

The FDIC regulations on this subject follow the statute in relevant respect without elaboration or variation. The regulations define the term “brokered deposit” as “any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.”¹⁴ As to the key issue here, the regulations define “deposit broker” in a manner drawn verbatim from the original statutory language defining “deposit broker.”

Like the statute, the relevant regulations focus that definition not on persons who merely made or facilitated the placing of deposits of others, but on persons “engaged in *the business of* placing deposits, or facilitating the placing of deposits, of third parties.”¹⁵

The regulations, like the statute, expressly exclude from the definition of “deposit broker” a number of business entities and persons, including “an agent or nominee whose primary purpose is not the placement of funds with depository institutions.”¹⁶

This important exception is the “primary purpose exception,” and it makes clear Congress’s purpose in the deposit broker definitional provisions of FIRREA to create “a narrowly drawn provision that specifically targets the most flagrant abusers.”¹⁷

Over the years, the FDIC and its staff have issued a number of interpretations regarding whether an entity or other person qualifies as a “deposit broker” or, relatedly, whether a certain kind of deposit qualifies as “brokered.”¹⁸ As shown below, none of these, until the FAQ Answers, squarely addressed the issues raised in this white paper.

¹³ 12 U.S.C. §§ 1831f(g)(1) and (2)(I) (emphasis added).

¹⁴ 12 C.F.R. 337.6(a)(2).

¹⁵ *Id.* 337.6(a)(5).

¹⁶ *See* sources cited nn. 13-14, *supra*.

¹⁷ *See* Hearings, *supra* note 10, at 9-10.

¹⁸ Advisory Opinion 94-13 (March 11, 1994) (primary purpose exception applies when credit card bank assisted would-be cardholders in placing security deposits at another bank because bank’s primary purpose was to obtain security interest in collateral, not place deposits); Advisory Opinion 94-39 (August 17, 1994) (primary purpose exception applies because broker-dealer’s primary purpose in placing client funds into bank accounts was to satisfy SEC reserve requirement); Advisory Opinion

B. Brokered Deposit Implications

The categorization of a deposit as “brokered” has several implications for any IDI that accepts such deposits (and, in turn, on the entity classified as a “deposit broker”).

1. Section 29 of the FDIA, as implemented at 12 C.F.R. 337.6, places restrictions on the acceptance by certain IDIs of deposits obtained through “deposit brokers,” which deposits are deemed to be “brokered deposits.” Specifically, IDIs that are not well capitalized may not accept or solicit brokered deposits.¹⁹
2. Deposits that are classified as brokered can increase an IDI’s deposit insurance assessment rate.²⁰
3. IDIs using brokered deposits must include certain prompt corrective action downgrade triggers in contingency funding plans.²¹
4. In addition, for banking organizations subject to the proposed minimum liquidity coverage ratio requirement, the assumed outflow rate applied to brokered deposits is generally higher than that applied to other deposits.²²

III. Treatment of Prepaid Cards as Brokered Deposits

A. FDIC Interpretive Precedent Related to the Prepaid Card Industry

Even though FIRREA added the regulation of brokered deposits to the FDIC’s mandate roughly 25 years ago, the history of regulation of prepaid cards focused for many years on the antecedent issue of whether such cards gave rise to deposits at all. The first major FDIC interpretive release discussing prepaid cards appears not to have been

05-02 (February 3, 2005) (FDIC determines that bank’s swept funds will satisfy primary purpose exception subject to certain limits on how much of the funds can be swept); Advisory Opinion 92-50 (July 24, 1992) (FDIC lays out terms under which listing service can be considered a deposit broker); Advisory Opinion 92-53 (August 3, 1992) (FDIC determines that even though a company never holds customer funds, by leading customers to choose a depository institution, the company is a broker).

¹⁹ 12 C.F.R. 337(b)(3)(i). *See also id.* 337(c) (FDIC’s waiver authority for adequately capitalized institutions).

²⁰ *See, e.g.,* 12 C.F.R. 327.9(d)(3).

²¹ Interagency Policy Statement on Funding and Liquidity Risk Management, 75 Fed. Reg. 13,656, 13,666 (March 22, 2010).

²² *See* Liquidity Coverage Ratio: Liquidity Risk Measurement, Standards, and Monitoring, 78 Fed. Reg. 71,818, 71,840 (Nov. 29, 2013).

issued until 1996 General Counsel’s Opinion No. 8 (“Opinion No. 8”).²³ In it, the FDIC addressed whether funds underlying “stored value cards” should be considered deposits as defined by FDIA. Opinion No. 8 began by classifying prepaid card distributors by the systems that they used to store the funds that customers loaded onto their prepaid cards. According to Opinion No. 8, there were generally four types of stored value systems.

Of these four systems, two stored funds entirely at a bank, either in a customer’s account (“Bank Primary - Customer Account Systems”) or in a pooled reserve account (“Bank Primary - Reserve Systems”). In other systems, third parties created and held the funds generated by the issuance of customer cards. These third-party systems were further subdivided into two categories: systems in which cardholder funds are held by banks for a short time before being forwarded onto third parties (“Bank Secondary - Advance Systems”), and systems in which banks exchange the value created by third parties for their own customers’ funds, and then exchange that value with customers (“Bank Secondary - Pre-Acquisition Systems”). After a detailed analysis of the relevant sections of the FDIA, the General Counsel concluded that Bank Primary - Customer Account Systems and Bank Secondary - Advance Systems created deposits, while Bank Primary - Reserve Systems and Bank Secondary - Pre-Acquisition Systems did not.

Yet, even as to this threshold question, the FDIC soon appreciated that the prepaid industry was rapidly evolving. Even as to the issue of whether prepaid cards created deposits, the FDIC outlined the need for regulation in 2004 and 2005 notices of proposed rulemaking.²⁴ The 2005 notice stated that “the development of new types of stored value cards has raised legal issues that the FDIC did not address in [Opinion No. 8]. [One] new development is the funding of a bank account by the sponsoring company for the purpose of making payments on the stored value cards... The ‘payroll card’ is another type of card not specifically addressed in [Opinion No. 8]... [Opinion No. 8] also included no specific discussion of ‘gift cards.’”²⁵ Significantly, while recognizing the rapid evolution of the prepaid market, neither of these proposed rules were finalized and promulgated.

