

First Data perspectives to share with the FRB re: Durbin
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to:
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10/11/2010 04:30 PM
Cc:
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Hi Louise,

We have outlined some key areas that we urge the Board to consider as it contemplates how to implement the debit interchange, debit network, and merchant acceptance provisions in Title X of the Wall Street Reform and Consumer Protection Act. We can classify our concerns/perspectives into two categories: (1) timing of effective dates; and (2) network exclusivity and routing - choice & competition.

Timing of Effective Dates

- **Interchange Fees:** The regulation of debit interchange rates for Issuers (above \$10B in assets) are closely related to the Act's provisions on routing and network exclusivity. Therefore we recommend that the final regulations on routing and network exclusivity that the Board adopts coincide with the effective date for debit interchange regulation. We believe that doing so will prevent individual participants from gaining an advantage in any interim period and best ensure a competitive payments system.

Network Exclusivity and Routing – Choice & Competition

- **Competitor Brands:** We strongly urge the Board to require Issuers to enable a minimum of two (2) debit access network brands -- not owned or controlled by a single entity – (and certainly could be more than two debit access networks) on their cards, which cannot both be Visa and MasterCard owned brands. In addition, we believe that to ensure meaningful choice and competition for both merchants and Issuers, at the very least the second additional brand should meet a minimum threshold of coverage and acceptance criteria.

Visa and MasterCard currently have an effective duopoly on credit and signature debit cards, and allowing those two brands to be the only card brands on a given issuer's cards would foster an inordinate amount of market power with these entities and perpetuate elements of the current duopoly structure. In our view, this would be counter to both the spirit of the Durbin provision and the actual statutory language. Therefore, we recommend basing the thresholds such that at least one of the additional debit access networks (the second network if an issuer selects only two) should include: (a) minimum Merchant coverage in all 50 states; (b) total US merchant coverage of at least

1.5 million merchants; (c) at least 100 M transactions processing per year; and (d) an ownership structure that is not controlled by greater than 49% by any particular financial institution Issuer. Issuers would be free to employ 3 or more debit access network brands as well where any additional networks would not need to meet such minimum critical mass criteria.

This policy would ensure that merchants and consumers are provided with true choice of at least two credible debit access network brands that includes at least one debit brand in addition to the global card networks (i.e. at least one credible debit brand that is currently predominantly a PIN based/single message network), regardless of where the interchange rate(s) may be established.

For illustrative purposes, a potential outcome we are trying to help avoid could be a scenario where leading issuers working with the global brands seek to enable (due to financial incentives, related global brand rules, contractual obligations, etc) a Visa or MasterCard brand (say Visa/Interlink) and a limited second debit access network (say XYZ network that only has 200 merchants in a single state). Without a minimum threshold for at least the second debit network, a plausible result could be a scenario in which an issuer is able to comply with the letter of the law, but fail to meet the spirit and intent of the law by not yielding material choice for consumers and merchants at the point of sale. An issuer could certainly select 3 or more networks, where additional networks beyond the minimum 2 are not required to meet such thresholds (say, for example, an issuer selects Visa/Interlink, STAR, AFFN and Presto).

- **Limiting Network Rules for Card or Form Factor Branding:** Both global card brands currently have rules that dictate the size, placement, and prominence of their network brands over all other network brands that may reside on the Issuer's cards. In effect, the global card brands currently "own" all branding and associated card details and dictate rules to issuers and other networks regarding such cards. In other words, in today's world, an FI's issued cards must abide by the global card brand rules.

We believe strongly that the issued cards and form factors (e.g. card, key fob, sticker, chip, etc.) are the Issuers' product property and they should have more say over their card design domain. As a result, we urge the Board to clearly and explicitly prohibit network branding rules that do not provide or allow for equal prominence with any other brands that an Issuer may elect to use on their Debit cards. This would include characteristics such as prominence, front/back placement, and dictating any other landscape issues relative to the Issuer's card that have preference of one brand over another. Our view is Issuers should have more say over the branding and positioning on their cards so long as networks have equal prominence on the cards.

- **Restrictions on functionality:** The global card brands also currently have rules (and the threat of rule making power) that restrict the functionality, utility and applications of other card brands on the card. For example, the global card brands employ rules that restrict the capability of other card brands to perform card-not-present transactions, such as bill pay (or restrict such transactions to limited merchant verticals or transaction types). Another example is global card brand restrictions on the 'applications' of other card networks that can reside on the same chip in contactless cards (e.g. limiting the application on a card's contactless chip to only the global card brand's own application or specification). These global card brand restrictions are anti competitive, and inhibit the

ability of additional competing networks to participate in emerging debit transactions and form factors, limiting choice and convenience for both merchants and consumers. Therefore, we urge the Board to clearly and unambiguously prohibit these rules.

- **Establishing Boundaries on Network Rules for Routing and Fee Assessment:** The practice of 'mandatory routing' rules by a network should be invalidated in an environment where merchants and consumers are provided true choice. Likewise the practice of one network assessing a merchant/acquirer/issuer/processor a 'service' fee for transactions a merchant or consumer elects to route over another network ("taxing" the transactions of competitive networks), should also be disallowed as these fees/taxes are ultimately passed back to merchants as part of the merchant/acquirer/issuer/processor's costs. Prohibiting this type of anti-competitive behavior will help enable consumer and merchant choice of debit access networks based upon competitive conditions.
- **Competing network rule:** We urge the Board to prohibit the global card brand rules regarding 'competing national network' to unambiguously clarify that Visa, MasterCard, American Express and Discover cannot use these rules as a threat or end-run for the multiple **competitor brands** issue described above (first point under network exclusivity) . The rationale for this provision is to ensure true competition between network organizations and provide for the true intent of the Durbin amendment.

Taken together, we believe that Board action in these areas will ensure that merchants and consumers experience competition, innovation, convenience, and choice at the point of sale.

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