



July 28, 2011

Gay Gilbert, Administrator  
Office of Unemployment Insurance  
U.S. Department of Labor  
Employment and Training Administration  
Washington, DC

Re: Unemployment Compensation Prepaid Cards

Dear Gay:

Thank you for talking with us on May 26<sup>th</sup> about the states that use prepaid cards to pay unemployment benefits. We share the Department's goal of ensuring that every possible dollar of benefits reaches unemployed workers while helping states to minimize their administrative expenses.

This letter provides a short summary of our proposals for next steps by the U.S. Department of Labor (DOL) to address the concerns identified in National Consumer Law Center's report on Unemployment Compensation Prepaid Cards: States Can Deal Workers a Winning Hand by Discarding Junk Fees. We are also providing some more background on relevant federal laws.

### **Important Steps for DOL**

We urge DOL to take the following actions to address continuing problems associated with prepaid cards in the unemployment compensation (UC) systems and to educate the states to maximize worker protections:

**1. Immediately Respond to Problems in Target States:** The report identified several states where practices or fees have been adopted that conflict with DOL's guidance on debit cards and with basic consumer protections. In particular, several card programs fail to meet four key principles:

- Direct deposit should be the first choice for paying benefits.<sup>1</sup>
- Recipients should be able to make purchases for free and access each deposit at both an ATM and a teller for free.<sup>2</sup>

- Penalty fees (overdraft, denied transaction) are inappropriate on state prepaid card programs and should not be deducted from future UC payments.<sup>3</sup>
- Account information (customer service and balance inquiries) should be free.<sup>4</sup>

Recognizing that the contracts for prepaid cards are periodically renegotiated, we urge DOL to immediately contact the states that have adopted especially problematic practices: (a) the 11 states that have not adopted direct deposit; (b) the five states that have imposed overdraft fees; (c) the 24 states that impose denied transaction fees; (d) the four states that charge point-of-service fees for purchases (whether made using a signature or PIN entry); (e) the six states that do not provide at least one free network ATM withdrawal per deposit,<sup>5</sup> (f) the five states that do not offer one free teller withdrawal per deposit; (g) the 24 states that charge for in-network ATM balance inquiries (especially the 16 that charge fees in-network); and (h) the 20 states that charge fees for calls to customer service (especially the 16 states that charge even for automated calls to check the card balance).

We have provided a chart at the back of this letter indicating which states fail in each of these areas.

**2. Clarify DOL's Guidance in Problem Areas:** The NCLC report identified several areas where the states have adopted policies that conflict with DOL's strong guidance on the use of debit cards by the state UC programs. Many of the states appear to have viewed the guidance as merely advisory rather than as reflecting the dictates of the Federal Unemployment Tax Act, including the ban on using fees taken from benefits to fund administrative expenses. Therefore, we urge DOL to strengthen its guidance, focusing on the four key principles above.

***The Department must also make clear to states in no uncertain terms that revenue sharing violates the Federal Unemployment Tax Act (FUTA).*** After the NCLC report came out, we learned that Tennessee, and possibly other states, gets income from the prepaid card program.<sup>6</sup> Any form of income paid by banks to states increases the costs of the prepaid card program and forces the bank to impose more fees on workers, effectively using worker benefits to pay the states a profit, in violation of the withdrawal standard. The urgency of a strong position on this issue was made clear at a conference on July 12 at the Philadelphia Federal Reserve on government use of prepaid cards. Two of the industry participants talked about a growing trend – disturbing also to industry – for states to seek revenue sharing to help balance their budgets. That revenue comes from public benefit recipients least able to afford it.

Finally, DOL should insist that states put a clear, easy to find fee schedule on their websites and take other measures to increase fee transparency, such as providing a wallet-sized plastic card listing fees (as the DOL Program Letter recommended).