To address the issues posed by technological developments in the prepaid card industry, in 2008, the FDIC issued New General Counsel’s Opinion No. 8 (“New Opinion No. 8”). Doing away with the classification scheme based on value storage systems, New Opinion No. 8 categorized prepaid cards by use. According to New

²³ General Counsel’s Opinion No. 8; Stored Value Cards, 61 Fed. Reg. 40490, 40494 (August 2, 1996).

²⁴ Definition of “Deposit”: Stored Value Cards, 69 Fed. Reg. 20,558 (Apr. 16, 2004); Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional Access Mechanisms, 70 Fed. Reg. 45571 (Aug. 8, 2005).

²⁵ Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional Access Mechanisms, 70 Fed. Reg. 45571, 45580 (Aug. 8, 2005).

Opinion No. 8, “prepaid products may be divided into two broad categories: (1) merchant products and (2) bank products.”²⁶ As the FDIC explained, merchant products act like gift certificates, and enable consumers to spend funds at a specific merchant or group of merchants without ever accessing funds at an IDI. On the other hand, New Opinion No. 8 defined any prepaid card program which places funds at an IDI as a “bank product.” Because all four systems described in Opinion No. 8 involved the placement of funds at an IDI, all would qualify as bank products under New Opinion No. 8.

New Opinion No. 8 explained that any funds underlying bank products qualify as deposits,²⁷ and referred to prepaid cards as “nontraditional access mechanisms” and to distributors of prepaid cards as “distributor[s] of the access mechanism.” It did not distinguish among employers who distributed payroll cards, retail stores that distributed GPR or gift cards, and IDIs that distributed prepaid cards directly to customers when determining that the underlying funds for all such programs constitute deposits. But at the same time, the FDIC did not classify any of those participants as deposit brokers.

The FDIC clarified its treatment of bank products in the 2011 Study, and in this publication attempted preliminarily to address whether the deposits underlying stored value cards should qualify as brokered deposits.²⁸ The Study explained that:

A particular program might be structured so that a bank sells prepaid cards directly to the cardholders (without the involvement of retail stores or any other intermediaries). In the absence of a third-party agent or custodian, the deposits held by the bank (to be accessed by the cardholders when they use their cards at merchant point-of-sale terminals) would not qualify as brokered deposits. In this situation, the bank presumably would maintain records as to the identities and interests of the cardholders so that the deposits would be eligible for ‘per cardholder’ insurance coverage. Indeed, the bank could maintain a separate account for each cardholder.

A different program might be structured so that a separate company (not the bank) sells or distributes cards to the cardholders. Further, the program might be structured so that the company places its own corporate funds (not the cardholders’ funds) at the bank (again, to be accessed by the cardholders when they use their cards at merchant point-of-sale terminals). In this situation, in the absence of a third party, the deposits would not qualify as brokered deposits. Of

²⁶ Insurability of Funds Underlying Stored Value Cards and other Nontraditional Access Mechanisms, 73 Fed. Reg. 67155, 67156 (Nov. 13, 2008).

²⁷ *Id.*

²⁸ FDIC, Study on Core Deposits and Brokered Deposits 31-32 (Jul. 8, 2011).

course, the deposits also would not be eligible for ‘pass-through’ insurance coverage to the cardholders.

Finally, a program might be structured so that a card distributor (not the bank) acts as an agent or custodian for the cardholders in placing or holding deposits at a bank. Such deposits would be eligible for ‘pass-through’ insurance coverage (assuming the satisfaction of the FDIC’s requirements for ‘pass-through’ coverage), but the deposits also would qualify as brokered deposits unless the agent is covered by one of the exceptions to the definition of ‘deposit broker’ (such as the ‘primary purpose’ exception).

As these excerpts show, the 2011 Study maintained that the funds generated by certain prepaid card programs do not qualify as brokered deposits. For those that triggered the initial elements of the definition of “deposit broker,” the FDIC Study left open the possibility that funds on deposit in some such programs could still fall within one of the exclusions from the definition, including the “primary purpose” exception.

B. The FAQ Answers

The Initial FAQ Answers and the Revised FAQ Answers for the first time declare that funds underlying prepaid cards offering pass-through FDIC insurance will generally be viewed as brokered deposits. The relevant Revised FAQ Answers state:

E7. What is the “primary purpose” exception to the definition of a deposit broker?

This exception applies to the following: “An agent or nominee whose primary purpose is not the placement of funds with depository institutions.”²⁹ This exception is applicable when the intent of the third party, in placing deposits or facilitating the placement of deposits, is to promote some other goal (*i.e.*, other than the goal of placing deposits for others). The primary purpose exception is not applicable when the intent of the third party is to earn fees through the placement of deposits. Also, the applicability of the primary purpose exception does not depend upon a comparison between the amount of revenue generated by the third party’s deposit-placement activities and the amount of revenue generated by the third party’s other activities. Rather, as previously stated, the applicability of the primary purpose exception depends upon the intent of the third party in placing deposits (or facilitating the placement of deposits).

²⁹ 12 C.F.R. 337.6(a)(5)(ii)(I).

As a number of examples will illustrate in the next several FAQs, the primary purpose exception applies only infrequently and typically requires a specific request for a determination by the FDIC. On those rare occasions when this exception may apply, the FDIC also may impose restrictions on the activity involved, routine reporting requirements, and regular monitoring. These conditions may be critical to the primary purpose exception determination. As a result, failure to comply with the conditions may trigger a reassessment of the original determination.

E8. Does the primary purpose exception apply to companies that distribute financial products (such as prepaid cards) that provide access to funds at one or more insured depository institutions?

Whether such companies qualify as deposit brokers depends upon the circumstances. As illustrated by the FAQs below, the primary purpose exception generally does not apply to such companies, and consequently, they are classified as deposit brokers, and the deposits would be brokered.

E9. Does the primary purpose exception apply to companies that sell or distribute general purpose prepaid cards?

No. Some companies operate general purpose prepaid card programs, in which prepaid cards are sold to members of the public at retail stores or other venues. After the funds are collected from the cardholders, the funds may be placed by the card company or other third party into a custodial account at an insured depository institution. The funds may be accessed by the cardholders through the use of their cards.

The selling or distributing of general purpose prepaid cards, accompanied by the placement of the cardholders' funds into a deposit account, is not secondary or incidental to the accomplishment of some other objective on the part of the prepaid card company. The general purpose prepaid card and the deposit account are inseparable, in that the card is a device that provides access to the funds in the underlying deposit account. Because of this relationship, prepaid card companies are not covered by the primary purpose exception. Therefore, prepaid card companies or other third parties, in selling or distributing prepaid cards, would qualify as deposit brokers, with the results that the deposits are classified as brokered.

E10. Does the primary purpose exception apply to companies or organizations that distribute debit cards or similar products that serve multiple purposes? For example, what if a debit card provides access to funds in a bank account but also serves as a college identification card?

In evaluating this scenario, the FDIC would consider the following factors: (1) the stated primary purpose of the third party in distributing or marketing the debit cards; (2) the features of the card (such as whether the card is reloadable and whether the card will provide access to a permanent account in the student's name at the insured depository institution); and (3) the compensation (if any) received by the third party for distributing or marketing the cards.

For example, in the case of a debit card distributed to students by a college, the stated primary purpose of the card might be to promote education. In making this argument, the college (or the insured depository institution) might rely upon the fact that the card will serve as the cardholder's student identification card and vehicle for access to student loan funds. Other factors such as the reloadability of the card and the permanency of the account, however, might indicate that the primary purpose of the card is to provide access to the account at the insured depository institution. This conclusion would be confirmed by the payment of the fees or commissions to the college by the insured depository institution as compensation for distributing or marketing the cards. Under these facts, the primary purpose exception would be inapplicable. Therefore, the college would be a deposit broker, and the associated funds would be brokered deposits.

E11. What is an example of a company that distributes prepaid cards (providing access to funds at an insured depository institution) without being classified as a deposit broker?

An example is a corporation that distributes prepaid cards as part of a rebate program. In this scenario, the corporation places its own corporate funds (not the cardholders' funds) into an account at an insured depository institution. The cardholders collect their rebate by using the cards. Thus, the distribution of prepaid cards is no different than the distribution of checks (payable against the corporation's checking account). The corporation is not a deposit broker.

E.12 How does the FDIC treat federal or state agency funds disbursed to beneficiaries of government programs through debit cards or prepaid cards?

Federal and state agencies sometimes use debit cards or prepaid cards to deliver funds to the beneficiaries of government programs. In some cases, the program is structured so that each beneficiary will own a separate deposit account at a particular insured depository institution (with the account being accessible by the beneficiary through the use of a debit card). Other programs may be structured so that multiple beneficiaries will own a commingled deposit account with "per beneficiary" or "pass-through" deposit insurance coverage (with the commingled account being accessible by the beneficiaries through the use of prepaid cards). In these scenarios, though the deposits will not belong to the government but instead

will belong to the beneficiaries, the federal or state agency might be involved in choosing the insured depository institution or in opening the deposit accounts. In other words, the agency might be “facilitating the placement of deposits” that belong to third parties (*i.e.*, the beneficiaries). Assuming such facilitation, the agency will be a deposit broker unless it is covered by one of the exceptions to the definition of deposit broker.

The exception that might be applicable in this circumstance is the primary purpose exception. The FDIC would apply this exception under the following circumstances:

1. The federal or state agency is mandated by law to disburse the funds to the beneficiaries;
2. The federal or state agency is the sole source of funding for the deposit accounts; and
3. The deposits owned by the beneficiaries do not produce fees payable to the federal or state agency by the insured depository institution.

Satisfaction of these requirements would indicate that the primary purpose of the federal or state agency, in facilitating the placement of the beneficiaries’ deposits, is not to provide the beneficiaries with a deposit-placement service or to assist the insured depository institution in expanding its deposit base. Rather, satisfaction of these requirements would indicate that the primary purpose of the federal or state agency is simply to discharge the government’s legal obligations to the beneficiaries. Therefore, the federal or state agency would be covered by the primary purpose exception with the result that the deposits would *not* be classified as brokered deposits.

In sum, the FAQ Answers suggest that companies that sell or distribute GPR cards through retail channels will henceforth be treated as deposit brokers, and all deposits associated with prepaid cards will be treated as brokered deposits if they are covered by pass-through FDIC insurance, with the exception of certain government programs.

These answers, and, in particular those to FAQ Answers E9 and E10, depart from the statutory language, as well as from the language of the FDIC’s rules governing the definition of deposit brokers. While Congress and the FDIC have focused on those persons “engaged in the *business of placing deposits*, or facilitating the placing of deposits, of third parties,” FAQ Answer E9 focuses on “one activity of a business,” rather than on the business as a whole. Of perhaps even more importance, the response to FAQ Answer E10 revises the statutory “primary purpose” exception so that it is no longer

targeted to protect from regulation “an agent or nominee whose primary purpose is not the *placement* of funds with depository institutions.”³⁰ Instead, the FDIC’s answer to FAQ Answer E10 appears to sweep within the definition of deposit broker (by excluding from the statutory primary purpose exception) any business whose primary purpose is “to provide *access to* the account at the insured depository institution.” FAQ Answer E10 (emphasis added).

The FAQ Answers also leave a number of key issues unaddressed, including what weight is given to the factors identified in FAQ Answer E12, and what the FDIC’s rationale is for utilizing these factors given the statutory language. As explained in more detail below, the NBPCA seeks clarification, if not significant revision, of the FAQ Answers, in light of the additional information that the NBPCA is providing the FDIC about this market.

IV. NBPCA Concerns

The NBPCA believes the primary purpose of participants in the prepaid card product market is not the placement of deposits, but rather providing consumers an innovative, low-cost, safe, and efficient substitute for traditional checking accounts and other methods for payment. For some, these products serve as their primary transaction account. While these products may be particularly attractive to lower-income and unbanked and underbanked consumers, many consumers, including millennials, use prepaid products with high satisfaction levels to control their budget, or as an alternative to credit cards or traditional bank accounts.³¹

The primary purpose of the program managers offering (or working to offer) these cards is not to collect and place deposits for the banks that hold those deposits. Their primary purpose is to offer consumers a primary transaction account alternative and payment instrument that is recognized and accepted at a variety of merchants to facilitate the purchase of goods and services, and, in some cases, the access to cash withdrawals.