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3. **Initiate an Outreach and Education Campaign:** The NCLC report described not only problems but also positive uses of prepaid cards to benefit unemployed workers. With the information provided by the report and updated federal guidance, states would benefit significantly from a webinar and other educational opportunities featuring best practices associated with the use of debit cards in the UC program. If helpful, NCLC would be available to participate.

4. **Develop New Federal Debit Card Options for States:** As reflected in the significant variation of the contracts negotiated by the states, even with the same bank, states do not have equal bargaining power. It is no coincidence that NCLC's report found that California, with its large unemployed population, has the best prepaid card. A stronger federal role would assist states in getting the best bargain for unemployed workers and also reduce inefficiencies associated with the negotiation of 50 individual state contracts and separate card programs for small states. Thus, we urge DOL to actively explore with the Treasury Department and other appropriate agencies a new system of a federally-negotiated debit card contracts available to the states at their option.

5. **Work With the Consumer Financial Protection Bureau (CFPB) to Increase Transparency and Fairness.** We hope that prepaid cards will be one of the early action items for the CFPB. The principles that we have laid out above are important not only for unemployment cards but also for other types of prepaid cards. CFPB action on prepaid cards would benefit unemployed workers, and DOL should urge the CFPB to reinforce DOL's guidance through a rulemaking that applies to all prepaid cards. The CFPB could also establish a website where the terms of every state unemployment card can be easily found in one place, to increase competition among banks and make it easier for states to negotiate strong contracts to protect unemployed workers (and recipients of other types of government benefits paid on prepaid cards). There is precedent for such a website: all credit card contracts are now posted on the Federal Reserve Board's website.

### **Other Relevant Federal Laws**

For your information, below is a short summary of other federal laws relevant to UC prepaid cards.

#### ***Electronic Funds Transfer Act (EFTA)***

The EFTA generally protects consumers in the electronic banking world. Although it does not presently cover all prepaid cards, it does cover unemployment prepaid cards. Several provisions of the EFTA impact the issues we have been discussing.

***Direct deposit.*** The EFTA prohibits any person (including a state) from requiring a consumer "to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of ... receipt of a government benefit."<sup>7</sup>

Consequently, states cannot require unemployed workers to establish a prepaid card account at the bank that holds the state contract as a condition of receiving their unemployment benefits, even if the worker has the ability to transfer the money out of

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that account into an individual bank account.<sup>8</sup> As discussed in the NCLC report, requiring funds to pass through the prepaid card account also causes delay in delivering funds and induces many consumers to use the prepaid card and to incur unnecessary fees.

***ATM and telephone balance inquiries.*** The EFTA generally requires that banks mail paper statements to consumers unless they have elected to receive electronic statements. Government benefits prepaid cards are exempt from the statement requirement as long as they (1) make the consumer's balance available through a telephone line and at a terminal and (2) provide a written transaction history upon request.<sup>9</sup> Because this information must be provided as a condition of omitting statements, it should be provided for free.

***Overdraft fees.*** Two parts of the EFTA affect overdraft fees. First, effective last year, Regulation E (which implements the EFTA) prohibits banks from authorizing debit card or ATM transactions that would result in an overdraft and an overdraft fee unless the consumer has opted-in to overdraft coverage.<sup>10</sup> This change prompted a number of banks to drop their overdraft fees on UC prepaid cards. U.S. Bank continues to charge overdraft fees on five UC cards. The U.S. Bank overdraft policies as described on some of the state websites would violate the opt-in regulation, though it is likely that the websites are out of date. Note, however, that U.S. Bank does not always seek consumer opt-in before charging an overdraft fee. The opt-in rule only applies to debit card and ATM transactions, not other transactions such as a bill payment using the bank's website or a regular monthly payment authorized such as a rent payment.<sup>11</sup>

Second, the new interchange fee amendment in last year's financial reform bill (the "Durbin amendment") caps the fees that merchants pay to banks when accepting bank debit cards. However, the amendment and the regulations implementing it (which were just finalized this month) exempt government benefits prepaid cards on certain conditions. Effective July 21, 2012, prepaid cards are exempt from the interchange fee cap only if they have no overdraft fees and permit at least one free ATM withdrawal per month.<sup>12</sup> This limitation only affects banks over \$10 billion, as smaller banks are categorically exempt from the interchange fee caps, but U.S. Bank is over \$10 billion. Thus, the bank will no longer be permitted to charge overdraft fees on its UC prepaid cards after July 21, 2012.