³⁰ 12 U.S.C. §§ 1831f(g)(1) and (2)(I) (emphasis added). The relevant FDIC rule’s definition of a deposit broker, like FIRREA itself, thus encompasses only (i) any person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with IDIs or the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties; and (ii) an agent or trustee who establishes a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan. 12 C.F.R. 337.6(a)(5).

³¹ See Fed. Res. Bank of Philadelphia, *Millennials with Money: A New Look at Who Uses GPR Prepaid Cards* (Sept. 2014), available at <http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/publications/discussion-papers/2014/D-2014-Millennials.pdf>.

The work of marketing and network facilitation that is required to effect prepaid transactions in this new and innovative market only confirms that the primary purpose of these entities is not placement of deposits or facilitating the placement of deposits. In sum, the most accurate way to describe the “primary purpose” of the businesses involved in the prepaid value chain is one of assisting consumers by making available an alternative method of payment and cash access that may be faster, more convenient, and cheaper to maintain than a traditional account at a depository institution. By overlooking this central fact, the FAQ Answers depart from the relevant statutes and regulations, as well as the underlying purpose of those laws in deterring so-called “hot money” deposits.

A. Under the Definitions in FIRREA and Prior FDIC Interpretation, We Believe That Participants in the Prepaid Industry Are Not Deposit Brokers

Although the Revised FAQ Answers state in their preamble “that brokered deposit determinations are very fact-specific, and are influenced by a number of factors,” taken as a whole the Revised FAQ Answers, even to a greater extent than the Initial FAQ Answers, operate in a categorical manner that would appear to render much of the entire prepaid industry as deposit brokers. This conclusion is perhaps evident most clearly in Revised FAQ Answer E9, which states that “The general purpose prepaid card and the deposit account are inseparable, in that the card is a device that provides access to the funds in the underlying deposit account. Because of this relationship, prepaid card companies are not covered by the primary purpose exception.”³²

However, the reasoning underlying the conclusion of Revised FAQ Answer E9, as well as other Revised FAQ Answers, such as those to Revised FAQs E7 and E8, overlooks the value – and thus the primary purpose of the relevant entities – in offering consumers the payment-enhancing function of prepaid card products, a function that “mere brokering” does not facilitate. Indeed, Revised FAQ Answer E7 acknowledges that the “primary purpose” exception “is applicable when the intent of the third party, in placing deposits or facilitating the placement of deposits, is to promote some other goal (*i.e.*, other than the goal of placing deposits for others).”³³ Here, the program managers, as well as those other entities in the service stream for these cards, are clearly pursuing “some other goal,” namely, providing products to consumers in order to facilitate *payments* and, in some cases, *cash withdrawals*, through an established, secure network.

The “primary purpose” of the business of companies in the prepaid card industry is not a deposit brokering function, but, rather, that of providing a product that reduces transaction costs for consumers facing increasing costs for traditional bank accounts and

³² See Revised FAQ Answers, *supra* note 8, at FAQ Answer E9.

³³ See Revised FAQ Answers, *supra* note 8, at FAQ Answer E7.

related services as a result of the unintended consequences of the Dodd-Frank Act and broader market conditions. These changes to the financial market include a significant reduction in the percentage of banks that offer free checking, as well as changes to balance requirements and other conditions offered for traditional checking account products and services that do not charge monthly fees.

These market changes show that the primary purpose in providing prepaid card products is not the brokering function identified in the statute and the FDIC's regulations, but rather that of reducing the costs associated with traditional banking services. The prepaid card market requires both capital investment and labor to build a brand and an efficient and safe network for the effecting of transactions. Rather than merely shuffling funds to IDIs in a brokering role, prepaid card companies serve consumers by "providing access to financial services for the unbanked, replacing paper checks and reducing costs to businesses and governments, [or] offering an inexpensive and convenient means to pay employees."³⁴ As for those retail stores that sell prepaid cards, "their primary purpose is only to sell products at retail, some of which happen to be prepaid cards."³⁵

An even more distinct scenario regarding the primary purpose exception applies to entities such as government agencies, employers, and other companies who use prepaid cards for the purpose of disbursing payments more efficiently than costly and environmentally unfriendly paper checks. These entities clearly have no intention of facilitating the placement of deposits, but rather have the primary purpose of providing a social service, conducting business and compensating employees, or selling goods and services and providing incentives, rebates or refunds to consumers who make purchases from those companies.

Indeed, the FDIC acknowledged the possibility that the primary purpose exception could broadly apply to such companies as recently as 2011.³⁶ And the argument that the exception should apply is supported by prior FDIC interpretations.

Long before the FDIC proposed the exemption for government-mandated deposit-related card programs set forth in the response to FAQ Answer E12, the FDIC issued Advisory Opinion No. 94-39, which involved the circumstance in which a registered broker-dealer placed client funds into a custodial account at a bank in order to satisfy a

³⁴ John Reveal & Judith Rinearson, FDIC'S BROKED DEPOSITS FAQs: IMPLICATIONS RANGE FROM LIMITED TO SIGNIFICANT FOR PREPAID ISSUERS: IT ALL DEPENDS (Jan. 2015), *available at* <http://paybefore.com/op-ed/viewpoint-fdics-brokered-deposits-faqs-implications-range-from-limited-to-significant-for-prepaid-issuers-it-all-depends/>.

³⁵ *Id.*

³⁶ *See supra* note 28, at 32.

reserve requirement by the SEC. The FDIC found the primary purpose exception applied as the broker-dealer’s primary purpose was to satisfy the SEC rule and not to provide deposit placement service.³⁷ The FDIC determined that, by placing funds in a custodial account with a purpose besides the placement of funds, the agent was not acting as a deposit broker. Even without the response to FAQ Answer E12, the rationale of Advisory Opinion No. 94-39 would apply to the placement of deposits in custodial accounts, like the satisfaction of a reserve requirement, to comply with regulations and to make funds available *to be spent* in certain circumstances. For example, Treasury Department rules require prepaid programs to provide pass-through FDIC insurance to cardholders in order to distribute federal benefits.³⁸ Indeed, a report issued by the Center for Financial Services Innovation found that most major GPR prepaid card account providers set up custodial accounts offering FDIC pass-through insurance in order to comply with these Treasury Department rules.³⁹ Since prepaid issuers oftentimes cannot determine from the incoming ACH load files whether government funds are being loaded to their cards, issuers often provide pass-through insurance to all of their GPR cardholders to ensure compliance with the applicable Treasury rules. Many state laws similarly require prepaid card providers to establish custodial accounts and pass-through insurance when deposits into the accounts can include wages or state-provided benefits.

The focus of Advisory Opinion 94-39 on the non-deposit-making purpose of the actor involved, however, shows that the Revised FAQ Answers, as a whole, have interpreted the primary purpose exception far too narrowly. The goal of a reserve requirement – to assure availability of specific funds for a contingent future need – is analogous to the payment-facilitation purposes that underlie the prepaid card market.

Indeed, an earlier advisory opinion, FDIC Advisory Opinion 94-13 (Mar. 11, 1994), relating to secured credit card loans, also makes this point. In holding the primary purpose exception applied to banks that offered those loan products, the FDIC reasoned that “the Bank’s ‘primary purpose’ when depositing the funds is to obtain a perfected security interest in collateral, not to provide a deposit-placing service to its customers.”

Here, the various businesses involved in the prepaid card market are likewise not providing a “deposit-placing service to its customers.” Rather, any activity related to the deposits is only part of a much larger economic activity and industry, namely, the activity

³⁷ Advisory Opinion No. 94-39 (Aug. 17, 1994).

³⁸ Federal Government Participation in the Automated Clearing House, 75 Fed. Reg. 80,335 (Dec. 22, 2010).

³⁹ David Neville & Melissa Koide, Center for Financial Services Innovation, *Prepaid Cards and Consumer Protections* 4 (Aug. 2011), available at http://policylinkcontent.s3.amazonaws.com/PrepaidCardsConsumerProtections_CFSI_0.pdf.

and industry of offering prepaid payments products or of simply replacing inefficient, costly and environmentally unfriendly paper checks with an electronic payment device. Like the deposits in Advisory Opinion No. 94-13, the deposits are “linked” to an underlying “agreement” that enables the customer to *spend* an amount of money associated with the account. As was also the case in Advisory Opinion No. 94-13, each prepaid card program usually deals with only “one depository institution at a time,” and the overall deposits in established prepaid card programs tend to be stable over time.⁴⁰

To reach the conclusion that actors in the prepaid card industry are functioning as deposit brokers, the reasoning in the Revised FAQ Answers overlooks key language of the relevant statute and regulation. For example, Revised FAQ Answer A2 states that “subject to certain exceptions, a deposit broker is any person, company or organization engaged in ‘placing deposits’ belonging to others or ‘facilitating the placement of deposits’ belonging to others.”⁴¹ Revised FAQ Answer E7 states that “the applicability of the primary purpose exception depends upon the intent of the third party in placing deposits (or facilitating the placement of deposits).”⁴² Both of these answers effectively ignore the statute’s limiting language focusing on the business of the entity, rendering that language surplusage. Although the Supreme Court’s “preference for avoiding surplusage constructions is not absolute,” the rule against reading words out of a statute is compellingly in play when doing so also conflicts with “the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁴³ When evaluated against the background of FIRREA, the Revised FAQ Answers’ omission of key statutory language is particularly anomalous and inappropriate.

That Congress intended to extend the limiting language “engaged in the business of” to the activities of both placing *and* facilitating the placement of deposits is clear given how broadly the law might extend without such limiting language. For example, if persons merely “facilitating the placement of deposits” – without being in that business – are deposit brokers, the regulation would be clearly overbroad, sweeping into its coverage a wide variety of entities that no one would consider deposit brokers (including absurd examples, such as any entity involved in preparing deposit slip forms or providing directions that enable a depositor to find the bank). To avoid such clearly overbroad consequences, the statute uses the words “in the business of,” as well as other key terms,

⁴⁰ *Id.*

⁴¹ See Revised FAQ Answers, *supra* note 8, at FAQ Answer A2.

⁴² See Revised FAQ Answers, *supra* note 8, at FAQ Answer E7.

⁴³ *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015).

such as “placement.” The statute does not use potentially much broader terms that would cover entities that merely “connect” a customer with a depository institution or that provide “access” to the account.⁴⁴

We respectfully submit that the test in Revised Answer E9 – which focuses on whether a prepaid card itself provides “access” to a depository account – is simply not consistent with the statute, which asks instead whether any of the participants in prepaid are in the business of placing, or facilitating placement of, deposits. We believe it is clear that, in light of the relevant facts and circumstances, prepaid card industry participants are generally not in engaged in that business.

In this regard, Revised FAQ Answer A5, for example, identifies as one potential factor on which the FDIC might focus is the fees paid in connection with a transaction in which funds are deposited with an insured depository institution.⁴⁵ A careful review of the facts regarding compensation paid in prepaid programs, however, shows that such fees does not suggest the relevant participants are in the business of placing deposits.

For example, in a common GPR card program structure, a program manager will pay the retailer a fee in exchange for the retailer selling the program manager’s cards in its stores. However, this fee is not compensation for the placement of deposits. Instead, this fee is analogous to the fee paid by any wholesaler desiring that its goods be offered for sale by retailers. This fee covers cost of real estate for card storage and display. This fee also covers inventory related expense and overhead associated with sale of these products. In sum, the fee paid by the program manager to the retailer in the GPR context is not intended to compensate for the placement of deposits. Thus, the retailer should not be considered to be a deposit broker. Similarly, at a minimum, the performance of other functions in exchange for compensation should not qualify as an indicator of deposit brokering unless the compensation is provided directly in exchange for deposit placement or for the service of facilitation of deposit placement, as such. Fees that reflect an aggregate form of compensation for multiple services should not be wrongly characterized as fees earned for the placement or facilitation of the placement of deposits.

⁴⁴ See Revised FAQ Answers A5, E9.

⁴⁵ See Revised FAQ Answers, *supra* note 8, at FAQ Answer A5.

B. Deposits Associated with Prepaid Cards Lack “Hot Money” Characteristics and Are Thus Outside the Concerns That Animated Congress

All of the above points have particular resonance given that deposits associated with prepaid cards are not the type of hot money Congress sought to regulate in FIRREA.