The EFTA overdraft opt-in requirements are insufficient to protect consumers, and DOL should enforce its conclusion in the guidance letter that taking overdraft fees from future UC benefits violates the FUTA withdrawal standard. Overdraft fees are an abusive product designed to induce consumers into incurring exorbitant fees for minimal credit at astronomical prices. A strong restatement by DOL that overdraft fees must be eliminated from UC prepaid cards would be consistent with the congressional directive against overdraft fees in the interchange amendment and would ensure that no other banks, even ones under \$10 billion, are tempted to add such fees to their cards in the future. If the card's balance is insufficient, the transaction should be denied or should be processed by a split transaction with the consumer paying the difference in cash.

***Federal Trade Commission Act (FTC Act)***

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The FTC Act bans unfair or deceptive acts or practices.<sup>13</sup> In the course of its rulemaking on overdraft fees, the Federal Reserve Board found that declined transaction fees “could raise significant fairness issues under the FTC Act, because the institution bears little, if any, risk or cost to decline authorization of an ATM or onetime debit card transaction.”<sup>14</sup> Even if the bank does incur some cost from denied transactions, the cost is minimal and should be absorbed as part of the overall administrative costs of the program. Those costs should not be deducted from future UC benefits through fees on workers.

### **Conclusion**

We appreciate the steps that DOL has taken in the past and continues to take to protect unemployed workers. We would be happy to discuss any of the issues in this letter with you at greater length and to collaborate on efforts to further improve state prepaid card programs. Please feel free to contact us if you have any questions. You can contact Lauren Saunders at [lsaunders@nclc.org](mailto:lsaunders@nclc.org), (202) 452-6252 x 105 and Maurice Emsellem at [memsellem@nelp.org](mailto:memsellem@nelp.org), (510) 663-5700.

Yours very truly,

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National Consumer Law Center

Maurice Emsellem  
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cc: Roberta Gassman  
Jane Oates

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<sup>1</sup> The UC Program Letter urged states to “use direct deposit for all individuals with bank accounts” and directed that states “should, *as an interim measure*, offer a way for UC benefits to be automatically transferred from the debit card to the individual’s bank account.” Best Practices for Payment of Unemployment Compensation (UC) by Debit Cards, Unemployment Insurance Program Letter No. 34-09 (Aug. 21, 2009) (“UC Program Letter”) at 1, 2 (emphasis added). Automatic transfers were to be an interim measure, not a permanent substitute for direct deposit. The Program Letter also urged states to “offer the opportunity to elect direct deposit as soon as possible during the claims process.” Yet many states automatically enroll workers in the prepaid card and force them to opt out to receive direct deposit or set up transfers from the prepaid card account to their bank account. NCLC’s report describes in greater detail why these alternatives are problematic.

<sup>2</sup> The UC Program Letter states that “the Department interprets Federal law to require that all beneficiaries have reasonable access to the entire amount of each UC payment without cost to the individual. At a minimum, reasonable access means at least one opportunity for the individual to withdraw the entirety of each UC payment at no cost. Applied to debit cards, the state must allow the individual at least one opportunity to cash-out each UC payment, whether by ATM, over-the-counter teller transaction, or point-of-sale (POS) purchase, without incurring any fee.” UC Program Letter at 3. The letter also stated that “to ensure fair and equitable fee schedules” states should provide “m]re than one free ATM withdrawal per payment.” *Id.* The NCLC report explains why both free ATM withdrawals and free teller withdrawals should be provided.