In the 2011 Study, the FDIC stated that “numerous studies have found that a bank’s use of brokered deposits contributes significantly to its likelihood of failure and increases the FDIC’s losses upon failure The use of brokered deposits may in some cases also compound liquidity risks because of their generally volatile nature.”⁴⁶

The FDIC advised the brokered deposit law should not be amended or repealed, as it limits banks “from trying to grow out of trouble by taking on greater risk.”⁴⁷

It is not necessary to challenge any of this reasoning for the FDIC to conclude that prepaid cards are different from brokered deposits. First, although, consistent with their budgeting function, the duration of a prepaid cardholder’s use of a card may not be extensive, the dollar value of prepaid card portfolios has proved over time to be stable or growing in accordance with the general growth trends of the industry. Put in practical terms, the nature of the business has meant that deposits provided to banks via prepaid card programs are very stable when considered at the aggregate portfolio level, something that cannot be said of brokered deposits that have caused harm in the past.

Second, and most importantly, characterizing prepaid card deposits as “hot money” makes little sense given that common prepaid account structures lead to robust regulatory restrictions on transfers of such deposits. It is most often the case that prepaid card deposits are held in a pooled custodial account in the bank’s name for the benefit of the individual cardholders. Pursuant to the Bank Merger Act, an insured depository institution is generally required to receive written approval from its responsible regulator before assuming “any liability to pay any deposits made in, any other insured depository institution”⁴⁸ Moving the deposits associated with a prepaid card program to a new

⁴⁶ See *supra* note 28, at 32.

⁴⁷ *Id.*

⁴⁸ See 12 U.S.C. § 1828(c) (requiring an IDI to receive written approval from the responsible agency before receiving transferred deposits); see also 12 C.F.R. § 5.33 (requiring OCC review and approval of an application for a “business combination” resulting in a national bank or a Federal savings association. “Business combination” is defined to include “the assumption by a national bank or Federal savings association of any deposit liabilities of another insured depository institution or any deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or Federal savings association.”); see also FDIC Statement of Policy on Bank Merger Transactions (Jul. 7, 1998) (stating that insured depository institutions must file an application

insured depository institution typically requires an application for written regulatory approval under the Bank Merger Act. Thus, it is nonsensical to characterize these deposits as “hot money” subject to unpredictable movement between institutions as regulators have significant control over the speed at which such deposits can be transferred.

C. The Revised FAQ Answers Will Negatively Affect Prepaid Consumers and Other Third Parties and Will Hinder Innovation in the Bank Sector

Although the statutory analysis above counsels that the FDIC lacks discretion to classify deposits associated with prepaid cards as brokered, any FDIC decision to classify what is in all likelihood the vast majority of prepaid card deposits as brokered deposits will affect consumers and other members of the public in a number of negative ways. Doing so will affect how prepaid card companies structure their programs and interact with IDIs and consumers. IDIs may be forced to pay significantly higher insurance assessments for deposits newly deemed “brokered.” Industry participants may respond to the Revised FAQ Answers by passing along resulting costs to consumers.

Increased costs are particularly problematic since prepaid card customers typically turn to prepaid cards in order to save money. As NetSpend CEO Daniel Henry stated in testimony before the Senate Subcommittee on Financial Institutions and Consumer Protection, “[Prepaid cardholders] are almost all U.S. citizens, the majority earning \$50,000 or less per year, with high school educations or less.”⁴⁹ These customers can ill afford to spare much money—they have an average daily balance of \$80, so even a seemingly minute increase in costs may have a pronounced effect on their finances.⁵⁰

Indeed, the intermediaries in the prepaid business are creating new, useful products and lowering costs for consumers, employers, governments, and others – they are not simply “deposit brokers” gathering deposits for IDIs. As a result, many consumers who could not obtain traditional bank accounts, credit or debit cards can obtain prepaid cards. In addition to helping many families more effectively budget and

for approval by the FDIC before assuming “any deposit liabilities of another insured depository institution if the resulting institution is to be a state nonmember bank,” or assuming “liability to pay any deposit or similar liabilities of . . . or transfer . . . deposits to . . . a noninsured bank or institution.”).

⁴⁹ Examining Issues in the Prepaid Card Market: Hearing Before the Subcommittee on Financial Institutions and Consumer Protection. S. S. Comm. on Fin. Inst. and Consumer Prot. of the Comm. on Banking, Hous. and Urban Aff., 112th Cong. (2012) (testimony by Daniel Henry, CEO of NetSpend Holdings).

⁵⁰ *Id.*

allocate their spending, prepaid cards can act as a key gateway to banking for lower-income consumers whom the banking industry is currently unwilling or unable to serve.⁵¹

The Revised FAQ Answers may also hamper FDIC member banks' ability to innovate within the market for payment services. By leveraging relationships with banks to provide solutions to satisfy consumer needs, prepaid card programs have reduced the impediments to consumers finding access to reliable financial services products. Consumers have benefitted from the increasingly robust competition that banks add to the market for prepaid products and the resulting innovation as existing players and new entrants continue to develop more efficient products. Government agencies have significantly benefited from the cost reductions and efficiencies gained by disbursing payments electronically through prepaid cards rather than paper checks, especially to the unbanked and underbanked constituents that they serve. The participation in new electronic payment mechanisms has resulted in substantial cost reductions that has enabled agencies to provide substantial additional benefits, including new and increased services, passing through costs savings to benefits recipients, and reducing the overall burden on taxpayers. But banks have also benefitted from this relationship by partnering with prepaid program managers to provide platforms that respond to customer expectations for faster payments. These banks then have oversight over these providers to ensure compliance with existing laws and regulations.

By reducing the number of banks that may hold prepaid deposits and increasing the assessment rate for those banks that do hold prepaid deposits, the Revised FAQ Answers may cause weaker competition and less robust innovation among banks, coupled with further reduction of banks' payments-system market share. Well capitalized banks may be reluctant to increase the programs in which they partner. New entrants to this market may opt-out of such partnerships altogether, giving consumers fewer protections and the FDIC and other bank regulators less oversight into these activities.⁵² Moreover, the migration of banking activities to less regulated providers may reduce the effectiveness of regulation and make the financial markets more vulnerable.⁵³

⁵¹ FDIC, Survey of Banks' Efforts to Serve the Unbanked and Underbanked (2009); Dan Fitzpatrick & David Enrich, "Big Bank Weighs Fee Revamp," *The Wall St. J.* (Mar. 1, 2012).

⁵² Non-banks providing payments system services are not regularly examined by federal financial agencies with regard to their payments system activities, which means that the oversight that other regulators may exercise may be inadequate to ensure that adequate safeguards and consumer protections are in place.

⁵³ See, e.g., Statement of Sheila C. Bair, Chairman, FDIC, on FDIC Oversight: Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today before the House Subcommittee on Financial Institutions and Consumer Credit, May 26, 2011, available at

This insight is particularly important because innovation in the U.S. payment system has largely failed to keep up with developing technology and changing customer expectations. Dissatisfaction with traditional banking coupled by advances in technology have led to significant disintermediation of banks in payments. A 2012 study suggests that 60 to 80 percent of U.S. consumers interested in mobile wallets would not only consider using alternatives to their primary banks (such as PayPal, Apple, or Google) for mobile wallets, but also for core banking services.⁵⁴ The number of consumers interested in such technology has only increased over the last few years.⁵⁵ Over the next decade, major technology players, retail providers, mobile carriers, emerging payment providers, and financial institutions will continue to compete to offer payment services. Overly restrictive supervisory guidance of bank-offered products may lead banks to become further displaced by non-banks in the payments marketplace as new products evolve.⁵⁶

V. Conclusion

NBPCA believes classifying deposits associated with prepaid cards as brokered deposits is inconsistent with the FDIC's statutory authority and rules, congressional intent as otherwise evidenced by legislative history, and the facts regarding such products. Moreover, an unduly harsh regulatory approach to this issue may have unintended consequences that conflict with the Nation's goal, recently re-articulated by the Secretary of the Treasury, to do more to assist those without present access to the banking system.⁵⁷

<https://www.fdic.gov/news/news/speeches/archives/2011/spmay2611.html> (describing the risk of opaque transactions undertaken outside of the more heavily regulated traditional banking system).

⁵⁴ Carlisle & Gallagher Consulting Grp., Mobile Wallet Reality Check: How Will You Stay Top of Wallet (June 4, 2012), *available at* https://www.carlisleandgallagher.com/sites/default/files/pdf/CG_Research_Paper_Mobile_Wallet_072512.pdf.

⁵⁵ See Carlisle & Gallagher Consulting Grp., Mobile Banking: the New American Addiction (Jan. 27, 2015), *available at* <https://www.cginc.com/sites/default/files/pdf/MobileBankingWhitePaper.pdf> (finding that 52% of consumers are doing more mobile banking than two years ago).

⁵⁶ Indeed the FDIC has already recognized the increased competition that banks face. In a recent supervisory newsletter, FDIC staff acknowledged that “[n]on-bank mobile payments providers are devising ways to streamline the current payments system and reduce transaction costs by limiting the role banks play in mobile payments or eliminating them from segments of the payments process altogether.” FDIC, Mobile Payments: An Evolving Landscape, Supervisory Insights -Winter 2012, *available at* <https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin12/mobile.html#ten>.

⁵⁷ See U.S. Treasury Dep't, New Financial Inclusion Initiatives Launched at Treasury USAID Forum (U.S. Treas. Dec. 1, 2015), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/jl0289.aspx>; U.S. Treasury Dep't, Opening Remarks of U.S. Treasury Sec'y Jacob L. Lew at the 2015 Financial Inclusion Forum (U.S. Treas. Dec. 1, 2015), *available at*

However, if the agency were to continue to hold the belief, notwithstanding these comments, that some prepaid card programs may nevertheless involve the placement of deposits that qualify as “brokered,” the NBPCA proposes that the agency adopt a multi-factor test that provides a considerably clearer roadmap for entities in the prepaid card value chain as to which program structures will result in deposit broker designation. For example, the NBPCA would propose that the FDIC consider some or all of the following criteria when making a deposit broker designation, as each criterion set forth below relates directly to the concerns Congress intended to address when adopting FIRREA:

1. The existence of contractual relationships between issuers, IDIs and program managers, which enable a program manager to require the transfer of prepaid card balances to a successor IDI on less than 90 days’ notice.
2. The ability of the program manager to move prepaid card balances from one IDI to another IDI without a written transfer/assignment/purchase agreement between the existing and successor IDI.
3. The ability to move prepaid card balances from one IDI to a successor IDI without going through the Bank Merger Act approval process (or any successor process).
4. The holding of program funds in a custodial or trust account on behalf of cardholders qualifying for FDIC pass through insurance, but with a third party (other than the IDI) having indicia of ownership or control over such custodial accounts. The mere delivery of instructions to the IDI regarding how to settle transactions should not be considered ownership of control by the third party.

We thank you for the opportunity to submit this white paper. The NBPCA welcomes the opportunity to work with the FDIC on these important issues, and to provide additional evidence and information to the FDIC and other policy makers.

<https://www.treasury.gov/press-center/press-releases/Pages/jl0288.aspx>; J. Chalmes, “Broad Effort Aims to Expand Financial Services to Low-Income Consumers,” *The New York Times* (Dec. 2, 2015) (noting the Obama Administration’s efforts and new policy initiatives), http://www.nytimes.com/2015/12/02/business/economy/initiatives-aim-to-expand-financial-services-to-low-income-consumers.html?_r=0.

APPENDIX 1

PRIMARY PURPOSE OF EACH PREPAID MARKET PARTICIPANT¹

I. Processor and Payment Network

The primary purpose of the Processor and the Payment Network is generally the same regardless of the type of prepaid product. A summary of their roles is provided below.

	Prepaid Card Market Participant Primary Purpose¹	
	Processor	Payment Network
All Products	The primary purpose is to offer payment processing services and the processor does not control or direct the placement of funds.	The primary purpose is to provide an infrastructure for authenticating and routing payment transactions that is ubiquitous, worldwide and largely cashless. The payment network does not handle funds nor does it direct the payment of funds from one depository institution to another, but it does provide the information necessary to enable the member financial institutions to settle among each other. Typically, the payment network does not interface directly with consumers.

¹ The table describes the primary purpose of each of the parties generally involved in the development and administration of prepaid card programs. Depending on the structure of the program and prepaid product type, several roles may be performed by one party, some roles might not be performed at all, or there may be additional roles not identified in the table.