<sup>3</sup>The UC Program Letter urged states to “eliminate overdraft fees and reduce or eliminate denial fees,” *id.* at 4. The letter went further and stated: “The Department understands that in some states, the debit card

provider deducts the amount of an overdraft, overdraft fee, or denial fee from future UC payments. This practice is inconsistent with federal law.” *Id.* at 5. (Note that we are not concerned about inadvertent overdrafts being recouped from the next deposit as long as the card issuer does not approve overdrawn transactions, denies overdrawn transactions whenever possible, and does not charge a fee.)

<sup>4</sup> The UC Program Letter urges states to provide “unlimited free ATM balance inquiries in-network” and “unlimited free telephone customer assistance.” *Id.* at 4, 5.

<sup>5</sup> Note that there was an error on page 10 in the NCLC report in describing which states fail to provide at least one free ATM withdrawal and one free teller withdrawal per deposit. The attached chart reflects the accurate information.

<sup>6</sup> When questioned, Tennessee initially denied having revenue sharing. The state did not view the 10 cents per card that it receives from the bank as “revenue sharing,” though of course the funds that Chase pays to the state comes from its revenue.

<sup>7</sup> 15 U.S.C. § 1693k.

<sup>8</sup> See Jen A. Miller, “Isn’t This State-Mandated Banking?!” (July 16, 2011), available at <http://www.bankaholic.com/isnt-this-state-mandated-banking/> (describing a consumer’s objection to having to have a New Jersey disability benefits prepaid card from Bank of America, a bank that the consumer swore never to use).

<sup>9</sup> See 12 C.F.R. § 205.15(c).

<sup>10</sup> See 12 C.F.R. § 205.17.

<sup>11</sup> Details of U.S. Bank’s overdraft fee policies are described in the NCLC report at pages 14-15 and Appendix G.

<sup>12</sup> Board of Governors of the Federal Reserve System, Final Rule, Debit Card Interchange Fees and Routing, RIN No. 7100 AD 63 (June 30, 2011), to be codified at 12 C.F.R. § 235.5(d).

<sup>13</sup> 15 U.S.C. § 57a.

<sup>14</sup> See 74 Fed. Reg. 59,033, 59,041 (Nov. 17, 2009).

## Exhibit: State Unemployment Compensation Prepaid Cards

State	No Direct Deposit	Overdraft Fees	Denied Transaction Fees	POS Fees	No Free ATM Per Deposit	No Free Teller Per Deposit	ATM Balance Inquiry Fees	IVR Fees	Live Customer Service Fees	Total Problematic Features
Alabama			X		X		X	X	X	5
Alaska			X			X		X	X	4
Arizona							X*	X	X	3
Arkansas		X								1
California	X									1
Colorado			X	X		X	X*	X	X	6
Connecticut			X				X	X	X	4
Florida							X*	X	X	3
Idaho		X							X	2
Illinois					X		X		X	3
Indiana	X		X				X	X	X	5
Iowa			X				X	X	X	4
Kansas	X						X			2
Louisiana			X			X	X	X	X	5
Maine			X	X						2
Maryland	X									1
Massachusetts			X					X		
Michigan			X				X			2
Minnesota									X	1
Mississippi			X		X		X	X	X	5
Missouri			X			X	X*	X	X	5
Nebraska		X								1
Nevada	X		X				X	X	X	5
New Jersey										0
New Mexico			X					X	X	3
New York			X				X*			2
North Carolina			X				X*			2
Ohio		X								1
Oklahoma			X		X		X	X	X	5
Oregon		X			X					2
Pennsylvania			X				X	X	X	4
Rhode Island			X	X			X			3
South Carolina			X						X	2
Tennessee			X	X	X		X	X	X	6
Texas			X				X*			2
Utah			X				X			2
Virginia			X			X	X			3
West Virginia			X				X*			2
Wyoming	X									1

Highlighted states have five or more problematic features, charge overdraft fees and/or fail to provide one free in-network ATM withdrawal per deposit.

\*Out of network only.