II. Issuer, Program Manager, Merchant and Load/Reload Service Provider

The primary purpose of the following prepaid card market participants may differ slightly depending on the type of prepaid product being offered as described further below:

Prepaid Card Market Participant Primary Purpose ¹					
		Issuer	Program Manager	Merchant (or other person distributing the prepaid cards)	Loading/Reload Service Provider
Product	General Purpose Reloadable (“GPR”)	The primary purpose is to offer a primary transaction account substitute, which may be more convenient or less expensive than traditional financial services products, as well as a method for making payments including point of sale transactions and ATM withdrawals, among other transactions.	The primary purpose is to offer a primary transaction account substitute, which may be more convenient or less expensive than traditional financial services products, as well as a method for making payments including point of sale transactions and ATM withdrawals, among other transactions.	The retailer’s primary purpose in selling GPR cards at retail is to offer a product to customers for which there is demand and a potential profit margin for the retailer in selling such product. This is the same purpose the merchant has in selling any product. Following the initial five minute interaction with a retail store clerk, there may be no further interaction between the retailer and the cardholder unless the cardholder utilizes a reload pack offered through the retailer.	The primary purpose in offering loading/reloading services is to offer consumers a service for which there is demand in exchange for a fee. There are hundreds of thousands of loading locations worldwide, allowing consumers to increase their card balance without relying on finding a specific bank branch.
	Government Disbursements	The primary purpose is to offer consumers a means of receiving government disbursements especially when other direct deposit options such as a checking account or savings account, are not available.	The primary purpose is to offer consumers a means of receiving government disbursements especially when other direct deposit options, such as a checking account or savings account, are not available.	The paying agency’s primary purpose in providing these products is to accommodate persons entitled to government disbursements who do not have access to or choose not to use checking or savings accounts.	N/A

¹ The table describes the primary purpose of each of the parties generally involved in the development and administration of prepaid card programs. Depending on the structure of the program and prepaid product type, several roles may be performed by one party, some roles might not be performed at all, or there may be additional roles not identified in the table.

Prepaid Card Market Participant Primary Purpose¹					
		Issuer	Program Manager	Merchant (or other person distributing the prepaid cards)	Loading/Reloading Service Provider
	Payroll Cards	The primary purpose is to offer employers a method of paying wages to employees who do not have access to or choose not to use a checking or savings account.	The primary purpose is to offer employees a means of receiving wages that does not require employees to have a checking account.	The employer's primary purpose in providing wages via payroll cards is to accommodate those employees who do not have access to or choose not to use checking or savings accounts and the employer does not wish to issue many paper checks.	N/A
	Expense Reimbursement/Spending Account Cards	The primary purpose is to offer employers a means of paying for employment-related expenses without requiring employees to use their own funds, or, in some cases, it is used as a more cost effective option than paper checks for reimbursing employees for employer-related expenditures.	The primary purpose is to offer employers a means of paying for employment-related expenses without requiring employees to use their own funds, or, in some cases, it is used as a more cost effective option than paper checks for reimbursing employees for employer-related expenditures.	The employer's primary purpose in providing expense reimbursement/spending account cards is to accommodate those employees who do not wish to pay for corporate expenditures out of their personal account and subsequently seek reimbursement from the employer, or, in some cases, it is used as a more cost effective option than paper checks for reimbursing employees for employer-related expenditures.	N/A

¹ The table describes the primary purpose of each of the parties generally involved in the development and administration of prepaid card programs. Depending on the structure of the program and prepaid product type, several roles may be performed by one party, some roles might not be performed at all, or there may be additional roles not identified in the table.

Prepaid Card Market Participant Primary Purpose¹					
		Issuer	Program Manager	Merchant (or other person distributing the prepaid cards)	Loading/Reloading Service Provider
	Student Aid Disbursement Cards	The primary purpose is to offer schools a means of disbursing student aid in a form that is convenient for the student to use both on and off-campus.	The primary purpose is to offer schools a means of disbursing student aid that is convenient for the student to use both on and off-campus.	The college or university's primary purpose in providing student aid via disbursement cards is to accommodate those students who do not have access to or do not wish to use checking or savings accounts.	N/A
	Healthcare and Employee Benefits Accounts	The primary purpose is to offer employees a means of receiving certain funds from employers that may be used for healthcare, transit, childcare and other expenses and that potentially provide employees with certain tax benefits.	The primary purpose is to offer consumers a means of receiving certain funds from employers that may be used for healthcare, transit, childcare and other expenses and that potentially provide employees with certain tax benefits.	The employer's primary purpose in providing these products is to provide employees with funds to be used for healthcare, transit or childcare in a potentially tax-free manner. Additionally, these programs help employers accommodate those employees who do not have access to or choose not to use checking or savings accounts.	N/A
	Insurance Workman's Compensation/Disaster Relief Cards	The primary purpose is to offer insurance companies and disaster relief organizations a method to pay persons who have suffered either injuries or damages through a payment vehicle that serves as a check replacement product.	The primary purpose is to offer insurance companies and disaster relief organizations a method to pay persons who have suffered either injuries or damages through a payment vehicle that serves as a check replacement product.	The insurance company's and disaster relief organization's primary purpose in providing these products is to accommodate those persons who are entitled to compensation/relief in a quick, safe and convenient manner.	N/A

¹ The table describes the primary purpose of each of the parties generally involved in the development and administration of prepaid card programs. Depending on the structure of the program and prepaid product type, several roles may be performed by one party, some roles might not be performed at all, or there may be additional roles not identified in the table.

Prepaid Card Market Participant Primary Purpose¹					
		Issuer	Program Manager	Merchant (or other person distributing the prepaid cards)	Loading/Reloading Service Provider
	Open-Loop Gift Cards	The primary purpose is to offer consumers a card product for gift giving that can be used at multiple, unaffiliated retailers rather than a single retailer.	The primary purpose is to offer consumers a card product for gift giving that can be used at multiple, unaffiliated retailers rather than a single retailer.	The retailer's primary purpose in selling open-loop gift cards at retail is to offer a product to customers for which there is demand and a potential profit margin for the retailer in selling such product. This is the same purpose the merchant has in selling any product.	N/A

¹ The table describes the primary purpose of each of the parties generally involved in the development and administration of prepaid card programs. Depending on the structure of the program and prepaid product type, several roles may be performed by one party, some roles might not be performed at all, or there may be additional roles not identified in the table.